



KAREN L. SMITH, MD, MPH
Director and State Public Health Officer

State of California—Health and Human Services Agency
California Department of Public Health



EDMUND G. BROWN JR.
Governor

November 9, 2018

REGULATORY BULLETIN 2018-03

NOTICE OF FINAL ACTION

Subject

Final Action on the Notice of Proposed Changes posted as [Regulatory Alert 2018-03](#) on June 20, 2018 at:

<https://www.cdph.ca.gov/Programs/CFH/DWICSN/CDPH%20Document%20Library/LawsandRegulations/RegulatoryAlertandResources/RegulatoryAlert2018-03AmendmentstotheVendorAuthorizationCriteria.pdf>.

Date of Adoption

The Final Action will be effective December 10, 2018.

Stakeholder Comments and Responses

Please see Attachment 1 of this Regulatory Bulletin for the Stakeholder comments and the Department's responses.

Regulation

Article 4. Vendor Authorization Criteria

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 one hundred and twenty percent (120%) of the Average Overall Market Basket price established by the Department for the vendor or vendor 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) Twelve (12) ounce and eighteen (18) ounce Breakfast Cereal
- (2) Sixteen (16) ounce Cheese
- (3) One (1) pound Bag of Dry Beans, Peas, or Lentils



CDPH Women, Infants and Children (WIC) Division
3901 Lennane Drive MS 8600 Sacramento, CA 95834
P.O. Box 997375 MS 8600 Sacramento, CA 95899-7375
(916) 928-8500 [Division Website](#) (www.wicworks.ca.gov)



- (4) One (1) Dozen Large Eggs (chicken only)
- (5) Sixty-four (64) ounce Shelf-Stable Bottled Juice
- (6) One (1) Gallon Milk (whole and lower fat)
- (7) Primary contract brand milk-based infant formula in powdered form currently under contract with the Department, as defined in section 82600
- (8) Sixteen (16) ounce to eighteen (18) ounce Peanut Butter
- (9) Sixteen (16) ounce Whole Wheat Bread Loaf

(c) Vendors shall submit the shelf price of their highest priced and lowest priced authorized food for each of the nine (9) food types in the Market Basket offered for sale 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 priced cheese and the shelf price of their lowest priced cheese. Vendors shall provide the 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 only one (1) 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 non-competitive 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 vendor applicant's average price of all Market Basket items submitted by the vendor or vendor 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 the need to correct their prices to meet the competitive price criteria. Vendors will be given thirty (30) days to correct their prices to meet the competitive price 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 (1) 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 after no less than six (6) months from the date the Department denied authorization.

(f) A vendor who fails to submit its semi-annual price information will be issued a written notice of the vendor's 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 its semi-annual price information, the Department will terminate the vendor from participation in the program.

70750 Food Item Quality

(a) All WIC authorized foods offered for sale by vendors and vendor applicants on store shelves in the public area of a vendor's store where merchandise is available for purchase shall be quality food items.

(b) Quality food items are defined as:

(1) Food items, including fresh fruits or fresh vegetables, that are free from evidence of spoilage such as rotting, slime, mold, insects, or pests.

(2) Food items with "Use By" or "Use or Freeze By" dates affixed to, or printed on, the food item's packaging that are sold or offered for sale on or before the "Use By" or "Use By or Freeze By" date.

(3) Infant formula offered for sale before the date affixed to, or printed on, the infant formula packaging as mandated by 21 Code of Federal Regulations parts 106.60(c)(2)(i) and 107.20(c).

(c) A vendor or vendor applicant fails to meet the food item quality authorization criteria when, on any pre-authorization, monitoring, or compliance visit, two (2) or more different WIC authorized food items offered for sale are not quality food items. For purposes of this section, different brands, sizes, flavors, or varieties of WIC authorized foods are considered different food items. For example, a Gala apple is a different food item from a Fuji apple and a half gallon Brand A nonfat milk is a different food item from a gallon Brand A nonfat milk.

(d) Any vendor failing to meet the food item quality authorization criteria 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 food item quality authorization criteria, the vendor shall have demonstrated a pattern of failure to meet food item quality authorization criteria and shall be disqualified from participating in the program for a period of one (1) year for failure to meet authorization criteria.

(e) A vendor applicant who fails to meet the requirements of this section shall be denied authorization.

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 the Department has determined derive more than fifty percent (50%) of their annual food sales revenue from WIC food instruments, or vendor applicants expected to meet this criterion. The Department shall determine which vendors are above-50-percent vendors using the assessment process in section 50100.

(2) Evidence of intent to provide prohibited incentive items to customers includes, but is not limited to, the following:

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

(3) Prohibited incentive items for above-50-percent 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, unless the incentive item is an allowable incentive item for above-50-percent vendors, as defined in subsection (a)(4);
- (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 documented cost to the vendor for the multiple incentive items provided during one shopping visit is less than two dollars (\$2);
- (F) Food, merchandise, or services of greater than nominal value provided to the customer, i.e., having a documented cost to the vendor of more than two dollars (\$2);
- (G) Food or 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 WIC authorized foods; as long as the combined total cost to the vendor is less than two dollars (\$2) and the food item(s) meet the requirements for quality food item(s) as defined in section 70750:
 1. 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, one hundred percent (100%) corn tortillas.

5. Commercially made, prepackaged, one hundred percent (100%) whole wheat bread. Package must state "100% Whole Wheat" on the front label.
6. Five (5) 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 or 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 vendors that are not above-50-percent vendors must be offered to all customers.

(1) Incentive items for vendors that 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 or 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.

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 subsections (b)(1)-(15) below of WIC authorized supplemental foods. WIC authorized supplemental foods stocked by vendors and vendor applicants must be quality food items, as defined in section 70750, to be counted towards the minimum stocking requirements in (b)(1)-(15).

(b) Inventory must be stocked on store shelves in the public area of a vendor's store where merchandise is available for purchase unless quantities of stock allowed in storage on the premises of that store location are specified in subsections (b)(10) and (12). 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; or

(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 a twelve (12) ounce size box and one (1) type must be an eighteen (18) ounce size box. Two (2) of the types or brands must be listed as cereals which contain fifty-one percent (51%) or more whole grain by weight in section 82100.

(3) Canned Fish.

(A) Twelve (12) five (5) 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; or

(D) Four (4) fifteen (15) ounce cans of authorized types of mackerel.

(4) Cheese. At least four (4) one (1) pound packages of any combination of authorized 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) authorized fresh yellow bananas.

