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

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April 4, 2014

WIC REGULATORY BULLETIN 2014-01

NOTICE OF FINAL ACTION

Subject Final Action on the Notice of Proposed Changes posted as Regulatory Alert 2013-03 on December 13, 2013, posted at: http://www.cdph.ca.gov/programs/wicworks/Documents/Regulatory%20Alert/WIC-RegulatoryAlert-2013-03-Attach1-2.pdf.

Date of Adoption The Final Action will be effective June 1, 2014.

Stakeholder Comments and Responses Please see Attachment 1 of this Regulatory Bulletin for the Stakeholder Comments and Department Responses.

Regulations Article 2. Peer Group Criteria

50000 Peer Group Criteria. (a) For the purposes of this article "Department" is defined as the Department of Public Health, and the "Program" and "WIC" are defined as the California Special Supplemental Nutrition Program for Women, Infants, and Children.

(b) The Department shall place vendors in an appropriate peer group category and subgroup, if applicable, when authorizing a vendor by applying the requirements set forth in this section and in sections 50100, 50200 and 50300. The Department may reassign a vendor to a different peer group category or subgroup at any time during the term of the vendor agreement. The Department shall notify the vendor of its peer group category and subgroup assignment at authorization or at the time of any subsequent changes in assignment.

(c) The Department shall make peer group category and subgroup assignments based on its review and assessments of the vendor at the time of the vendor's initial authorization and as part of vendor monitoring at any time during the term of the vendor agreement, according to the requirements in this section.

(d) Vendors shall be reassessed based on their records using criteria in Section 50100 within six (6) months of authorization, annually, at reauthorization, and at any time during the term of the vendor agreement. In order to reassess a vendor, the Department shall request that the vendor provide a copy of its California Board of Equalization (BOE) State, Local and District Sales and Use Tax Return statement for the period of time specified by the Department. A vendor must provide the BOE State, Local and District Sales and Use Tax Return statement to the Department within thirty (30) days of the date on which the vendor received the Department's request for the statement. If a vendor does not file a BOE State, Local and District Sales and Use Tax Return statement because that vendor does not sell any taxable goods or if a vendor applicant has not filed a State, Local and District Sales and Use Tax Return statement with the BOE within 6 months of authorization because the vendor files these statements annually, the vendor must submit the materials specified in Section 50100(a)(2)(B)(1). If the vendor fails to submit the BOE State, Local and District Sales and Use Tax Return statement or the alternate materials in Section 50100(a)(2)(B)(1) within thirty (30) days from receipt of the request, the Department shall deny reauthorization of the vendor, or, if the vendor is not in the reauthorization process, place a vendor in Peer Group Category C.

(1) For the purposes of this section, "date of receipt" shall mean the date indicated on the United States Postal Service delivery confirmation when delivered to the vendor's most recent business ownership address on file with the Department.

(e) The Department shall conduct an on-site visit upon initial authorization of a vendor and may conduct on-site visits at other times during the term of the vendor agreement, as part of vendor monitoring, for the purposes of reviewing inventory to assign or verify a vendor's peer group category and subgroup assignment.

(1) On-site visits shall be conducted during the vendor's regular business hours, and Department staff conducting the visit shall identify themselves upon arrival. The Department is not required to notify the vendor of the on-site visit in advance of arrival.

(2) During the on-site visit, the vendor shall provide the Department staff with access to its food stock. All food items must be documented by invoices or transfer documents specific to that store location. When an on-site visit occurs at the same time as vendor monitoring, the vendor shall provide access to inventory records.

(3) The Department's on-site review of inventory for peer group assignment shall include only food items in the public area of a vendor's store where merchandise is available for purchase, and infant formula, infant meats, and milk in storage on the premises of the vendor location, at the time Department staff arrives on the premises for the assessment.

50100 A-50 Peer Group/Category A. (a) Vendors receiving more than fifty (50) percent of their annual food sales revenue from WIC redemptions and those vendor applicants expected to meet this criterion shall be classified as above-50-percent (A-50) vendors and placed in Peer Group Category A. The Department shall take the following steps to assess whether a vendor shall be placed in Peer Group Category A:

(1) Upon initial application, the Department shall ask vendor applicants if they believe they will meet the criteria for Peer Group Category A.

(A) If an applicant answers in the affirmative, the Department shall place the vendor in Peer Group Category A.

(B) If an applicant answers in the negative, the Department will make the assessment according to the following criteria and shall place a vendor in Peer Group Category A based on any one of these criteria.

1. If a vendor applicant is requesting authorization of a new store location and owns other WIC authorized stores, the Department shall first determine if the vendor applicant owns an existing authorized A-50 store. If the vendor applicant ownership owns at least one (1) existing authorized A-50 store, the Department shall then calculate WIC redemptions as a percent of total food sales of all the existing WIC authorized stores owned by the vendor applicant. If the combined total WIC redemptions of the vendor's stores exceed 50 percent of the combined total food sales the applicant store will be placed in Peer Group Category A.

2. The Department shall request from the vendor applicant the percentage of anticipated food sales by type of payment, including cash, Supplemental Nutrition Assistance Program (SNAP), WIC, and credit/debit card. If the vendor's anticipated WIC sales are more than 50 percent of the anticipated food sales, the vendor applicant will be placed in Peer Group Category A.

3. The Department shall review the actual food items present at the preauthorization on-site visit described in Section 50000. If the food items indicate that the vendor's inventory is more than 50 percent WIC authorized supplemental food items, the vendor applicant shall be placed in Peer Group Category A.
4. If the Department receives notification from a new vendor applicant otherwise qualified for authorization that WIC authorization is required in order for the store to open for business, the vendor applicant will be placed in Peer Group Category A.

(2) Within six (6) months of authorization, the Department shall re-assess whether a new vendor should be placed in Peer Group Category A using the following criteria:

(A) The Department shall compare the total dollar amount of a vendor's WIC redemptions to the total dollar amount of a vendor's SNAP redemptions for the period which the vendor has been authorized. When comparing a vendor's WIC redemptions to SNAP redemptions the Department shall consider only WIC redemption information from the Department and SNAP redemption information provided by the California Department of Social Services and the United States Department of Agriculture (USDA). If the vendor's SNAP redemptions exceed WIC redemptions for the period during which the vendor has been authorized the vendor shall not be considered an A-50 vendor.

(B) If the total dollar amount of the vendor's WIC redemptions exceeds the total dollar amount of its SNAP redemptions, the Department shall compare total dollar amount of the vendor's non-taxable food sales from the vendor's most recent BOE State, Local and District Sales and Use Tax Return statement to the total dollar amount of the vendor's WIC redemptions for the same time period. If the vendor's WIC redemptions exceed 50 percent of the non-taxable food sales for the time period covered by the tax return statement, the Department shall place the vendor in Peer Group Category A.

1. If a vendor does not file a BOE State, Local and District Sales and Use Tax Return statement because that vendor does not sell any taxable goods or if a vendor has not filed a State, Local and District Sales and Use Tax Return statement with the BOE within 6 months of authorization because the vendor files these statements annually, the Department may require the vendor to submit monthly sales statements with inventory records detailing the vendor's sales for SNAP eligible foods and total sales for the period of time specified by the Department. This vendor must certify that the information included in this statement is true and correct. If the vendor's WIC redemptions exceed 50 percent of the non-taxable food sales for the time period covered by the sales and inventory records, the Department shall place the vendor in Peer Group Category A.

(3) In addition to the assessments set forth in Section 50100(a)(1 – 2), the Department shall assess all authorized vendors annually, or, as part of vendor monitoring at any time during the term of the vendor agreement, to determine if a vendor's WIC redemptions are more than 50 percent of its total food sales. The Department shall use the following criteria to determine if an authorized vendor shall be placed in Peer Group Category A:

(A) The Department shall compare the total dollar amount of the vendor's WIC redemptions for the most recent twelve (12)-month period to the total dollar amount of the vendor's SNAP redemptions for the same

period. If SNAP redemptions exceed WIC redemptions, the Department shall not consider the vendor an A-50 vendor. When comparing a vendor's WIC redemptions to SNAP redemptions the Department shall consider only WIC redemption information from the Department and SNAP redemption information provided by the California Department of Social Services and the USDA.

(B) If the total dollar amount of the vendor's WIC redemptions exceeds the total dollar amount of its SNAP redemptions for the most recent twelve (12)-month period, the Department shall compare the total dollar amount of the vendor's non-taxable food sales from the vendor's most recent BOE State, Local and District Sales and Use Tax Return statement(s) for the same twelve month period to the total dollar amount of the vendor's WIC redemptions covering the same time period. If WIC redemptions exceed fifty (50) percent of food sales for the time period covered by the tax return statement, the Department shall place the vendor in Peer Group Category A.

1. If a vendor does not file a BOE State, Local and District Sales and Use Tax Return statement because that vendor does not sell any taxable goods, the Department may require the vendor to submit monthly sales statements with inventory records detailing the vendor's sales for SNAP eligible foods and total sales for the period of time specified by the Department. This vendor must certify that the information included in this statement is true and correct. If the vendor's WIC redemptions exceed 50 percent of the non-taxable food sales for the time period covered by the sales and inventory records, the Department shall place the vendor in Peer Group Category A.

(4) When comparing a vendor's total dollar amount of non-taxable food sales as reported on the vendor's BOE State, Local and District Sales and Use Tax Return statement, the Department will not include the dollar amount of sales to other retailers for the purposes of resale.

(5) The Department may require a vendor to provide copies of inventory, sales, and other records for inspection in order to verify the accuracy of information used in the assessment process.

50200 Full-Line Grocery Peer Group/Category B. (a) Vendors receiving less than or equal to fifty (50) percent of their annual food sales revenue from WIC redemptions who meet the definition of a full-line grocery store shall be classified as full-line grocers and placed in Peer Group Category B.

(1) For the Purposes of this section, the Department shall use the following definitions to determine variety and quantity of food items stocked:

(A) A variety includes different types of food items in the food group. For

purposes of this section, food groups include cereals, breads/tortillas, fresh dairy products, fresh fruits and vegetables, and fresh meats/poultry/seafood. For example, a variety of dairy products includes eggs, cheese, milk, yogurt, and butter. A variety of cereal includes but is not limited to shredded wheat, toasted o's, corn flakes, rice flakes, puffed rice, oatmeal, and cream of wheat. A variety of breads includes but is not limited to rye, whole wheat, white, and multi-grain. A variety of breads also includes different forms of bread, regardless of the grain; for example, a variety of bread includes rolls, a whole loaf, a pre-sliced loaf, and buns. A variety of fresh meats includes but is not limited to different cuts of the same type of fresh meat. For example, a variety of fresh meats includes boneless chicken breasts, chicken legs, whole chicken and ground chicken.

(B) <u>The variety requirement cannot be met by stocking different brands or flavors of the same food item</u>. For example, a variety of fresh dairy products does not include five (5) different brands of yogurt. A variety of fresh dairy products also does not include five (5) different flavors of yogurt. A variety of cereal does not include different brands of the same type of cereal or different flavors of the same brand. For example, a variety of cereal does not include different brands of puffed rice or different flavors of toasted o's. Rolled oats, steel cut oats and instant oatmeal shall not count as more than one (1) variety. ~~Different flavors of oatmeal shall not count as more than one (1) variety.~~

(C) For food items packaged for sale as one item, a unit shall mean one package.

(D) For food items sold in bulk quantities, a unit shall be determined by the method in which the food item is sold. For example if produce or meat is sold by weight, a unit shall be one pound. For example for bananas, apples, oranges and other fruits sold by the pound, one pound shall be one unit.

(E) For products sold in set quantities, a unit shall be one (1) set quantity. For example, a head of lettuce sold by the head shall be one (1) unit. An avocado or banana sold individually shall be one (1) unit.

(F) For the purposes of this section, "fresh" food items shall not include cooked, frozen, canned, dried, or other shelf stable food items.

(2) A full-line grocer shall be defined as a vendor stocking the following:
(A) Cereal: five (5) or more varieties with five (5) units of each variety. Single serving units of cereal packaged for sale will not be counted toward the variety or quantity required to meet the full-line grocery definition described in this subsection.

(B) Breads/Tortillas: four (4) or more varieties with five (5) units of each variety. Frozen breads will not be counted toward the variety or quantity required to meet the full-line grocery definition described in this subsection.

(C) Fresh Dairy Products: five (5) or more varieties with five (5) units of each variety.

(D) Fresh Fruits and Vegetables: seven (7) or more fresh fruits and seven (7) or more fresh vegetable varieties with five (5) units of each variety.

(E) Fresh Meats/Poultry/Seafood: four (4) or more varieties with five (5) units of each variety.

(3) Vendors assigned to Category B shall be assigned to subgroups based on the number of cash registers in the ~~vendor~~ store:
(A) 1-2 registers
(B) 3-5 registers
(C) 6-9 registers
(D) 10+ registers
(E) Only registers that comply with W.B.R. §70300 shall be counted in accordance with the following subsections:

1. All registers must be counted whether they are used full time or occasionally.

2. All registers in specialty locations or sections shall be counted if those registers transact any foods sales as defined in 7 C.F.R. §246.2. Examples of specialty locations or sections include but are not limited to jewelry, clothing, and electronics.

3. Specialty locations shall not be included in the register count if the location does not have a register.

4. Automated Teller Machines (ATMs) or in-store banks with registers shall not be included in the register count.

50300 Other Peer Group/Category C. Vendors meeting the authorization criteria described in WIC Regulations by Bulletin Article 4 that do not meet the criteria for placement in Peer Group Categories A or B shall be placed in Peer Group Category C.

Article 3. Reimbursement System for Vendors
60000 Definitions.

(a) For purposes of this article, the following definitions apply:
(1) *Actual Selling Price*. The Actual Selling Price is the amount entered on the Food Instrument by a vendor at the time of sale, including all store,

coupon, advertisement, or other discounts applied to the sale.

(2) *Competitive Average Redemption Value*. The Competitive Average Redemption Value (CARV) is a 12-week average, using food instrument redemption data from vendors assigned to Peer Group Category B Register Count Subgroups 6-9 and 10+ as defined in WIC Bulletin Regulations Section 50200.

(A) For Unit-Priced Food Instruments: The CARV shall be calculated as a dollar sum of all redemptions for Peer Group Category B Register Count Subgroups' 6-9 register vendors and 10+ vendors across all food instruments for the same supplemental food divided by the quantity of units redeemed by Peer Group Category B Register Count Subgroups' 6-9 register vendors and 10+ register vendors, rounded up to the nearest one cent.

(B) For Non-Unit Priced Food Instruments: The CARV shall be calculated for each food item number as the dollar sum of all redemptions for Peer Group Category B Register Count Subgroups' 6-9 register vendors and 10+ register vendors divided by the number of food instruments redeemed by Peer Group Category B Register Count Subgroups' 6-9+ register and 10+ register vendors, rounded up to the nearest one cent.

(3) *Department*. The Department is defined as the California Department of Public Health and the California Special Supplemental Nutrition Program for Women, Infants, and Children (WIC Program).

(4) *Food Instruments, Non-Unit Priced*. Non-Unit Priced Food Instruments <u>are Food Instruments, as defined in 7 CFR 246.2 and adopted by WIC Regulatory Bulletin 2012-01, that</u> contain either a single supplemental food or a combination of various supplemental foods as defined in the "What to buy" section and identified by the food item number found on the face of the food instrument. A food instrument containing a single supplemental food which does not specify both a specific quantity and package size prescribed in the "What to buy" section on the face of the food instrument such as 16-18 oz. of peanut butter is a non-unit priced food instrument.

(5) *Food Instruments*, *Unit Priced*. Unit-Priced Food Instruments <u>are Food Instruments, as defined in 7 CFR 246.2 adopted by WIC Regulatory Bulletin 2012-01, that</u> contain either one or multiple quantities of a single supplemental food with a specific package size such as a 12.5 oz. can of infant formula and are differentiated for quantity in both the "What to buy" section and the food item number found on the face of the food instrument.

(6) *Food Item Number*. A four-digit number found on the face of a food instrument or cash-value voucher (CVV) that corresponds to an individual supplemental food or group of supplemental foods by quantity or dollar amount.

(7) *Maximum Allowable Department Reimbursement*. The Maximum Allowable Department Reimbursement (MADR) rate for food instruments and CVVs is defined as the maximum reimbursement paid to WIC authorized vendors in exchange for providing WIC supplemental foods to program participants according to the food item number.

(8) *Peer Groups*. A classification of authorized vendors into groups based on common characteristics or criteria that affect food prices, for the purpose of applying appropriate competitive price criteria to vendors at authorization and limiting payments for food to competitive levels. Regulations defining California WIC vendor Peer Groups, Categories and Register Count Subgroups are located in WIC Bulletin Regulations Section 50000 et seq.

(9) *Statewide Average*. The Statewide Average is a 12-week average of food instrument redemption data from Peer Group Category B and C vendors, excluding food instruments that are identified as partially-redeemed pursuant to 60300(c).

(A) For Unit-Priced Food Instruments: The Statewide Average shall be calculated as a dollar sum of all redemptions across all food instruments for the same supplemental food divided by the quantity of units redeemed by Peer Group Category B and C vendors, rounded up to the nearest one cent. This calculation shall exclude food instruments that are identified as partially-redeemed pursuant to 60300(c).

(B) Non-Unit Priced Food Instruments: The Statewide Average shall be calculated for each food item number as the sum of all redemptions of Peer Group Categories B and C divided by the number of food instruments redeemed by Peer Group Category B and C vendors, rounded up to the nearest one cent. This calculation shall exclude food instruments that are identified as partially-redeemed pursuant to 60300(c).

(10) *Tolerance Factor*. A percentage adjustment applied to the CARV to account for differences in vendor prices due to store size and the variety of brands and package sizes stocked by the store as part of the MADR calculation.

60100 Maximum Allowable Department Reimbursement Rates for Cash-Value Vouchers.

(a) The MADR rate for CVVs shall be the amount printed on each CVV. Vendors shall be reimbursed for CVVs as follows:

(1) The Department shall reimburse vendors for the actual selling price of the fruits and vegetables when the cost of the quantity purchased by the participant is less than the MADR rate for the CVV.

(2) The Department shall reimburse vendors the MADR rate for the fruit and vegetable CVV when the actual selling price of the quantity of fruits and vegetables purchased by the participant equals or exceeds the MADR rate.

(A) If the actual selling price of fruits and vegetables chosen by a participant exceeds the MADR rate for the fruit and vegetable CVVs and the participant wishes to purchase the full quantity selected, the vendor shall accept and collect payment from the participant for the amount by which the actual selling price exceeds the MADR rate of the CVV.

60200 Maximum Allowable Department Reimbursement Rates for Food Instruments

(a) The Department shall reimburse vendors the lesser of the vendor's posted price, the actual selling price, or the MADR of all of the supplemental foods purchased by the participant and included on the food instrument.

(b) If the vendor submits a food instrument for payment in an amount that exceeds the MADR, that food instrument will be rejected and returned to the vendor by the Department or its agent. When a food instrument is rejected, a vendor must reduce the amount requested for reimbursement on the food instrument so that it does not exceed the MADR and resubmit the food instrument.

