

# RULES AND REGULATIONS

## Title 28—HEALTH AND SAFETY

### DEPARTMENT OF HEALTH

[28 PA. CODE CHS. 1101, 1103, 1105, 1107  
AND 1113]

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

##### A. *Scope and Purpose*

The Department of Health (Department) adopts amendments to Part VIII (relating to Supplemental Nutrition Program for Women, Infants and Children (WIC Program)) to read as set forth in Annex A. This rulemaking amends Chapters 1101, 1103, 1105, 1107 and 1113, which govern the authorization and management of grocery stores participating in the Department of Health's Special Supplemental Nutrition Program for Women, Infants and Children (WIC Program) and the procedures for administrative appeals of WIC applicants and participants, and local agencies and grocery stores.

The majority of the changes to the Department's regulations are necessitated by recent amendments to the Federal regulations governing the WIC Program found in 7 CFR Part 246 (relating to Special Supplemental Nutrition Program for Women, Infants and Children). The Women, Infants and Children/Food Stamp Program (FSP) Vendor Disqualification Final Rule adopted on March 18, 1999, mandates uniform sanctions for the most serious violations of WIC Program Federal regulations by grocery stores authorized to participate in the WIC Program. The purpose of the Federal amendments, as explained in the preamble to those regulations, is to curb vendor-related fraud and abuse in the WIC Program and to promote coordination between the WIC Program and the Food Stamp Program in the disqualification of stores that violate either WIC Program or Food Stamp Program rules. These regulations reflect the Department's implementation of those changes, as well as several other changes agreed upon after meetings with stakeholders.

##### B. *Comments*

Notice of proposed rulemaking was published at 30 Pa.B. 873 (February 19, 2000) with an invitation to submit written comments. In addition to the notice published in the *Pennsylvania Bulletin*, the Department sent personal notice of the proposed rulemaking by letter dated February 18, 2000, to approximately 1,400 grocery stores which were authorized to participate in the WIC Program.

The Department received no comments within the 30-day comment period.

After the comment period, the Department received comments from the Independent Regulatory Review Commission (IRRC). The Department also received a letter from Senator Vincent Hughes. Although not received within the public comment period, the Department will address the comments expressed by Senator Hughes.

The WIC Program was authorized through an amendment to the Child Nutrition Act of 1966 (42 U.S.C.A. § 1786). Congress authorized the United States Department of Agriculture, Food and Nutrition Services (USDA-

FNS), to contract with and make funds available to states to administer the program. In this Commonwealth, the WIC Program receives 100% of its funding from the USDA-FNS. The WIC Program is governed by Federal regulations found in 7 CFR Part 246. The Federal regulations require all aspects of program operation to be included in an annual State Plan of Operations which must be reviewed and approved by the USDA-FNS prior to a state's receipt of funding. See 7 CFR 246.4 (relating to State plan). Because the Department's regulations relate to the operation of the WIC Program under its delegation of authority from the USDA-FNS to operate the WIC Program, the Department was required to submit the proposed regulations to the USDA-FNS for review and approval as an amendment to the State Plan of Operations. See 7 CFR 246.4(c). The Department submitted the regulations to the USDA-FNS. The USDA-FNS notified the Department by letter dated February 25, 2000, that it found the proposed regulations to be in accordance with the WIC Program/Food Stamp Program Vendor Disqualification Final Rule.

Following is a discussion of amendments to the regulations, the comments received by the Department and the Department's response to the comments.

The Department received no comments on the proposed changes to §§ 1103.5, 1103.6, 1105.1, 1105.2, 1105.4 and 1113.2. The Department adopts as final the proposed changes to these sections.

##### *§ 1101.2. Definitions.*

The Department received no comments on this section, however, it has made two minor revisions to the definition of "store slot" for the purpose of clarification. The Department replaced the words "particular geographic" with the word "trade" to indicate that store slots are assigned to trade areas. The Department also added the words "in which the trade area is located" following the word "county" in the second sentence. This is to clarify that the Department's allocation of store slots is based upon the participant density of the specific county in which the store is located.

##### *§ 1103.1. Certification and recertification reviews.*

The Department received no comments from IRRC on this section. Senator Hughes did, however, comment on the procedure that the Department uses to certify or recertify stores seeking authorization. He expressed the opinion that the distinction between certification and recertification reviews set forth in § 1103.1, and monitoring reviews in § 1105.6 (relating to monitoring of WIC authorized stores), was illogical and invalid as a matter of law. Senator Hughes further commented that he had conducted an exhaustive review of relevant Federal regulations and that the regulations do not distinguish between periodic reviews and certification/recertification inspections. He commented that the regulations still fail to correct the problem cited by the Commonwealth Court in *Giant Food Stores v. Department of Health (Giant I)*, 554 A.2d 174 (Pa. Cmwlth. 1989).

In *Giant I*, the Commonwealth Court held that the finding of the hearing examiner upholding the Department's decision to terminate authorization of a store was not based upon substantial evidence. The decision was based upon the evidence before the Court at that time. In 1989, a store was authorized for a minimum period of 18 months up to a period of 2 years. In *Giant I*, the

Department conducted a recertification review at the store 14 months into the store's period of authorization. The store failed the review and the Department denied the store's application. The denial of the application was based upon failure to have minimum inventory standards available at the time of the review. The Court found that it was clear from the reading of the contract, that the store's authorization was valid for a period of 2 years (554 A.2d at 176) and that the violation upon which the denial of authorization was based, that is, a shortage of inventory, was such that it would warrant a warning during any other review. The court found that if a single product shortage was not sufficient to justify disqualification during a routine inspection, it was not sufficient to terminate a store from the WIC Program during a recertification inspection. The court determined that there was not substantial evidence upon the record before it to make such a distinction. Therefore, it reversed the Department's decision.

In response to this case, the Department revised its agreement with grocery stores to put a store on notice that its authorization was valid only until such time as the next certification/recertification review was conducted. The duration of certification was codified in the regulations the Department promulgated in 1999 in § 1103.1(c). A store's authorization to participate in the WIC program remains in effect only until such time as "... its application for recertification is denied or its certification expires if it fails to apply for certification." Under both Federal regulations, 7 CFR 246.12(f)(2)(xviii), and State regulations, § 1131.1 (relating to right to appeal), the expiration of a store's authorization is a nonappealable issue and there is no obligation of either party to renew the agreement, 7 CFR 246.12(f)(2)(xvi).

The certification/recertification reviews are the periodic review of vendor qualifications the State agencies are required to conduct under 7 CFR 246.12(g). The reviews are conducted to determine if stores meet the qualifications necessary to be authorized. The qualifications, called selection and limitation criteria, were established by the Department to further the purpose of the program by ensuring stores are able to meet the needs of participants going to the stores for WIC purchases. For instance, stores are required to maintain minimum inventory of WIC authorized foods to ensure that these foods are available to participants when making purchases. If the stores do not meet the qualifications, they are not authorized. To authorize a store which does not meet the qualifications the Department has established to serve the needs of the WIC participants would not further the purpose of the WIC Program. Section § 1103.1(f) specifically states that the Department, when making a decision on an application for certification or recertification, will deny the application if the criteria for certification or recertification set forth in § 1103.4(a) and (b) are not satisfied, and that there will be no warning or opportunity to correct problems identified during certification or recertification reviews.

In contrast to the certification/recertification reviews which are required by Federal regulation to be conducted at least once every 2 years, 7 CFR 246.12(g), the Department has also implemented a system to monitor stores which have been authorized to participate in the program. State agencies are required to monitor authorized stores under Federal regulation, 7 CFR 246.12(i). The system to monitor stores is set forth under § 1105.6 (relating to monitoring of WIC authorized stores). The purpose of the monitoring is to ensure that once a store has demonstrated that it meets the qualifications neces-

sary to be authorized, the store continues to comply with the program regulations. The purpose of monitoring reviews, as set forth in § 1105.6, is to determine compliance with applicable Federal and State regulations, and to investigate complaints regarding stores. Thus, the purpose of monitoring reviews and certification/recertification reviews are completely different and should be treated differently, regardless of the fact that some of the same factors may be used in conducting the reviews.

The decision issued in *Giant I* was issued 10 years prior to the publication of the regulations. The issue raised by Senator Hughes had been presented to the Department prior to its initial promulgation of the WIC regulations in 1999. The Department's regulations specifically correct the issue raised by the court in the *Giant I* case. The regulations clarify that there are different and distinct purposes for the types of reviews Senator Hughes commented on. The Department conducts certification/recertification reviews to determine whether or not a store meets the minimal qualifications necessary to be certified to participate in the WIC Program, while monitoring reviews determine whether a store is complying with regulations during a period of authorization.

In *Giant I*, as stated previously, the appellate court had no Department regulations before it to distinguish between the two types of reviews. Also, the record before the court did not reflect that the USDA-FNS construed its regulations to embrace such a distinction. Now, however, the USDA-FNS has approved of the regulatory scheme the Department uses for authorization of stores and found it to be in accordance with the authority the Department was delegated by Federal regulation.

Due to moving the criterion contained in § 1103.4(a) (13) to limitation criteria contained in § 1103.4(b) as discussed later herein, the Department citation that appears in subsection (b)(2) for determining whether a store slot is available is incorrect. The Department has revised the proposal to reflect the proper citation. Other than this revision, the Department has made no change to this section.

#### *§ 1103.2. Probationary certification.*

IRRC asked for clarification of a citation found in subsection (b)(2). IRRC commented that there appeared to be a typographical error in subsection (b)(2) in the cross reference to inadequate participant access. In the proposed rulemaking, § 1107.3(c)(8) was given as the cite for an explanation of inadequate participant access. The correct citation is § 1103.7(c)(8). The Department has revised the proposal to reflect the proper citation.

#### *§ 1103.3. Authorization of store slots.*

Subsection (b) provides that by October 1 of each year the Department will evaluate the WIC participant population to determine the store slot allocation per county for each Federal fiscal year. IRRC asked for an explanation of how the public and the industry will be notified of annual changes to store slots. Upon consideration of this comment, the Department added language to this section to state that the Department will publish the yearly allocations of stores slots in the *Pennsylvania Bulletin* no later than October 30 of each year, thereby providing notification to the public and industry.

#### *§ 1103.4. Selection and limitation criteria; authorization process.*

The Department received no comments on this section, however, it has made a revision for the purpose of clarification. An incorrect citation appears in subsection

(a)(2). The Department has replaced the reference to § 1107.1(i) with § 1107.2(j), the proper reference.