(8) Fruits and Vegetables.

(A) Thirty-eight dollars (\$38) worth of a combination of:

1. Five (5) varieties of authorized fresh fruits; and
2. Five (5) varieties of authorized fresh vegetables.

(B) Any combination of at least thirty-eight dollars (\$38) worth of three (3) varieties of authorized canned or frozen fruits.

(C) Any combination of at least thirty-eight dollars (\$38) worth of three (3) varieties of authorized canned or frozen vegetables.

(D) Dollar amounts for fruits and vegetables in subsections (b)(8)(A)-(C) will be calculated based on the vendor shelf price.

(E) For the purposes of subsections (b)(8)(A)-(C), "variety" means distinctly different types of fruits or vegetables. For example, a variety of frozen fruits may include authorized frozen strawberries, blueberries, and raspberries. However, a variety does not include different packaging or cuts of the same type of fruit. For example, a variety of canned fruit does not include authorized canned pineapple chunks, pineapple slices, and crushed pineapple. A variety of frozen and canned fruits may include frozen blueberries and canned peaches, but does not include frozen peaches and canned peaches.

(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. The authorized primary contract brand milk-based infant formula in powdered form currently under contract with the Department, as defined in section 82600, in the following quantity:

(A) Twenty (20) authorized size containers of the authorized primary contract brand milk-based infant formula in powdered form currently under contract with the Department. 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 ten (10) containers on the shelf, no less than ten (10) containers must be in storage on the premises.

(11) Infant Fruits and Vegetables.

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

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

(12) Milk.

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

(B) Fourteen (14) one gallon containers of any combination of two percent (2%), one percent (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; and

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

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

(14) Whole Grain. At least six (6) pounds of authorized whole grains, which must include:

(A) At least two (2) one (1) pound packages of one hundred percent (100%) whole wheat bread loaves; and any combination of four (4) pounds of:

1. At least two (2) one (1) pound packages of white or yellow soft corn tortillas; or
2. At least two (2) one (1) pound packages or two (2) pounds of bulk oatmeal or oats; or
3. At least two (2) one (1) pound packages or two (2) pounds of bulk brown rice; or
4. At least two (2) sixteen (16) ounce packages of whole wheat pasta.

(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.

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 WICRegulations@cdph.ca.gov.

Attachment 1

Amendments to the Vendor Authorization Criteria, Stakeholder Comments, and Responses to Comments

**California Special Supplemental Nutrition Program for Women, Infants, and Children
November 9, 2018**

Health and Safety Code section 123322 authorizes the California Department of Public Health (Department) to establish regulations regarding Vendor Authorization Criteria for the California Women, Infants, and Children (WIC) Supplemental Nutrition Program using a regulatory bulletin process. The Department is utilizing this process to adopt the regulations set forth in Regulatory Alert 2018-03. This Attachment is intended to provide responses to stakeholder comments on the proposed Vendor Authorization Criteria specified in Regulatory Alert 2018-03. Revisions to the proposed regulation as a result of the stakeholder comment period, if any, will be adopted into California regulation.

This page is left intentionally blank.

Table of Contents

How to use this Document.....	1
Written Comment Letters Received	2
Letter 1 Sunsweet Growers, Inc.	3
Letter 2 General Mills	5
Letter 3 California Grocers Association	16

This page is left intentionally blank.

How to Use This Document

This document from the California Department of Public Health/Women, Infants and Children Division (Department) consists of written stakeholder letters provided during the stakeholder comment period between June 21 and July 13, 2018, as well as Departmental responses to stakeholders' comments.

This document contains a reproduction of the three stakeholder letters provided to the Department, with each stakeholder comment 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 3.5 refers to the fifth comment in stakeholder Letter 3. Departmental responses to each of the comments in a stakeholder's letter follow immediately after the letter and use the same numbering system. Thus, response 3.5 addresses comment 3.5 in stakeholder Letter 3.

Written Comment Letters Received

The Department received comment letters regarding the Vendor Authorization Criteria regulations proposed in Regulatory Alert 2018-03 from the following three organizations:

1. Sunsweet Growers, Inc., June 20, 2018
2. Tammy M. Seitel, WIC Director, General Mills, July 10, 2018
3. Timothy M. James, Sr. Manager, California Grocers Association, July 13, 2018

Letter 1 Sunsweet Growers, Inc.

From: Stephanie Harralson <SHarralson@sunsweet.com>
Sent: Wednesday, June 20, 2018 10:50 AM
To: Snoke, Malory@CDPH
Subject: Re: Regulation Proposal: Amendments to the Vendor Authorization Criteria

Hi Malory,

Has dried fruit been removed from the market basket list, or is that only for the purposes of determining the pricing average? I.1

Response to Letter 1

1.1 The commenter is inquiring if dried fruit has been removed from the Market Basket.

In both the current and proposed regulation text for WIC Bulletin Regulation (W.B.R.) section 70600, Competitive Price Criteria, the Market Basket food list does not include dried fruit. As a result, the Department's proposed changes do not apply to dried fruit.

Letter 2 General Mills



July 10, 2018

California Department of Public Health
WIC Program

Re: Comments Related to Regulatory Alert 2018-03; WIC Vendor Authorization Criteria

To whom it may concern:

General Mills appreciates the opportunity to provide comments regarding proposed amendments to Sections 70600, 70800, and 71100, and adoption of Section 70750. General Mills is a major packaged-food manufacturer engaged for 90 years in the development and production of food products, including ready-to-eat (RTE) cereals, fruits and vegetables, beans, yogurt, and numerous other products.

General Mills is dedicated to serving the food and nutrition needs of families and children. We were among the first to offer fortification of iron, calcium and folic acid to meet the special nutrition needs of women and children. Today, we remain the nation's leading seller of cereals with 100% of the Daily Value of multiple vitamins and minerals. We support nutrition education by providing complimentary materials available online for WIC clinics and other health professionals at www.bellinstitute.com. Finally, General Mills underwrites WIC educator meetings and other nutrition programs.

2.1

The following comments address proposed amendments in 2018-03.

70600 Competitive Price Criteria

1) 70600(b)(c): Related to Breakfast Cereal, there are three topics we would like to address. First, the components used to calculate averages; second, the impact that store brand and/or low-cost bagged cereals may have in determining averages; and third, a potential unintended consequence of basing competitiveness using a high/low calculation.