(1) Vendors may not seek or accept payment for any difference between the vendor's posted price or the actual selling price of the supplemental foods purchased and the MADR rate for a food instrument when the vendor's posted price or actual selling price of the supplemental foods exceeds the MADR rate.

(c) The MADR rate for a food instrument shall be assigned based on the MADR rate in effect at the time the food instrument is initially submitted by the vendor to the Department through the Vendor WIC Information eXchange (VWIX) and shall be calculated according to the vendor's assigned Peer Group Category

and Subgroup as follows:

(1) The MADR rate for Peer Group Category A vendors shall be the Statewide Average.

(2) The MADR (MADR) rate for vendors assigned to Peer Group Category B Register Count Subgroups shall be calculated by adding the applicable tolerance factor to the CARV:

MADR= CARV + Tolerance Factor

(A) Tolerance factors for Peer Group Category B vendors shall be determined based on whether a food item number is a Single Item Food Instrument or a Combination ~~Item~~ Food Instrument.

1. Single Item Food Instruments contain a single supplemental food in the “What to buy” section on the face of the food instrument.

2. Combination Food Instruments contain two or more different supplemental foods as found in the “What to buy” section of the food instrument.

(B) Each Peer Group Category B Register Count Subgroup’s MADR rate for single item food instruments shall be calculated using the Register Count Subgroup’s Tolerance Factor for Single Item Food Instruments as follows:

1. 1-2 Register Count Subgroup: 28% of CARV
2. 3-5 Register Count Subgroup: 22% of CARV
3. 6-9 Register Count Subgroup: 16% of CARV
4. 10+ Register Count Subgroup: 10% of CARV

(C) Each Peer Group Category B Register Count Subgroup’s MADR rate for combination food instruments shall be calculated using the Register Count Subgroup’s Tolerance Factor for Combination Food Instruments as follows:

1. 1-2 Register Count Subgroup: 49% of CARV
2. 3-5 Register Count Subgroup: 43% of CARV
3. 6-9 Register Count Subgroup: 37% of CARV
4. 10+ Register Count Subgroup: 31% of CARV

(3) The MADR rates for Peer Group Category C vendors shall be the CARV.

60300 Rules for Calculating the Maximum Allowable Department Reimbursement Rate

(a) The MADR rates shall be calculated every 4 weeks on Thursday using the prior 12 weeks of data, beginning on a Tuesday and ending on the Tuesday prior to the calculation date. The Department will have 10 days to review the calculated rates and make manual adjustments as specified in subsection (b) below. The rates shall go into effect at 12:01am on the Friday following the end of the Department's 10 day review period.

(1) The MADR rate shall be calculated for all food item numbers for Peer Group Category A if there are at least 30 unique vendors in Peer Group Categories B and C with redemptions for that food item number during the 12-week redemption period.

(2) The MADR rate shall be calculated for all food item numbers for Peer Group Category B if there are at least 30 unique vendors in Peer Group Category B, Register Count Subgroups 6-9 and 10+ with redemptions for that food item number.

(3) The MADR rate shall be calculated for all food item numbers for Peer Group Category C if there are at least 30 unique vendors in Peer Group Category B, Register Count Subgroups 6-9 and 10+ with redemptions for that food item number.

(b) The Department may manually adjust the MADR rates or the calculation methods, as specified below.

(1) Upon implementation of this section, if a food item number does not have at least thirty (30) unique vendors in the 6-9 and 10+ Register Count Subgroups with redemptions during the immediately preceding 12-week period used for calculations the Department will make a one-time calculation to determine the MADR for food item numbers calculated as follows:

(A) The average of the MADRs for each food item number for the three 10+ register store peer groups under the peer group and MADR systems in effect prior to the implementation of this regulation shall be set as the new MADR for the 10+ register Count Subgroup for that food item number.

(B) A substitute CARV shall be derived from the new MADR calculated in (b)(1)(A) above using the calculation rules in Section 60200(c). The substitute CARV shall be used as the basis for calculating all

other peer group substitute MADRs.

(2) When a food item number does not have at least thirty (30) unique vendors in Peer Group Categories B and C with redemptions for that food item number during the 12-week redemption period, the Department may manually adjust the MADR for Peer Group Category A to comply with federal requirements of cost neutrality by comparing the simple averages of the prices at which the food item number was redeemed by Peer Group Category B and C vendors and those redeemed by vendors in Peer Group Category A.

(3) When a food item number does not have at least thirty (30) unique vendors in the 6-9 and 10+ Register Count Subgroups with redemptions during the immediately preceding 12-week period used for calculations, the previous period's MADR rate for Peer Group Category B and C vendors will remain in effect. The Department may calculate a substitute CARV for food item numbers that do not have thirty (30) unique vendor redemptions of that food item number in any of the preceding six (6) four (4) week MADR periods.

(A) When the Department calculates a substitute CARV for food item numbers pursuant to subsection (b)(2) above, the Department shall use data from the Peer Group Category B 6-9 and 10+ Register Count Subgroups collected during the most recent semiannual collection of shelf prices for determination of cost competitiveness to calculate the substitute CARV for food item numbers. The substitute CARV will be determined by averaging the sum of the average prices of the foods included on the food instrument for all vendors in a peer group based on the most recent semi-annual collection of shelf prices.

(B) Where no submitted shelf price data is available from the semiannual collection of shelf prices, the Department shall collect shelf price data from Peer Group Category B 6-9 and 10+ Register Count Subgroups for calculation of a substitute CARV. When the Department collects data for this purpose, it will be from a minimum of eight (8) rural and eight (8) urban vendors as those terms are as defined in Cal. Code Regs., tit. 22, § 40740(h)(2) in the Peer Group Category B 6-9 Register Count Subgroup and from a minimum of eight (8) rural and (8) urban vendors in the Peer Group Category B 10+ Register Count Subgroup, for a minimum total of thirty-two (32) vendors. Using this data, the substitute CARV will be calculated as a dollar sum of all of the collected shelf prices for a food item divided by the total number of shelf prices collected.

(4) The Department may manually adjust the MADR rate to temporarily

accommodate extreme fluctuations in wholesale food prices as reported by price and inflation information from other California State agencies and departments or nationally recognized sources of commodity food pricing information.

(c) The Department will remove partially-redeemed food instruments (FIs) when calculating the Statewide Average for food item numbers ~~6000, 6003, and 6107.~~for which 75% of the food types and container sizes listed on the food instrument are included in the Market Basket, and for which redemption represents at least 0.1% of overall food expenditures, less CVV redemptions. Food item numbers will be selected for removal on a semi-annual basis 30 days following the Department's request for vendors to submit shelf prices pursuant to W.B.R. §70600(c) using redemption information from the most recently completed quarterly Vendor Cost Neutrality Assessment, required pursuant to 7 CFR 246.12(g)(4)(i)(D).

(1) In order to identify a partially-redeemed FI, upon completion and Department verification of the prices submitted as part of the semi-annual shelf price collection, the Department will calculate a minimum full redemption value for each food item number that meets the criteria in (c) by determining the lowest shelf price for each Mmarket Bbasket item reported by Peer Group B and C vendors in the most recent complete shelf price submission required by W.B.R. §70600. The minimum full redemption value is a threshold dollar amount below which the Department will consider a food instrument to be partially-redeemed. The Department shall identify the minimum full redemption value for each food item number in one of ~~three~~ two ways, dependent on the availability of reported shelf prices as follows:

(A) If the food item number meets the criteria in (c) above and consists only of Market Basket items, t~~T~~he Department will determine the minimum full redemption value for ~~each~~ the food ~~instrument~~ item number ~~identified in (1) will be determined~~ by adding the lowest reported non-sale ~~reported~~ shelf prices of ~~each individual~~the Market Basket ~~food~~ items included in the food item number. Any redemption amount below the minimum full redemption value shall be deemed a partially-redeemed FI for purposes of calculating the statewide average.

For example, food item number 6003 includes three food items (one gallon milk, lower fat, sixteen ounces of whole grains, and thirty six ounces of breakfast cereal), all of which are included in the Market Basket. If the lowest reported shelf prices for each item are as follows, the minimum full redemption value possible for this food item number would be:

1 gallon milk, lower fat	$2.50

1 (16 oz.) whole grains	$2.00
36 oz. breakfast cereal	$4.00
Total Minimum Full Redemption Value	$8.50

Any redemption below $8.50 would be considered a partially-redeemed FI.

(B) ~~If a food item number does not have reported shelf prices for all of the supplemental food types included in the market basket, the Department will not calculate a minimum full redemption value for that food item number~~ If a food item number meets the criteria in (c) above, but less than 100% of the food types and container sizes in the food item number are included in the Market Basket, the Department will determine the minimum full redemption value by adding the lowest reported non-sale shelf prices of the Market Basket items included in the food item number. For purposes of this calculation, all non-Market Basket items will be treated as having a shelf price of zero. Any redemption amount below the minimum full redemption value shall be deemed a partially-redeemed food instrument for purposes of calculating the statewide average.

For example, food item number 6013 includes four Market Basket items (one gallon milk lower fat, one dozen eggs, sixteen ounces cheese, and sixteen ounces dry beans) and one quart of milk, which is not included in the Market Basket. If the lowest reported non-sale shelf prices by Peer Group B or C vendors are as follows then the minimum full redemption value for this food item number would be:

1 gallon milk, lower fat	$2.50
1 dozen eggs	$1.50
1 (16 oz) cheese	$2.50
1 (16 oz) dry beans, peas, or lentils	$0.50
Subtotal	$7.00
1 quart milk, lower fat (no shelf price collected)	$0.00
Total Minimum Full Redemption Value	$7.00

In this example, any redemption below $7.00 will be considered a partially-redeemed FI.

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.

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CALIFORNIA DEPARTMENT OF PUBLIC HEALTH

Attachment 1

Vendor Peer Group and Reimbursement System Stakeholder Comments and Responses to Comments

California Special Supplemental Nutrition Program for Women, Infants, and Children

April 4, 2013

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This final rule addresses public comments submitted in response to Regulatory Alert 2013-03 posted on December 13, 2013, regarding proposed changes to the California WIC vendor peer group criteria and corresponding reimbursement system.

A stakeholder webinar consultation was held on January 21, 2014, and the public comment period was held from December 16, 2013, through January 24, 2014.

A total of six comment letters were received with a majority of the comments being related to partial redemption criteria and calculation of the Maximum Allowable Department Reimbursement Rate (MADR). Other general comments were related to the peer grouping system, vendor moratorium, incentive items, and food policy issues.

The Department is currently under a United States Department of Agriculture (USDA) directed moratorium on new vendors into the WIC Program, and implementation of this final rule is a condition of lifting of moratorium.

This Final Rule reflects the Department's desire to work with the stakeholders to provide clarification that will enable the effective implementation of the new peer group criteria and corresponding reimbursement system. The changes will be evaluated and amendments to these regulations will take place in the future as deemed appropriate and necessary.

1. Partially-Redeemed Food Instruments

    a. Methodology and Criteria

        Stakeholders commented that the scope of this partially-redeemed food instruments (FI) methodology will not go far enough to make an impact on reimbursements to vendors.

        Policy suggestions included: requiring participants to fully-redeem all FIs; excluding partially-redeemed FIs from the calculation of the Competitive Average Redemption Value (CARV) in addition to the Statewide Average; and stating the criteria for determining the food item numbers for which partially-redeemed FIs will be removed, rather than simply identifying the food item numbers.

        Suggestions for modification to the criteria for inclusion of FIs as a part of the partially-redeemed FI methodology included: applying the methodology to all single-item FIs, regardless of percentage of overall expenditures; including infant formula FIs in a manner similar to the infant formula contract; excluding the lowest 10% of redemptions as partially-redeemed (based upon research from the University of California, Davis [UCD]); modifying the criteria to account for the price of a quart of milk that would allow more high-redeeming food item numbers to be included in the methodology; and that eight (8) food items be added to the shelf price survey to increase the number of FIs that meet the proposed criteria for identification and exclusion of partially-redeemed FI.

The Department is pleased to have received approval from the USDA to modify its partially-redeemed FI criteria to include additional FIs. The revised criteria allow identification and removal of FIs determined to be partially-redeemed from food items for which 75% of the food types and container sizes on the food instrument have shelf price information available and for which the FI's redemption is at least 0.1% of overall food expenditures, less CVV redemptions. The Department has adjusted the regulation to include the criteria for identifying food item numbers for which partially-redeemed FIs will be removed, rather than include the actual food item numbers.

The FIs that currently meet these criteria are: 6000, 6003, 6008, 6009, 6013, 6014, 6100, and 6107. These eight (8) FIs together make up about 50% of statewide food expenditures, excluding cash value vouchers. For those food item numbers where shelf price information is missing for a food item, the shelf price of that food item will be considered $0.00.

The Department will consider adding additional food items to the Shelf Price Survey (SPS) that is included in the vendor authorization criteria in W.B.R. §70600; however food items that are not included in W.B.R. §71100, the minimum stocking requirements, will not be added because all stores may not carry those foods. Foods were removed from the minimum stocking requirements in 2013 after receiving feedback from stakeholders; those foods will not be added back into the requirements.

Applying the methodology to infant formula FIs is problematic as these FIs must be fully-redeemed by participants as a policy; however, the Department may assess including infant formula FIs in the future.

The Department cannot utilize a flat percentage to determine the redemptions to exclude to address partial redemption calculations as such a percentage would constitute a rate and is disallowed by federal regulation in 7 C.F.R. §246.12(g)(4)(i)(D).

The Department has analyzed the remaining suggested revisions to the criteria for determining which food item numbers will have partially-redeemed FIs and determined that the recommendations would either result in: little benefit to the vendor stakeholder community; would not be approved by USDA; and/or delay the adoption of these regulations which is a condition of lifting the new vendor moratorium.

The Department will continue to evaluate expanding this partially-redeemed FI methodology in the future and will amend this regulation should the required USDA approval be obtained for such changes. The finalization of this step toward identifying partially-redeemed FI is a condition of lifting the new vendor authorization moratorium and the Department hopes that the stakeholder

community will join with us in supporting this step towards increasing the accuracy of the Statewide Average calculation.

b. Minimum Full Redemption Values (MFRV)

Stakeholder comments were received suggesting changes to the method of calculating the MFRV. Suggestions included: calculating the MFRV based on each individual vendor's lowest reported shelf price rather than from all vendors lowest reported shelf price in Peer Groups B and C; using the lowest of the reported high prices; using an average of the reported lowest and highest prices; collecting shelf prices for only the most popular brands; estimating the prices of food items not collected in the survey by considering the price to be $0.00; or using IRI or Nielsen price data to obtain average sale price of WIC authorized foods.

The Department recognizes that calculating the MFRV based on each individual vendor's lowest reported shelf price rather than from all vendors lowest reported shelf price more accurately reflects a participant's shopping behavior; however, the shelf price tool will need to be modified to perform automated calculations, as planned by the Department in the future. While the remaining recommendations would be more likely to identify the maximum number of partially-redeemed FIs, they have a high risk of also incorrectly identifying fully-redeemed FIs as partially-redeemed FIs in the process, and are limited by the information available from the existing shelf price survey.

Nielsen data cannot be limited to California-only pricing information and would not be relevant to California WIC Authorized Vendor prices. Additionally, the information provided by IRI does not represent the lowest prices by food item, but instead average prices by food item, which would risk incorrectly excluding fully-redeemed FI from the Statewide Average.

A stakeholder suggested splitting checks for whole grains - one with whole wheat bread and one with lesser-priced items such as oatmeal, rice, and tortillas in order to eliminate the effects the disparity in pricing of these items would have on the MFRV. The current food policy allows for the purchase of any of the items listed above whenever the purchase of 16 ounce of whole grains is allowed. To ensure that only partially-redeemed FI are being identified and excluded from the statewide average and ensure consistency with the partially-redeemed FI methodology, the lowest possible price of a food authorized in that food group must be used.

A stakeholder requested that the MFRV be updated every four (4) weeks with new shelf price information, rather than every six (6) months as proposed in the regulation to capture the most current and accurate price. Collecting shelf price data from vendors every 4 weeks would cause undue hardship for the vendor

community and administrative burden for the Department to manage these surveys and recalculate the MFRV so frequently.

A stakeholder requested further information on how MFRVs will be verified by the Department. WIC program staff verified the lowest shelf price information from the shelf price survey through direct contact with the vendors.

2. Maximum Allowable Department Reimbursement (MADR) rates

   a. Tolerance Factors

   A stakeholder noted that tolerance factors may be too low to allow for full redemption of FIs at larger stores and increase the risk of vendors incurring returned check fees as a result and recommended that food instruments submitted for reimbursement over the MADR be paid at the MADR. The Department is confident that the percentage tolerance factors will allow for full redemption of FIs for all of the Peer Group Category B register count subgroups in the overwhelming majority of cases, as the percentage tolerance factors were designed using actual redemptions of vendors in this category. Although 12 C.F.R. §229.36 prohibits the Department's contractor from reducing the payment of food instruments below the amount presented, the Department will consider this suggestion upon the expiration of the current contract. The Department is also working diligently toward the conversion of the vendor payment processes to an Electronic Benefit Transfer (EBT) system that would meet the needs of this stakeholder and others.

   Other stakeholders noted that tolerance factors may be too high for small stores and recommended changes to how the tolerance factors were calculated, including weighting the cost differential tolerance (CDT) and heterogeneity differential tolerance (HDT) differential factors. The CDT and HDT differential factors are not percentages themselves, but are indexes used to measure the amount of tolerance needed for different factors relative to vendor costs. The Department is confident that these indexes represent the different factors influencing food instrument redemption without the need to be weighted.

   Analysis indicates that the proposed percentage tolerance factors, together with the new Peer Group Categories and competitive price criteria, will ensure that costs are contained and that appropriate reimbursement is made to all peer groups.

   Additional stakeholders were concerned that the regulation does not allow the Department to adjust the tolerance factors, as necessary, following implementation should the proposed regulation result in increased program costs. While the Department is moving forward with the implementation of the proposed MADR rates and peer groups at this time, a thorough evaluation of their impacts will occur in the months following implementation. Should

modification to the MADR rates be identified during the evaluation period, the Department will move forward with changes through the regulatory alert process.

b. Manual Adjustments

Several stakeholder comments were received requesting clarification of the process of making manual adjustments to the MADR. It was requested that all changes to wholesale prices for infant formula should be reflected in the MADR rates immediately instead of waiting until the impact of the wholesale price increase is naturally reflected in the CARV. The percentage tolerance factors were created to accommodate price fluctuation; however, should there be an extreme situation, this provision will allow the Department to make a temporary adjustment to the affected food item numbers and ensure the projected increase in food prices will not present undue hardship for vendors. If the infant formula rebate contractor were to increase their wholesale price by an extreme amount, then an adjustment would be acceptable under the regulation as proposed.