The Department had proposed to move the limitation criterion formerly contained in subsection (b)(2) to a selection criteria in subsection (a)(13). This criterion stated that the Department would not authorize a store if it was located within 1 mile of another WIC authorized store unless the Department determined that there was sufficient WIC participant shopping in order to support the authorization of an additional WIC authorized store. In the proposed rulemaking, the Department set forth a new three-tier method for defining "sufficient participant shopping." This method was based upon the proposed method for assigning store slots in § 1103.3 (relating to authorization of store slots). Upon further consideration, the Department has determined that the criterion which appears in the proposed regulations as subsection(a)(13), is, in fact, a limitation criterion. The Department uses this as a limitation criterion in addition to that contained in subsection (b)(1) which requires that a store slot be available in a trade area before authorization of a store. Notwithstanding the fact that a store slot may be open, if a store is located within 1 mile of another store and there is not a sufficient number of WIC participants making their purchases in this area, the store will not be authorized. The purpose of this criterion is to ensure an adequate distribution of WIC authorized stores in a trade area by limiting the authorization of stores to locations within a trade area where participants are shopping. The Department has moved the criterion to subsection (b)(2), and has revised the numbering in subsection (b) to reflect the change. The Department has made additional changes to subsection (c)(1) and (3) to reflect the move of this criterion from a selection criterion to a limitation criterion.

*§ 1103.7. Inadequate participant access.*

The Department received no comments on this section, however, it has made a revision for the purpose of clarification. In subsection (c)(2), the Department has deleted the words "according to" and replaced them with "in accordance with one of." The Department made this change so that the language used in subsection (b)(1), (2) and (3) is consistent.

*§ 1105.3. Terms and conditions of participation.*

In subsection (a), the Department has corrected the reference to section § 1107.1 (relating to imposition of sanctions).

*§ 1105.6. Monitoring of WIC authorized stores.*

In subsection (b)(1)(vi), (c)(6) and (d)(6), references are made to the "disqualification" of a store based upon violations of statutes and regulations governing the store's participation in the WIC Program detected during compliance investigations, routine reviews and training buys. Due to the changes in the proposed regulations which permit the Department to impose a civil money penalty in lieu of a disqualification if the Department determines that inadequate participant access would result if the store were to be disqualified, the Department has changed the language in these three subsections to reference sanctions under § 1107.1 (relating to imposition of sanctions). The section sets forth the procedure for the Department to use in determining the appropriate sanction to be imposed, whether it be a disqualification or a civil money penalty.

*§ 1107.1. Imposition of sanctions.*

The Department changed the language in proposed subsection (a) to provide that the Department may

choose, in certain circumstances, to not provide a store with a prior warning that program violations were occurring before imposing sanctions. The Department added the words "in the case of fraud, trafficking, sale of alcohol or alcoholic beverages or tobacco products, and other serious program violations or offenses" to set forth the circumstances that would guide the Department's determination that no prior warning should be given before imposing the sanction. This change is consistent with 7 CFR 246.12(k)(3) (relating to participant and vendor sanctions), and makes clear that providing a prior warning is an option for the Department only under certain circumstances. As stated in the preamble to the WIC/FSP Vendor Disqualification Final Rule:

The location of this provision (referring to § 246.12(k)(3)) in the final rule clarifies that it applies to both mandatory and State agency-established sanctions. The provision clearly makes the use of prior warning a State agency option. However, the prior warning cannot be provided for trafficking violations or "the sale of alcohol, alcoholic beverages or tobacco products" violation because these violations warrant a mandatory sanction for the first offense. Also, while prior warning for other violations may be acceptable for the first incidence, continual use of the warning, undermines the State agency's fraud and abuse investigation and prevention efforts. 64 FR 13314.

For clarification, the Department has added the word "inadequate" before the words "participant access" in the last sentence of subsection (a). This change promotes consistency with the language used throughout the regulations.

New subsections (b) and (c) both state "... the Department will give the store the option of paying a civil money penalty in lieu of ... disqualification..." The parallel portions of 7 CFR 246.12(f)(2)(xix) and (xx) provide "... the State agency shall impose a civil money penalty..." IRRC asked the Department to explain why the language in the proposed amendment differs from the language in the Federal regulation.

The Federal regulations are mandatory for the Department with respect to the options that it may use when imposing sanctions upon stores in certain circumstances. The Federal regulations direct that the Department must impose a civil money penalty in lieu of disqualification in instances of inadequate participant access. Nevertheless, subsections (b) and (c) are adopted as proposed and provide the option to the store to pay the civil money penalty in lieu of disqualification. This is because the WIC Program is a voluntary program in which vendors choose to participate. The Department can not require the store to pay the civil money penalty, and thus force the continued participation in the WIC Program by the store. The store may make a business decision that it will accept the disqualification for the specified period of time in lieu of payment of the civil money penalty. The USDA-FNS reviewed the proposed regulation and found it to be proper and in accordance with the Final Federal Vendor Disqualification Rule.

*§ 1107.1a. Disqualifications.*

Under subsection (d)(3), the Department added the language "on the premises at all times" to clarify that the store is responsible for always maintaining the minimum inventory required under § 1103.5 (relating to minimum inventory) on the premises. The additional language is consistent with the proposed regulations that permit the

store to maintain the inventory on the premises of the store, not the store shelves, as had been the previous requirement.

IRRC had two comments with respect to this section. First, IRRC commented that in subsection (d)(9), the phrase "or with another WIC check for purchases made with a WIC check" is unclear, and asked for clarification as to what circumstances the phrase addressed. This phrase addresses a situation in which a store's bank rejects a WIC check that the store improperly accepted and the store then attempts to have the WIC participant reimburse the store for the rejected check with another WIC check or with the participant's own money. No change was made to this proposal.

Secondly, IRRC asked for clarification as to proposed subsection (d)(14), which provides for a 1-year disqualification of a store which fails "to remit payment of an overcharge within the specified time frame." IRRC asked for clarification as to the time frame which the phrase "within the specified time frame" referred. To clarify this, the Department added references to §§ 1105.2(f) and (g) and 1105.6(f) (relating to overcharge recovery system; and monitoring of WIC authorized stores) which provides the specific time frames for which remittance is due.

Subsection (h) relates to disqualifications based on an FSP disqualification. The Department has added the words "WIC Program" in the last sentence of this subsection to clarify that it is the WIC Program disqualification as a result of a disqualification from the Food Stamp Program that is not subject to administrative or judicial review. The Department has deleted language in subsection (1), which is unnecessary.

#### *§ 1107.2. Civil money penalties.*

The Department received no comments on this section, however, it has made a revision for the purpose of clarification. Under subsection (b)(1), the Department removed the proposed language that would require civil money penalties for stores denied recertification to be calculated at 10% of the average monthly sales for the most recent 6-month period. For stores denied recertification for which the option of paying a civil money in lieu of the disqualification is available, the civil money penalty will be calculated on a 5% of the average monthly sales for the most recent 6-month period as set forth in subsection (b)(2).

IRRC noted an inconsistency between proposed subsection (b)(2) and the preamble to the proposed regulations. IRRC commented that proposed subsection (b)(2) begins "For disqualifications identified in § 1107.1a(d)(2)—(15) . . ." and the preamble identified this as § 1107.1a(d)(2)—(16). The citation was incorrect in the proposed regulations and is corrected to reflect the proper reference to § 1107.1a(d)(2)—(16).

In subsection (b)(2), the Department also removed the proposed words "the store shall pay" to clarify the sentence. These words were inadvertently added in the language of the proposed regulations and the removal of the language does not change the meaning of the subsection.

In subsection (f), the Department has clarified the example provided in the last sentence by explaining that an outstanding financial liability includes overcharges for the "sale of unauthorized foods" as opposed to "the unauthorized sale of foods." The word "unauthorized" has been deleted before the word "sale," then added after the word "sale" to make clear the intent.

#### *§ 1113.1. Right to appeal.*

The Department received no comments on this section, however, it has made a revision for the purpose of clarification. In subsection (b)(3), the Department has added the words "from the WIC Program" following the first word of the proposed subsection (b)(3) to clarify that a disqualification from the WIC Program as a result of a disqualification from the FSP is the disqualification that is non-appealable. This change is consistent with the Department's clarification made to § 1107.1a(h) set forth previously.

#### *C. Fiscal Impact*

The WIC Program is 100% Federally funded. No State dollars are involved in the operation of the WIC Program. The regulatory changes to § 1103.3 (relating to authorization of store slots) that change the method of allocating store slots based upon WIC population density has the potential for increasing by approximately 200 the number of stores authorized to participate in the WIC Program. As a result, the Department anticipates an increase of approximately \$96,000 annually in store-related monitoring costs.

#### *D. Paperwork Requirements*

The regulations will not increase paperwork for the WIC Program participants or those grocery stores voluntarily participating in the WIC Program. Except to the extent that 200 additional stores will be participating in the WIC Program, the regulations also will not increase paperwork for the Department.

#### *E. Effective Date/Sunset Date*

The regulations shall be effective upon publication. The Department will send approximately 1,400 grocery stores currently participating in the WIC Program direct notice of the final regulations upon publication.

These regulations will be monitored continually and will be updated as required by changes in Federal statute or Federal regulations governing the WIC Program. Therefore, no sunset date has been set.

#### *F. Statutory Authority*

The WIC Program was authorized through an amendment to the Child Nutrition Act of 1966 (42 U.S.C.A. § 1786). Congress authorized the USDA-FNS to contract with and make funds available to States to administer the program. In this Commonwealth, the WIC Program receives 100% of its funding from the USDA-FNS.

There are no state statutes governing the operation or administration of the WIC Program. There is a State statute found at 62 P. S. § 2951 which authorizes additional State funding for the expansion of the WIC Program. The Commonwealth, however, has not provided funding for the expansion of the program since State Fiscal Year 1996.

The existing State regulations were developed and published in the *Pennsylvania Bulletin* on July 24, 1999, following the decision of the Commonwealth Court in *Giant Food Stores, Inc. v. Commonwealth of Pennsylvania, Department of Health (Giant II)*, 713 A.2d 177(1998). *Giant II* held that the Department was required to promulgate regulations governing the selection and management of grocery stores to participate in the WIC Program. The State regulations added Part VIII. The regulations also repealed 28 Pa. Code §§ 8.41—8.74, the Department's then existing regulations pertaining to WIC Program administrative appeals.

The changes to the existing State regulations contained herein are submitted under the Department's general power and duty to protect the health of the people of the Commonwealth (71 P. S. § 532), and under *Giant II*.

G. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 9, 2000, the Department submitted a copy of a notice of proposed rulemaking, published at 30 Pa.B. 873 to IRRC and to the Chairperson of the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare.

In compliance with section 5.1(a) of the Regulatory Review Act (71 P. S. § 745.5a(a)), the Department submitted a copy of the final-form regulations to IRRC and the Committees on September 18, 2000. In addition, the Department provided IRRC and the Committees with a copy of a Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available upon request.

In preparing the final-form regulations, the Department has considered all comments it received. The USDA-FNS reviewed and approved these regulations on February 25, 2000.

This final-form regulation was deemed approved by the House Health and Human Services Committee and deemed approved by the Senate Public Health and Welfare Committee. IRRC met on October 19, 2000, and approved the final-form regulations in accordance with section 5.1(e) of the Regulatory Review Act.

H. *Contact Person*

Questions regarding these regulations may be submitted to Greg Landis, Chief, Grants and Retail Store Management Unit, WIC Program, Room 604, Health and Welfare Building, Harrisburg, PA 17109, (717) 783-1289. Persons with disabilities may submit questions in alternative formats such as by audio tape, braille or by using V/TT: (717) 783-6514 or the Pennsylvania AT&T Relay Service at (800) 654-5984 (TT).

Persons with disabilities who would like to obtain this document in an alternative format (such as, large print, audio tape, braille) should contact Greg Landis so that he may make the necessary arrangements.

I. *Findings*

The Department finds that:

(1) Public notice of intention to adopt the regulations adopted by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202), and regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and no comments were received.

(3) The adoption of regulations in the manner provided by this order is necessary and appropriate for the compliance with the Federal regulations governing the WIC Program.

J. *Order*

The Department, acting under the authorizing statute, orders that:

(a) The regulations of the Department, 28 Pa. Code Chapters 1101, 1103, 1105, 1107 and 1113, are amended by adding § 1107.1a and by amending §§ 1101.2,

1103.1—1103.7, 1105.1—1105.4, 1105.6, 1107.1, 1107.2, 1113.1 and 1113.2 to read as set forth in Annex A.

(2) The Secretary of Health shall submit this order and Annex A to the Office of General Counsel and Office of Attorney General for approval as required by law.

(3) The Secretary of Health shall submit this Order, Annex A and a Regulatory Analysis Form to IRRC, the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare for their review and action as required by law.

(4) The Secretary of Health shall certify this Order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(5) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

ROBERT S. ZIMMERMAN, Jr.,  
*Secretary*

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 30 Pa.B. 5807 (October 14, 2000).)*

**Fiscal Note:** Fiscal Note 10-161 remains valid for the final adoption of the subject regulations.

**Annex A**

**TITLE 28. HEALTH AND SAFETY**

**PART VIII. SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN (WIC PROGRAM)**

**CHAPTER 1101. GENERAL PROVISIONS**

**§ 1101.2. Definitions.**

The following words and terms, when used in this part, have the following meanings, unless the context clearly indicates otherwise:

*Allowable foods*—Foods and infant formula on the WIC food list. These products meet nutritional standards established by the USDA-FNS and are authorized by the Department for purchase with WIC checks.

*Applicant*—An individual applying to become a participant.

*Authorized representative*—For an applicant or participant, an adult applicant or participant, a parent or guardian of an applicant or participant who is an infant or child or an individual designated by that person to represent the applicant or participant in administrative proceedings involving the WIC Program. For a local agency or store, an individual designated by the local agency or store to represent it in administrative proceedings involving the WIC Program.

*Breastfeeding woman*—A woman, during 1 year postpartum, who is breastfeeding her infant.

*Certification*—For purposes of Chapters 1101—1109 and 1113, the term means the Department's acceptance of a store, not currently authorized to participate in the WIC Program, as a WIC authorized store. For purposes of Chapter 1111 (relating to applicant and participant appeals), the term means the Department's acceptance of an applicant to participate in the WIC Program as a participant.

*Child*—A person 1 year of age or older but under 5 years of age.

*Clinic*—A facility where applicants apply for and participants receive WIC Program services other than food benefits.

*Compliance buy*—A covert purchase at a WIC authorized store, with a WIC check, conducted to enable the

Department to evaluate adherence by a WIC authorized store with this part governing the store's participation in the WIC Program.

*Compliance investigation*—A series of at least two compliance buys conducted at the same WIC authorized store.

*Competent professional authority*—An individual on the staff of the local agency authorized to determine nutritional risk and prescribe supplemental foods. The following persons are the only persons the Department will authorize to serve as a competent professional authority: physicians, nutritionists (Bachelor's or Master's Degree in Nutritional Sciences, Community Nutrition, Clinical Nutrition, Dietetics, Public Health Nutrition or Home Economics with emphasis on nutrition), dietitians, registered nurses, physician's assistants (certified by the National Committee on Certification of Physician's Assistants or certified by the State medical certifying authority), or State or local medically trained health officials. The term also applies to an individual who is not on staff at the local agency but who is qualified to provide data upon which nutritional risk determinations are made by a competent professional authority on staff of the local agency.

*Department*—The Department of Health of the Commonwealth.

*Disqualification*—For the purposes of Chapters 1101, 1103, 1105, 1107, 1109 and 1113, the term means the action by the Department to end participation of a WIC authorized store in the WIC Program for reasons of fraud, abuse or other violations of this part governing the store's participation in the WIC Program. For purposes of Chapter 1111 (relating to applicant and participant appeals), the term means action by the Department or local agency to end participation of a participant who no longer meets the qualifications necessary to participate in the WIC Program or for reasons of fraud, abuse or violation of standards governing the participant's enrollment in the WIC Program.

*Division of WIC*—Division of WIC in the Department.

*Endorser*—The parent or guardian of an infant or child participant who is authorized to use and sign the WIC checks of the infant or child for purchase of allowable foods.

*Filing date*—The date on which the local agency or the Department receives an appeal.

*Food prescription*—A designation by a competent professional authority of allowable foods in specified quantities to meet a participant's nutritional needs based upon a determination of nutritional risk.

*Health services*—Routine pediatric and obstetric care (such as infant and child care and prenatal and postpartum examinations) or referral for treatment.

*High risk store*—A store identified as a possible perpetrator of fraud or abuse through analysis of redemption patterns of WIC checks or WIC sales, through compliance violations, or by complaints of participants or WIC Program staff.

*Infant*—A person under 1 year of age.

*Inventory audits*—A comparison of a WIC authorized store's inventory levels and purchases of a particular WIC product over a specific period of time, to actual WIC purchases of the same product during the same period of time, to determine if the store had adequate product

quantities available to satisfy claims made for WIC reimbursement of the product during the same period of time.

*Limitation criteria*—Criteria in § 1103.4(b) (relating to selection and limitation criteria; authorization process) which the Department has established to limit the number of WIC authorized stores in a particular area to assure that State and local officials can effectively manage, review and monitor WIC authorized stores.

*Local agency*—A public or private nonprofit health or human service agency with which the Department contracts to provide WIC Program services for a specific geographic area.

*Nutritional risk*—A determination that one of the following exists:

(i) Detrimental or abnormal nutritional conditions detectable by biochemical or anthropometric measurements.

(ii) Other documented nutritionally related medical conditions.

(iii) Dietary deficiencies that impair or endanger health.

(iv) Conditions that predispose persons to inadequate nutritional patterns or nutritionally related medical conditions.

*Onsite review*—An overt visit to a store by Federal, Department or local agency personnel to determine if the store meets the selection criteria necessary to be certified or recertified as a WIC authorized store, or a visit to a WIC authorized store after certification or recertification, to determine whether the store is complying with this part governing the store's participation in the WIC Program.

*Participant*—A pregnant woman, breast-feeding woman, postpartum woman, infant or child enrolled in the WIC Program.

*Participant certification period*—The period of time during which an individual is authorized to participate in the WIC Program.

*Postpartum woman*—A woman, during 6 months after termination of pregnancy.

*Pregnant woman*—A woman determined to have one or more embryos or fetuses in utero.

*Premises*—The sales floor and storage areas within the building housing the authorized store.

*Proxy*—A person authorized by the local agency and the participant, or by the participant's parent or guardian if the participant is an infant or child, to pick up or use WIC checks to make purchases for that participant.

*Recertification*—The Department's authorization of a WIC authorized store, following a review process, to continue as a WIC authorized store.

*Redeem*—A WIC authorized store submitting a WIC check to its bank for the purpose of securing a money payment for the amount appearing in the "Pay Exactly" box on the WIC check.

*Sales floor*—The display shelving, the floor in the area normally used for retail trade and the area behind the customer service desk, excluding other areas not accessible to the general public.

*Sanction*—A penalty imposed by the Department upon a WIC authorized store for violation of this part governing the store's participation in the WIC Program. The

term does not include a decision to deny certification or recertification following a certification or recertification onsite review process.

*Secretary*—The Secretary of Health of the Department.

*Selection criteria*—Criteria in § 1103.4(a) which the Department has established which a store seeking to be certified or recertified is required to satisfy.

*Standard formula*—Infant formula products that do the following:

(i) Meet the Federal WIC regulatory definition of an iron-fortified formula (7 CFR 246.10(c)(1)(I) (relating to supplemental foods)).

(ii) Comply with the Infant Formula Act of 1980, the act of September 26, 1980 (Pub.L. No. 96-359, 94 Stat. 1190), which amended the Food and Drug Act.

(iii) Meet the requirements of an “infant formula” as opposed to an “exempt infant formula” or “medical food” as determined by the Food and Drug Administration (FDA), United States Department of Health and Human Services.

*Stale-dated*—After the date imprinted on the product as the recommended last date for sale or use.

*Store slot*—A slot established by the Department for a WIC authorized store in a trade area. The number of store slots the Department authorizes for a geographic area assigned to a local agency is based on the density of participant population in the county in which the trade area is located and the actual number of participants in the county.

*Trade area*—A designated geographic area within the geographical area assigned to a local agency, which is organized to serve the participant populations in that designated area through an assigned number of store slots.

*Training buy*—The presentation of a WIC check by a Federal, Department or local agency representative to purchase foods at a WIC authorized store, which does not result in the actual tender of the WIC check or the purchase of the foods, to evaluate adherence by a WIC authorized store with this part governing the store's participation in the WIC Program.

*USDA-FNS*—The United States Department of Agriculture, Food and Nutrition Service.

*WIC authorized store*—A retail food store which is authorized through certification or recertification to provide allowable foods to participants by accepting WIC checks.

*WIC check*—A negotiable instrument issued to participants to purchase allowable foods at WIC authorized stores.