2.2

First, the Market Basket pricing requires a vendor to submit their highest shelf price item and their lowest shelf price item. It is unclear whether vendors may submit either 12 or 18 ounce prices (or a combination thereof), or whether they must provide the high/low for each net weight category. We are also unsure whether this category is for ready-to-eat (cold) cereal, or also includes hot. Unlike the other Food Types in the Market Basket, the net weight range for Breakfast Cereals is significant and package size has an impact on pricing.

2.3

Second, there may also be an impact on competitive assessment analysis when store brand and/or low-cost cereal data is used. Not all retailers carry these cereal formats, and indeed only two cereal types in the California WIC Program include store brands (instant oatmeal/oats and Crisp(y) Rice). To illustrate, if Vendor A does not carry these products (but others in their peer group do), it may not mean that vendor A is uncompetitive if the analysis shows them to be above average cost. It may simply mean that the selection of cereals they carry is different. There may be reasons why a vendor cannot or chooses not to carry lower cost cereals (such as overall availability of these cereals, or customer preferences).

2.4

One General Mills Boulevard, Minneapolis, MN 55426

Lastly, we want to share a potential unintended consequence of determining vendor price competitiveness using only high/low data points. While we recognize that vendors are not deemed non-competitive up to 120% of Overall Market Basket pricing, a potential result may still occur that eliminates higher-priced cereals by vendors to protect the overall average. This may sound exactly the result that this policy is intended to achieve, but it may negatively impact the role of cereal in the overall food package (increase iron and whole grain intake) as well as the role of the specific brands (e.g., those high in folic acid) selected for approval in the California WIC program by the nutritionists. We have seen examples across the country of cost containment policies that have unintended results. These include:

2.5

- **Vendors not carrying an approved product due to price.** Some higher-priced cereals may have unique and beneficial attributes, such as Multi-Grain Cheerios™ which provides 100% DV of 9 vitamins and minerals, including folic acid. This product also meets the 51% whole grain requirement and is labeled gluten free, which is important for many participants. We do not believe that WIC would want to see vendors purposefully not stock Multi-Grain Cheerios because of its higher price – but we have seen vendor behaviors like this driven by cost containment practices. A key consideration should be unique attributes along with overall contribution of a specific cereal to WIC’s food expense. This is typically done by the state when making its approved food list decisions, and yet some cost containment policies may serve to interfere or undo the thinking that resulted in the products’ approval.

2.6

- **Higher than expected prices on traditionally lower-priced items.** WIC has many well-documented examples of this situation. In a cost containment situation that minimizes profit/margin options on a specific item, vendors will either eliminate that item or encourage the purchase of higher margin items. This market behavior helps to ensure that a vendor does not exceed the average, which may result in financial loss if they must reimburse the state. Maximizing profit may be easier to achieve on a lower-cost item that has room for higher shelf price, protecting the “average” and creating profit from which any reimbursement can be paid.

2.7

These contributing factors – package size (net weight), comparing store brand/bagged cereals prices to national brands, and not accounting for unique attributes of some cereals - may result in vendors making decisions that can have unintended consequences for the WIC program.

It is important to consider the popularity and business size of breakfast cereal. Unlike baby products, where WIC comprises over 50% of the population in that age group, WIC participants account for less than 4% of the cereal category. Therefore, if vendors do not stock some cereals due to cost containment concerns, a potential future result is that these cereals may no longer be submitted for WIC approval. Manufacturers need to have their products on shelf in order for non-WIC consumers to have the opportunity to purchase these items. Given that non-WIC consumers account for over 95% of cereal sales, one can appreciate that WIC policies need to work with current market dynamics.

2.8

One General Mills Boulevard, Minneapolis, MN 55426

Options that may mitigate these concerns:

We realize that California WIC may have different procedures in the current voucher environment, as well as preparing for the upcoming eWIC environment. For the current environment, California WIC may consider requiring and analyzing both 12 and 18 ounce cereals separately (if this isn't already the practice) and do so only for national branded, boxed cereal to decrease variables within the analysis. 2.9

As California WIC prepares for eWIC, we strongly recommend that cost competitiveness methodology be adopted on an SKU/UPC basis. Certainly, vendors must be competitively priced to ensure they are not increasing WIC's overall food cost beyond what competitive market. To illustrate, wherever a WIC participant purchases an 18 ounce box of Cheerios, the price paid should be at the state average for that same product (within a reasonable percentage to allow for market variability). 2.10

A practice we do not support is to a) require that all cereals sold be within a certain percentage of the average (or high/low) of all cereals; and b) require that certain vendors be required to sell the same box of cereal (e.g., 18 oz Cheerios) at a below average price than the state average of their peer group. 2.11

We do support control mechanisms to ensure that vendors do not charge more for WIC items than is reasonable in the competitive marketplace. 2.12

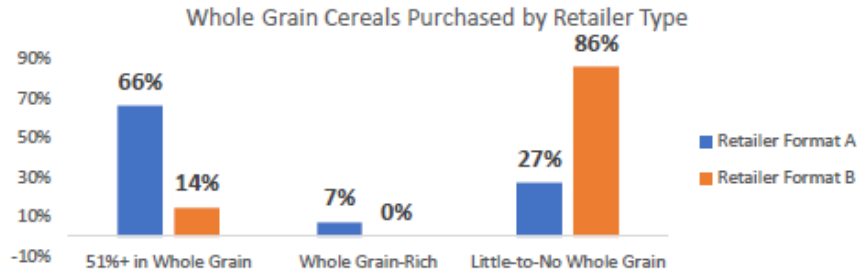
70750 Food Item Quality

General Mills supports the objective of ensuring quality food items be sold to all consumers, including WIC consumers. However, as members of the California Grocers Association, we share their concerns about the proposed language, and support their comments in this area. 2.13

71100 Minimum Stocking Requirements

General Mills supports and encourage the requirement that all WIC foods be stocked in the public area (with allowance for replenishment items in storage). Specifically, all WIC foods should be available to the public on shelves typically found in traditional grocery stores. One objective of WIC is to educate participants on how to shop for nutritious foods, which includes reading package labels. Unless things have changed, some WIC vendors display available items behind the counter and retrieve requested items from storage. We believe this shopping experience is counter to WIC education and may lead to vendors influencing food selection or making available options that best meet the needs of the vendor, rather than the participant. 2.14

EBT data analysis from another state shows significant differences in WIC cereal purchases between two retailer formats. In Retailer Format A, we see much more choice and selection, with a direct impact on whole grain cereals. For Retailer Format B, we see primarily little-to-no whole grain cereals being offered and therefore selected by participants. (EBT statewide data; 2016). 2.15



Regarding 71100 (b)(2), we encourage the California WIC Program to revise the minimum stocking requirements for Breakfast Cereal to increase the requirement for whole grain cereals from two to at least three cereals. Rationale includes:

- If hot cereal is one of the four cereals stocked, it is most likely whole grain, increasing the likelihood that two of the three cold cereals stocked may not meet the whole grain requirement. As shown on the chart above, this may have the unintended consequence of decreasing whole grain cereal purchases by WIC participants;
- Increasing requirements of more whole grain cereals stocked aligns with the California WIC Program objective of approving more cereals (than half of all approved) that provide whole grain;
- Increasing whole grain cereal stocking requirements is better aligned with the recent recommendation from the National Academies of Sciences, Engineering, and Medicine to require that all (100%) of WIC breakfast cereals should meet the “whole grain-rich” level.