3. Peer Group Assessments:

Stakeholders requested clarification regarding the maintenance and confidentiality of records required for peer group assignment. The Department is not requiring vendors to maintain the Board of Equalization (BOE) State, Local and District Sales and Use Tax Return statement or the sales and inventory records at specific store locations. Section 50000(d) requires a vendor to provide the BOE tax return statement or the alternate materials to the Department within thirty (30) days of the date on which the vendor received the Department's request. Vendors will receive requests for these records in advance via written correspondence. If additional inventory records are required as part of vendor monitoring, the Department or its designee will provide a vendor with advanced notice. Federal regulation 7 C.F.R. §246.26(e) establishes specific confidentiality requirements for vendors' records. To the extent that a vendor's BOE State, Local and District Sales and Use Tax Return statement contains personal information as defined in Civil Code 1798.3, this information will also be protected by the Information Practices Act.

Stakeholders also requested clarification as to whether the Department will conduct peer group assessments described in W.B.R. §50000(e) and implement the full-line grocery store criteria described in W.B.R. §50200(a) simultaneously. While W.B.R. §50200(a) describes the criteria a vendor must fulfill to be classified as a full-line grocery store and receive assignment to Peer Group Category B and register count subgroups within that peer group category, W.B.R. §50000(e) describes how the Department will conduct on-site visits to assess vendors for peer group assignment.

A stakeholder suggested that there may be an inconsistency between assessment of inventory in stores and the Vendor Authorization Criteria's minimum stocking requirements; however, Section 50000(e) and 50200(a) are consistent with the minimum stocking requirements established by W.B.R. §71100 because when conducting the on-site assessment the Department will only consider inventory for sale in the public area of a vendor's store, and infant formula, infant meats, and milk in storage on the premises of the vendor location.

Stakeholders also recommended that the Department remove §50100(a)(1)(B)(1) from the peer group criteria. However, the assessment described in this section is required by 7 C.F.R. §246.12(g)(4)(i)(E), and therefore cannot be removed.

4. Provisions Regarding Peer Group Category B (Full-Line Grocery Stores)

A stakeholder asked for clarification as to whether the Department will notify vendors of their register count subgroup in the event that a vendor meets the criteria for assignment to Peer Group Category B. The Department will notify vendors of their register count subgroup at the time of their peer group assignment notification.

A stakeholder also recommended that the Department modify the register count subgroups described in W.B.R. §50200(a)(3)(A-D) to accommodate circumstances where physical space limits the number of cash registers a full-line grocer may have within the store.

The Department determined that other methods for grouping stores based on reimbursement such as overall store sales, store sales of food products, store total square footage, or store square footage devoted to food sales, would need to rely upon vendor self-reports and require the Department to verify the self-reported data via an audit of each vendor. The Department has determined that register count is the most reasonable criterion affecting food prices by which it can group vendors.

5. Miscellaneous Comments

a. WIC Staffing

One stakeholder urged the Department to refrain from lifting the current vendor authorization moratorium until a plan for staffing authorizations and oversight workload has been approved. The Department has made plans for this workload and has sufficient staff to accomplish the work.

b. Incentive Items

One commenter mentioned that it would be cleaner and easier to simply prohibit all incentivizing for redeeming WIC food instruments by all stores, including

above-50-percent vendors. Federal regulations have separate incentive requirements for A50 vendors and non A50 vendors. 7 C.F.R. §246.12(g)(3(iv) provides a list of approved incentive items and requirements for A50 vendors and gives the State agency authority to further define allowable and non-allowable incentive items in those stores. 7 C.F.R. §246.12(h)(3)(iii), requires vendors to offer WIC Program participants the same courtesies that are offered to non-WIC customers. Thus if a non A 50 store provides incentive items to its general customers, they must offer them to WIC Program participants. The Department does not have the authority to regulate the incentives that non A50 vendors offer to non-WIC customers.

January 24, 2014

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

RE: Draft Regulations, Alert 2013-03

To Whom It May Concern,

On behalf of the California WIC Association Board of Directors and members, I am pleased to share comments and suggestions for strengthening the proposed new Vendor Peer Group and Reimbursement Regulations released on December 13, 2013. We congratulate you and your staff for the progress and very hard work that this complex package represents.

Higher food costs mean that fewer WIC participants can be served, unless Congress appropriates more funding for WIC. In a threatening federal budget environment, it is therefore important to insure overall WIC fiscal integrity, especially in the area of WIC food cost containment. WIC has a long history of rigorous food cost containment strategies, including the creation of infant formula rebates in 1989 and the regulation of "WIC-only" stores in 2004-05.

Allowing any WIC-authorized store, of any size, to charge exorbitant prices for WIC foods risks undermining this record, and in so doing, threatens long term public and political support for the program. Moreover, given that WIC is 100% federally funded, CDPH needs to be very clear that it is not the mission of the California WIC program to subsidize business models based on excessively high prices, nor to accommodate the "costs of doing business" by any size store. Rather, the intent is to design a reimbursement system that reflects food prices that are driven by the overall competitive market. Not every grocery store in the state meets this important criterion. The WIC program should only make exceptions to ensure reasonable participant access.

In late 2011, CWA became concerned about the rapid proliferation of small (1-4 register) and marginal stores in the WIC system. We received increasing reports from our local agency members and WIC participants of high prices and questionable incentivizing being practiced by some of these stores. We shared our concerns with state and federal policymakers, and they were confirmed in early 2012 by USDA data showing that California WIC's monthly food cost per participant had risen by almost 5%, while other Western states showed a decline of nearly 8%.

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In response to the growing crisis, USDA imposed a moratorium on all new WIC vendor authorizations in California, except in cases where participant access would be compromised, as well as a temporary MADR rate of 15% and 11% for 1-3 and 3-4 register vendors, respectively. The fact that, as noted in the Statement of Reasons (Attachment 2, p. 13), CDPH was able to save over $90 million in the first twelve months of this lower MADR rate shows how serious the problem had become, justifying the prompt action.

The April 2012 federal moratorium will be lifted when a new vendor authorization and peer group pricing system is in place which will ensure the California WIC state agency can properly monitor the total number of approved vendors in its system and carefully manage the prices they charge for WIC foods. New authorization rules have already been implemented, so this current package of regulations is the final and most critical step in the series of reforms that CDPH has undertaken in the past two years.

Our comments and concerns regarding specific proposed Sections are listed below.

Article 2. Peer Group Criteria

50100- A-50 Peer Group/Category A
50200-Full-Line Grocery Peer Group/Category B
50300-Other Peer Group/Category C

CWA strongly supports the proposed restructuring of the existing WIC grocer peer groups, based primarily on number of registers and variety of stocked foods. We commend the Department for commissioning a thorough study of WIC and California grocery market dynamics by UC Davis experts, whose data and findings underlie much of this proposal.

The federally required use of geographic location as criteria for peer groups should be waived. It is an unreliable indicator in the current peer group configuration and was also found to be of little use by UC Davis. The use of Board of Equalization tax return statements is an excellent tool for independent verification of food sales by vendors and is a great idea. The full-line grocery store stocking requirements are fair and very similar to those used in the SNAP program. The Full Line Grocery definition should be of great use to food access advocates seeking a clearer picture of what a full-service grocery store should stock.

The creation of Category C, the “Other Peer Group,” is an innovative way to allow a group of stores who are not A-50s (and thus must be cost-neutral to the program) and do not stock an ample variety of staple foods (Full-Line) to become WIC-authorized, but at the same time protect the WIC Program from negative fiscal impacts by limiting their WIC reimbursements in an even-handed way.

Article 3. Reimbursement System for Vendors

60000-Definitions

CWA supports the continued use of the Maximum Allowable Departmental Reimbursements (MADRs) based on prices set by relatively large and competitive vendors in the system, and the addition of the Competitive Average Redemption Value (CARV) using a 12-week average based on redemption data from the 6+ register subgroup of Peer Group B.

We also support using the CARV as the MADR for Category C vendors, since by definition these stores do not stock a full line of groceries for WIC shoppers and tend towards higher prices. Exceptions should be made to ensure that all participants have access to a WIC-authorized vendor, with participant access already clearly defined in CDPH WIC regulations (Alert 2013-01) implemented on October 17, 2013.

60100- MADR Rates for Cash-Value Vouchers

(2) (A) Fruits and Vegetables Cash Value Vouchers (CVVs)

CWA is very pleased with the Department's policy of allowing participants to purchase produce using both the WIC CVV and additional cash, if needed. This "split tender" accommodation seems to be working well, since California CVV redemption rate is higher than many other states. We support its continuation.

60200-MADR Rates for Food Instruments

(c)(2) Tolerance Factors

The proposed MADR rates for Peer Group B are calculated by adding a "tolerance factor" to the CARV. The proposed tolerance factors for the subgroups with 1-2 and 3-5 registers, in particular, are much higher than those currently imposed by USDA. This is of some concern, since stores within this subgroup were found in the UCD study to exhibit substantial "profit-motivated pricing" rather than competitive pricing.

Past experience has shown a marked tendency for many small stores to price up to the new MADR, which would once again drive food costs up. If pricing behavior in the 1-2 and 3-5 register stores in Peer Group B follows this pattern again, there will be no way for CDPH to quickly step in and lower the MADR to control costs, as was accomplished by the adjustments made in consultation with USDA in April 2012.

Imposing a system-wide moratorium and promulgating new MADRs and Tolerance Factors – which would be a costly and time-consuming disruption -- should not be the only recourse for controlling runaway costs. CWA therefore strongly urges CDPH to add some kind of administrative mechanism to these proposed rules, which would allow the Department to lower the tolerance factors when necessary in order to control WIC food costs. One criteria for implementing such an adjustment mechanism would be when the percentage of FI redemptions at the 1-2 and 3-5 register stores increases beyond a certain level, as they did in the crisis of 2011-12.

The Statement of Reasons explains that the Tolerance Factor is adjusted by a "Cost Differential Tolerance (CDT)" and a "Heterogeneity Differential Tolerance (HDT)" but does not explain how they are calculated. The CDT somehow captures the "cost of doing business" while the HDT accounts for a wider selection of brands, package sizes and types for a given Food Instrument. It's not clear exactly how these two additional factors are weighted, but the UCD study clearly indicates that pricing in smaller stores was driven by factors other than CDT or HDT. Therefore, from a consumer perspective, CWA strongly supports giving heavier weight to HDT when calculating the MADRs. As mentioned earlier, it is not the appropriate mission of the California WIC program to subsidize business models based on excessively high prices, nor to accommodate all the "costs of doing business" by any size store.

One of the reasons some WIC participants continue to patronize small and marginal stores for their WIC shopping is because these are allowed to offer incentives for redeeming WIC FIs, including "points" towards blenders, pots and pans, etc. CDPH should consider not allowing WIC specialty foods to be used by non-Above-50-Percent stores for buy-one-get-one (BOGOs) or other incentives. CWA believes that it would be cleaner and easier to simply *prohibit all incentivizing of the sale of WIC-approved food items by all stores, including A50 stores*. We understand that current federal rules and guidance prohibit this. We will be work with other advocates to seek federal reforms in this area.

60300-Rules for Calculating the MADR Rate
(c) Partial Redemptions

CWA supports the efforts of the Department to exclude partial redemptions from the calculation of the statewide average, but believes that the methodology proposed by the State will only capture a small percentage of partial redemptions. We urge the Department to not only create a methodology that reasonably estimates most partial redemptions, but apply the calculation to as many food instruments as practicable, not just the proposed three.

In the last (2004) WIC reauthorization, infant formula manufacturers, who must bid competitively to furnish their product to WIC at a discount, sought a federal law change to require state WIC programs to account for partial redemption of formula FIs in the calculation of their invoices. It is only fair, therefore, that the A-50 stores, whose prices must meet federal cost-neutrality requirements, are reimbursed accurately for the FIs redeemed by participants at these stores. Other commentators with more expertise than CWA, for example the Center on Budget & Policy Priorities, have proposed specific methodologies to capture more partial redemptions; we urge CDPH to adopt them.

Capacity for Adequate Monitoring

More than ever, the proposed new vendor authorization and peer group pricing system will require constant monitoring of individual stores and ongoing analysis of grocery pricing trends, a significant workload for WIC vendor staff. Because conditions may arise where resources are insufficient to support the work needed for proper oversight, CWA once again urges CDPH to include regulatory language in this package that would authorize a limitation of the number of

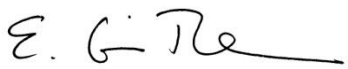
authorized vendors under certain conditions, and set ratios for monitoring staff by number of vendors. Without such language, the Department could again find itself overwhelmed and unable to adequately monitor unanticipated consequences of this complex and dynamic set of changes.

In addition, since there has been a state or federal moratorium on new WIC vendor authorization in place since April 2011, there will be hundreds of new stores seeking approvals. Recent language in the FY 2014 Omnibus appropriations bill allows for waivers from the on-site visit requirement for certain vendors; CDPH should pursue this option.

Conclusion

Thank you for the opportunity to comment on these proposed new rules. They are the product of a great deal of research and thoughtful analysis. As local WIC program providers and advocates for California's WIC program, we look forward to collaborating with the WIC Division to implement these and other measures to ensure that program integrity and cost-effectiveness is strengthened and protected.

Sincerely,



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January 24, 2014

California Department of Public Health
Women, Infants and Children (WIC) Program
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Sacramento, CA 95834
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To Whom It May Concern:

We are writing to comment on the proposed rules regarding the California WIC vendor peer group criteria and vendor reimbursement system as announced in Regulatory Alert 2013-03.

The Center on Budget and Policy Priorities is a non-profit public policy institute that works at the federal and state levels on fiscal policy and public programs that affect low- and moderate-income families and individuals. The Center conducts research and analysis to help shape public debates over proposed budget and tax policies and to help ensure that policymakers consider the needs of low-income families and individuals in these debates. We also develop policy options to alleviate poverty.

We have worked on the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) since our inception, with a focus on ensuring that funding is sufficient to serve all eligible applicants. The Center has a long history of working to strengthen WIC cost containment. Cost-containment efforts, which both reduce costs and strengthen Congressional commitment to fully funding the program, are a key component of ensuring that no eligible family is turned away for lack of funding.

In the late 1980s we recognized the potential savings that could be achieved through competitive bidding for infant formula contracts and, in the face of vehement opposition from infant formula manufacturers, we championed the adoption of the current requirement that state WIC programs use competitive bidding for infant formula. Over the past two decades, we have defended the competitive bidding system from repeated attempts by infant formula manufacturers to undermine or dismantle it.

In 2003 we recognized the potential cost to the program of high food prices at "WIC-only" stores and were amongst the chief architects and supporters of the vendor management provisions that were enacted in the Child Nutrition and WIC Reauthorization Act of 2004, some of which underlie the rules that the California Department of Public Health (CDPH) now proposes to adopt. For nearly two decades WIC has been able to serve all eligible applicants in part because it is an extremely cost-effective program. A higher price food package in one state means that fewer participants can be served, in that state or others, unless Congress consistently provides funds to cover the extra cost. To avoid a situation in which the inclusion of higher price vendors results in fewer participants being served, we consider cost containment a priority.

We approach all of our work on vendor cost containment from the premise that the mission of the WIC program is to support the nutrition and health of low-income pregnant women, mothers, and their very young children. WIC's mission does not include providing sufficient reimbursement to support higher-priced vendor business models. As long as participants have access to a WIC-authorized vendor, the program is not obligated to consider vendor costs when setting maximum reimbursement levels. Instead, maximum reimbursement levels should reflect market prices that are driven by factors far broader than WIC. If particular vendors cannot participate in WIC under a reimbursement structure that reflects prevailing market prices, that is an acceptable outcome so long as exceptions can be made to ensure participant access, as allowed under federal law.

We very much appreciate the efforts that CDPH, in partnership with the U.S. Department of Agriculture (USDA), have made to contain WIC costs over the last year and a half by implementing temporary vendor management rules. As shown in Figures 1 and 2, which are based on our analysis of CDPH data, the temporary rules and enhanced oversight have resulted in a reduction in the number of authorized 1-2 register vendors, which tend to charge higher prices, and a reduction in the estimated per-participant reimbursement to a level comparable to the level prior to the proliferation of high-priced, small WIC-authorized vendors. Likewise, as shown in Figure 3, the share of food instruments redeemed at the largest, lowest price vendors has increased.

We also very much appreciate the analysis and careful consideration that clearly went into developing the proposed rules regarding vendor peer group criteria and reimbursements. With a few critical revisions, we support the overall structure proposed for vendor peer groups and the vendor reimbursement system. Our specific comments below will highlight areas where we support the provisions in the proposed rules as well as areas where it is important to strengthen the rules.

Vendor Peer Group Criteria (Article 2, 500000, 50100, 50200, 50300)

The Center supports the proposed policy for WIC vendor peer groups. The two proposed criteria-register count and variety of foods stocked-were selected based on research and have been tested in other contexts. Register count is a peer group criterion used by many state WIC programs and has been found to be a reliable criterion for differentiating vendors by pricing patterns. The stocking requirements for full-line grocery stores draw on the definition of "staple food" used in the Supplemental Nutrition Assistance Program. In light of the research conducted by the University of California, Davis (UCD), which showed that geographic location has less of an impact on prices than the proposed criteria, we also support USDA's waiver from the federal requirement that geography be one of the criteria used to establish peer groups. *We recommend that you adopt the proposed mies in the final regulation.*

Vendor Reimbursement System (Article 3, 600000, 60100, 60200, 60300)

The Center supports the proposed structure for vendor reimbursement with the revisions recommended in the remainder of these comments. We support the general approach of setting Maximum Allowable Departmental Reimbursements (MADRs) based on prices at relatively large competitive vendors. The approach that was in use until 2012, and is commonly used in other state WIC programs, of setting maximum reimbursements based on variation among prices within the peer group, proved in California to be inadequate to contain costs in smaller vendors that exhibited "profit-motivated pricing."

We support the proposed methodology for calculating the Competitive Average Redemption Value (CARV) based on recent average prices in full-line competitive vendors in Peer Group B with 6+ registers. We also support using the CARV as the MADR for Peer Group C because these vendors generally do not offer a full line of groceries to WIC participants, do not offer a wide variety of WIC foods, and tend to have higher prices. We recommend that you adopt these provisions of the proposed rules in the final regulation.

Split Tender (Article 3, 60100(a)(2)(A))

The Center strongly supports the continued policy of requiring vendors to accept payment from participants who wish to cover the difference between the MADR for Cash-Value-Voucher (CVV) food instruments and the fruits and vegetables that they have selected, a policy known as "split tender." The Center is concerned about the extent to which WIC participants in other states are missing out on fruits and vegetables that tend to be lacking in their diets by not fully utilizing their CVVs. California has an exemplary take-up rate of CVVs - 98 percent in 2011. Allowing split tender facilitates WIC transactions and makes it more likely that participants will fully use their CVVs. We recommend that you adopt the proposed rules in the final regulation.