*WIC food list*—A list published by the Department in the *Pennsylvania Bulletin* of foods and infant formula which may be purchased with WIC checks.

*WIC identification card*—A document issued by the Department to a participant, which is used for identification purposes, signature verification and authorization to purchase allowable foods with WIC checks at a WIC authorized store.

*WIC Program*—The Special Supplemental Nutrition Program for Women, Infants and Children.

*WIC Program benefits*—Supplemental foods, nutrition education and referral to health services.

## CHAPTER 1103. AUTHORIZATION OF STORES

### § 1103.1. Certification and recertification reviews.

(a) *Qualifying for certification or recertification.* To be certified or recertified as a WIC authorized store, a store shall meet the selection criteria in § 1103.4(a) (relating to selection and limitation criteria; authorization process) at the time of the onsite review. If the number of applicants satisfying the selection criteria exceeds the number of stores the Department permits to participate in the WIC Program under the limitation criteria in § 1103.4(b), the Department will determine which store to certify or recertify under the process in § 1103.4(c). The Department will exempt a store from satisfying the selection and limitation criteria only if there is a finding of inadequate participant access, as set forth in § 1103.7 (relating to inadequate participant access).

(b) *Certification or recertification review process.* The certification or recertification review process is as follows:

(1) A person authorized on behalf of a store to make an application for certification or recertification shall contact the local agency responsible for the county in which the store is located to request an application.

(2) The local agency shall determine if a store slot is available in accordance with § 1103.4(b).

(3) If a store slot is available, the local agency shall send the WIC Program information and an application to the store.

(4) A store that is not certified shall complete the application in accordance with the instructions therein and return it to the local agency. If the local agency is apprised by a certified store that it wants to be recertified, the local agency shall collect the application from the store at the time of the onsite review. The Department will not accept an application for certification or recertification from a store that has been provided notice of disqualification or is disqualified from the WIC Program. The WIC Program disqualification period shall be completed before an application will be accepted by the Department. The Department may deny an application for certification from a new owner of a recently purchased store if the Department determines that the purpose of the sale of the business was a sham transaction to avoid a WIC disqualification.

(5) A person authorized on behalf of a chain of stores to make an application for certification or recertification shall complete a separate application for each store in the chain that seeks certification or recertification.

(6) The local agency shall schedule an onsite review of the store for the purpose of determining if the store meets the selection criteria in § 1103.4(a). The local agency will notify the store of the approximate date of the review.

(7) The local agency shall conduct the onsite review and forward the results to the Department for a decision on the store's application for certification or recertification.

(8) The Department will notify the store of its decision on the store's application for certification or recertification.

(c) *Duration of certification or recertification.* The certification or recertification of a store shall remain in effect until the store is disqualified, changes ownership, withdraws from the WIC Program, its application for recertification is denied or its certification expires if it fails to apply for recertification. The Department will provide 30 days written notice to the store prior to expiration of WIC

certification for any store failing to apply for recertification. Either the Department or the WIC authorized store may terminate the certification for cause after providing at least 30 days advance written notice.

(d) *Periodic reviews.* At least once every 2 years, the Department will conduct contemporaneous certification and recertification reviews in a trade area for the purpose of filling store slots in that trade area with WIC authorized stores. Both stores that are certified, and stores that are not certified but want to become WIC authorized stores, shall make an application for certification or recertification. The Department will send a notification of the contemporaneous certification/recertification review process to each WIC authorized store and each store on the waiting list. The notice shall include information advising the store of the procedure for being reviewed for the purpose of receiving certification or recertification. The Department will notify a store which fails to seek recertification or is denied recertification under this subsection of the date the store's current certification expires. Expiration of the certification shall be no less than 30 days after the mailing date of the notice.

(e) *Moratorium on applications.* The Department will not accept applications, or schedule or conduct certification reviews in a trade area 90 days or less prior to the scheduled start date of the contemporaneous certification/recertification reviews in that trade area. The Department will grant an exception to this moratorium only if the Department finds that there would be inadequate participant access, as set forth in § 1103.7, if it does not consider the application. A store granted certification under this exception shall be exempt from the contemporaneous certification/recertification review if it has been certified for less than 60 days prior to the date the contemporaneous reviews begin in the trade area.

(f) *No opportunity to correct problems.* When the Department is making a decision on an application for certification or recertification, it will deny the application if the criteria for certification or recertification set forth in § 1103.4(a) and (b) are not satisfied. The Department will make its decision on the application without providing a warning or an opportunity to correct problems identified during the certification or recertification review.

(g) *Eligibility for stores denied certification or recertification.* A store which has been denied certification or recertification shall wait 6 months from the effective date of the Department's decision to reapply, except a store denied certification or recertification under § 1103.4(c)(2) will be placed on a waiting list and will be considered immediately for certification if a store slot becomes open.

### § 1103.2. Probationary certification.

(a) *Criteria for probationary certification.* If during the certification or recertification review, the store fails to meet one or more of the qualifications in § 1103.4(a) and (b) (relating to selection and limitation criteria; authorization process), the Department may grant probationary certification to the store for a period not to exceed 6 months when either of the following applies:

(1) Inadequate participant access would occur if the store is not certified or recertified.

(2) A store is reviewed prior to opening to the public and the store has not stocked its dairy section or its frozen juice section at the time of the review.

(b) *Probationary certification reviews.*

(1) If a store receives probationary certification, except in situations of inadequate participant access identified in

§ 1103.7(c)(8) (relating to inadequate participant access), the Department will conduct an unannounced onsite review during the probationary certification period to determine if regular status should be granted to the store. The Department may rescind probationary certification and deny the store's application to serve as a WIC authorized store if the store fails to meet one or more of the selection criteria during this review.

(2) If a store receives probationary certification due to inadequate participant access as identified in § 1103.7(c)(8), the Department will conduct a certification review of the store and any other stores on the waiting list within the store's trade area. The Department may rescind probationary certification and deny the store's application to serve as a WIC authorized store if the store fails to meet one or more of the selection or limitation criteria during this review.

(c) *Extension of probationary certification.* If the store fails the review conducted during the probationary certification period, and inadequate participant access exists as determined by the Department, the Department may extend probationary certification for an additional 3 months during which time at least one representative of the store who is responsible for training store personnel on the WIC Program shall attend corrective training.

(d) *Extended probationary certification reviews.* The Department will conduct an unannounced onsite review during the extended probationary certification period after the store representative has attended corrective training, to determine if certification should be granted to the store. The Department will rescind probationary certification and deny the store's application to serve as a WIC authorized store if the store fails to meet one or more of the selection criteria during this review.

(e) *Rescission of probationary certification.* If the Department rescinds the probationary or extended probationary certification of a store, the store is not eligible to reapply for certification for 6 months from the date of the Department's rescission of the certification.

### § 1103.3. Authorization of store slots.

(a) *Assignment of store slots.* The Department will assign store slots based upon WIC participant density according to the following:

(1) In counties with WIC participant density greater than 100 participants per square mile, the Department will assign one store slot for every 175 WIC participants.

(2) In counties with WIC participant density of 25 to 100 participants per square mile, the Department will assign one store slot for every 150 WIC participants.

(3) In counties with WIC participant density less than 25 participants per square mile, the Department will assign one store slot for every 125 WIC participants.

(b) *Yearly allocation of store slots.* By October 1 of each year, the Department will evaluate WIC participant population to determine store slot allocations per county for each Federal Fiscal Year. The Department will publish these allocations in the *Pennsylvania Bulletin* no later than October 30 of each year.

### § 1103.4. Selection and limitation criteria; authorization process.

(a) *Selection criteria.* The Department will use the following selection criteria to identify stores that meet the operational criteria to serve as a WIC authorized store:

(1) The store shall be located within this Commonwealth.



(2) A store shall serve or reasonably expect to serve at least 25 participants per month.

(i) The Department will provide a store seeking certification which has not been certified previously, an 8-month period to determine if the store is serving 25 participants. The Department may disqualify a store for a period of no less than 6 months in accordance with § 1107.1a(j) (relating to disqualifications) if it is not serving 25 participants at the end of the 8-month period.

(ii) The Department may deny recertification if the store is not serving 25 participants per month in the most recent month for which the Department has participant data at the time the recertification review is conducted.

(3) The store shall have allowable foods properly stored and refrigerated.

(4) The store shall not have stale-dated allowable foods on its sales floor.

(5) The store shall have available on the premises at all times the minimum inventory requirements in § 1103.5 (relating to minimum inventory) of allowable foods.

(6) The store shall have shelf prices less than the maximum allowable cost established by the Department for Food Prescription One and Food Prescription Two. The highest price of each allowable food available at the store, regardless of brand, shall be recorded to determine if the store's prices are within the maximum allowable prices established by the Department. The Department will publish in the *Pennsylvania Bulletin*, no later than September 15 of each year, the maximum allowable prices for Food Prescription One and Food Prescription Two. Revisions to the maximum allowable prices will be published in the same manner. Food Prescription One and Food Prescription Two are as follows:

- (i) Food Prescription One consists of the following:
  - (A) Eighteen quarts or nine half gallons of milk.
  - (B) One pound of cheese.
  - (C) One dozen eggs.
  - (D) One 15 to 18 ounce container of peanut butter.
  - (E) One pound of dried beans or peas.
  - (F) Four 11.5 to 12 ounce containers of frozen concentrated juice or four 46 ounce containers of single strength juice.
  - (G) Thirty ounces of cereal.

(ii) Food Prescription Two consists of: Thirty-one 13 ounce cans of concentrated contract brand milk or soy based infant formula.

(7) The store shall be open for business at least 8 hours per day, 6 days per week.

(8) The store shall be sanitary. There may not be evidence of unremoved rubbish, vermin, or general lack of cleanliness.

(9) The store shall operate in a permanent fixed location where participants may purchase allowable foods with their WIC checks.

(10) The store may not be currently disqualified from participation in the Food Stamp Program.

(11) The store may not be currently disqualified from the WIC Program or have been denied certification or recertification by the WIC Program within the past 6 months unless the conditions of § 1103.6(a)(2) (relating to waiting list) are met.

(12) The store shall have implemented all required corrective actions resulting from monitoring by the Department, including repayment of any overcharges to the WIC Program, and shall be in compliance with all applicable Federal and State regulations.

(b) *Limitation criteria.* The Department will use the following criteria to limit the number of WIC authorized stores in a trade area:

(1) A store slot shall be available in the trade area in which the store is located.