2.16

In summary, General Mills is concerned about cost containment methodologies that may result in unfair comparisons between various cereals and which may interfere with the WIC-approved items being carried by vendors. We believe that WIC should not implement cost containment policies which may effectively undermine the very purpose of the program itself - to provide nutritious foods that are commonly available that participants and their children want to eat. We also believe that minimum stocking requirements related to whole grain could be strengthened to encourage stocking and selling of cereals that possess this important attribute. Finally, we support the California Grocers Association comments related to food quality.

2.17

Thank you for the opportunity to provide comments related to the proposed regulations.

Respectfully submitted,



Tammy M. Seitel
WIC Director

One General Mills Boulevard, Minneapolis, MN 55426

Responses to Letter 2

- 2.1** The commenter, a food manufacturer, provides a general introduction to its company and comments, and expresses appreciation for the opportunity to participate in the regulatory process.
- 2.2** The commenter outlines the three main topics its letter addresses specific to section 70600, Competitive Price Criteria, and breakfast cereal in particular. These topics are: (1) the components used to calculate averages, (2) the impact that store brand and/or low-cost bagged cereals may have on determining averages, and (3) a potential unintended consequence of basing cost competitiveness on a high/low calculation. The Department addresses these topics below (see responses 2.3 to 2.11).
- 2.3** First, the commenter states that it is unclear whether vendors may submit the highest and lowest shelf prices for either twelve (12) or eighteen (18) ounce cereal (or a combination thereof), or whether they must provide the highest and lowest shelf prices for both the twelve (12) and the eighteen (18) ounce net weight categories. The commenter also states that it is unclear whether the breakfast cereal Market Basket requirement applies only to ready-to-eat (cold) cereal, or if it also applies to hot cereal.

The Department notes that it is not proposing to make changes to the Market Basket price submission requirements for breakfast cereal. The Department's Shelf Price Submission tool, used by vendors to submit their highest and lowest prices for all Market Basket food items, provides clear product descriptions and sizes to prevent vendor confusion about which breakfast cereals or breakfast cereal prices are required. Market Basket price collection for cereal is only applicable to cold, ready-to-eat breakfast cereals. The tool contains separate and distinct fillable fields for highest and lowest prices for both twelve (12) ounce breakfast cereal and eighteen (18) ounce breakfast cereal, not just one (1) size or the other. To ensure vendors understand the requirements, the Department provides vendors with training on how to use the shelf price submission tool and posts the Shelf Price Submission FAQ and User Guide on the Department website for easy access. For these vendor resources see <https://www.cdph.ca.gov/Programs/CFH/DWICSN/Pages/Grocers/VendorEd.aspx>.

- 2.4** Second, the commenter expresses concern that there will be an impact on the Department's competitiveness assessment when vendors submit shelf prices for store brand or low-cost cereal. The commenter asserts that a vendor may not be uncompetitive because it does not carry store brand or low-cost cereal and the Department's competitiveness assessment shows that the vendor has above-average costs. The commenter also notes that not all retailers carry the same cereal formats.

Under federal regulations, the Department is required to consider vendors' shelf prices when establishing Competitive Price Criteria and must "authorize vendors . . . that offer the program the most competitive prices." (See 7 C.F.R. §246.12(g)(4) (2018)); see also 7 C.F.R. §246.12(g)(1) (2018).) State law similarly requires that the Department only

enter into a vendor agreement with a vendor that meets certain criteria related to the “prices the vendor charges for foods in relation to other vendors in its peer group.” (See Health & Saf. Code, §123310, subd. (a).) These laws are intended to contain the costs of the WIC Program, which is funded with federal taxpayer dollars. (See U.S. Dept. of Agr., WIC Policy Memorandum #2015-6 (Aug. 10, 2015).) The United States Department of Agriculture (USDA) has observed that authorizing generic/store brands, which seventy-six percent (76%) of WIC State agencies authorize in at least one (1) food category, is one common practice for saving WIC Program dollars. (See U.S. Dept. of Agr., WIC Policy Memorandum #2015-6 (Aug. 10, 2015).)

Under section 70600, Competitive Price Criteria, each vendor’s Vendor Market Basket price is calculated by taking the average of the highest and lowest prices for each individual Market Basket food type and adding those averaged prices together. The Average Overall Market Basket price across all vendors in a peer group is then calculated by averaging the Vendor Market Basket price for each vendor within that peer group. A vendor is only non-competitive if its Vendor Market Basket price exceeds one hundred and twenty percent (120%) of the Average Overall Market Basket price for its peer group. The Department bases its calculations on the average of “high-low prices so vendors that carry a single high priced food item will not be disqualified for failing to meet the competitive price criteria as long as they also stock a variety of low cost items.” (See WIC Regulatory Alert 2013-01.) With the proposed removal of corn tortillas from the Market Basket, the Department is proposing to look at the highest and lowest shelf prices for nine (9) different food types, including breakfast cereal. As a result, a vendor will not be non-competitive merely because it stocks national brand breakfast cereals instead of generic/store brand breakfast cereals. Even if a vendor only sells national brand breakfast cereals, which tend to be more expensive, it can still be competitive if it sells other Market Basket items at a lower cost. The Department notes that it is not proposing to change the methodology established in section 70600, Competitive Price Criteria, which is designed to account for price variance within peer groups by using a one hundred and twenty percent (120%) threshold for assessing competitiveness. Peer groups themselves also account for price variance due to store size and format. The Department has not observed issues with competitiveness based on breakfast cereal, meaning vendors have not been found non-competitive due to breakfast cereal shelf prices.