Tolerance Factors (Article 3, 60200(c)(2))

While a variety of WIC vendors may be needed to ensure that all participants have access to a WIC-authorized vendor, once participant access has been assured, the WIC program does not need to support multiple business models that result in higher costs, thereby drawing down federal funds that could otherwise be used to serve more participants. Nonetheless, it is a common practice for state WIC programs to authorize some small vendors, even though they typically have higher prices. Sometimes these vendors are authorized to ensure participant access. When they are not needed to ensure participant access, the higher prices are sometimes tolerated because such vendors typically account for a very small share of WIC redemptions, which limits the extent to which they drive up program costs. If vendors are not necessary to ensure participants access, maximum reimbursements should be set so as to maximize cost-containment, even if the result is that higher-priced vendors do not choose to seek or maintain WIC authorization.

Because California has experienced a proliferation of small, higher-priced stores seeking WIC authorization, it is especially important for CDPH to ensure that the tolerance factors applied to these vendors do not substantially drive up program costs unless necessary to ensure participant access. Based on our analysis of CDPH data, vendors with 1-4 registers account for 11 percent of all California WIC redemptions in January through November of 2013, down from a peak of 18 percent in 2011. (See Figure 4.) It is important to ensure that the tolerance factors for Peer Group B vendors with 1-2 registers or 3-5 registers do not result in an increase in the share of redemptions at these higher-priced vendors, which would drive up program costs.

This concern applies to the Cost Differential Tolerance (CDT), which is designed to "capture the cost of doing business for store size" in the context of developing the tolerance factor for 6-9 register vendors and 10+ register vendors in Peer Group B. The explanation provided in the Statement of Reasons does not reveal the extent to which CDTs drive the tolerance factors, as compared to Heterogeneity Differential Tolerances (HDTs), which are designed to account for a wider selection of grocery offerings and therefore capture a benefit to program participants that might justify modest cost increases. We strongly encourage you to give more weight to the HDTs than to the CDTs.

We are also concerned about the potential for the proposed tolerance factors for smaller vendors in Peer Group B to drive up program costs. The proposed tolerance factors for 1-2 register vendors and 3-5 register vendors in Peer Group B (28 percent and 22 percent for single item food instruments and 49 percent and 43 percent for combination food instruments, respectively) are substantially higher than the 15 percent and 11 percent tolerance factors that have been in used for the past year and a half (acknowledging that there are differences in how the competitive average redemption value is currently calculated). While extending the observed difference between the 10+ register vendors and the 6-9 register vendors to the smaller vendors seems like a reasonable starting point, this approach will need to be carefully monitored once implemented.

In light of UCD's finding of a "sig n ificant presence of profit-motivated pricing rather than competition-controlled pricing" in 1-2 register and 3-5 register vendors, we are concerned that a substantial portion of these smaller vendors in Peer Group B will increase prices to levels at or close to the new MADRs, which would increase program costs.

To assess the potential cost implications of such an outcome, we analyzed CDPH 2013 redemption data (through November 2013) for four combination food instruments (6003, 6011, 6012, and 6145) and four single-item food instruments (1011, 2110, 2111, and 2371), which collectively accounted for 26 percent of the aggregate value of redemptions. We found that if 10 percent of each type of food instrument redeemed by 1-2 and 3-4 register vendors increased from the 2013 average amount to an estimate of the proposed MADR, aggregate redemptions would increase by $1.4 million. Likewise, if 25 percent of each type of food instrument redeemed by 1-2 and 3-4 register vendors increased from the 2013 average amount to an estimate of the proposed MADR, aggregate redemptions would increase by $3.6 million. Finally, if 50 percent of each type of food instrument redeemed by 1-2 and 3-4 register vendors increased from the 2013 average amount to an estimate of the proposed MADR, aggregate redemptions would increase by $7.2 million. While we do not have information on how many 1-2 register and 3-5 register vendors will be placed in Peer Group C and therefore not be affected by the proposed tolerance factors, the potential for cost increases of this magnitude concerns us. (We may be underestimating the proposed MADR because we used data for 7+ register vendors to estimate the CARV in the absence of disaggregated data for 6+ register vendors. We also may be underestimating the increase in redemptions because we are not considering 5 register vendors, which would be included in the peer group with 3-4 register vendors. In addition, we used data for January though November 2013 rather than for a 12-week period, but we do not know whether this would tend to overstate or understate the CARV.)

Under the proposed rules, if CDPH found that the proposed tolerance factors result in increased program costs, there would be no way for CDPH to adjust them without going through a full regulatory alert and comment process. *Therefore, we urge you to build into the rules a mechanism for pen'odical/y assessing the effectiveness* ef *the MADRs in achieving cost containment and arfjusting downward the tolerancefattors if th*$_{ry}$ *arejotmd to result in increasedprogram costs.* Including such a mechanism would help ensure that if the new MADRs had unintended consequences, the WIC program could respond quickly to ensure that cost-containment remains strong.

Partial Redemptions (Article 3, 600300(c))

The Center strongly supports and works aggressively to protect the competitive bidding process for infant formula. We have also supported efforts to ensure that the competitive bidding process is fair. Thus, when infant formula manufacturers sought a change in federal law to require state WIC

programs to account for partial redemptions, we supported the provision that was ultimately enacted in 2004.

Likewise, as strong supporters of the cost-neutrality requirements related to above-SO-percent (A-50) vendors, we believe that when comparing the cost to the program of participants shopping at A-50 vendors to the cost of participants shopping at competitive vendors, an "apples-to-apples" comparison should be made. If participants are receiving more of the items on their food instruments when shopping at A-50 vendors, then that should be taken into account when calculating the maximum reimbursement for A-50 vendors and conducting quarterly assessments of whether cost-neutrality has been achieved.

The proposed methodology for removing partial redemptions from the data used to calculate the Statewide Average for Peer Groups B and C, and thus the MADR for the A-50 vendors in Peer Group A, will remove only a small fraction of partial redemptions.

We urge you to adopt a methodology for addressing partial redemptions that is akin to the methodologies approved by USDA in the context of infant formula rebates (see USDA's August 1, 2005 Memorandum, "Guidance for WIC Policy Memorandum #2004-4: Implementation of the Infant Formula Cost-Containment Provisions of P.L. 108-265-Rebate Invoices"). These empirical methodologies could be adopted without undermining the cost-neutrality provisions that apply to A-50 vendors.

If you decide not to adopt such a methodology, or USDA does not allow you to adopt such a methodology, *we urge you to make several changes to the proposed approach to capture more partial redemptions and allow it to become more comprehensive over time.* Even with these changes, only a portion of partial redemptions are likely to be removed from the calculations, but more would be identified than under the proposed approach.

- Identify in the regulation itself the criteria for removing partial redemptions for a particular food instrument, rather than identifying specific food instruments. These criteria are explained in the Statement of Reasons as: the food code must represent at least 0.1 percent of the dollars redeemed and shelf prices must be collected for all foods on the food instrument. By specifying the criteria rather than the food instrument numbers in the regulation, CDPH would retain the flexibility to remove partial redemptions for food instruments that meet the criteria in the future even if they do not currently.

- Calculate a minimum full redemption value for each vendor rather than across all vendors in Peer Groups B and C. While it is possible that this approach could lead to the exclusion of some fully redeemed food instruments with very low sales prices, those "false positives" would likely be offset by fewer "false negatives," as this approach would better capture partial redemptions that are masked by higher prices on the items purchased.

- Apply the partial redemption methodology to single-item food instruments, if any meet the criteria described above, including infant formula food instruments. Even though CDPH requires infant formula food instruments to be fully redeemed, they may not be, as recognized in the inclusion of a partial redemption methodology in your infant formula rebate contract.

Oversight

For the proposed changes to the vendor peer group criteria and reimbursement system to be effective, rigorous oversight and monitoring will be critical. Moreover, effective implementation has implications that extend far beyond California. The proposed rules represent a substantial step forward in addressing a program integrity weakness that is being closely monitored by policy makers. We want to be sure that you have the operational capacity to successfully implement them.

The establishment of the new Peer Group C and its MADRs may result in fewer small stores that are not full-line grocery stores seeking WIC authorization. But when the moratorium on new vendor authorizations is lifted there is likely to be an influx of new vendors seeking WIC authorization and staff will need to be devoted to the authorizing process. Each new vendor's application will need to be fairly considered and a perception that the authorization and peer group decisions are fair will be important to retaining support for the new rules. *We ttrgeyou not to lift the moratorium until the new vendorpeergroup criteria and reimbursement !)!Stem have been implemented and aplanfor ensuring adequate staffingfor authorizations, as well as ongoing monitoring and oversight, has been adopted.* If resources are not sufficient to support such staffing, we urge you to consider establishing vendor limiting criteria.

In addition, to help manage the workload associated with the new vendor management provisions, we encourage CDPH to seek a carefully structured waiver from the on-site preauthorization vendor visit requirement under 7 C.F.R. 246.12(g)(6) for 6-9 register and 1O+ register vendors that are likely to fall into Peer Group B, which is permitted under the recently enacted federal Omnibus appropriations law.

Conclusion

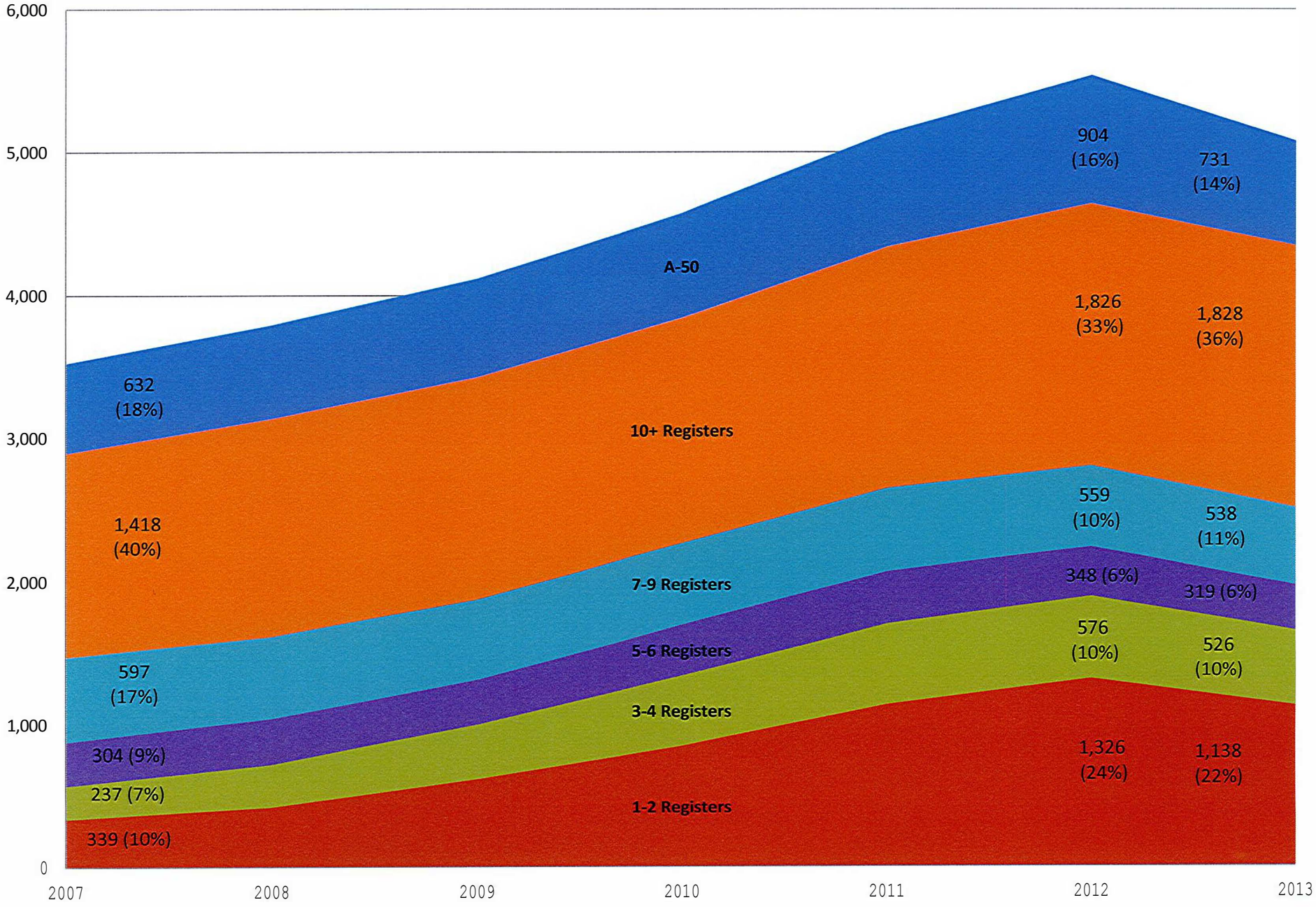
With a few critical changes, the Center on Budget and Policy Priorities believes that CDPH's overall proposed vendor peer group criteria and vendor reimbursement system represent a marked improvement for California's WIC program. The overall framework would establish a sound peer group structure and has the potential to maintain the savings that CDPH has achieved over the last year and a half. It is crucial, however, that the final regulations be revised to allow for a downward adjustment of the tolerance factors that help determine the MADR for 1-2 register and 3-5 register vendors in Peer Group B, if they result in increased program costs. In addition, the Center encourages you to strengthen the MADR system by more accurately eliminating partial redemptions from the calculation of the Statewide Average for Peer Groups B and C. The Center applauds CDPH for conducting the analyses necessary, and taking the time needed, to develop strong new vendor management rules.

Sincerely,

Stacy Dean
Vice President for Food Assistance Policy

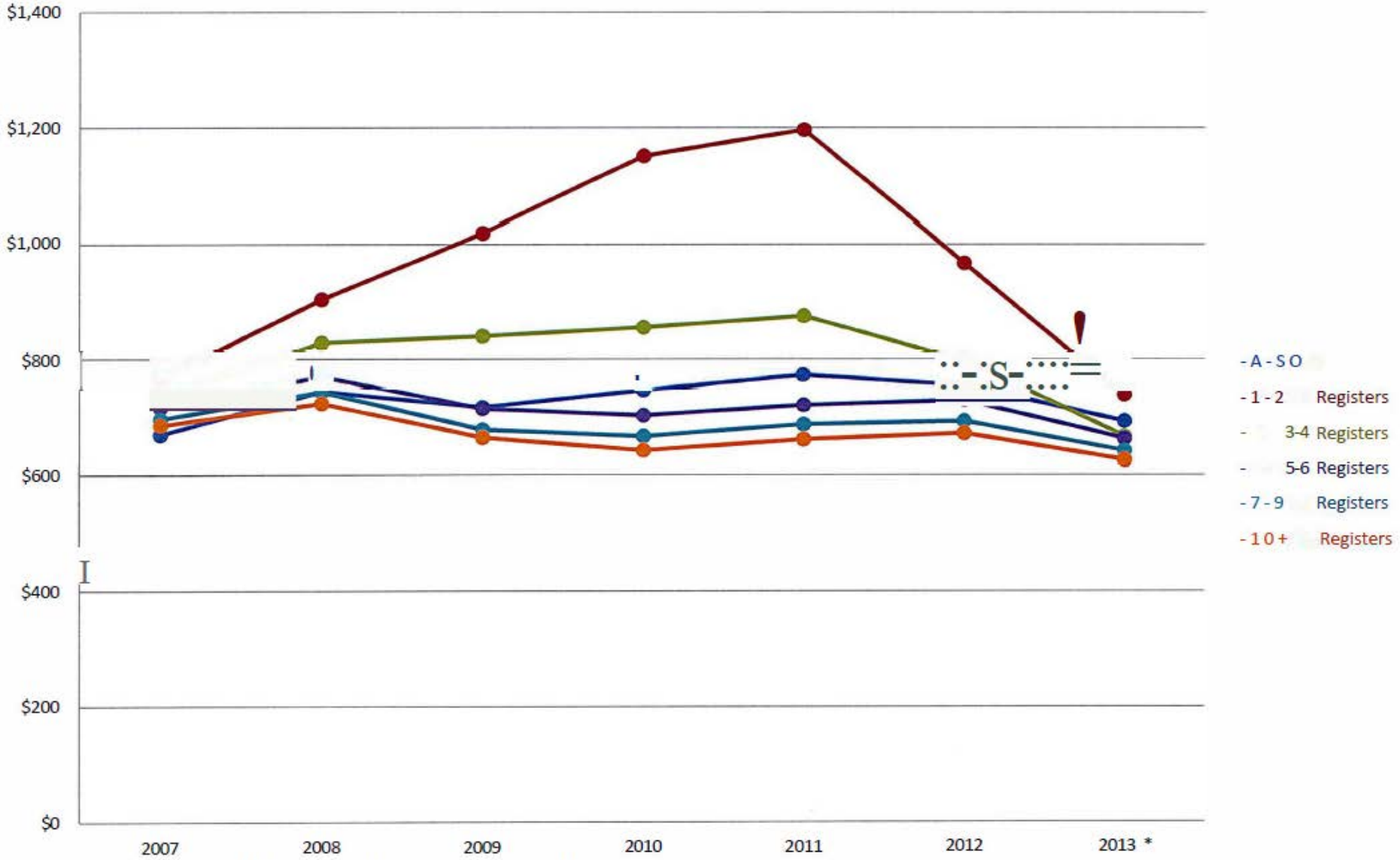
Zoe Neuberger
Senior Policy Analyst

Figure 1: Number and Share of California WIC Vendors by Type



Source: January 2014 Center on Budget and Policy Priorities analysis of California Department of Public Health data

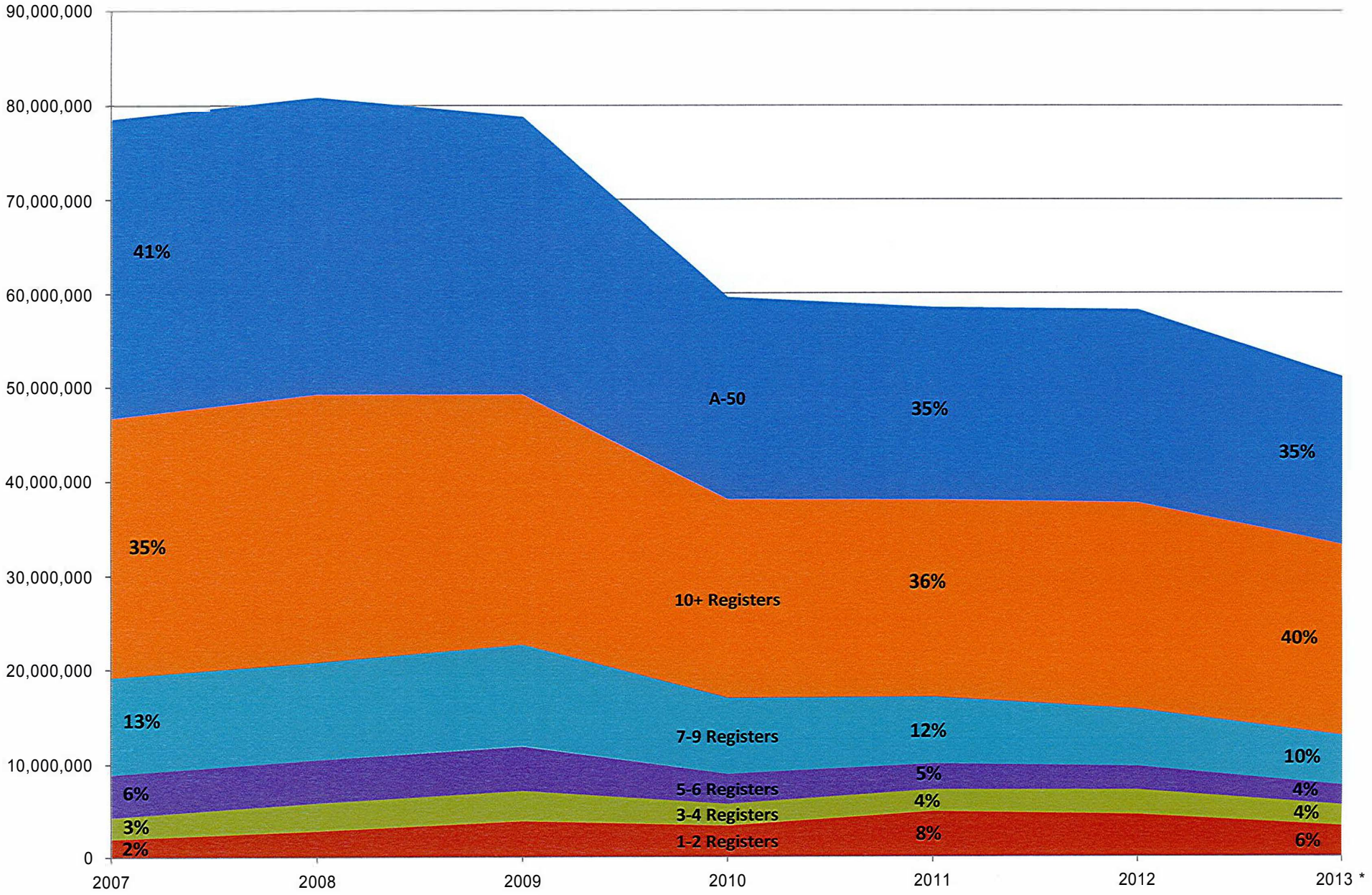
Figure 2: Estimated Per-Participant Cost of California WIC Redemptions by Vendor Type



Note: * December 2013 data is not yet available. Participation data for November is preliminary. Assumes that participants redeem the same number and variety of food instruments regardless of where they shop.