(2) The store may not be located within 1 mile of another WIC authorized store within the same trade area unless the Department determines that there is sufficient WIC participant shopping within the 1 mile area to support an additional WIC authorized store. For the purpose of this paragraph, to support the authorization of each additional WIC authorized store within the 1 mile radius, sufficient WIC participant shopping shall be determined by the following:

(i) For counties with WIC participant density greater than 100 participants per square mile, there shall be at least 175 WIC participants shopping within 1 mile of the applying store for each store slot authorized.

(ii) For counties with WIC participant density of 25 to 100 participants per square mile, there shall be at least 150 WIC participants shopping within 1 mile of the applying store for each store slot authorized.

(iii) For counties with WIC participant density less than 25 participants per square mile, there shall be at least 125 WIC participants shopping within 1 mile of the applying store for each store slot authorized.

(c) *Authorization process.*

(1) If the total number of stores meeting all selection criteria are less than or equal to the total number of store slots assigned to the trade area and there is sufficient WIC participant shopping as defined in subsection (b)(2), all stores meeting the selection criteria shall be authorized to participate in the WIC Program.

(2) If the total number of stores meeting all selection criteria are greater than the total number of store slots assigned to the trade area, the Department will certify or recertify the stores having the lowest weighted prices for the two food prescriptions, until the store slots in the trade area have been filled. For determining the weighted food prices for the two food prescriptions, the Department will add 80% of the total of the store's highest price for Food Prescription One to 20% of the store's highest price for Food Prescription Two.

(3) The criteria in paragraph (2) also apply when more than one store applies for certification or recertification within 1 mile and there is not a sufficient WIC participant shopping as defined in subsection (b)(2) to support an additional WIC authorized store or stores.

**§ 1103.5. Minimum inventory.**

(a) A store shall have available on the premises at the time of the certification or recertification onsite review, and maintain at all times thereafter while participating as a WIC authorized store, minimum inventory requirements of allowable foods.

(b) Minimum inventory requirements of allowable foods are as follows:

(1) *Formula.*

(i) Contract milk-based formula with iron:

(A) Sixty-two 13 ounce cans of liquid concentrate.

- (B) Twenty-five 32 ounce cans of ready-to-feed.
- (C) Six 14.1 ounce cans of powdered.
- (ii) Contract soy-based formula:
- (A) Thirty-one 13 ounce cans of liquid concentrate.
- (B) Twenty-five 32 ounce cans of ready-to-feed.
- (C) Six 14 ounce cans of powdered.
- (iii) Other standard formulas specified on the WIC check are not minimum inventory requirements. The store shall be able to provide these within 72 hours after a participant makes a request for the formula.
- (2) *Milk.*
- (i) Fluid whole, vitamin D fortified, fourteen 1/2 gallons or quart equivalent.
- (ii) Fluid skim or low fat, vitamin A and D fortified, four 1/2 gallons or quart equivalent.
- (iii) Nonfat dry, 2 pounds, in 1 or 2 pound containers.
- (iv) Evaporated, twelve 12 ounce cans.
- (3) *Natural domestic cheese.* One pound each of three varieties prepacked in 8 or 16 ounce packages.
- (4) *Grade "A" eggs.* Five, 1 dozen containers.
- (5) *Juices.*
- (i) Three varieties with a total of nine 46 ounce containers.
- (ii) Frozen concentrated or shelf stable concentrated, two varieties with a total of nine 11.5 to 12 ounce containers.
- (iii) Infant, three varieties with a total of fifteen 4 ounce individual containers.
- (6) *Cereal.*
- (i) Adult, five varieties in 8 ounce or larger packages totaling at least 72 ounces.
- (ii) Infant, two varieties, totaling at least 32 ounces.
- (7) *Peanut butter.* Five 15 to 18 ounce containers.
- (8) *Dried peas and beans.* Two varieties, 1 pound each.
- (9) *Tuna.* Four 6 to 6.5 ounce cans, chunk, light, packed in water.
- (10) *Carrots.* Two pounds of whole, unpeeled fresh carrots in 1 or 2 pound cello pack, or two cans of sliced carrots in 14 to 20 ounce cans.
- (c) *Annual publication of WIC food list.* The Department will publish in the *Pennsylvania Bulletin*, no later than September 15 of each year, the name of the contract brand of formula and, if applicable, the names of allowable brands of foods, and the maximum price permitted for those allowable foods for which the Department establishes a maximum price.
- (d) *Waivers.* The Department may grant minimum inventory waivers for allowable foods listed in subsection (e) under the following circumstances:
- (1) For a WIC authorized store, the Department has no current reported purchases of the allowable foods based upon WIC checks redeemed by the store.
- (2) For a store seeking certification, the Department has no current reported purchases of the allowable foods based upon WIC checks redeemed by the WIC authorized store closest to the store applying for certification.
- (3) The store occupies the same physical location as a prior WIC authorized store, the waiver was granted to

the prior WIC authorized store, and the application for certification from the new owner is received by the Department within 3 months after the date the prior WIC authorized store's certification to participate in the WIC Program terminated.

(e) *Waiverable allowable foods.* These foods are:

- (1) Contract milk based with iron ready-to-feed infant formula.
  - (2) Contract milk based with iron powdered infant formula.
  - (3) Contract soy based ready-to-feed infant formula.
  - (4) Contract soy based powdered infant formula.
  - (5) Nonfat dry milk.
  - (6) Evaporated milk.
  - (7) Carrots.
  - (8) Tuna.
- (f) *Expiration of waivers.* A minimum inventory waiver of an allowable food granted by the Department shall expire upon the presentation to the store, on behalf of a participant, of a WIC check for the purchase of that allowable food. The WIC authorized store shall provide the food item within 72 hours after presentation of the WIC check.

#### § 1103.6. Waiting list.

(a) *Placement of stores on the waiting list.* The Department will place on a waiting list eligible stores as follows:

- (1) A store that seeks to become a WIC authorized store if no store slots are open in the trade area where the store is located.
- (2) When the total number of stores seeking certification or recertification is greater than the total number of store slots available for the trade area, and the store meets all selection criteria and has prices within the maximum allowable costs of Food Prescription One and Food Prescription Two, but is denied authorization because its weighted price is higher than other stores meeting all selection and limitation criteria.
- (3) A store that seeks to apply during a moratorium as set forth in § 1103.1(c) (relating to certification and recertification reviews).
- (4) When a store slot is open and the store seeking certification is located within 1 mile of a WIC authorized store, if the Department determines that there is not sufficient WIC participant shopping within the 1-mile area to support an additional WIC authorized store.

(b) *Certification review of stores on waiting list.* The Department will ensure that all stores on the waiting list in a trade area will be reviewed when a store slot becomes available in the trade area, or when stores in the trade area are reviewed during the next contemporaneous certification/recertification review process. The only exception to reviewing all stores on the waiting list is when a store slot opens as a result of a change of ownership of a store and the store, under new ownership, applies for certification under section § 1105.4(c) (relating to change of ownership of a WIC authorized store). The Department will review the store under its new ownership to determine if the store should receive certification.

(b) *Certification review of stores on waiting list.* The Department will ensure that all stores on the waiting list in a trade area will be reviewed when a store slot becomes available in the trade area, or when stores in the trade area are reviewed during the next contemporaneous certification/recertification review process. The only exception to reviewing all stores on the waiting list is when a store slot opens as a result of a change of ownership of a store and the store, under new ownership, applies for certification under section § 1105.4(c) (relating to change of ownership of a WIC authorized store). The Department will review the store under its new ownership to determine if the store should receive certification.

#### § 1103.7. Inadequate participant access.

(a) The Department will consider whether there is inadequate participant access when considering whether to place a store on probation, rather than deny recertifica-

tion, for failure to meet selection and limitation criteria in § 1103.4(a) and (b) (relating to selection and limitation criteria; authorization process) during recertification reviews.

(b) The Department may also consider whether there is inadequate participant access when deciding whether to place on probation a store undergoing a change of ownership under § 1105.4(b) and (c) (relating to change of ownership of a WIC authorized store).

(c) Inadequate participant access is any of the following:

(1) Ten or more participants whose specific nationality, ethnicity or religious dietary needs can not be served properly by another WIC authorized store located in accordance with one of the following:

(i) Less than 3 miles of the store for counties with WIC participant density less than 25 participants per square mile.

(ii) Less than 2 miles of the store for counties with WIC participant density of 25 to 100 participants per square mile.

(iii) Less than 1 mile of the store for counties with WIC participant density greater than 100 participants per square mile.

(2) Ten or more participants will be required to travel in accordance with one of the following:

(i) Three or more miles to the next closest WIC authorized store for counties with WIC participant density less than 25 participants per square mile.

(ii) Two or more miles to the next closest WIC authorized store for counties with WIC participant density of 25 to 100 participants per square mile.

(iii) One or more miles to the next closest WIC authorized store for counties with WIC participant density greater than 100 participants per square mile.

(3) A participant has a physical disability that cannot be accommodated by another WIC authorized store in accordance with one of the following:

(i) Within 3 miles of the store for counties with WIC participant density less than 25 participants per square mile.

(ii) Within 2 miles of the store for counties with WIC participant density of 25 to 100 participants per square mile.

(iii) Within 1 mile of the store for counties with WIC participant density greater than 100 participants per square mile.

(4) Ten or more participants are affected by physical barriers or conditions which make normal travel to another WIC authorized store impractical.

(5) One hundred or more participants but less than 200 participants use WIC checks to purchase allowable foods at the store and the distance to the next closest WIC authorized store exceeds 2 miles.

(6) Two hundred or more participants but less than 300 participants use WIC checks to purchase allowable foods at the store and the distance to the next closest WIC authorized store exceeds 1 mile.

(7) Three hundred or more participants use WIC checks to purchase allowable foods at the store and the distance to the next closest WIC authorized store exceeds 3/10 of a mile.

(8) A WIC authorized store changes ownership without the Department receiving prior notice sufficient to arrange other accommodations for participants.

**CHAPTER 1105. REQUIREMENTS OF WIC AUTHORIZED STORES**

**§ 1105.1. Training.**

(a) *Initial training.* Following certification, the local agency shall provide initial training for the personnel a certified store designates. The training shall be mandatory and shall occur within 30 days after the date of certification. A store receiving certification may not accept WIC checks prior to having its designated personnel attend the initial mandatory training.

(b) *Annual training.* The Department will provide for WIC authorized stores annual training which is designed to prevent WIC Program errors and abuses and to improve WIC Program services. The following apply to annual training:

(1) A WIC authorized store shall ensure that at least one representative from the store who is responsible for training store personnel on the WIC Program shall attend.