- 2.5** Third, the commenter states a potential unintended consequence of determining vendor price competitiveness using only high/low data points may be that vendors choose not to stock higher-priced cereals in order to protect the overall average. The commenter suggests that this could negatively impact the role of cereal in the overall food package and the role of specific brands selected by Department nutritionists. The commenter also provides examples of cost containment policies that have unintended results (see responses 2.6 and 2.7).

As stated above (see response 2.4), breakfast cereal is only one (1) of nine (9) different food types for which shelf prices are collected and averaged when assessing price competitiveness. Vendors that choose to stock higher-priced cereals based on participant preferences or other considerations are unlikely to be non-competitive solely due to the price of breakfast cereal and can choose to sell other Market Basket items at a lower cost to address any concerns about competitiveness. The Department notes that it is not proposing changes to the calculation methodology for the Average Overall Market Basket or the Vendor Market Basket. The Department's analysis of 2017 competitive shelf price survey data, with the removal of corn tortillas, found that more than ninety-nine percent (99%) of vendors would remain competitive within their peer group (See WIC Regulatory Alert 2018-03.) The Department has not received vendor feedback expressing concerns that cost competitive pressures are forcing them not to stock higher-priced breakfast cereals.

- 2.6** The commenter provides an example of cost containment policies with unintended results by noting that vendors may choose not to carry an approved product, such as Multi-Grain Cheerios, due to price. The commenter also suggests that a key consideration when the Department makes approved food list decisions should be the food's unique and beneficial attributes, like its daily value of vitamins and minerals, along with the food's overall contribution to WIC Program food costs.

Department nutritionists consider many factors when authorizing foods or making changes to the WIC Authorized Food List. These factors include federal requirements, participant preferences, nutritional quality, cost, availability, and representation of food manufacturers. Vendors have discretion when choosing which foods to stock, including high and low price items, and can consider participant preferences in making these decisions. The Department has not received vendor feedback about vendors choosing not to stock certain breakfast cereals, including the breakfast cereals their customers prefer, due to concerns about cost or cost competitiveness.

- 2.7** The commenter provides a second example of cost containment policies with unintended results, stating that some vendors may charge higher than expected prices on traditionally lower-priced items. The commenter suggests that cost containment policies may minimize profit margins on specific items, causing vendors to either eliminate an item or encourage the purchase of higher margin items in order to not exceed the average. The commenter further states maximizing profit may be easier to achieve on a lower-cost item that has room for a higher shelf price, "protecting the 'average.'"

The Department is required to establish requirements for WIC authorized foods. (Health & Saf. Code, §123322, subd. (a)(3)). Vendors have discretion to choose which brands of WIC authorized foods to carry in order to comply with the Department's Minimum Stocking Requirements (section 71100), and may decide which foods to stock based on customer preferences (including WIC participant preferences), food costs and price

points, and other business considerations. The Minimum Stocking Requirements for breakfast cereal (and all other food types) do not specify types or brands that vendors must stock. As long as a vendor is stocking a sufficient number of WIC authorized foods, the vendor may consider pricing and cost containment goals when deciding which foods to carry. In response to the commenter's concern about vendors encouraging WIC participants to purchase items that maximize the vendor's profit margins, the Department notes that when the Department receives a participant complaint about a vendor attempting to influence WIC participant food selection, the Department provides technical assistance to the vendor to correct this conduct.

- 2.8** The commenter states it is important to consider the "popularity and business size of breakfast cereal," noting that unlike for baby products, where WIC participants comprise over fifty percent (50%) of the relevant age group, WIC participants make up less than four percent (4%) of cereal customers. The commenter also states that if vendors do not stock some cereals due to cost containment concerns, a potential result may be that these cereals are no longer submitted for WIC authorization.

The Department notes that it is not proposing substantive changes to the Competitive Price Criteria requirements for breakfast cereal in section 70600. As noted above (see response 2.4), by law, the Department is required 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 establish criteria for "the prices the vendor charges for foods in relation to other vendors in its peer group." (See 7 C.F.R. §246.12(g)(1) (2018); Health & Saf. Code, §123310, subd. (a).) The Department's Competitive Price Criteria are intended to accomplish these goals by establishing competitiveness requirements that protect WIC Program dollars while ensuring that participants have adequate access to nutritious foods. As the commenter notes, WIC participants make up a small percentage of breakfast cereal customers. This should mitigate concerns about the Department's Competitive Price Criteria having a significant impact on the authorized breakfast cereals vendors choose to stock. Food manufacturers are free to submit foods for authorization as they deem appropriate.

- 2.9** The commenter provides an option for mitigating the concerns listed in comment 2.8, stating that the Department may consider requiring and analyzing shelf prices for both twelve (12) ounce and eighteen (18) ounce cereals separately or consider requiring and analyzing shelf prices only for national branded, boxed cereal to decrease variables within the Department's competitiveness analysis.

In response to the commenter's first suggestion, and as noted above (see response 2.3), the Department collects the lowest price and highest price for cold, ready-to-eat breakfast cereal in both twelve (12) ounce and eighteen (18) ounce sizes. The Department notes the commenter's second suggestion regarding analyzing prices for national branded, boxed breakfast cereal, and also notes that comparing shelf prices for national brand breakfast cereals only may not align with USDA-approved best practices

for cost containment, which highlights the authorization of generic/store brand foods. (See U.S. Dept. of Agr., WIC Policy Memorandum #2015-6 (Aug. 10, 2015).)

- 2.10** The commenter provides a second option for mitigating the concerns listed in comment 2.8, suggesting that as the Department prepares for implementation of a WIC electronic benefit transfer (EBT) system, the Department's cost competitiveness methodology could be adopted on a stock keeping unit/universal product code (SKU/UPC) basis.

A WIC EBT system has not yet been implemented in California. Once WIC EBT has been implemented, and after the Department has sufficient data available to make informed decisions about how to modify its cost competitive methodology, if at all, the Department will address any changes to the Competitive Price Criteria in a future W.B.R. package that will have a separate review and comment period.

- 2.11** The commenter states that it does not support the requirements "that all cereals sold be within a certain percentage of the average (or high/low) of all cereals" and that certain vendors "be required to sell the same box of cereal at a below average price than the state average of their peer group."