Source: January 2014 Center on Budget and Policy Priorities analysis of California Department of Public Health data

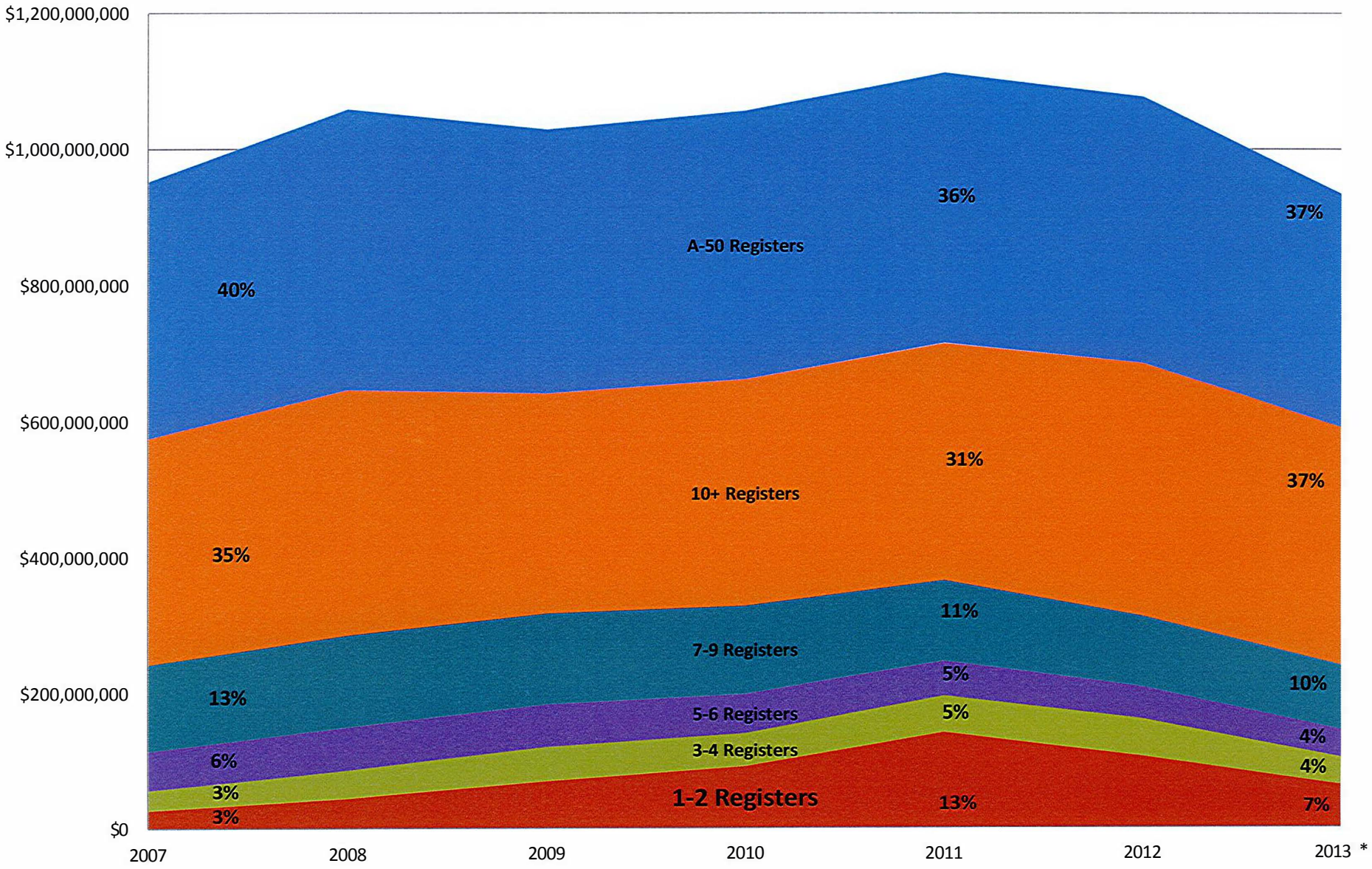
Figure 3: Share of California WIC Food Instruments Redeemed by Vendor Type



Note: *December 2013 data is not yet available. Participation data for November is preliminary.

Source: January 2014 Center on Budget and Policy Priorities analysis of California Department of Public Health data

Figure 4: Share of California Redemptions by Vendor Type



Note: * December 2013 redemption data is not yet available.

Source: January 2014 Center on Budget and Policy Priorities analysis of California Department of Public Health data

January 24, 2014

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 2, 50000 ET SEQ – Vendor Peer Group Criteria and Reimbursement System

To Whom It May Concern:

On behalf of the California Grocers Association (CGA) and the California Retailers Association (CRA), we respectfully submit the following comments relative to the proposed Article 2, 50000 et seq, Vendor Peer Group Criteria and Reimbursement System 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. Combined, our associations represent the lion's share of California's authorized WIC vendors including national full-line grocery chains, mixed retail that includes a full-line grocery component, regional independent supermarket chains, individually operated supermarkets, warehouse format discount supermarkets, specialty grocers, A-50 vendors, and club stores.

50000 – 50200 - PEER GROUP CRITERIA

Several questions have been raised with regard to a proposed requirement that appears in several areas of the proposed peer group criteria. The Department, in seeking to ensure appropriate vendor peer group placement, proposes to require companies to submit otherwise confidential tax information to the Department. While it may be necessary to substantiate revenue and other claims from vendors, retail locations for chain stores do not typically have a copy of their California Board of Equalization (BOE) state, local and District Sales and Use Tax Return statement. Many chains have centralized department offices where this information would be kept and in some instances this department is not even located in California. Is there an expectation that these tax documents, or copies of them, will be stored at each vendor location? And given the highly confidential nature of these documents, are they to be treated in a confidential manner once produced? The proposed regulation should be clarified to provide for production of documents within a reasonable timeframe and to ensure confidentiality of any documents submitted.

In addition, concerns have been raised from some vendors that generally fall into the peer groupings covering vendors with 5 or more registers. In some instances, those vendors may have one or a few store locations that for issues relating to available physical space have only 3 or 4 registers. In these cases, the current and proposed reimbursement schemes necessarily lead to differences in allowable reimbursement rates even though products are priced the same at the separate locations. Given the consensus that full services supermarkets do not price to reimbursement rates, but rather price to competitive issues in the marketplace, and given some significant challenges with the proposed calculation of

redemption rates the Department should consider modifying the peer group selection criteria to accommodate circumstances that may force a vendor into a peer group that is not typical in terms of number of registers.

50000(e) - ON SITE VISITS

While producing inventory records in and of itself is reasonable, the proposed regulations do not appear to make adequate accommodation for current business practices in the full service supermarket industry. In 50000(e), the proposed regulations note that an on-site visit shall be conducted upon initial authorization and may be "…at any other times…" during the term of the vendor agreement. While it is appreciated that those visits must take place during normal business hours, (1) specifies that the Department staff, "…is not required to notify the vendor of the onsite visit in advance of arrival." The proposal goes on in (2) and (3) do on to require production of inventory documentation during such unannounced, unscheduled visits and that documentation must be maintained at individual store locations.

Unfortunately, this is simply does not comport with standard business practices. Most companies with multiple store locations centralize their inventory, ordering, and payment systems within a central corporate office. Products are purchased and invoiced on a company-wide or regional basis rather than designated for use at a specific store location. For example, XYZ Grocer may order a pallet of 16-oz boxes of cereal from a central purchasing office, which would receive and pay a single invoice. The pallet of cereal would be delivered to a centralized warehouse and distribution facility and at that point divided up for distribution to specific store locations based on demand. The individual store location would never deal directly with the supplier and would never see the invoice.

The Department should modify the proposed regulation to allow companies with centralized, off site procurement and/or billing functions a minimum of three to four business days to produce records specific to a given store location. In addition, the Department should clarify that records may be retained in electronic format at vendor discretion.

Additionally, there appears to be an internal inconsistency between stocking requirements contained in proposed 50000(e), discussing on-site visits, and overall requirements for variety of food offered in proposed 50200(a) discussing full-line grocers. Does the Department anticipate inspections for each requirement will take place simultaneously and how will requirements relative to minimum stocking and availability of products on shelf versus in storage impact either or both of the inspections?

502000(3) – FULL-LINE GROCERY PEER GROUP/CATEGORY B

In determining register categories for Peer Group B, the proposed regulation outlines which registers will be counted as WIC registers for purposes of the count. However, the regulation does not indicate how vendors are to report such register counts or whether the Department plans to require verification of register count. In addition, as noted above, some companies may have store locations that fall in separate register count groupings. Does the Department plan to provide vendors with a list of which locations are authorized in which register count groupings, when, and if not how may vendors obtain that information from the Department?

60000 DEFINITIONS

Competitive Average Redemption Value (CARV)

This section defines the Competitive Average Redemption Value (CARV) calculation of unit- priced vouchers as the dollar sum of all redemptions for Peer Group Category B, 6-9 and 10+ register vendors across all food instruments for the same supplemental food divided by the quantity of units redeemed by the vendors.

This method also assumes that the actual number of items specified by the FI are redeemed by the participant. Most unit-priced redemptions are infant formula. These FIs consist of differing numbers of items of the same package size. Although participants are encouraged to obtain all of the specific number of infant formula units prescribed, both prior research and the language contained in the Infant Formula Rebate contract regarding accounting of units sold for the purpose of establishing dollar rebate amounts indicate such FIs (both unit and non-unit priced) are often less than fully

redeemed[1]. As a result, the method defined in Item (2)A for calculating the CARV for unit-priced FIs underestimates their true voucher cost had they been fully redeemed.

Multi unit Infant Formula FIs, as well as any multi-unit FIs for food items included in future rebate contracts, should be included in the partial redemption adjustment process. While vendors are required to redeem these FIs for the full number of units specified, the Department recognizes that partial redemptions exist, as evidenced by the current rebate contract between the California WIC Program and Mead Johnson, which specifies a methodology for identifying and excluding from a rebate any cans of infant formula that were not purchased. Infant formula is a high volume, low margin product and as such it is particularly important that it be included in the partial redemption adjustment process.

In (2)B, the method of calculating the CARV for non-unit priced vouchers again assumes all items specified by a non-unit priced voucher are fully redeemed. This assumption is highly unlikely, however. The greater mix of supplemental foods contained in the combination type vouchers increases the potential for their partial redemption. Even though there are over 150 food instruments used in California, the proposed rule limits food instruments eligible for partial redemption adjustment to three multiple food item food instruments (6000, 6003 and 6107). These three food instruments account for less than 16.5% of all food instrument dollar redemptions. As a result, the proposed regulations provide for much less than a full accounting of partial redemptions among non-unit priced food instruments. The assumption of full redemption in the proposed calculation method results in an underestimation of the CARV for non-unit priced vouchers.

Statewide Average

In (9), A of this section defines the Statewide Average calculation of unit- priced vouchers as the sum of all vouchers redeemed for the same authorized food divided by the total quantity of units redeemed by Peer Group B and C vendors. This method also assumes that the actual number of items specified by the FI are redeemed by the participant. Most unit-priced redemptions are infant formula. These FIs consist of differing numbers of items of the same package size. Although participants are encouraged to obtain all of the specific number of infant formula units prescribed, both prior research and the language contained in the Infant Formula Rebate contract regarding accounting of units sold for the purpose of establishing dollar rebate amounts indicate such FIs (both unit and non-unit priced) are often less than fully redeemed[2]. As a result, the method defined in (9)A for calculating the Statewide Average (and the CARV) for unit-priced FIs underestimates their true voucher cost had they been fully redeemed.

Multi unit Infant Formula FIs, as well as any multi-unit FIs for food items included in future rebate contracts, should be included in the partial redemption adjustment process. While vendors are required to redeem these FIs for the full number of units specified, the Department recognizes that partial redemptions exist, as evidenced by the current rebate contract between the California WIC Program and Mead Johnson, which specifies a methodology for identifying and excluding from a rebate any cans of infant formula that were not purchased. Infant formula is a high volume, low margin product and as such it is particularly important that it be included in the partial redemption adjustment process.

Further, in (9)B, the method of calculating the Statewide Average for non-unit priced vouchers (the sum of all Peer Group B and C dollar redemptions divided by their total number of food instruments redeemed) again assumes all items specified by a non-unit priced voucher are fully redeemed. This assumption is highly unlikely, however. The greater mix

[1]A 2013 USDA study reviewed the rate of partial redemptions in 40 WIC State Agencies, three of which prohibit partial buys when purchasing traditional food items (both unit priced and non-unit priced food instruments). The study found that 36% of vendors nevertheless allowed the partial buy to happen. USDA WIC Vendor Management Study Final Report (2013), page 24. http://www.fns.usda.gov/sites/default/files/2013WICVendor.pdf

[2]A 2013 USDA study reviewed the rate of partial redemptions in 40 WIC State Agencies, three of which prohibit partial buys when purchasing traditional food items (both unit priced and non-unit priced food instruments). The study found that 36% of vendors nevertheless allowed the partial buy to happen. USDA WIC Vendor Management Study Final Report (2013), page 24. http://www.fns.usda.gov/sites/default/files/2013WICVendor.pdf

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60200 – MAXIMUM ALLOWABLE REIMBURSEMENT RATES (MADRS)

In proposed section 60200(b) the regulation notes that if a vendor submits a food instrument requesting reimbursement at a rate higher than that provided in the MADR, "…that food instrument will be rejected and returned to the vendor…" for adjustment to a price not higher than the posted MADR for that food instrument. While regulations are clear that vendors may not be reimbursed at a rate higher than the MADR, given the methodology and low tolerances proposed in the regulations it is likely that unless the Department adopts significant changes there will be a sharp increase in occurrence of standard shelf prices at full line grocery stores exceeding the posted MADRs, especially for combination vouchers.

When vouchers are returned, vendors incur fees from their financial institutions and absorb additional labor costs associated with program participation as vouchers must be adjusted and resubmitted. In addition, the Department significantly increases its own workload as employees must return vouchers and then process the same documents over again when adjusted and returned. Given the likelihood of a sharp increase in returned vouchers, the Department should modify the proposed regulation to instead simply pay the incorrect voucher at the MADR rate. The net result of that approach is the same as the approach outlined in the proposal (vendors are reimbursed no more than the MADR) in a manner that saves time and money for both the vendor and the Department. Those administrative savings could be significant and this change would maintain the commitment to cost containment.

In proposed section 60200(c) the Department lays out tolerances for the various peer groups that range from the statewide average for peer group A to CARV +28% for peer group B, single item vouchers, and CARV +49%, combination vouchers. While this may seem to be an adequate tolerance, in light of significant challenges with establishment of the CARV they are in reality far too low. Unless the Department is willing to adopt a more realistic and fair methodology to determine CARV, the regulation should be modified to provide for higher tolerances to prevent a majority of full line grocers from being reimbursed less than their shelf prices when providing WIC authorized items to California WIC clients.

60300 – RULES FOR CALCULATING MAXIMUM ALLOWABLE DEPARTMENT REIMBURSEMENT RATE (MADR)

There are several significant challenges with various aspects of the proposed regulations with regard to calculation of MADRs. While it is certainly a requirement that the Department craft methodology that achieves cost containment goals, it must be done in a way that fairly reimburses participating vendors for products and properly reflects market realities in California. The following represent major areas of concern for the vendor community.

Manual Adjustments

In proposed section 60300(b)(3)(C), the proposed regulation provides that the Department **MAY** manually adjust posted MADRs on a temporary basis to account for fluctuations in wholesale prices. While we support that as a general concept, the regulation should be modified to include a more specific statement relative to manual adjustment of reimbursement rates for infant formula. As you are aware, infant formula is the one WIC-authorized item that is "captive" - there are no alternatives for vendors or shoppers. The State enters into a contract with a formula provider and negotiates a rate with that provider. Under the methodology proposed in the current draft, assuming an initial MADR of $19.22 for a 12.5 oz can of infant formula, the MADR would drop to $18.70 within a few months. If historical trends continue and formula manufacturers adopt a 5% increase in price, the new MADR calculations would lead to rejected vouchers for 9 of 12 full line grocers in the 10+ register subgroup.

Given manufacturers and the State of California enjoy the benefits of wholesale price increases for infant formula through the program immediately, the proposed regulation should be modified to **REQUIRE** the Department to **IMMEDIATELY** manually adjust the MADR for infant formula if any wholesale price increase is seen in that product line. Otherwise, vendors will be forced to take significant losses on this product line in particular, on top of losses that will necessarily result from the Department's proposed methodology for CARV calculation.

Calculation of Partial Redemptions

We appreciate that the Department is proposing to exclude some partial redemptions in the calculation of the statewide average. That is a critical issue for vendors. However, we see no reason, why partial redemptions should also not be excluded in the calculation of the CARV. According to UC Davis "…partial redemptions introduce a downward bias into the CARV."[3] The identification and exclusion of food instruments that have been partially redeemed is also important to calculate a CARV that more accurately reflects actual prices for supplemental foods.

