

Commonwealth of Pennsylvania



DEPARTMENT OF HEALTH

HARRISBURG

August 15, 2008

THE SECRETARY

The Honorable Edwin B. Erickson
Majority Chairperson
Senate Public Health and Welfare Committee
281 Main Capitol Building
Harrisburg, PA 17120-3026

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

Dear Senator Erickson:

Enclosed are proposed regulations for review by your Committee in accordance with the Regulatory Review Act (71 P.S. §§745.1-745.15). The regulations which the Department proposes to revise govern the authorization and management of retail grocery stores in the WIC Program, and set forth procedures for administrative appeals of WIC applicants and participants, local agencies and retail grocery stores. These proposed revisions remove the requirement that WIC checks be redeemed at a specific store as previously selected by the WIC participant, and prohibit the authorization of any new WIC-Only stores, which are referred to as “above-50-percent-stores.” The proposed revisions also provide for WIC Program cost containment measures required by changes to federal law governing WIC. The Department proposes to classify stores in “peer groups” and provide competitive price criteria for authorization of stores in the WIC Program. The proposed regulations would also require stores seeking new authorization to maintain certain minimum information technology requirements.

Section 5(d) of the Regulatory Review Act, 71 P.S. §745.5(d), provides that the Committee may, at any time prior to the submittal of the regulation in final form, convey to the proposing agency and the Independent Regulatory Review Commission its comments, recommendations and objections to the proposed regulations and provide the agency with any pertinent staff reports. The Department expects the regulations to be published on August 30, 2008. A 30-day comment period is provided.

Section 5.1(a) of the Regulatory Review Act, 71 P.S. §745.5a(a), provides that upon completion of the agency's review of comments, the agency shall submit to the Committee a copy of the agency's response to the comments received, the names and addresses of the commentators who have requested additional information relating to the final-form regulations, and the text of the final-form regulations which the agency intends to adopt.

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

Sincerely,



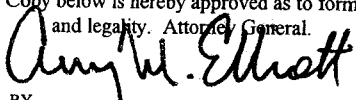

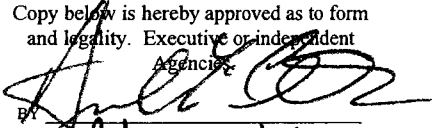
Calvin B. Johnson, M.D., M.P.H.
Secretary of Health

Enclosures

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

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

NOTICE OF PROPOSED RULEMAKING

TITLE 28. HEALTH AND SAFETY

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

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

Notice is hereby given that the Department of Health (Department), Bureau of Family Health, Division of WIC (WIC Program), proposes to amend 28 Pa. Code Chapters 1101, 1103, 1105, 1107 and 1113. 28 Pa. Code Chapters 1101 – 1113 govern the authorization and management of stores participating in the Special Supplemental Nutrition for Women, Infants and Children (WIC) Program.

Without some of these proposed revisions, the United States Department of Agriculture, Food Nutrition Services (USDA-FNS) may withhold funding to the WIC Program. If federal funding is interrupted, the Department would likely need to suspend or eliminate the WIC Program, having a significant negative impact on the health and welfare of WIC eligible women, infants and children. Loss or even suspension of federal funding for the WIC Program would render it inoperable, as 100% of the WIC Program's funds are federal funds, or would place a difficult, if not impossible, financial burden on the Commonwealth, should the Commonwealth continue to operate the WIC Program with State funds. The WIC Program serves approximately 245,000 families and individuals, and is a high profile benefits program not only in the Commonwealth, but also around the country. An interruption in the funding of the WIC Program would affect the receipt of necessary food benefits for the participants of the WIC Program, the retail grocery business and the employment of personnel at twenty-four local WIC agencies.

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

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

A. *Summary of Amendments*

Section 1101.2. Definitions.

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

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

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

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

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

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

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

As stated above, above-50-percent-stores are typically referred to as WIC-Only stores. WIC-Only stores generally sell only WIC foods, serve only WIC participants, and charge significantly higher prices for WIC foods than typical grocery stores. In turn, these higher prices result in a higher cost for the WIC program, which could result in a reduction in the number of WIC checks

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

The Department proposes to define “peer group” as the classification of an authorized store pursuant to the store peer group system, as determined by the criteria selected by the Department. The term “store peer group system” is proposed to be defined as a classification of authorized stores into groups based on common characteristics or criteria that affect food prices, for the purposes of applying appropriate competitive pricing criteria to stores at authorization and reauthorization and limiting payment for foods to competitive levels. Both of these proposed terms and definitions will allow the Department to implement federally mandated cost containment measures.

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

Section 1103.1. Authorization and reauthorization process and requirements.

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

The proposed subsections (b)(5) and (c)(2) provide that the Department may request from a store seeking authorization or reauthorization any information the Department deems necessary to determine whether the store will derive or is deriving more than 50% of its annual food items sales revenue from the sale of food items for WIC checks. This information may include, but is not limited to, official State and Federal Income Tax Filings, Official State Sales Tax records, inventory purchase records, sales records and/or a self-declaration from the applicant. Amendments to the federal regulations governing the WIC Program and appropriating the funding to the WIC Program necessitate these, and other similar revisions to the Pennsylvania WIC regulations. *See* Child Nutrition and WIC Reauthorization Act, Pub. Law 108-265, §203(e)(10), 118 Stat. 729 at 776-779 (2004)(codified at 42 U.S.C. §1786(h)(11)); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2833 and 2850 §780 (2005 Appropriations Act); *and*, Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-97, 119 Stat. 2120, 2144 and 2163 §787 (2006 Appropriations Act). The Department published a notice of its intent to implement some of these federal mandates in the Pennsylvania Bulletin. *See*, 35 Pa.B. 77 (January 1, 2005).

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

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

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

Section 1103.4. Selection criteria for authorization and reauthorization.

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

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

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

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

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

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

Section 1103.8. Store peer group system.

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

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

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

Section 1105.1. Training.

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

Section 1105.2. Price adjustment.

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

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