As noted above (see responses 2.4, 2.5, and 2.8), the Department's Competitive Price Criteria would continue to apply to all Market Basket food types, not simply breakfast cereal. The Department calculates the average of the highest price and lowest price for each Market Basket food, then adds the averaged prices together for all Market Basket foods in order to determine an individual vendor's Vendor Market Basket price. The Department then averages the Vendor Market Basket prices for all vendors within a peer group to determine the Average Overall Market Basket price. The Department relies on these averages in order to account for price variance within peer groups and has made clear that vendors can compensate for especially high priced items by lowering their prices on other Market Basket foods. (See WIC Regulatory Alert 2013-01.) The Department also notes that only those vendors with Vendor Market Basket prices that exceed one hundred and twenty percent (120%) of the Average Overall Market Basket price will be deemed non-competitive. With the proposed removal of corn tortillas from the Market Basket, Department data analysis shows that more than ninety-nine percent (99%) of vendors are price competitive within the one hundred and twenty percent (120%) threshold. The Department is not currently proposing substantive changes to the Competitive Price Criteria requirements and does not require specific pricing for breakfast cereals.

- 2.12** The commenter expresses support of "control mechanisms to ensure that vendors do not charge more for WIC items than is reasonable in the competitive marketplace."

- 2.13** The commenter supports ensuring that quality food items are sold to all consumers, including WIC participants. As a member of the California Grocers Association (CGA), the commenter shares the CGA's concerns about the Department's proposed Food Item Quality regulation, section 70750.

Please see below for the Department's responses to the CGA's substantive comments regarding quality food items (see responses 3.2 to 3.9).

- 2.14** With regard to the Department's proposed changes to section 71100, Minimum Stocking Requirements, the commenter expresses support and encouragement for the requirement that all WIC authorized foods be available to the public on shelves typically found in traditional grocery stores. The commenter states that some vendors display available items behind the counter or will retrieve requested items from storage, which may be an attempt to influence participant food selection or make available those options that best meet the needs of the vendor rather than the participant.

Under federal regulations, vendors "must offer program participants, parents or caretakers of infant o[r] child participants, and proxies the same courtesies offered to other customers." (See 7 C.F.R. §246.12(h)(3)(iii) (2018).) If the Department receives a complaint that a vendor is attempting to influence participant food selection, the Department will provide technical assistance in the form of courtesy visits and provide the vendor with materials and guidance to end this vendor conduct.

- 2.15** The commenter states that WIC EBT data analysis from other states shows significant differences in WIC cereal purchases between two retailer formats. According to the commenter, Retailer Format A offers "more choice and selection" regarding whole grain cereals compared to Retailer Format B, which shows little-to-no whole grain cereals being offered to and selected by participants.

The Department notes this suggestion. The Department also notes that not all state WIC programs operate in similar market conditions, nor do they implement federal regulations and policy in an identical manner. As stated above (see response 2.10), a WIC EBT system has not yet been implemented in California. Once WIC EBT has been implemented, and after the Department has sufficient data available to make informed decisions about how to modify its stocking requirements, if at all, the Department will address any changes to the Minimum Stocking Requirements in a future W.B.R. package that will have a separate review and comment period. As the commenter observes below (see comment 2.16), at this time, vendors are required to ensure that at least two (2) out of four (4) types or brands of breakfast cereal stocked contain fifty-one percent (51%) whole grain by weight in order to satisfy section 71100, Minimum Stocking Requirements.

- 2.16** The commenter encourages the Department to revise the Minimum Stocking Requirements for Breakfast Cereal to increase the requirement for whole grain cereals from two (2) to at least three (3) cereals. According to the commenter, doing so is likely to increase purchases of whole grain cereal by WIC participants, which itself would align with Department objectives as well as a recent recommendation from the National Academies of Sciences, Engineering, and Medicine.

The Department has taken this comment into consideration, but will not be modifying the Minimum Stocking Requirements at this time. The Department has determined that the requirement that two (2) types or brands of breakfast cereal containing fifty-one percent (51%) whole grain by weight is sufficient, as it provides WIC participants access to whole grains while allowing vendors the flexibility to stock breakfast cereals based on their customers' purchasing preferences.

- 2.17** The commenter summarizes their overall concern about unfair comparisons between various cereals under the Department's cost containment methodologies, suggesting that these methodologies may ultimately result in WIC participants having fewer whole grain cereal options. The commenter reiterates its prior statements that Breakfast Cereal Minimum Stocking Requirements related to whole grain could be strengthened, and restates its support of the comments submitted by the CGA regarding food item quality.

The Department notes these comments and responds to them in other parts of this document (see responses 2.4 to 2.11, 2.14 to 2.16, and 3.3 to 3.9).

Letter 3 California Grocers Association



July 13, 2018

WIC Division, CDPH
PO Box 997377, MS 0500
Sacramento, CA 95899-7377

Sent Via e-mail to: WICRegulations@cdph.ca.gov

RE: Comments on Regulatory Alert 2018-03

Thank you for the opportunity to submit comments regarding proposed changes to the California WIC Program (WIC) incorporated in Regulatory Alert 2018-03. The California Grocers Association (CGA) is a non-profit, statewide trade association representing the food industry since 1898. CGA represents approximately 500 retail members operating over 6,000 food stores in California and Nevada, including traditional supermarkets, specialty food stores, club stores, and A-50 WIC stores. Our membership represents a significant percentage of authorized WIC vendors in California.

3.1

Section 70750 Food Item Quality

The grocery industry takes its moral and legal responsibility seriously to offer safe and quality food for sale. We fully recognize the trust our customers place in us to ensure all food items meet and exceed the robust safety standards in the California Retail Food Code (CalCode). As part of our commitment to consumers we fully embrace and support the enforcement of CalCode by California Department of Health (CDPH) and the local entities responsible for inspections. This proposed regulation creates an unnecessary parallel system which is deficient in specifics and runs counter to existing food safety enforcement efforts.

3.2

Instead of creating a separate food item inspection regulation within CDPH that has no connection to the current CalCode process we encourage WIC to work with the existing food safety inspection system in place. It is important to note that WIC vendors must be licensed as retail food facilities which subjects them to regular inspection. This automatically brings those retailers under the control of CDPH and local enforcement agencies. Coordinating with the existing process will ensure trained inspectors knowledgeable in food safety and quality enforce statewide standards.

3.3

The Statement of Reasons provides no evidence that the current process of inspections conducted by county health departments is failing to protect the public health and WIC participants. If WIC feels the current enforcement of Cal Code is insufficient or inaccurate we encourage CDPH to convene both internal and external stakeholders to address any failures WIC feels there may be with CalCode or its enforcement.