Because the MADR rates for all Peer Group B and C stores are based on the CARV, partial redemptions do also impact reimbursement rates for non A-50 vendors. This effect is further concerning because there are a significant number of partial redemptions. In a review of certain food instruments, a UC Davis study observed a rate of partial redemptions that ranged from 1.8% to 7.2%, depending on the FI, and that the average of the partial redemptions was 4.4%.[4] These results have helped to "identify the severity of the partial redemption problem…"[5] The identification and exclusion of food instruments that have been partially redeemed is important to calculate a CARV that more accurately reflects actual prices for supplemental foods.

The best solution to the issue of partial redemption of combination FIs is timely and appropriate implementation of WIC EBT; The Department will then have a full accounting of all items redeemed and be able to create MADRs that reflect actual prices paid for individual food items. We understand that the Department is diligently working towards this goal and will have EBT in place in two to three years. We look forward to being a partner in those efforts.

Until EBT is in place, however, the best solution to resolve the structural under-payments based on partial redemptions would be the elimination of all combination FIs. However, we share articulated concerns about the practicality of this option. Our organizations support the Department's efforts to find another alternative that will meet Federal requirements for cost containment and cost neutrality without unduly burdening participants, local agencies, vendors, and CDPH.

The State could also consider requiring the purchase of all food items on all food instruments, a policy that is currently in place in at least 3 State agencies: "The impact of partial redemptions may be less significant for State agencies that require vendors to ensure that participants obtain all foods prescribed on the food instrument."[6] However, even under this policy partial redemptions still occur. [7]

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[3] *The California Women, Infants and Children (WIC) Program, Analysis of Cost-Containment Strategies and recommendations for Improved Program Efficiency*, Professor Richard J. Sexton and Post-Doctoral Scholar Tina L. Saitone, University of California Davis (2012), page 109.

[4] Id., pg. 110-111.

[5] Id., pg. 111.

[6] FNS-USDA, *Interim Guidance on WIC Vendor Cost Containment*, June 2006, page 42. http://www.fns.usda.gov/sites/default/files/InterimCostContainmentGuidance-June2006.pdf

[7] A 2013 USDA study reviewed the rate of partial redemptions in 40 WIC State Agencies, three of which prohibit partial buys when purchasing traditional food items (both unit priced and non-unit priced food instruments). The study found that 36% of vendors nevertheless allowed the partial buy to happen. USDA WIC Vendor Management Study Final Report (2013), page 24. http://www.fns.usda.gov/sites/default/files/2013WICVendor.pdf

To be clear, or organizations do not support the Department's proposed partial redemption elimination methodology. The vendor community was not consulted about this process[8] prior to the release of the proposed regulation, nor was clarification provided on the Department's webinar, so we are unclear as to why this particular methodology was selected.

Our specific concern with the Department's proposed partial redemption methodology is that it will remove only a small fraction of food instruments that have actually been partially redeemed. The proposed partial redemption adjustment seeks to calculate a "minimum full redemption amount", below which a food instrument is considered partially redeemed. To establish the minimum full redemption value for identifying a partial redemption, shelf prices of items specified in applicable food instruments are collected from all Peer Group B and C vendors. From shelf prices collected, a *single lowest* observed item price is determined.

Because the lowest observed price is that of a single vendor, however, it cannot be considered representative of all applicable vendors' lowest item price. Retailers are not uniform in their pricing, resulting in a mix of higher and lower priced items for a range of foods. For an individual vendor, the sale of higher volume, lower margin foods may be offset by lower volume, higher margin foods--a pricing strategy that generates a low-price image for many but not all food items. As a result, the *single lowest* observed item price may be the outcome of an individual vendor's pricing strategy and not typical of a market-based price charged by other vendors. When combined with other *single lowest* observed item prices to obtain a lowest price combination voucher value, the result is not representative of any single vendor. When the single lowest item prices are summed for each voucher type, the resulting composite minimum full redemption voucher value is likely a reflection of individual vendor pricing strategies.

The methodology is also not reflective of actual WIC participant shopping patterns. WIC participants are not necessarily price sensitive. They rarely redeem all of their FIs for only least cost items. They also do not redeem each of their FIs at the lowest cost vendor for each item on each FI. The Department itself acknowledge during its recent webinar that WIC customers are not price-sensitive shoppers. Yet the proposed methodology only considers FIs partially redeemed if they were redeemed for less than the shelf prices represented in these shopping patterns.

Any methodology used by the Department must actually eliminate a large majority of partial redemptions from the calculation of the Statewide Average. The proposed methodology will not. Any partial redemption elimination methodology must either recognize that the proposed peer groups and sub-groups include a wide range of business models, and therefore require an analysis of shelf-prices and the determination of partial redemption at the individual vendor level, or the methodology must provide for some mechanism to normalize individual redemptions to account for the variety of vendor business models. Most importantly, any calculation of partial redemptions should be based on what participants **actually purchase** with their FIs, not what is the least cost item reported in a shelf price survey by any single vendor.

Since we know that EBT planning is underway and that once implemented will solve the issue of partial redemptions, we should also know that any process put in place now is an interim approach until EBT is implemented. That argues even more strongly against any approach that is cumbersome or that requires extensive administrative and data processing changes. In our estimation, the best approach, realizing the imprecision noted above, is one that is based on realistic data, is not overly complex, is fair to all parties, and is manageable.

Ideally, partial redemptions would be completely excluded. However, as the UC Davis study points out, this is impractical at this time. The UC Davis study reviews two options, one of which excludes the lowest 10% of

[8] This is in contrast to guidance USDA provides to States in creating methodologies for identifying and eliminating partial redemptions for purposes of calculating infant formula rebates: "We [USDA] encourage State Agencies to continue working with their regional offices and infant formula manufacturers to develop systems that are mutually satisfactory." "…[s]tate agencies should develop a methodology based on their own capabilities and mutually agreed upon by all parties." USDA Memorandum, *Guidance for WIC Policy Memorandum number 2004-04: Implementation of the Infant Formula Cost-Containment Provisions of P.L. 108-265 – Rebate Invoices*, August 1, 2005.

redemptions.[9] Rather than adopt the current proposal, we urge the Department to adopt this option in its new vendor cost containment plan. This approach is simple and manageable. It was suggested after an exhaustive analysis of redemption data patterns – it is based on empirical data. It is simple to manage, covers all food instruments and is fair.

We request that the Department revise its proposed partial redemption methodology to incorporate the recommended methodology from UC Davis. The Department has accepted all of the recommendations from UC Davis for peer grouping and reimbursement rates. We are at a loss as to why the Department has not also accepted their recommendation on partial redemption methodology.

We understand that Federal regulations set forth in 7 C.F.R. section 246.12(g)(4)(i)(D) allow states to "exclude partially-redeemed food instruments based on an empirical methodology approved by FNS." A system that arbitrarily excludes a certain percentage of redemptions would not be based on empirical data. But the UC Davis fixed percentage proposal is not arbitrary, but in fact based on empirical data:

> *"The strategy we undertook in advising the Program regarding identification of partial redemptions was to utilize the small (1-4 register) vendor surveys and the computations we made of the least-cost way to fully redeem the leading FIs for each vendor surveyed. [footnote omitted]. We then identified partial redemptions for each of the surveyed vendors as all redemptions of a FI for that vendor in the ISIS database for which the requested redemption value of the FI was less than the value of the least-cost bundle for that FI. [footnote omitted]"*[10]

An empirical methodology requires only that actual data be used in the formulation of the methodology, and not be arbitrary. UC Davis used actual shelf price data and redemption data to validate their recommendation and it is not arbitrary.

Excluding outliers is consistent with guidance USDA has issued to States in creating methodologies for excluding partial redemptions in determining infant formula rebates. This guidance states in part:

> *"Over the past several years we have worked with a number of State agencies that have developed procedures to more accurately estimate the number of units of contract infant formula being purchased. In preparation for providing this guidance, we also sought input from the National WIC Association (NWA) and infant formula manufacturers. Specifically, we requested information on procedures and/or best practices in State agencies that provide a reasonable estimate of contract brand infant formula purchases.*
>
> *We acknowledge that it is not realistic to assume that only one methodology exists and/or is appropriate for all State agencies to use when determining a reasonable estimate of the number of units of contract brand infant formula sold to WIC participants. Nevertheless, State agencies should develop a methodology based on their own capabilities and <u>mutually agreed upon by all parties</u>."*[11] *(emphasis added).*

This guidance on infant formula partial redemption methodologies provides States considerable latitude to develop systems for identifying and excluding partial redemptions. Recognizing the complexity of the problem, the guidance also provides for a lower standard – a 'reasonable estimate' of infant formula FIs that have been partially redeemed is all

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[9] According to UC Davis, "[t]he largest differences between trimmed and untrimmed means occur in our view due to partial redemptions for combinations FIs which are in the untrimmed data but are removed, to some extent when the lowest 10 percent of redemptions are eliminated." *UC Davis report on Saitone-Sexton Proposal for Maximum Allowable Department Reimbursement (MADR) Rate Construction for New Vendor Peer Groups*, page 2.

[10] UC Davis, page 110.

[11] USDA Memorandum, *Guidance for WIC Policy Memorandum number 2004-04: Implementation of the Infant Formula Cost-Containment Provisions of P.L. 108-265 – Rebate Invoices*, August 1, 2005.

that is necessary. The guidance also provides that any methodology a State agency adopts should be done in consultation with infant formula companies, and also by mutual agreement. There is no reason why these same guiding principles should not also be applied to any State's creation of partial redemption methodologies for WIC authorized retail food vendors.

Further, the Department should also expand exclusion of partial redemptions to include all food instruments that represent at least 0.1% of total food dollars redeemed. The reason for excluding partial redemptions from the calculation of the Statewide Average is to more accurately reflect actual prices for supplemental foods.[12] Identifying and removing partial redemptions for only three vouchers will remove a small fraction of the partial redemptions that impact the CARV. There is no reason to exclude partial redemptions for any food instrument unless redemptions are insignificant.

Additionally, the proposed regulations do not provide for future changes to FI specifications and corresponding partial redemption adjustment processes. To accommodate the changing specifications of food instruments and the need for additional shelf price data, the proposed rule regarding the scope of partial redemption adjustment should be rewritten to specify a general process by which FIs are included in the partial redemption adjustment process in place of listing specific FIs. This change will also place into regulation the Department's commitment to applying the partial redemption adjustment process as broadly as possible. The Statement of Reasons (60300) includes a clear set of criteria that should be substituted into the proposed regulations. This will allow the partial redemption adjustment process to be applied to additional FIs as the items for which specific shelf-prices are collected changes, as well as if changes in foods included in FIs occurs. This will eliminate the need to modify this portion of the regulations due to small operational changes.

Minimum Full Redemption Values (MFRVs)

The proposed partial redemption methodology seeks to identify a "minimum full redemption amount", below which a food instrument is considered partially redeemed. To establish the MFRV, the proposal anticipates shelf prices of items in FIs 6000, 6003, and 6107 would be collected from all Peer Group B and C vendors. From shelf prices collected, a **single lowest observed item price** is determined. We object to this MFRV calculation for multiple reasons.

Objection #1: Because the lowest observed price is that of a **single vendor**, it cannot be considered representative of all applicable vendors' lowest item price. Pricing strategies vary from vendor to vendor, resulting in a mix of higher and lower priced items for a range of foods. For an individual vendor, the sale of higher volume, lower margin foods may be offset by lower volume, higher margin foods – a pricing strategy that generates low-price image for many but not all food items. As a result, the single lowest observed item price may be the outcome of an individual vendor's pricing strategy and not typical of a market-based price charged by other vendors. When combined with other single lowest observed item prices to obtain a lowest price combination voucher value, the result is not representative of any single vendor. When the single lowest item prices are summed for each voucher type, the resulting composite MFRV is an artifact of individual vendor pricing strategies.

Objection #2: The methodology is also not reflective of actual WIC participant shopping patterns. WIC participants are not necessarily price sensitive. They rarely redeem all of their FIs for only least cost items. They also do not redeem each of their FIs at the lowest cost vendor for each item on each FI. Yet the proposed methodology only considers FIs partially redeemed if they were redeemed for less than the shelf prices represented in these shopping patterns.

Objection #3: The MFRV based on least cost price is an unreasonable standard because there simply is too much variability inherent in combination FIs. For most FIs participant choices can be a significant contributor to the redemption value.[13] The range of choices provided on combination FI's among types of whole grains, cheeses, breakfast

[12] CDPH Regulatory Alert 2013-03, Attachment 2 Vendor Reimbursement System and Statement of Reasons, December 13, 2013, 60300(c), page 24.

[13] Id., p. 57.

cereals, juices, etc., create considerable dispersion in redemption values for FIs containing these items.[14] There are several choices in the redemption of combination food instruments that magnify this variability:

1. Choosing between product groupings (brown rice or whole wheat bread; shelf stable juice or frozen juice)
2. Choosing between brands (national brand cereal or private label cereal)
3. Choosing product sizes (three 12 oz boxes of cereal or two 18 oz boxes of cereal)

Examples include:

Quart of Milk. There are several combination FIs that are issued in large quantities (FIs #6013, and #6014) for which all shelf prices for items included in the FI are collected except for a single quart of milk. The Department appears to be aware that the one-quart size of milk is not carried by a large number of vendors, since it was dropped from the minimum stocking requirement. For example, among some vendor categories, FIs containing a quart of milk represent approximately 14 percent of total redemptions. These are some of the most commonly issued FIs and include four different items and therefore are likely to be partially redeemed in large numbers. Unfortunately, however, all FIs that contain a quart of milk are not eligible for the Department's proposed partial redemption methodology because the quart of milk is not one of the food items subject to the current shelf price survey.

As a means to include FIs containing a quart of milk for partial redemption adjustment, the Department should either set the price of 1 qt of milk to zero (because it is not on the shelf-price survey) or collect a shelf-price estimate from a small sample of stores. Another option is to purchase a representative sample of prices from proprietary sources such as IRI and Nielsen. While setting the price to zero would not be as accurate as collecting shelf prices, it will eliminate more partial redemptions than otherwise.

Cereals. It is not very often that WIC participants redeem their FIs for all 36oz of the least expensive WIC authorized cereal brands. This is supported by actual redemption data. The most expensive cereals on the California program are Post Honey Bunches of Oats and MultiGrain Cheerios. Combined they account for about 50% of all WIC cereals sold. But this methodology would set the minimum in the cereal category based on a box of cereal that could be priced considerably lower

The Department should choose to survey only the most popular cereals instead of the least expensive. This would provide a more accurate price of what the most probable pricing would be on FIs containing cereal.

Whole Grains. Calculation of the MFRV based on the reported least cost price per item is also a problem in other multiple item food instruments where there is a large disparity in pricing amongst certain types of food items in the same category. Whole grains are an example. The current shelf price survey requires submittal of prices on two products in this category (whole wheat bread and corn tortillas). The typical retail price for a loaf of whole wheat bread tends to be significantly higher than for corn tortillas yet the MFRV based on the lowest reported shelf prices of food instruments containing ANY whole grains.

The Department should split into two the FIs containing whole grains. One FI would contain tortillas, brown rice, and oatmeal, since they are similarly priced. The other FI would contain whole wheat bread.

Objection #4: We have further concerns with the MFRV using the single lowest observed item price across all Peer Group B and C vendors. Peer groups have been established to group together vendors with similar business characteristics. Shelf prices are collected to evaluate those vendors, by peer group to determine cost competitiveness. By combining prices across all Peer Group B and C vendors, the Department ignores the reason peer groups exist. When the determination of the single lowest price and voucher value is based across all vendors, there is a greater likelihood that a large number of partially redeemed vouchers will be above the established minimum full redemption voucher value. Partial redemptions from higher cost vendors are more likely to be accepted as full redemptions when they are

[14] Id., p. 97.

not. As a result of the failure of the proposed rule to identify all partially redeemed vouchers, the CARV--which is used to determine non A-50 vendor MADR rates--will be underestimated.

Options for calculating the MFRV:

The Department has proposed calculating the MFRV by identifying the lowest reported shelf price of each individual market basket food item included in the food item number.[15] It appears, however, that the Department is considering other methodologies to calculate the MFRV: "The Department shall identify the minimum full redemption value for each food item number in one of three ways…"[16] (emphasis added). We have expressed our concerns above about this methodology and propose that, if the Department does not implement the UC Davis proposal, it consider the following "three ways": (a) use the lowest of the high prices reported on shelf price survey food item; (b) an average of the high and lowest prices reported on shelf price survey food items by vendor; or (c) the use of IRI or Nielsen price data to obtain the average sale price of individual WIC authorized foods.

Lowest of the high reported shelf price survey food items

This methodology is based on the lowest prices per food instrument type of the highest prices reported by each vendor or peer group. USDA should have no objection to this methodology since it is based on empirical data.

Average of the high and lowest prices reported on shelf price survey food items per vendor

USDA and the State should have no objections to this methodology since it is based on empirical data and already approved for use in California for other purposes. There is no reason why partial redemptions can't be based on vendor specific data as opposed to a peer group. Administratively, this procedure should be no more burdensome since the State is already collecting shelf prices from every vendor in the State. Use of average prices is also consistent with the substitute CARV method proposed in Section 60300(b)(3)(A), which calls for "averaging the sum of the average prices of the foods included in the food instrument for all vendors in a peer group." In fact, California is or will be already calculating this average for each vendor. Pursuant to its last regulations published in September, in order to determine cost competitiveness, "The Department shall determine the average of the highest and lowest prices of the individual Market Basket Items…" This is a viable option and will also have the benefit of having minimal impact on State technical resources since the methodology is already in place.

Use IRI or Nielsen price data to obtain the average sale price of individual WIC authorized foods

The proposed regulations already contemplate the use of this data in section 60300 (b)(3)(C). Use of this data would be a reasonable estimate of average shelf prices for all WIC approved products and would avoid the necessity of expanding the shelf price survey to cover more items, or to collect shelf price survey data more often.

Shelf Price Surveys

The regulation proposes to limit the identification and exclusion of partial redemptions to three food instruments because only these three FIs will contain reported shelf prices for all the available food items on the FI. However, the shelf price survey is largely automated so expanding the shelf price survey to accommodate all food items on the majority of FIs of relative significance should not be overly burdensome.