(2) Attendance is mandatory.

(3) The Department will offer each WIC authorized store two opportunities to attend.

(4) The Department will ensure that annual training is offered to a WIC authorized store either within the county in which it is located or in an adjoining county within the appropriate local agency's jurisdiction.

(5) Failure to have at least one representative attend training shall result in the Department imposing sanctions against the WIC authorized store as in § 1107.1a(d)(16) (relating to disqualifications).

(c) *Corrective training.* The Department will provide corrective training as set forth in §§ 1103.2 and 1105.6 (relating to probationary certification; and monitoring of WIC authorized stores). Attendance is mandatory.

**§ 1105.2. Overcharge recovery system.**

(a) *Quarterly price reports.* A WIC authorized store shall provide to the Department, in a format prescribed by the Department, the highest prices the store charged for allowable foods during the previous quarter for which the Department collects prices. The report shall be known as the Quarterly Price Report. A store may submit its Quarterly Price Report by mail or fax. If submitted by mail, the Quarterly Price Report shall be postmarked no later than the 15th of the month following the end of the calendar quarter. If submitted by fax, the Quarterly Price Report must be received by the Department by the 15th of the month following the end of the calendar quarter.

(b) *Department review.* The Department will review WIC check amounts redeemed by a WIC authorized store against the prices reported on the store's Quarterly Price Report to determine and collect overcharges owed to the Department.

(c) *Determination of maximum redemption amount of each WIC check.* For each WIC check redeemed for which the store was reimbursed for the sale of foods for which the Department collects prices, the Department will determine the maximum amount for which the WIC authorized store could have redeemed the check based upon prices provided in the Quarterly Price Reports supplied by the store.

(d) *Determination of overcharges.* The Department will compare the maximum amount for which a WIC authorized store could have redeemed a WIC check based upon the prices in the store's Quarterly Price Report, against the actual amount for which each WIC check accepted by the store during a reporting quarter was redeemed, to determine any overcharge owed to the Department.

(e) *Pursuit of reimbursement.* The Department will seek reimbursements from a WIC authorized store for the store's overcharges totaling \$10 or more for a calendar quarter.

(f) *Reimbursement of overcharges.* A WIC authorized store shall submit reimbursement of overcharges to the Department within 20-calendar days of the date on the Department's billing notice for the overcharge, unless the WIC authorized store disputes the overcharge determination.

(g) *Overcharge disputes.* A WIC authorized store that disputes an overcharge billing shall submit the basis for its dispute in writing to the Department, postmarked within 15-calendar days of the date on the Department's billing notice. Upon resolution of an overcharge dispute, any overcharge the Department determines to be owing shall be due within 15-calendar days of the mailing date on the Department's notification of its resolution of the dispute.

(h) *Sanctions.* The Department will impose a sanction against a WIC authorized store under § 1107.1a(d)(14) (relating to disqualifications) if the store fails to pay overcharges due within the time required under subsections (f) and (g).

(i) *Disqualification.* The Department may disqualify a WIC authorized store if the store's reported prices on the Quarterly Price Report exceed the current maximum allowable cost as published by the Department for Food Prescription One or Food Prescription Two, set forth in § 1103.4(a)(6)(i) and (ii) (relating to selection and limitation criteria; authorization process).

### § 1105.3. Terms and conditions of participation.

(a) *General terms and conditions.* A WIC authorized store shall adhere to this subsection. Failure to do so shall result in the imposition of sanctions as in § 1107.1 (relating to imposition of sanctions). A WIC authorized store shall:

(1) Adhere to all applicable statutes and State and Federal regulations regulating the WIC Program, including the nondiscrimination provisions of 7 CFR Parts 15, 15a, 15b and 246, and this part.

(2) Inform the public of its participation in the WIC Program by displaying at least one WIC decal supplied by the Department in a place conspicuously visible to the general public.

(3) Monitor, supervise and be accountable for the actions of employes in the handling of WIC checks, the selling of allowable foods, and the performance of other conduct related to the WIC Program.

(4) Maintain the minimum inventory of allowable foods on the premises.

(5) Ensure that allowable foods are properly stored and refrigerated.

(6) Ensure that there are no stale dated allowable foods on the sales floor.

(7) Provide the Department, on the Quarterly Price Report Form provided by the Department, the highest prices of allowable foods specified on the report form.

(8) Maintain a clean and sanitary store.

(9) Provide orientation and training to employes regarding applicable regulations governing the WIC Program.

(10) Maintain a copy of the current WIC food list at each check-out aisle.

(11) Send at least one representative who is responsible for training store personnel on the WIC Program to WIC Program training annually, or more often if required by the Department under § 1105.1(c) (relating to training).

(12) Immediately notify the Department when store ownership changes, when store operations cease on a permanent or temporary basis, or when any other circumstance impacting service to participants occurs.

(13) Allow Federal, State, Department and local agency representatives who are involved in monitoring the store's compliance with statutes and regulations governing the WIC Program, to visit the store to observe its procedures for accepting and handling WIC checks and to conduct announced or unannounced onsite reviews to determine compliance with applicable Federal and State regulations.

(14) Provide Federal, State, Department and local agency representatives who are involved in monitoring the store's compliance with statutes and regulations governing the WIC Program, access to all WIC checks accepted by the store and on its premises at the time of an onsite review.

(15) Provide Federal, State, Department and local agency representatives who are involved in monitoring the store's compliance with statutes and regulations governing the WIC Program, access to price and inventory records during an onsite review.

(16) Agree that neither the Department nor the WIC authorized store has an obligation to renew the store's authorization to participate in the WIC Program.

(17) Agree that the store's authorization to participate in the WIC Program shall become void when ownership of the store changes.

(18) Display the current shelf price of each allowable food either on the allowable food, on the shelf immediately above or below the allowable food, or prominently on an allowable food price list easily located by participants and clearly visible to them.

(19) Not transfer or assign its WIC certification or recertification to another person or entity.

(20) Reimburse the Department for funds received through transactions involving WIC checks which were not conducted in accordance with this part.

(21) Maintain price and inventory records for allowable foods for a minimum period of 6 months from the date of receipt of the inventory.

(b) *Terms and conditions of participation with regard to participants.* A WIC authorized store shall serve participants as set forth in this subsection. The Department will impose sanctions against a WIC authorized store that fails to do so, as set forth in § 1107.1. A WIC authorized store shall:

(1) Provide allowable foods to participants only as authorized on the WIC food list and as specified on the WIC check.

(2) Not encourage or discourage a participant from purchasing allowable foods specified on the WIC check.

(3) Provide allowable foods to participants at or below the current price the store charges other customers.

(4) Not seek restitution or payment from participants for WIC checks not reimbursed by the Department, or contact participants concerning WIC transactions that occur in the store.

(5) Not seek restitution or payment from participants for allowable foods when the price the store charges for the allowable foods exceeds the "Not to Exceed" amount on the WIC check.

(6) Not request personal addresses, telephone numbers or other personal identification of participants.

(7) Offer participants the same courtesies offered other customers, and not distinguish or identify participants from other customers.

(8) Provide services to participants without regard to race, color, age, sex, religion, national origin or disability.

(9) Give trading stamps to participants for purchases made with WIC checks if trading stamps are given for cash purchases.

(10) Accept cents-off coupons, a store discount card or other discounts from participants for allowable foods, and deduct the savings in calculating the total purchase price entered into the "Pay Exactly" amount on WIC checks.

(11) Accept "buy one get one free" coupons and manufacturers' promotional free product offers from participants.

(c) *Terms and conditions of participation with regard to WIC check processing and redemption.* A WIC authorized store shall adhere to the requirements of this subsection with regard to WIC check processing and redemption. The Department will impose sanctions against a WIC authorized store that fails to do so, as set forth in § 1107.1. A WIC authorized store shall:

(1) Treat the acceptance of a WIC check as a financial transaction between only the Department and the WIC authorized store, not the participant.

(2) Accept a WIC check only if the WIC check is made payable to that specific WIC authorized store, unless the Department has provided written authorization otherwise to the store.

(3) Accept a WIC check only if the participant, endorser or proxy presents the WIC check on or between the "First Day to Use" and the "Last Day to Use" designations on the WIC check.

(4) Accept a WIC check only if a valid WIC identification card is presented at the time of redemption.

(5) Accept a WIC check only if the signature of the participant, endorser or proxy is obtained, at the time of purchase, on the WIC check, and the signature on the WIC check matches the signature on the WIC identification card.

(6) Accept a WIC check only if there is no visible alteration on the WIC check.

(7) Charge the WIC Program only for the types and quantities of allowable foods specified on the WIC check and selected for purchase by the participant, endorser or the participant's proxy.

(8) Record in ink, on each WIC check immediately after completion of the WIC transaction and prior to the participant, endorser or proxy signing the WIC check, the actual purchase amount of the transaction net of any cents-off coupons or other discounts.

(9) Properly correct an error made in recording the "Pay Exactly" amount of a WIC check by drawing a single line through the incorrect amount and writing the correct amount above or below the error and having the participant, endorser or proxy initial next to the corrected amount. No other corrections are permissible.

(10) Not alter any information on the WIC check as presented by the participant, endorser or proxy.

(11) Not provide substitute items, rainchecks or cash reimbursement for allowable foods that are unavailable.

(12) Not provide cash or credit for a WIC check.

(13) Not provide change for the difference between the "Not to Exceed" and the "Pay Exactly" amounts on the WIC check nor for any coupons tendered during the WIC transaction.

(14) Not refund money or provide exchanges to replace allowable foods returned by participants, endorsers or proxies.

(15) Not accept a WIC check as payment for items other than allowable foods specified on the WIC check.

(16) Not charge the WIC Program for allowable foods not received by the WIC participant or for allowable foods provided in excess of those listed on the WIC check.

(17) Not charge the WIC Program for the sale of an amount of an allowable food which exceeds the store's documented inventory of that food item covering the period of time under review and in which the sale was made.

(18) Deposit WIC checks accepted by it directly to its bank account no later than 45 days after the "First Day to Use" date on the WIC check.

(19) Not receive, transact, redeem or otherwise dispose of a WIC check outside of check redemption procedures set forth in this section.

(20) Not use a WIC check for the purchase of any commodity or the payment of any debt.

(21) Not collect sales tax on allowable food purchases.

(22) Reimburse the Department for payments the store has received for improperly executed WIC checks.

(d) The Department will deny payment to a WIC authorized store for WIC checks which the store did not process under subsection (c).