3.4

It would be far more sensible for WIC to work with other divisions at CDPH and county level health officers to develop a reporting and referral process to ensure that retail food vendors are in compliance with existing food safety regulations. County inspectors are trained professionals in food safety and understand what constitutes a threat to the health of WIC participants and the general public. WIC vendors who repeatedly violate health standards should be considered for removal from the program, but this does not require an unnecessary, parallel inspection system for food retailers.

3.5

Specific to the regulation, it includes terms which are not defined and highly subjective. Both in the attempted description to identify foods that may have been adulterated or to identify voluntary usage descriptions there are no standardized definitions. Without clear and reasonable definitions based in food science and terms defined by CalCode enforcement will be highly subjective, making compliance confusing and difficult.

3.6

The vague language used in the proposed regulation and non-scientific interpretation by Department staff is likely to result in uneven application of the proposed standard. The determination of what is fully ripe and what is spoiled is often a matter of personal preference and has nothing to do with the safety of the food item. For example, whether a banana is considered ripe or spoiled is a matter of personal and cultural preference but could be considered grounds for eliminating a vendor from the WIC program. With disqualification happening with two violations in two years and the unscientific, subjective nature of the regulation it is likely the program will unnecessarily and inappropriately disqualify vendors.

3.7

Food safety enforcement agencies recognize that inspections only represent a snapshot of time and do not always reflect the standard practices and procedures of the food retailer. This is why food safety enforcement is equally about education of retailers, understanding food retailing challenges and enforcement when an established unsafe pattern is found and gone uncorrected. This proposed regulation does not incorporate any of those best practices, instead creating an environment where WIC appears to more interested in shutting down WIC vendors than identifying improvements.

3.8

We strongly encourage WIC not move forward with 70750 Food Item Quality Proposed Regulation at this time. Instead we believe WIC should work with other CDPH Departments, local food safety enforcement officials and industry stakeholders to develop a system that works in concert with existing food safety inspections and enforcement.

3.9

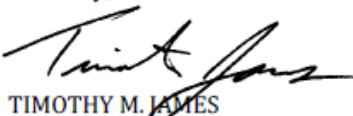
Section 71100 Minimum Stocking Requirements

We are aware of concerns being brought to your attention regarding cost containment methodologies which could result in unfair comparisons. We ask you to consider those concerns and potential solutions.

3.10

Thank you for your consideration and we look forward to continuing to partner with WIC to help California families.

Sincerely,



TIMOTHY M. JAMES
Sr. Manager, Local Government Relations and Regulatory Affairs

Responses to Letter 3

- 3.1** The commenter, a non-profit trade association representing more than five hundred (500) retail members in California and Nevada, provides an introduction to the association and its members. The commenter expresses appreciation for the opportunity to participate in the regulatory process.
- 3.2** The commenter states that the grocery industry has a moral and legal responsibility to ensure that food items meet the safety standards in the Health and Safety Code, specifically the California Retail Food Code, and expresses support for the enforcement of the California Retail Food Code by the Department and local entities. The commenter also expresses concern that the proposed regulation, section 70750, Food Item Quality, creates an unnecessary parallel system that runs counter to existing food safety enforcement efforts.

The Department addresses the specific issues raised by the commenter below (see responses 3.3 to 3.9).

- 3.3** The commenter states that instead of creating a separate food item inspection regulation, the Department should work with the existing food safety inspection system in place for retail food facilities, which applies to all WIC vendors. The commenter maintains that this will ensure that inspectors are trained, knowledgeable, and enforce statewide standards.

The Department has taken this comment into consideration, and has determined that the proposed Food Item Quality authorization criteria, section 70750, provides a much-needed mechanism for ensuring that vendors are selling WIC participants quality food items that are safe for consumption and provide the intended nutritional benefit. The provisions of the California Food Retail Code that apply to retail food facilities, including WIC vendors, are primarily enforced by the local health departments, with the Department providing technical expertise and responding to technical and legal inquiries. As the commenter suggests, one provision of the California Retail Food Code (Health & Saf. Code, §113980) requires that:

All food shall be manufactured, produced, prepared, compounded, packed, stored, transported, kept for sale, and served so as to be pure and free from adulteration and spoilage; shall have been obtained from approved sources; shall be protected from dirt, vermin, unnecessary handling, droplet contamination, overhead leakage, or other environmental sources of contamination; shall otherwise be fully fit for human consumption; and shall conform to the applicable provisions of the Sherman Food, Drug, and Cosmetic Law.

The proposed regulation, section 70750, Food Item Quality, is intended to complement the California Retail Food Code.

Proposed section 70750, subsection (b), defines quality food items as food items “free from evidence of spoilage such as rotting, slime, mold, insects, or pests” as well as food items sold on or before the specified “Use By” or “Use or Freeze By” dates, or infant formula safety dates. This proposed definition is both consistent with, and less stringent than, the California Retail Food Code requirements quoted above. As a result, vendors that satisfy the requirements in the California Retail Food Code will be in a good position to satisfy the Food Item Quality authorization criteria set forth by the Department in proposed section 70750. In terms of knowledge and training, the Department trains staff to evaluate all vendor authorization criteria assessed during vendor pre-authorization routine monitoring, and compliance on-site visits objectively and provides tools for staff to follow when conducting on-site visits. Department management reviews reports conducted by staff to ensure uniformity and objectivity.

Food Item Quality authorization criteria is needed in part due to documented observations of spoiled fresh fruits and vegetables found during site visits conducted by the Department. The Department’s on-site visits to vendors are required by federal regulations. These visits are independent of the inspections conducted by local health departments to enforce the California Retail Food Code, and are conducted at separate intervals. The main purpose of the Department’s vendor on-site visits is to ensure that vendors and vendor applicants are complying with those minimum criteria that are required in order for a vendor to be authorized under the WIC Program. Contrary to public policy, the commenter’s suggestion would prohibit the Department from taking immediate action to protect WIC participants when spoiled or foods past their safety dates are observed during on-site visits.

Under current regulations, the Department does not have a mechanism for denying authorization to vendor applicants who, prior to authorization, are selling spoiled foods. Section 70750 is intended to address the gap in the Department’s regulatory enforcement powers and ensures that only quality food items safe for consumption and which provide the intended nutritional benefits are sold to WIC participants. The Department notes that the proposed regulation applies only to WIC authorized foods on store shelves in the public area of a vendor’s store, and not to all food items offered by the vendor or food items removed from store shelves for disposal.