If the Department chooses not to implement the UC Davis recommended partial redemption methodology, we recommend that additional food items be added to the survey of shelf prices to allow adjustment for partial redemption for the remaining non-unit priced vouchers. These additional items added to the shelf-price survey do not need to be utilized in the cost competitiveness market basket calculations; they would be used only for the partial redemption exclusion methodology. To the 12 food items currently surveyed, an additional 8 foods should be added: 1) Milk (whole and lower fat) – 1 quart; 2) Baby Food – Fruits/Vegetables (4.0oz and 3.5oz); 3) Baby Food – Meat; and 4) Bananas (4); 5) Milk – Lactose Free – Half Gallon; 6) SOY milk – 1 Gallon and 1 Quart; 7) Tofu – 14oz to 16oz; and 8) Canned Fish – 30oz. This modest expansion of the shelf price survey would allow almost all non-unit priced food instruments to be adjusted

[15] CDPH Regulatory Alert 2013-03, section 60300(c)(1)(A), page 15 of 17.
[16] CDPH Regulatory Alert 2013-03, section 60300(c)(1), page 15 of 17

for partial redemption. The cost to vendors and the Department for adding these items should be minimal, given that a web based system to collect shelf prices is already in place.

Semi-annual shelf price collection

The regulation proposes to update the partial redemption rates every six months because vendors will only be submitting shelf price survey information twice a year, yet the Department's adjustment of the MADRs will take place every four weeks. The Department has recognized that there is volatility in food pricing and that MADRs should be adjusted every four weeks to accommodate for these price fluctuations. This same rationale should apply to partial redemption calculations since they are also dependent on fluctuating shelf prices.

If the Department chooses not to implement the UC Davis recommended partial redemption methodology, then the partial redemption methodology should be updated every four weeks with current shelf price data in order for the calculation to be current and accurate.

Verification of Shelf Price Data

The existing shelf-price collection regulation does not include any process to verify that all prices submitted are valid and free of error. The lack of verification undermines the use of a single lowest observed item price in the calculation of the MFRV when the single lowest item price may be erroneous. Errors by individual vendors when submitting any one shelf price are unlikely to have a significant impact on the calculation of price competitiveness. However, a single erroneous item food price submitted by a vendor and used in the partial redemption exclusion process can have a significant impact on the MFRV, and the number of partially redeemed vouchers in the Statewide Average calculation.

To ensure collected shelf-prices are valid and free of error, those used in the determination of a MFRV should be verified by Department staff through direct observation.

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

Sincerely,

Keri Askew Bailey
Senior Vice President
California Grocers Association

Pamela Boyd Williams
Executive Vice President
California Retailers Association

From:	Lea Ann Hoogestraat
To:	WICRegulations
Subject:	Regulatory Alert 2013-03
Date:	Monday, December 16, 2013 11:34:27 AM

Will the proposed changes get us closer to adding new WIC vendors?

Do we know when new vendors can apply again?

Any information you can provide will be helpful. I have a couple of businesses in our area that have been waiting for years now.

Respectfully
L. Hoogestraat

Nutritional Grocers Association of California

Comments on California Department of Public Health Regulatory Alert 2013-03

Introduction

The Nutritional Grocers Association of California (NGAC) represents the interests of several hundred A-50 stores in the State. Our mission is to ensure that every customer is treated with dignity and respect, while providing a clean, friendly, stigma-free environment in which to shop for supplemental nutritious foods. A-50 stores provide parents, many that work and rely on public transportation, the ability to access healthy, nutritious foods. Our service-oriented store format is specifically designed to overcome the cultural and language issues that often act as barriers towards non-English speaking participants when redeeming their WIC vouchers.

The importance of A-50 vendors to the California WIC program was clearly documented in the paper prepared by UC Davis economists discussing their findings following an extensive review of the vendor portion of the WIC program: "…the A-50 vendors collectively are a very important component in the California WIC food distribution network; 37% of WIC program food sales (nearly one billion dollars) were made by A-50 vendors over the 29-month period from October 2009-February 2012 analyzed in this study."[1]

The report goes on to say "It is also clear simply from the amount of WIC Program business conducted by A-50 vendors that Participants value shopping at them due most likely to the positive shopping experience they offer in terms of store location, ease of finding products in the store, and convenience of checkout."[2] It is clear that A-50 vendors contribute to the continued success of the California WIC program.

[1] The California Women, Infants, and Children (WIC) Program, Analysis of A-50 Vendor Performance, Richard J. Sexton, Tina L. Saitone, Agricultural and Resource Economics Department, University of California, Davis, page v.

[2] id., page 39

As long-term supporters of the WIC Program we applaud the State's efforts to promulgate regulations that will help with cost containment and help curb the abuses that surfaced in the Program over the past couple of years. It is unfortunate, however, that the Department did not exhibit more of a sense of partnership with retail vendors and involved this community in the development of the regulations. We all share in the responsibility to make sure that this important Program is run effectively and efficient. Including the vendor community in the regulation formulation process would have mitigated what we see as some serious flaws in the proposed regulations. We trust, especially given the lack of consultation during the regulation development, that our comments will be given full and thorough consideration during the comment period and that modifications will be made as a result of recommendations received during the public comment period.

Concerns

The long-term viability of A-50 vendors to serve these WIC participants depends on the ability to be reasonably compensated for supplying WIC families with their authorized foods in ways that meet both cost neutrality criteria and cover store cost of goods and operating margins. Our members are very concerned about the adverse impact of the proposed regulations (Regulatory Alert 2013-03) on A-50 vendors.

The proposed rules addressing partially-redeemed vouchers are particular areas of concern. A-50 vendors have very high full redemption rates as a result of a business model that focuses on serving WIC participants (an estimated 99.7 percent). This is in contrast to many other categories of vendors with business models that focus on a wider range of consumers. It is important this disparity be accounted for when computing the Statewide Average. Since families are more likely to receive more of their authorized foods when redeeming their food instruments in an A-50 store, it is appropriate to consider this factor into the methodology for calculating the Statewide

Average and corresponding MADR rates for A-50 vendors. The identification and exclusion of food instruments that have been partially redeemed is also important to calculate a Statewide Average that more accurately reflects actual prices for supplemental foods.

The following comments address the specific sections of the proposed regulations that are likely to have an adverse impact on A-50 vendors. Our purpose in this response is to identify areas that adversely and unreasonably affect A-50 vendors' participation in the California WIC Program, primarily the issue of the negative impact of partial redemptions on the calculation of the statewide average and corresponding A-50 MADR rates. To this end, we propose alternative methods to address differences in rates of full voucher redemption that offer a more reasonable and fair solution to this complex issue.

Our comments first discuss the issue of partial redemptions and then definitions and other general provisions.

I. PARTIAL REDEMPTIONS

General

We applaud the Department's recognition that partial redemptions should be excluded in the calculation of the statewide average. Partial redemptions pose an issue in setting MADR rates[3] in that the inclusion of partial redemptions "introduce a downward bias into calculations of mean redemption values…"[4] Because the MADR rates for A-50 stores are based on the average redemption values in all other stores, partial redemptions do impact A-50 reimbursement rates. This effect is further magnified because there are a significant number of partial redemptions for regular vendors, but a very low number of

[3] *The California Women, Infants and Children (WIC) Program, Analysis of Cost-Containment Strategies and recommendations for Improved Program Efficiency*, Professor Richard J. Sexton and Post-Doctoral Scholar Tina L. Saitone, University of California Davis (2012), page 109.
[4] Id., pg. 109.

partial redemptions for A-50 vendors. In a review of certain food instruments, a UC Davis study observed a rate of partial redemptions that ranged from 1.8% to 7.2%, depending on the FI, and that the average of the partial redemptions was 4.4%.[5] These results have helped to "identify the severity of the partial redemption problem…"[6] The exclusion of partial redemptions is necessary to ensure a more accurate comparison of equally redeemed food instruments between A-50 vendors and peer group B and C vendors.

NGAC urges CDPH to reconsider the methodology used in the proposed regulation for elimination of partial redemptions from the Statewide Average calculation. NGAC recognizes the importance of cost containment to the future of the WIC program. We understand that Federal rules require that A-50 vendor reimbursement be cost neutral to the program and also require that this cost neutrality be demonstrated using the average redemption value of food instruments redeemed at non A-50 vendors. However, the Federal rules also recognize that the issuance of multi-item FIs results in a significant number of partially redeemed FIs. When combined with the well documented fact that participants are much more likely to fully redeem combination FIs at A-50 vendors than at other types of stores, these partially redeemed FIs depress the Statewide Average. The resulting reimbursement for A-50 is not based on an accurate Statewide Average.

The perfect solution to the issue of partial redemption of combination FIs is the implementation of EBT; CDPH will then have a full accounting of all items redeemed and be able to create MADRs that reflect actual prices paid for individual food items. CDPH reports that it is diligently working towards this goal and will have EBT in place in two to three years. However, the cost containment and cost neutrality concerns raised by USDA must be addressed now.

[5] Id., pg. 110-111.
[6] Id., pg. 111.

As the redemption process is currently structured, the best solution to resolve the structural under-payments to A-50 vendors would be the elimination of all combination FIs. However, NGAC shares CDPH's concerns about the practicality of this option. NGAC supports the Department's efforts to find another alternative that will meet Federal requirements for cost containment and cost neutrality without unduly burdening participants, local agencies, vendors, and CDPH.

The State could also consider requiring the purchase of all food items on all food instruments, a policy that is currently in place in at least 3 State agencies: "The impact of partial redemptions may be less significant for State agencies that require vendors to ensure that participants obtain all foods prescribed on the food instrument."[7] However, even under this policy partial redemptions still occur. [8]

To be clear, NGAC does not support the Department's proposed partial redemption elimination methodology. The vendor community was not consulted about this process[9] prior to the release of the proposed regulation, so we are not clear as to why this particular methodology was selected. However, it appears that the Department has chosen to implement a methodology that will result in very little impact on a very important issue.

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[7] FNS-USDA, *Interim Guidance on WIC Vendor Cost Containment*, June 2006, page 42. http://www.fns.usda.gov/sites/default/files/InterimCostContainmentGuidance-June2006.pdf

[8] A 2013 USDA study reviewed the rate of partial redemptions in 40 WIC State Agencies, three of which prohibit partial buys when purchasing traditional food items (both unit priced and non-unit priced food instruments). The study found that 36% of vendors nevertheless allowed the partial buy to happen. USDA WIC Vendor Management Study Final Report (2013), page 24. http://www.fns.usda.gov/sites/default/files/2013WICVendor.pdf

[9] This is in contrast to guidance USDA provides to States in creating methodologies for identifying and eliminating partial redemptions for purposes of calculating infant formula rebates: "We [USDA] encourage State Agencies to continue working with their regional offices and infant formula manufacturers to develop systems that are mutually satisfactory." "…[s]tate agencies should develop a methodology based on their own capabilities and mutually agreed upon by all parties." USDA Memorandum, *Guidance for WIC Policy Memorandum number 2004-04: Implementation of the Infant Formula Cost-Containment Provisions of P.L. 108-265 – Rebate Invoices*, August 1, 2005.

Our specific concern with the Department's proposed partial redemption methodology is that it will remove only a small fraction of food instruments that have actually been partially redeemed. The proposed partial redemption adjustment seeks to calculate a "minimum full redemption amount", below which a food instrument is considered partially redeemed. To establish the minimum full redemption value for identifying a partial redemption, shelf prices of items specified in applicable food instruments are collected from all Peer Group B and C vendors. From shelf prices collected, a *single lowest* observed item price is determined.

Because the lowest observed price is that of a single vendor, however, it cannot be considered representative of all applicable vendors' lowest item price. Retailers are not uniform in their pricing, resulting in a mix of higher and lower priced items for a range of foods. For an individual vendor, the sale of higher volume, lower margin foods may be offset by lower volume, higher margin foods--a pricing strategy that generates a low-price image for many but not all food items. As a result, the *single lowest* observed item price may be the outcome of an individual vendor's pricing strategy and not typical of a market-based price charged by other vendors. When combined with other *single lowest* observed item prices to obtain a lowest price combination voucher value, the result is not representative of any single vendor. When the single lowest item prices are summed for each voucher type, the resulting composite minimum full redemption voucher value is likely an artifact of individual vendor pricing strategies.

The methodology is also not reflective of actual WIC participant shopping patterns. WIC participants are not price sensitive.[10] Participants rarely redeem all of their FIs for only least cost items. Participants also do not redeem each of their FIs at the lowest cost vendor for each item on each FI, which would also be impossible given the variety of food items within combination FIs. Yet the proposed methodology only considers FIs partially redeemed if they were redeemed for less than the shelf prices represented in these shopping patterns.

[10] The California Women, Infants and Children (WIC) Program, Analysis of Cost-Containment Strategies and Recommendations for Improved Program Efficiency, Richard J. Sexton and Tina L. Saitone, Agricultural and Resource Economics Department, University of California, Davis, page v.

Any methodology used by the Department must actually eliminate a large majority of partial redemptions from the calculation of the Statewide Average. The proposed methodology will not. Any partial redemption elimination methodology must either recognize that the proposed peer groups and sub-groups include a wide range of business models, and therefore require an analysis of shelf-prices and the determination of partial redemption at the individual vendor level, or the methodology must provide for some mechanism to normalize individual redemptions to account for the variety of vendor business models. Most importantly, any calculation of partial redemptions should be based on what participants actually purchase with their FIs, not what is the least cost item reported in a shelf price survey by any Peer Group B and C vendor in the State.

UC Davis Methodology

We know that eventually EBT will be implemented and will solve the issue of partial redemptions. Any process put in place now is an interim approach until EBT is implemented. That argues even more strongly against any approach that is cumbersome or that requires extensive administrative and data processing changes. In our estimation, the best approach, realizing the imprecision noted above, is one that is based on data, is not overly complex, does not burden the State staff, is reasonable to all parties, and is manageable.

Ideally, partial redemptions would be completely excluded. However, as the UC Davis study points out, this is impractical at this time. The UC Davis study reviews two options, one of which excludes the lowest 10% of redemptions.[11] We urge the Department to adopt this option in its new vendor cost containment plan. We believe

[11] According to UC Davis, "[t]he largest differences between trimmed and untrimmed means occur in our view due to partial redemptions for combinations FIs which are in the untrimmed dtata but are removed, to some extent when the lowest 10 percent of redemptions are eliminated." *UC Davis report on Saitone-Sexton Proposal for Maximum Allowable Department Reimbursement (MADR) Rate Construction for New Vendor Peer Groups*, page 2.

that the large differences in vendor business models, pricing strategies, and the variation in individual products included in the combination food instruments justify the exclusion of the lowest 10% of redemptions. This simple, manageable approach was suggested after an exhaustive analysis of redemption data patterns – it is based on empirical data. Regarding the 'tests' suggested above, it is simple to manage, covers all food instruments and more accurately identifies partial redemptions. Though we assert it does not capture all partial redemptions, the UC Davis methodology is far more reasonable than the methodology proposed. According to UC Davis "…we have considered other more complex rules for identifying partial redemptions, and do not think there is an alternative that will work better as long as the combination FI contain as much heterogeneity as they presently do."[12]

There is also an issue of simple fairness. CDPH is proposing to use a method to identify partial redemptions that will most certainly not capture the majority of partially redeemed FIs. At the same time, CDPH has significantly reduced the tolerance in setting the MADRs for redemptions that will be used to calculate the Statewide Average that is the MADR for A-50 vendors. However, imprecise methodologies call for larger, not smaller, tolerances to compensate for the larger errors that will result from imprecise methods. A truly fair system would recognize and more fully compensate for the resulting downward bias that has been empirically identified by the UC Davis economists.

The Nutritional Grocers Association of California requests that CDPH revise its proposed partial redemption methodology to incorporate the recommended methodology from UC Davis. In short, CDPH has accepted all of the recommendations from UC Davis as to peer grouping and reimbursement rates. We are at a loss as to why the Department has not also accepted their recommendation on partial redemption methodology.

[12] *The California Women, Infants and Children (WIC) Program, Analysis of Cost-Containment Strategies and recommendations for Improved Program Efficiency*, Professor Richard J. Sexton and Post-Doctoral Scholar Tina L. Saitone, University of California Davis (2012), page 114.

We understand that Federal regulations set forth in 7 C.F.R. section 246.12(g)(4)(i)(D) allow states to "exclude partially-redeemed food instruments based on an empirical methodology approved by FNS." A system that arbitrarily excludes a certain percentage of redemptions would not be based on empirical data. But the UC Davis fixed percentage proposal is not arbitrary, but in fact based on empirical data:

> *"The strategy we undertook in advising the Program regarding identification of partial redemptions was to utilize the small (1-4 register) vendor surveys and the computations we made of the least-cost way to fully redeem the leading FIs for each vendor surveyed. [footnote omitted]. We then identified partial redemptions for each of the surveyed vendors as all redemptions of a FI for that vendor in the ISIS database for which the requested redemption value of the FI was less than the value of the least-cost bundle for that FI. [footnote omitted]"*[13]

An empirical methodology requires only that actual data be used in the formulation of the methodology, and not be arbitrary. UC Davis used actual shelf price data and redemption data to validate their recommendation and it is not arbitrary.

Excluding outliers is consistent with guidance USDA has issued to States in creating methodologies for excluding partial redemptions in determining infant formula rebates. This guidance states in part:

> *"Over the past several years we have worked with a number of State agencies that have developed procedures to more accurately estimate the number of units of contract infant formula being purchased. In preparation for providing this guidance, we also sought input from the National WIC Association (NWA) and infant formula manufacturers. Specifically, we requested information on procedures and/or best practices in State agencies that provide a reasonable estimate of contract brand infant formula purchases.*
> *We acknowledge that it is not realistic to assume that only one methodology exists and/or is appropriate for all State agencies to use when determining a reasonable estimate of the number of units of contract brand infant formula sold to WIC participants. Nevertheless, State agencies should develop a methodology based on their own capabilities and <u>mutually agreed upon by all parties</u>."*[14] *(emphasis added).*

[13] UC Davis, page 110.

[14] USDA Memorandum, *Guidance for WIC Policy Memorandum number 2004-04: Implementation of the Infant Formula Cost-Containment Provisions of P.L. 108-265 – Rebate Invoices*, August 1, 2005.

This guidance on infant formula partial redemption methodologies provides States considerable latitude to develop systems for identifying and excluding partial redemptions. Recognizing the complexity of the problem, the guidance also provides for a lower standard – a 'reasonable estimate' of infant formula FIs that have been partially redeemed is all that is necessary. The guidance also provides that any methodology a State agency adopts should be done in consultation with infant formula companies, and also by mutual agreement. There is no reason why these same guiding principles should not also be applied to any State's creation of partial redemption methodologies for WIC authorized retail food vendors.

Conclusion

NGAC urges the Department to adopt the partial redemption methodology recommended by its consultants.

Should the Department not pursue the UC Davis methodology, NGAC offers the following comments and recommendations on the Department's current proposals.

60300 Proposed Partial Redemption Methodology

60300(c) "The Department will remove partially-redeemed food instruments (FIs) when calculating the Statewide Average for food items numbers 6000, 6003, and 6107"

Comment: Identifying and removing partial redemptions for these three vouchers will only remove a small fraction of the partial redemptions that impact the Statewide Average. Our redemption data reflect that these three FIs represent approximately 16.5% of all redemption dollars. Accordingly, only removing partial redemptions on these three FIs will have very little impact on the statewide average and corresponding A-50 MADRs.