**§ 1105.4. Change of ownership of a WIC authorized store.**

(a) A certification or recertification is void when a change of ownership of a WIC authorized store occurs.

(b) To allow uninterrupted service to participants subsequent to a change of ownership, the Department may accept an application for certification from the prospective new owner of a WIC authorized store prior to a change of ownership.

(c) When a change of ownership occurs and inadequate participant access as defined in § 1103.7(c)(8) (relating to inadequate participant access) would result, the store under the new ownership may receive probationary certification for a period not to exceed 6 months if the State conducts an immediate onsite visit followed by a complete certification visit at the store. Until the immediate onsite visit is conducted, the new owner may not accept WIC checks. As soon as possible within the 6-month probationary period or during the next recertification process,

whichever occurs first, the store under the new ownership shall compete with stores on the waiting list in the trade area for the store slot.

(d) The Department will not accept an application for certification from a store that has been provided notice of disqualification or is serving a disqualification if an individual who had at least a 10% ownership interest in the store has at least a 10% ownership interest in the applicant or such ownership interest has been transferred or sold to immediate family members of the individual.

**§ 1105.6. Monitoring of WIC authorized stores.**

(a) *Purpose and types of monitoring of WIC authorized stores.* Federal, State or local representatives will conduct announced and unannounced onsite reviews of WIC authorized stores to determine compliance with applicable Federal and State regulations, and to investigate complaints regarding a store. The types of onsite reviews that may be conducted for monitoring purposes are high risk reviews, routine reviews and training buys.

(b) *High risk reviews.* The Department will monitor all high risk stores. The Department will use either compliance investigations or inventory audits as methods to monitor high risk stores. The Department also may conduct compliance buys and inventory audits on stores that have not been identified as high risk stores.

(1) *Compliance investigations.* The following standards apply:

(i) The Department will conduct at least two compliance buys during a compliance investigation.

(ii) The Department will not notify the WIC authorized store that a compliance buy is scheduled.

(iii) The Department will provide written notification to the WIC authorized store of the results of each compliance buy, including the store's violation of a statute or regulation governing its participation in the WIC Program, unless subparagraph (viii) applies.

(iv) The Department will provide to the personnel of the WIC authorized store mandatory corrective training after two compliance buys detect violations of statutes or regulations governing the store's participation in the WIC Program.

(v) The Department will conduct a third compliance buy at the WIC authorized store after store personnel have attended mandatory corrective training.

(vi) The Department will impose a sanction in accordance with § 1107.1 (relating to imposition of sanctions) against the store if three compliance buys detect violations of statutes or regulations governing the store's participation in the WIC Program. If multiple violations are found during the compliance investigation, the Department will impose the sanction against the store for the term corresponding to the most serious violation.

(vii) The Department will close the compliance investigation on a WIC authorized store if no violations of a statute or regulation governing the store's participation in the WIC Program are discovered after two consecutive compliance buys.

(viii) The Department may withhold notification of compliance buy results, and may withhold providing training or conducting further compliance investigations, when fraudulent activities by the WIC authorized store are indicated during a compliance investigation or by local agency or participant complaint.

(2) *Inventory audits.* The Department will disqualify the WIC authorized store when an inventory audit establishes the claim of reimbursement for authorized food in excess of documented inventory. No warning letters will be issued.

(c) *Routine reviews.* The Department will use reviews as follows to determine whether a WIC authorized store is in compliance with the selection and limitation criteria in § 1103.4(a) and (b) (relating to selection and limitation criteria; authorization process) and terms and conditions of participation in § 1105.3 (relating to terms and conditions of participation):

(1) The Department will not notify the WIC authorized store that a routine review is scheduled.

(2) The Department will provide written notification to the WIC authorized store of the results of each routine review, including violation of a statute or regulation governing the store's participation in the WIC Program.

(3) The Department will conduct a second routine review of the WIC authorized store if the first routine review detects violations of a statute or regulation governing the store's participation in the WIC Program.

(4) The Department will provide to the personnel of the WIC authorized store mandatory corrective training after two routine reviews detect violations of a statute or regulation governing the store's participation in the WIC Program.

(5) The Department will conduct a third routine review of a WIC authorized store after store personnel have attended mandatory corrective training.

(6) The Department will impose a sanction in accordance with § 1107.1 against a store if a third routine review detects violations of a statute or regulation governing the store's participation in the WIC Program. If multiple violations are found during the routine reviews, the Department will impose the sanction against the store for the term corresponding to the most serious violation.

(d) *Training buys.* The Department will use training buys to monitor WIC check transaction procedures and compliance with statutes and regulations governing the store's participation in the WIC Program. The following standards shall apply:

(1) The Department will not notify the WIC authorized store that a training buy is scheduled.

(2) The Department will provide written notification to the WIC authorized store of the results of each training buy, including violations of a statute or regulation governing the store's participation in the WIC Program.

(3) The Department will conduct a second training buy at the WIC authorized store if the first training buy detects violations of a statute or regulation governing the store's participation in the WIC Program.

(4) The Department will provide to the personnel of the WIC authorized store mandatory corrective training after two training buys detect violations of a statute or regulation governing the store's participation in the WIC Program.

(5) The Department will conduct a third training buy at the WIC authorized store after store personnel have attended the mandatory corrective training.

(6) The Department will impose a sanction in accordance with § 1107.1 against a store if a third training buy detects violations of a statute or regulation governing the

store's participation in the WIC Program. If multiple violations are found during the training buys, the Department will impose the sanction against the store for the term corresponding with the most serious violation.

(e) *Use of law enforcement agency.* The Department may utilize a law enforcement agency in the investigation of a WIC authorized store or other store suspected of trafficking WIC checks or other fraud or abuse of the WIC Program.

(f) *Reimbursement.* The Department will seek reimbursement from a WIC authorized store that received funds improperly due to a violation of regulations governing the store's participation in the WIC Program discovered during monitoring reviews. The Department will send notice to the store of the amount of money to be reimbursed to the WIC Program. The store shall make payment within 20 days from the date of the notice.

**CHAPTER 1107. SANCTIONS**

**§ 1107.1. Imposition of sanctions.**

(a) The Department may disqualify a store or impose a civil money penalty in lieu of disqualification for reasons of program abuse. In the case of fraud, trafficking, sale of alcohol or alcoholic beverages or tobacco products the Department will not provide the store with a prior warning that violations were occurring before imposing the sanctions. For other serious program violations or offenses, the Department may choose to not provide the store with prior warning that violations were occurring before imposing the sanctions. The store may appeal a Department decision pertaining to disqualification, denial of application to participate, or other adverse actions that affect participation during the agreement performance period in accordance with § 1113.1 (relating to right to appeal). Expiration of an agreement with a store, disqualification of a store as a result of disqualification from the Food Stamp Program, and the Department's determination regarding inadequate participant access are not subject to review.

(b) The Department will disqualify a store which has been disqualified from the Food Stamp Program unless the Department determines that the disqualification of the store would result in inadequate participant access under § 1103.7 (relating to inadequate participant access). If the Department determines that disqualification of the store would result in inadequate participant access under § 1103.7, the Department will give the store the option of paying a civil money penalty in lieu of WIC disqualification.

(c) The Department will disqualify a store for WIC Program violations in § 1107.1a (relating to disqualifications) unless the Department determines that disqualification of the store under § 1107.1a(b)—(d) would result in inadequate participant access. In that case, the Department will give the store the option of paying a civil money penalty in lieu of disqualification. The Department will not impose a civil money penalty in lieu of disqualification for third or subsequent sanctions for violations.

(d) Disqualification from the WIC Program may result in disqualification as a retailer in the Food Stamp Program. The disqualification may not be subject to administrative or judicial review under the Food Stamp Program.

(e) In addition to imposing a sanction against a WIC authorized store that commits fraud or abuse of the WIC Program, the Department may prosecute or make a referral for prosecution of the WIC authorized store to a

criminal prosecution agency for prosecution under applicable Federal, State or local laws.

(f) A WIC authorized store that has a sanction imposed against it by the Department for accepting a WIC check for items other than those specified on the WIC check shall also reimburse the Department for monies received for the purchase of these items with the WIC check.

(g) The Department may impose a sanction against a WIC authorized store for failing to remit any amount demanded due to violations of statutes or regulations governing its participation in the WIC Program within the time frame in § 1105.2(f) and (g) (relating to reimbursement of overcharges) or the notice given by the Department under § 1105.6(f) (relating to monitoring of WIC authorized stores).

**§ 1107.1a. Disqualifications.**

(a) *Permanent disqualification.* The Department will permanently disqualify a WIC authorized store convicted of trafficking in WIC checks or selling firearms, ammunition, explosives or controlled substances (as defined in section 102 of the Controlled Substances Act (21 U.S.C.A. § 802)) in exchange for WIC checks. The Department will not compensate the store for revenues lost as a result of the violation.

(b) *Six-year disqualification.* The Department will disqualify a WIC authorized store for 6 years for either of the following:

(i) One incidence of buying or selling WIC checks for cash (trafficking).

(ii) One incidence of selling firearms, ammunition, explosives, or controlled substances as defined in section 102 of the Controlled Substances Act, in exchange for WIC checks.

(c) *Three-year disqualification.* The Department will disqualify a WIC authorized store for 3 years for any of the following violations:

(1) One incidence of the sale of alcohol or alcoholic beverages or tobacco products in exchange for WIC checks.

(2) A pattern of claiming reimbursement for the sale of an amount of a specific allowable food, which exceeds the store's documented inventory of that specific allowable food item for a specific period of time. A pattern may be established during a single inventory audit encompassing a 2-month period when a WIC authorized store's records indicate that the WIC authorized store's redemptions for a specific allowable food exceed the WIC authorized store's documented inventory for that allowable food.

(3) Two or more incidences of charging participants more for an allowable food than non-WIC customers or charging participants more than the current shelf price.

(4) Two or more incidences of receiving, transacting or redeeming WIC checks outside of authorized channels, including the use of an unauthorized store or an unauthorized person, or both.

(5) Two or more incidences of charging for allowable food not received by the participant.

(6) Two or more incidences of providing credit or nonfood items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in section 102 of the Controlled Substances Act, in exchange for WIC checks.

(d) *One-year disqualification.* The Department will disqualify a WIC authorized store for 1 year for any of the following violations:

(1) Two or more incidences of providing unauthorized food items in exchange for WIC checks, including charging for allowable food provided in excess of those listed on the WIC check.

(2) Having stale-dated allowable food on the sales floor.

(3) Failing to maintain on the premises at all times minimum inventory requirements of an allowable food.