- 3.4** The commenter asserts that the Statement of Reasons for section 70750 provides no evidence that the current process of inspections conducted by the county health departments is failing to protect the public health and WIC participants, and suggests that the Department engage with stakeholders to identify which failures affecting the current process, if any, are undermining the California Retail Food Code or its enforcement.

The Department notes this suggestion and holds the position that the proposed food item quality regulation complements, rather than replaces or detracts from, the existing enforcement mechanisms under the California Retail Food Code (see response 3.3).

The proposed regulation also enhances the Department's ability to ensure that vendor applicants who do not maintain adequate food safety and quality procedures are denied authorization to participate in the WIC Program. The proposed regulation is intended to ensure that authorized vendors are selling WIC participants safe, quality foods that provide the intended nutritional benefits. Through the course of its pre-authorization, routine monitoring, and compliance visits, the Department has discovered WIC food items considered unsafe for consumption offered by vendors, including food items infested with insects. As the commenter notes, the grocery industry takes seriously its moral and legal responsibility to offer safe and quality food for sale (see comment 3.2). Proposed section 70750 would not add any new responsibilities for vendors under the California Retail Food Code. This section sets out to establish food item quality standards to ensure that vendors offer safe and quality foods to WIC participants and provides a necessary mechanism for allowing the Department to deny WIC Program authorization to those vendors that fail to satisfy minimum food safety and quality standards.

- 3.5** The commenter states that it would be more sensible for the Department to work with other divisions within the Department, as well as county health officers, to develop a reporting and referral process for ensuring that retail food vendors comply with existing food safety regulations.

The Department notes this suggestion, but will not modify proposed section 70750 at this time. A referral process as described in comment 3.5 would not allow WIC to address the needs of its participants, since without this regulation WIC would be required to authorize vendor applicants even after observing serious patterns of offering food items for sale that are considered unsafe for consumption. Also, as noted above (see responses 3.3 and 3.4), the proposed regulation complements and is consistent with the California Retail Food Code. Vendor compliance with the proposed regulation will be assessed by trained WIC staff, and the proposed regulation provides a necessary mechanism for allowing the Department to deny WIC Program authorization to those vendors that fail to satisfy minimum food safety and quality standards.

- 3.6** The commenter asserts that the proposed regulation includes terms which are not defined and are highly subjective. The commenter also expresses concerns that without clear and reasonable definitions based in food science and terms defined by the California Retail Food Code, the Department's enforcement of the proposed regulation will be highly subjective, making compliance confusing and difficult.

The Department notes this comment, and will not be modifying the language in proposed section 70750, Food Item Quality, at this time. The Department observes that the California Retail Food Code already requires WIC vendors to ensure that food items are "pure and free from adulteration and spoilage," and that although adulteration is defined, spoilage is not. (See Health & Saf. Code, §113980.) The Department is not aware of WIC vendors being confused by or unable to comply with this provision in the California

Retail Food Code merely because the word spoilage is undefined. The Department also notes that the proposed regulation describes what is meant by “evidence of spoilage” using common terms such as “rotting, slime, mold, insects, or pests.” These terms were selected because they can be readily understood by the vendor population and provide specific examples of spoilage that may affect food items. In terms of maintaining objective, uniform standards when assessing a vendor’s compliance with the proposed regulation, the Department trains staff to evaluate all vendor authorization criteria assessed during pre-authorization, monitoring, and compliance visits objectively and provides tools for staff to follow when conducting on-site visits. Department management reviews staff reports to ensure uniformity and objectivity.

- 3.7** The commenter states that the “vague language used in the proposed regulation” makes it likely that the Department will apply the regulation unevenly and “unnecessarily and inappropriately disqualify vendors.” The commenter also indicates that the difference between fully ripe food items and spoiled food items, such as bananas, is often a matter of personal or cultural preference and has nothing to do with the safety of the food item.

The Department understands that ripeness is subject to personal preference. For example, some people may prefer slightly brown or spotted bananas to green or yellow bananas. That being said, a very ripe banana is not the same as a banana with evidence of spoilage such as rotting, mold, or pests. The Department considers the examples of “rotting, slime, mold, insects, or pests” sufficiently clear, commonplace, and distinct from ripeness, as to be readily understood by vendors without raising serious concerns about personal preference being substituted for objective standards. As noted above (see responses 3.3, 3.5, and 3.6), the Department trains staff to evaluate all vendor authorization criteria assessed during pre-authorization, monitoring, and compliance visits objectively and provides tools for staff to follow when conducting on-site visits. Additionally, Department management reviews staff reports to ensure uniformity and objectivity.

- 3.8** The commenter expresses concern that proposed section 70750, Food Item Quality, will create an environment in which the Department is more interested in “shutting down WIC vendors than identifying improvements,” and expresses a concern that the proposed regulation focuses on a snapshot of time that may not always reflect a vendor’s standard practices and procedures.

The Department notes this concern, and is clarifying that it is not the Department’s intent to disqualify vendors unnecessarily. Proposed section 70750 is to ensure the Department only authorizes vendors that provide foods safe for consumption and which provide the intended nutritional benefits. Department Vendor Authorization Criteria requirements apply to both vendor applicants and authorized vendors. The Department’s intent is to ensure vendor applicants are successful WIC authorized vendors.

Once a vendor is authorized, the Department works with vendors to help them understand and comply with program requirements. The Department provides vendors

with training and technical assistance, including access to a vendor help line, vendor stakeholder calls and alerts to inform vendors of policy and regulatory changes, and local vendor liaisons. These Departmental efforts are preventative steps to decrease the frequency of vendor violations, and the Department does not sanction a vendor until a pattern of violations is discovered. The Department values vendor participation and works in partnership with WIC authorized vendors to provide efficient WIC food delivery services.

- 3.9** The commenter suggests that WIC not move forward with proposed section 70750, Food Item Quality, and instead work with other components of the Department, local food safety officials, and industry stakeholders to “develop a system that works with existing food safety inspections and enforcement.”

The Department notes this suggestion. At this time, the Department will not be modifying the language in proposed section 70750, Food Item Quality, for the reasons explained above (see responses 3.3 to 3.8).

- 3.10** The commenter states it is aware of concerns being brought to the Department’s attention regarding the cost containment methodologies set forth in section 71100, Minimum Stocking Requirements.

The Department responds to these comments in other parts of this document (see responses 2.3 to 2.17).