Recommendation: Partial redemptions should be calculated for all FIs of relative significance. The reason for excluding partial redemptions from the calculation of the Statewide Average is to more accurately reflect actual prices for supplemental foods.[15] There is no reason to exclude partial redemptions for any food instrument unless the redemptions of that FI are insignificant. NGAC respectfully requests that the Department identify and exclude partial redemptions for all FIs that represent at least 0.1% of total dollars redeemed.

60300(c)(1) Minimum Full Redemption Value

Comment: The proposed partial redemption methodology seeks to identify a "minimum full redemption amount" (MFRV), below which a FI is considered partially redeemed. To establish the MFRV, shelf prices of items in specified FIs 6000, 6003, 6107 are

[15] CDPH Regulatory Alert 2013-03, Attachment 2 Vendor Reimbursement System and Statement of Reasons, December 13, 2013, 60300(c), page 24.

collected from all Peer Group B and C vendors. From shelf prices collected, a single lowest observed item price is determined. NGAC objects to this MFRV calculation for multiple reasons.

Objection #1: The NGAC has further concerns with calculating the MFRV across all Peer Group B and C vendors. Because the lowest observed price is that of a single vendor, it cannot be considered representative of all applicable vendors' lowest item price. Pricing strategies vary from vendor to vendor, resulting in a mix of higher and lower priced items for a range of foods. For an individual vendor, the sale of higher volume, lower margin foods may be offset by lower volume, higher margin foods – a pricing strategy that generates low-price image for many but not all food items. As a result, the single lowest observed item price may be the outcome of an individual vendor's pricing strategy and not typical of a market-based price charged by other vendors. When combined with other single lowest observed item prices to obtain a lowest price combination voucher value, the result is not representative of any single vendor. When the single lowest item prices are summed for each voucher type, the resulting composite MFRV is an artifact of individual vendor pricing strategies.

Recommendation (MFRV by vendor): The MFRV should be computed for each vendor rather than across all vendors in Peer Groups B and C. Analysis conducted by UC Davis (Sexton and Saitone) examined partial redemption rates of 1-4 register vendors (excluding A-50 vendors). For each vendor in the survey, they calculated the minimum full redemption voucher value (lowest possible voucher redemption value) based on the lowest item shelf prices of each individual vendor. NGAC believes that the UC Davis approach of calculating a MFRV by vendor provides a more accurate method for identifying partial redemptions.

Objection #2: The methodology is also not reflective of actual WIC participant shopping patterns. According to UC Davis:

> *"Cost containment concerns are most paramount for foods procured through FI with a retail delivery system because when program participants obtain the prescribed supplemental foods at no cost, they lack incentive to be cost*

conscious in making their purchases. This means, other factors constant, that participants lack incentive to shop at vendors offering the lowest prices for the FI and, moreover, when FI allow the purchase of different products, package sizes, and brands, as is often the case, participants have no incentive to seek the best value among the available brands."[16]

Yet the proposed methodology only considers FIs partially redeemed if they were redeemed in the manner represented in these shopping patterns.

Objection #3: The MFRV based on least cost price is an unreasonable standard because there simply is too much variability inherent in combination FIs. For most FIs participant choices can be a significant contributor to the redemption value.[17] The range of choices provided on combination FI's among types of whole grains, cheeses, breakfast cereals, juices, etc., create considerable dispersion in redemption values for FIs containing these items.[18] There are several choices in the redemption of combination food instruments that magnify this variability:

1. Choosing between product groupings (brown rice or whole wheat bread; shelf stable juice or frozen juice)
2. Choosing between brands (national brand cereal or private label cereal)
3. Choosing product sizes (three 12 oz boxes of cereal or two 18 oz boxes of cereal)

The following are some specific examples.

Quart of Milk. There are several combination FIs that are issued in large quantities (FIs #6013, and #6014) for which all shelf prices for items included in the FI are collected except for a single quart of milk. The Department appears to be aware that the one-quart size of milk is not carried by a large number of vendors, since it was

[16] *The California Women, Infants and Children (WIC) Program, Analysis of Cost-Containment Strategies and recommendations for Improved Program Efficiency*, Professor Richard J. Sexton and Post-Doctoral Scholar Tina L. Saitone, University of California Davis (2012), page 16.
[17] Id., p. 57.
[18] Id., p. 97.

dropped from the minimum stocking requirement. Among A-50 vendors, FIs containing a quart of milk represent approximately 14 percent of total redemptions. These are some of the most commonly issued FIs and include four different items and therefore are likely to be partially redeemed in large numbers. Unfortunately, however, all FIs that contain a quart of milk are not eligible for the Department's proposed partial redemption methodology because the quart of milk is not one of the food items subject to the current shelf price survey.

Recommendations. As a means to include FIs containing a quart of milk for partial redemption adjustment, the Department should either set the price of 1 qt of milk to zero (because it is not on the shelf-price survey) or collect a shelf-price estimate from a small sample of stores. Another option is to purchase a representative sample of prices from proprietary sources such as IRI and Nielsen. While setting the price to zero may not be preferable to collecting shelf prices, it will accurately identify more partial redemptions than otherwise.

Cereals. It is not very often that WIC participants redeem their FIs for all 36oz of the least expensive WIC authorized cereal brands. This is supported by actual redemption data. The most expensive cereals on the California Program are Post Honey Bunches of Oats and MultiGrain Cheerios. These cereals account for roughly half of all WIC cereals. They typically have a retail price of between $4-5.50. But this methodology would set the minimum in the cereal category based on a low volume box of cereal that could be priced as low as $3, which are common on some of the WIC authorized cereals that are subject to the shelf price survey.

Recommendations. The Department should survey only the most popular cereals instead of the least expensive. This would be representative of shopping patterns and provide a more accurate price, one that is reflective of the pricing on FIs containing cereal.

Whole Grains. Calculation of the MFRV based on the reported least cost price per item is also a problem in multiple item food instruments where there is a large disparity in pricing amongst certain types of food items in the same category. Whole grains are an example. The current shelf price survey requires submittal of prices on two products in this category (whole wheat bread and corn tortillas). There are very few suppliers of the 16oz loaf of whole wheat bread. The typical retail price for a loaf of whole wheat bread is around $4. But in a recent price survey we found WIC authorized corn tortillas priced at .99 cents at a couple of authorized WIC vendors in Los Angeles. Therefore .99 cents would be the MFRV based on the lowest reported shelf prices of food instruments containing whole grains.

Recommendations. Like the former FIs containing both peanut butter and beans, the Department should split into two the FIs containing whole grains. One FI would contain tortillas, brown rice, and oatmeal, since they are somewhat similarly priced. The other FI would contain whole wheat bread.

NGAC Recommended Methodologies for calculating the Minimum Full Redemption Value (MFRV)

The Department has proposed to calculate the Minimum Full Redemption Value by identifying the lowest reported shelf price of each individual market basket food item included in the food item number.[19] It appears, however, that the Department is considering other methodologies to calculate the MFRV: "The Department shall identify the minimum full redemption value for each food item number in one of three ways…"[20] (emphasis added). We have expressed our concerns above about this methodology and propose that, if the Department does not implement the UC Davis proposal, it consider the following "three ways": (a) use the lowest of the high prices reported on shelf price survey food item; (b) an average of the high and lowest prices reported on

[19] CDPH Regulatory Alert 2013-03, section 60300(c)(1)(A), page 15 of 17.
[20] CDPH Regulatory Alert 2013-03, section 60300(c)(1), page 15 of 17

shelf price survey food items by vendor; or (c) the use of IRI or Nielsen price data to obtain the average sale price of individual WIC authorized foods.

(a) Lowest of the high reported shelf price survey food items

This methodology is based on the lowest prices per food instrument type of the highest prices reported by each vendor or peer group. USDA should have no objection to this methodology since we understand that it was previously approved in Kentucky.

(b) Average of the high and lowest prices reported on shelf price survey food items per vendor.

USDA and the State should have no objections to this methodology since it is based on empirical data and already approved for use in California for other purposes. There is no reason why partial redemptions can't be based on vendor specific data as opposed to a peer group. Administratively, this procedure should be no more burdensome since the State is already collecting shelf prices from every vendor in the State. Use of average prices is also consistent with the substitute CARV method at section 60300 (b)(3)(A), which calls for "averaging the sum of the average prices of the foods included on the food instrument for all vendors in a peer group.", based on the most recent collection of shelf prices. In fact, California is or will be already calculating this average for each vendor. Pursuant to its last regulations published in September, in order to determine cost competitiveness, "The Department shall determine the average of the highest and lowest prices of the individual Market Basket items…"[21] NGAC believes this is a viable option and will also have the benefit of having minimal impact on State technical resources since the methodology is already in place.

(c) Use IRI or Nielsen price data to obtain the average sale price of individual WIC authorized foods.

The proposed regulations already contemplate the use of this data in section 60300 (b)(3)(C). Use of this data would be a reasonable estimate of average shelf prices for

[21] CDPH Regulatory Alert 2013-01, section 70600(d)(1)(A).

all WIC approved products and would avoid the necessity of expanding the shelf price survey to cover more items, or to collect shelf price survey data more often.

60300(c) Shelf Price Surveys

Comment: The regulation proposes to limit the identification and exclusion of partial redemptions to three food instruments because only these three FIs will contain reported shelf prices for all the available food items on the FI. However, the shelf price survey is largely automated so expanding the shelf price survey to accommodate all food items on the majority of FIs of relative significance should not be overly burdensome.

Recommendation: If the Department chooses not to implement the UC Davis recommended partial redemption methodology, NGAC recommends that additional food items be added to the survey of shelf prices to allow adjustment for partial redemption for the remaining non-unit priced vouchers. These additional items added to the shelf-price survey do not need to be utilized in the cost competitiveness market basket calculations; they would be used only for the partial redemption exclusion methodology. To the 12 food items currently surveyed, an additional 8 foods should be added: 1) Milk (whole and lower fat) – 1 quart; 2) Baby Food – Fruits/Vegetables (4.0oz and 3.5oz); 3) Baby Food – Meat; and 4) Bananas (4); 5) Milk – Lactose Free – Half Gallon; 6) SOY milk – 1 Gallon and 1 Quart; 7) Tofu – 14oz to 16oz; and 8) Canned Fish – 30oz. This modest expansion of the shelf price survey would allow almost all non-unit priced food instruments to be adjusted for partial redemption. The cost to vendors and the Department for adding these items should be minimal, given that a web based system to collect shelf prices is already in place.

60300(c)(1) Semi-annual shelf price collection

Comment: The regulation proposes to only update the partial redemption rates every six months because vendors will only be submitting shelf price survey information twice

a year but the Department's adjustment of the MADRs will take place every four weeks. The Department has recognized that there is volatility in food pricing and that MADRs should be adjusted every four weeks to accommodate for these price fluctuations. This same rationale should apply to partial redemption calculations since they are also dependent on fluctuating shelf prices.

Recommendation: If the Department chooses not to implement the UC Davis recommended partial redemption methodology, then the partial redemption methodology should be updated every four weeks with current shelf price data in order for the calculation to be current and accurate and aligned with the MADR updates.

Process for Including Additional FIs for Partial Redemptions

Comment. The proposed regulations do not provide for future changes to FI specifications and corresponding partial redemption adjustment processes.

Recommendation. To accommodate the changing specifications of food instruments and the need for additional shelf price data, the proposed rule regarding the scope of partial redemption adjustment should be rewritten to specify a general process by which FIs are included in the partial redemption adjustment process in place of listing specific FIs. This change will also place into regulations the Department's commitment to applying the partial redemption adjustment process as broadly as possible. The Statement of Reasons (60300) includes a clear set of criteria that should be substituted into the proposed regulations. This will allow the partial redemption adjustment process to be applied to additional FIs as the items for which specific shelf-prices are collected changes, as well as if changes in foods included in FIs occurs. This will eliminate the need to modify this portion of the regulations due to small operational changes.

Verification of Shelf Price Data

Comment: The existing shelf-price collection regulation does not include any process to verify that all prices submitted are valid and free of error. The lack of verification undermines the use of a single lowest observed item price in the calculation of the "minimum full redemption value" when the single lowest item price may be erroneous. Errors by individual vendors when submitting any one shelf price are unlikely to have a significant impact on the calculation of price competitiveness. However, a single erroneous item food price submitted by a vendor and used in the partial redemption exclusion process can have a significant impact on the minimum full redemption voucher values, and the number of partially redeemed vouchers in the Statewide Average calculation.

Recommendation: To ensure collected shelf-prices are valid and free of error, those used in the determination of a minimum full redemption voucher value should be verified by Department staff or LVLs through direct observation.

II. 2013-03 DEFINITIONS

Reference: Article 3. Reimbursement System for Vendors
60000 (9)(A)&(B) Statewide Average

Comment: Item (9), A of this section defines the Statewide Average calculation of unit-priced vouchers as the sum of all vouchers redeemed for the same authorized food divided by the total quantity of units redeemed by Peer Group B and C vendors. This method assumes that the actual number of items specified by the FI are redeemed by the participant. Most unit-priced redemptions are infant formula. These FIs consist of differing numbers of items of the same package size. Although participants are required to obtain all of the specific number of infant formula units prescribed, both prior research and the language contained in the Infant Formula Rebate contract regarding accounting of units sold for the purpose of establishing dollar rebate amounts indicate such FIs (both unit and non-unit priced) are often less than fully redeemed[22]. As a result, the method defined in Item (9)A for calculating the Statewide Average for unit-priced FIs underestimates their true voucher cost had they been fully redeemed. The MADR rates applied to A-50 vendors based on the resulting Statewide average are likewise underestimated when vouchers are not fully redeemed.

Recommendation: Multi unit Infant Formula FIs, as well as any multi-unit FIs for food items included in future rebate contracts, should be included in the partial redemption adjustment process. While vendors are required to redeem these FIs for the full number of units specified, the Department recognizes that partial redemptions exist, as

[22]A 2013 USDA study reviewed the rate of partial redemptions in 40 WIC State Agencies, three of which prohibit partial buys when purchasing traditional food items (both unit priced and non-unit priced food instruments). The study found that 36% of vendors nevertheless allowed the partial buy to happen. USDA WIC Vendor Management Study Final Report (2013), page 24.
http://www.fns.usda.gov/sites/default/files/2013WICVendor.pdf

evidenced by the current rebate contract between the California WIC Program and Mead Johnson, which specifies a methodology for identifying and excluding from a rebate any cans of infant formula that were not purchased. Infant formula is a high volume, low margin product and as such it is particularly important that it be included in the partial redemption adjustment process.

Language Recommendation: 60000 (a)(9)(A):

For Unit-Priced Food Instruments: The Statewide Average shall be calculated as a dollar sum of all redemptions across all food instruments for the same supplemental food divided by the quantity of units redeemed by Peer Group Category B and C vendors, rounded up to the nearest one cent. *This calculation shall exclude food instruments that were redeemed for less than the full number of units specified on the food instrument as determined through the partial redemption removal process in 60300(c).* (proposed language change/addition in italics).

Comment: Item (9), B: The method of calculating the Statewide Average for non-unit priced vouchers (the sum of all Peer Group B and C dollar redemptions divided by their total number of food instruments redeemed) again assumes all items specified by a non-unit priced voucher are fully redeemed. This assumption is highly unlikely, however. The greater mix of supplemental foods contained in the combination type vouchers increases the potential for their partial redemption. Even though there are over 150 food instruments used in California, the proposed rule limits food instruments eligible for partial redemption adjustment to three multiple food item food instruments (6000, 6003 and 6107). These three food instruments account for less than 16.5% of all food instrument dollar redemptions. As a result, the proposed regulations provide for much less than a full accounting of partial redemptions among non-unit priced food instruments. The assumption of full redemption in the proposed calculation method results in an underestimation of the Statewide average for non-unit priced vouchers, and unfairly penalizes A-50 vendors that aim to ensure that WIC participants obtain all items specified by food instruments because food instruments redeemed at A-50 stores are more likely to be fully redeemed.

Language Recommendation:

Language Recommendation: 60000 (a)(9)(B):

For Non-Unit Priced Food Instruments: The Statewide Average shall be calculated for each food item number as the sum of all redemptions of Peer Group Categories B and C divided by the number of food instruments redeemed by Peer Group Category B and C vendors, rounded up to the nearest cent. *This calculation shall exclude food instruments that were redeemed for less than the full quantity of items specified on the food instrument as determined through the partial redemption removal process in 60300(c).* (proposed language change/addition in italics).

III. GENERAL PROVISIONS

Reference: *Article 2. Peer Group Criteria, 50100 A-50 Peer Group/Category A*.

Comment: Referring to (1)B of that section, if a current A-50 vendor requests authorization of a new store, under Item 1 of (1)B, the new store authorization will be classified as an A-50 vendor, regardless of the type of store the owner wishes to authorize. We believe this provision sets a double standard for A-50 vendors. For example, some NGAC members operate both A-50 stores and supermarkets. Under the proposed regulations, if an A-50 owner opened a new supermarket, it would be placed in Peer Group A for up to 6 months following initial authorization if the vendor fails to be exempt from the test in section 50100(a)(1)(B)1. NGAC is of the opinion that this provision unfairly discriminates against owners/operators of A-50 stores. Each store outlet should be judged on its own merits.

Recommendation: NGAC proposes that Item 1 of (1)B be removed from Peer Group A authorization criteria. As a result, the same rules that govern authorization of new stores by non-A-50 owners will apply.

Reference: *60300 Rules for Calculating the Maximum Allowable Department Reimbursement Rate, Item (b), 3(C)*

Comment: This section describes rules for manual adjustment of the MADR rate to accommodate "extreme fluctuations in wholesale food prices". The rule does not specify the situations that may cause this authority to be invoked. The NGAC has long recognized the need for such adjustments because some price increases can be anticipated and take effect on a schedule yet are not reflected in the MADR's for months. Thus, we support this provision but think it needs to be modified.

Recommendation: The proposed regulations should be strengthened by including a definition of "extreme fluctuations", as well as how the manual adjustment will take

place. The regulation should also account for wholesale price fluctuations in infant formula. Because contracted infant formula is subject to a rebate, vendors are only permitted to redeem infant formula FIs for the specified brand. Substitutions are not permitted. In California, over 2/3rds of all infant formula purchased in the State is through the WIC Program. It is therefore only appropriate that the WIC Program raise the MADRs at the same time that the manufacturers of these infant formulas raise their wholesale price. This practice would also be more closely aligned with the current State's infant formula contract, which requires that any wholesale price increase be immediately (and possibly retroactively) factored into the State's rebate calculation. The same consideration should be given to vendors. In addition, if any other products become subject to negotiated pricing with the suppliers the way that formula is, price increases for those products should also be manually reflected into MADR's at the time the price changes rather than waiting for the prices to cycle through the calculation process.

From: Randy De Bates
To: WICRegulations
Subject: Invoices
Date: Thursday, January 23, 2014 2:19:09 PM

Hello, How long do vendors need to keep invoices on site? Can they be electronically stored at headquarters then faxed when needed?

Randy DeBates, Purchasing Manager / C. W. Brower, Inc. Wholesale Grocer / 413 South Riverside Dr. Modesto, CA 95354 / Phone 209-523-1828 x-118 / Fax 209-523-9305