(4) Failing to request the participant's WIC identification card prior to accepting a WIC check.

(5) Accepting a WIC check made payable to another store without prior written approval from the Department.

(6) Failing to maintain a clean and sanitary store.

(7) Failing to properly store and refrigerate allowable foods.

(8) Closure of the store by a city, local or county health department.

(9) Charging or demanding that a participant pay for an allowable food with the participant's own money or with another WIC check for purchases made with a WIC check.

(10) Securing the signature of the participant, endorser or proxy prior to completing the "Pay Exactly" box on the WIC check.

(11) Overcharging the WIC Program by charging sales tax.

(12) Having or charging prices which exceed the current maximum allowable costs established by the Department and published in the *Pennsylvania Bulletin* for either Food Prescription One or Food Prescription Two set forth in § 1103.4(a)(6)(i) and (ii) (relating to selection and limitation criteria; authorization process).

(13) Giving monetary change to an authorized individual who tenders a WIC check.

(14) Failing to remit payment for an overcharge within the specified time frame under either §§ 1105.2(f) and (g) or 1105.6(f) (relating to overcharge recovery system; or monitoring of WIC authorized stores).

(15) Physically altering or changing on the face of a WIC check the store name, food type or quantity, participant information, date or printed dollar amount.

(16) Failing to have at least one representative of the store attend required training.

(e) *Second mandatory sanction.* When a WIC authorized store, which previously has been assessed a sanction for any of the violations in subsections (b)—(d), receives another sanction for any of these violations, the Department will double the second sanction. The Department will double civil money penalties up to the limits allowed under § 1107.3(c) (relating to civil money penalties).

(f) *Third or subsequent mandatory sanction.* When a WIC authorized store, which previously has been assessed two or more sanctions for any of the violations listed in subsections (b)—(d), receives another sanction for any of these violations, the Department will double the third sanction and all subsequent sanctions. The Department will not impose civil money penalties in lieu of disqualification for third or subsequent sanctions for violations listed in subsections (b)—(d).

(g) *Multiple violations during a single investigation.* When during the course of a single investigation the Department determines a WIC authorized store has committed multiple violations, the Department will disqualify the WIC authorized store for the period corresponding to the most serious violation. However, the Department will include all violations in the notice of disqualification action.

(h) *Disqualification based on a Food Stamp Program disqualification.* The Department will disqualify a WIC authorized store which has been disqualified from the Food Stamp Program. The disqualification shall be for the same length of time as the Food Stamp Program disqualification, but may begin at a later date than the Food Stamp Program disqualification. Under 7 CFR 246.12(k)(1)(vii) and 1113.1(b)(3) (relating to right to appeal), the WIC program disqualification is not subject to administrative or judicial review under the WIC Program.

(i) *Voluntary withdrawal or nonrenewal of agreement.* The Department will not accept voluntary withdrawal of the WIC authorized store from the WIC Program as an alternative to disqualification for the violations listed in subsections (a)—(d), but will enter the disqualification on the record. The Department will not permit the store to use nonrenewal of a store agreement as an alternative to disqualification.

(j) *Other violations.* For any violation of a statute or regulation governing the store's participation in the WIC Program which is not specifically classified in subsections (a)—(d), the Department will determine the appropriate type and level of sanction to be imposed upon the store based upon the nature and severity of the violation. A disqualification imposed under this subsection will not exceed 1 year.

(k) *Advance notice.* The Department will provide a WIC authorized store at least 30 days advance notice of the effective date of any disqualifications and, if appropriate, an opportunity to appeal the disqualification under § 1113.1 (relating to right to appeal).

(l) *Certification following expiration of disqualification period.* A store that has been disqualified from the WIC Program may apply for certification following expiration of the disqualification period. If the store chooses to apply for certification after expiration of the disqualification, the Department will not consider the prior disqualification from the WIC Program when determining eligibility. The store will be considered in accordance with § 1103.4 (relating to selection and limitation criteria; authorization process) or placed on a waiting list in accordance with § 1103.6 (relating to waiting list).

### § 1107.2. Civil money penalties.

(a) *Option available in lieu of a disqualification.* The Department may offer to a store the option of paying a civil money penalty in lieu of a denial of recertification or a disqualification required under § 1107.1 (relating to imposition of sanctions), only if the Department finds inadequate participant access as set forth in § 1103.7 (relating to inadequate participant access). The Department will not provide this option for third or subsequent violations in § 1107.1a(b)—(d) (relating to disqualifications).

(b) *Calculation of civil money penalty.*

(1) For civil money penalties in lieu of disqualifications under § 1107.1a(b), (c) and (d)(1), the Department will calculate the civil money penalty for each violation identi-



fied by multiplying 10% of the average monthly total value of WIC checks redeemed for the most recent 6-month period by the number of months the store would be disqualified under § 1107.1. If 6 months of information relating to the monthly value of WIC checks redeemed is not available, the Department will calculate the monthly average based upon the number of months for which information is available.

(2) For disqualifications identified in § 1107.1a(d)(2)—(16), the Department will calculate the civil money penalty for each violation identified by multiplying 5% of the average monthly total value of WIC checks redeemed for the most recent 6-month period by the number of months the store would be disqualified under § 1107. 1. For stores which are denied recertification for which this option is available, the Department will multiply 5% of the average monthly total value of WIC checks for the most recent 6-month period by 6 months to determine the civil money penalty to be paid. If 6 months of information relating to the monthly value of WIC checks redeemed is not available, the Department will calculate the monthly average based upon the number of months for which information is available.

(c) *Limitation of Penalties.* The amount of the civil money penalty will not exceed \$10,000 for each violation. When, during the course of a single investigation, the Department determines a store has committed multiple violations, the Department will impose a civil money penalty for each violation. The total amount of civil money penalties imposed for violations investigated as part of a single investigation will not exceed \$40,000.

(d) *Written agreement.* If the Department offers and the store agrees to pay a civil money penalty in lieu of disqualification, the Department and store shall set forth the terms of the agreement in writing. The terms may include a probationary period during which the Department may conduct monitoring to ensure action has been taken by the store to correct problems. The agreement will be effective when it is signed by the Director of the Division of WIC or the Director's designee.

(e) *Payment of the civil money penalty.* If a WIC authorized store does not pay, only partially pays, or fails to timely pay a civil money penalty assessed in lieu of disqualification, the Department will disqualify the WIC authorized store for the length of the disqualification corresponding to the violation for which the civil money penalty was assessed. If a civil money penalty is assessed for more than one violation, the Department will impose the disqualification for the period corresponding to the most serious violation. The Department may permit payment of civil money penalties by installments.

(f) *Outstanding financial liabilities.* Payment of the civil money penalty, unless specifically provided for in a written agreement between the Department and the store, does not relieve the store of any other past or future financial liability incurred by the store by reason of its participation in the WIC Program. This includes, by way of example, payment to the Department of outstanding overcharges for the acceptance of WIC checks for the sale of unauthorized foods.

**CHAPTER 1113. LOCAL AGENCY AND STORE APPEALS.**

**§ 1113.1. Right to appeal.**

(a) A store or local agency adversely affected by a Division of WIC action has the right to appeal. The right of appeal shall be granted when a local agency's or store's application to participate in the WIC Program is denied;

or during the course of an agreement or period of authorization, when a local agency or store is disqualified; or when any other adverse action during the period of authorization which affects participation is taken against the store or local agency by the Division of WIC.

(b) The following actions are not subject to appeal:

(1) The expiration of a WIC authorization.

(2) The Division of WIC's determination regarding participant access.

(3) Disqualification from the WIC program of a store as a result of disqualification from the Food Stamp Program.

(c) The appeal process is designed to secure and protect the interest of both the store or local agency and the Division of WIC and to ensure equitable treatment for all involved.

(d) Except for permanent disqualifications assessed under § 1107.1a(a) (relating to disqualifications), the Department may take adverse action against a store after 30 days advance notification.

(e) In the case of a disqualification of a local agency, the Department will provide at least 60 days advance notice.

**§ 1113.2. Appeal procedures.**

(a) *Notification.* At the time the Division of WIC denies an application of a store, or disqualifies a WIC authorized store or takes an adverse action against a local agency or store during a period in which the local agency or store is authorized, the Division of WIC will notify the local agency or store of its right to an administrative appeal.

(b) *Form of appeal.* The appeal shall be made by the local agency or store or its authorized representative, in writing, stating the reasons for the appeal.

(c) *Time for filing an appeal.* The appeal shall be filed with the Director of the Division of WIC within 30 days after any final decision by the Division of WIC.

(d) *Scheduling the hearing.*

(1) The Director of the Division of WIC shall forward the appeal to the office of the hearing examiner.

(2) The hearing examiner shall set a time, date and place for the hearing.

(3) The hearing examiner shall send notice to the local agency or store, or its authorized representative, at least 10 days in advance of the date of the hearing.

(4) The hearing examiner shall schedule the hearing to be held within 21 days after the date of receipt by the Division of WIC of the local agency or store appeal.

(5) The Department or the appellant may request in writing that the hearing be rescheduled for another time or date and the hearing examiner shall consider the request.

(e) *Hearing examiner.* The Secretary will appoint a hearing examiner to preside over the appeal. The person shall be an impartial decision-maker, whose decision as to the validity of the Department's action shall rest solely on the evidence presented at the hearing and the statutory and regulatory provisions governing the WIC program, and who may not have participated in the decision made by the Division of WIC or have any personal stake in the outcome.

(f) *Hearing procedures.*

(1) The local agency or store may be assisted or represented by an attorney or other authorized representative.

(2) The local agency or store, or its authorized representative, may examine, prior to and during the hearing, the documents and records considered by the Division of WIC in reaching its decision under appeal.

(3) The hearing shall be open to the public.

(4) Each party shall have the opportunity to present and cross-examine witnesses.

(5) Each party may present oral or documentary evidence and arguments to support its position in narrative form.

(6) Each party may object to or attempt to refute any testimony or other evidence presented by the other party.

(g) *Supersession.* Subsection (d) supersedes 1 Pa. Code § 35.105 (relating to notice of nonrulemaking procedures). Subsection (e) supersedes 1 Pa. Code § 35.185 (relating to designation of presiding officers). Subsection (f) supplements 1 Pa. Code § 31.21 (relating to appearance in person) and supersedes 1 Pa. Code §§ 31.22 and 31.23 (relating to appearance by attorney; and other representation prohibited at hearings).

[Pa.B. Doc. No. 00-2255. Filed for public inspection December 22, 2000, 9:00 a.m.]

---