

# PROPOSED RULEMAKING

## DEPARTMENT OF HEALTH

[28 PA. CODE CH. 18]

### Recreational Swimming Establishment Lifeguard Requirements

The Department of Health (Department) proposes to amend Chapter 18 (relating to public swimming and bathing places) to read as set forth in Annex A.

#### *Purpose of the Proposed Amendments*

The act of June 18, 1998 (P. L. 531, No. 75) (Act 75), amending the Public Bathing Law (act) (35 P. S. §§ 672—680d), directed the Department to select and identify authorities to certify lifeguards and to promulgate regulations to determine the number of lifeguards required at a recreational swimming establishment when the recreational swimming establishment is open to the public. The Department is proposing these amendments in consultation with established certifying authorities and recreational swimming establishments.

Act 75 granted authority to the Department to promulgate regulations to require an adequate number of certified lifeguards at certain types of swimming facilities. Application of these lifeguard requirements is limited to “recreational swimming establishments” as defined in Act 75. Two major factors governing the applicability of the regulations are that the recreational swimming establishment must be open to the public and charge a fee for admission.

The lifeguard requirements of Act 75 and the regulations are intended to enhance public safety by requiring adequate lifeguard coverage at recreational swimming establishments and by setting forth requirements for the certification of lifeguards. The provisions of current § 18.42 (relating to lifeguards) requiring lifeguard coverage for public bathing places, were invalidated by the Pennsylvania Supreme Court in 1990 as exceeding the promulgating agency’s regulatory authority. *Spooner v. Secretary of Commonwealth*, 574 A.2d 600 (Pa. 1990), aff’d per curiam, 539 A.2d 1 (Pa. Cmwlth. 1988). The Conservation and Natural Resources Act (71 P. S. §§ 134.101—134.103), which dismantled the former Department of Environmental Resources and transferred certain powers and duties to other agencies, also required the Department to administer the act. The Department is proposing to delete the inoperative language from § 18.42 and add language that corresponds to the requirements of Act 75.

#### *Requirements of the Proposed Amendments*

##### § 18.1. Definitions

The Department has proposed to amend this section to add definitions for pertinent terms.

A “certified lifeguard” is defined in section 2(5) of the act (35 P. S. § 673(5)) as:

“[A] . . . an individual who has a current certification in lifeguarding from a certifying authority recognized by the Department in a notice published in the *Pennsylvania Bulletin*.”

The Department is proposing to add the statutory definition to this section.

A “recreational swimming establishment” is defined in section 2(6) of the act (35 P. S. § 673(6)) as:

“[A] facility that is designed, constructed and/or designated for use by individuals for the primary purpose of swimming, where a fee is charged for admission.”

This definition includes, swimming pools, water rides, wave pools and swimming beaches and other outdoor swimming facilities. The term excludes those facilities owned by condominiums, other property owner associations, rental arrangements which include three or more families or social units, hotels or motels, campgrounds, private clubs and private organizations which do not provide access to the general public, swimming facilities used exclusively for hydrotherapy and residential swimming facilities used solely by the owner of a residence, his family and personal guests.

The Department is proposing to add the statutory definition to § 18.1.

The Department is proposing definitions for “bather,” “bather load,” “maximum bather load,” and “rope and float line” that are derived from established definitions adopted by the National Spa and Pool Institute. See National Spa and Pool Institute, *American National Standard for Public Swimming Pools, ANSI/NSPI—1 (1991)*.

##### § 18.42. Certified lifeguards.

The Department is proposing to change the title of this section to “certified lifeguards” to reflect Act 75. Subsections (a) and (b) would be deleted and replaced by new subsections (a)—(d).

##### *Subsection (a)*

The Department has identified the American Red Cross, the YMCA and Ellis and Associates as approved lifeguard certifying authorities and has listed them in proposed subsection (a). This is consistent with the practice in various other states, as these organizations are Nationally recognized and accepted lifeguard certifying authorities.

Another authority that provides certification for lifeguards could apply to be approved by the Department as a qualified, certifying authority. Every authority applying for approval must submit materials to the Department on an annual basis to establish that its lifeguard training would satisfy the requirements of proposed subsection (b). The Department would publish a list of approved certifying authorities, on an annual basis, in the *Pennsylvania Bulletin*.

##### *Subsection (b)*

In addition to the American Red Cross, the YMCA and Ellis and Associates, another lifeguard certifying authority may apply to be approved by the Department. Proposed subsection (b) specifies the criteria that would be required for a certifying authority’s lifeguard training course to be recognized by the Department. The criteria are based on Nationally recognized lifeguard certifying authority standards and include first aid training, cardiopulmonary resuscitation certification, swimming ability, testing and certification and renewal criteria.

##### *Subsection (c)*

This proposed subsection would provide the Department’s criteria for determining that a minimum number of certified lifeguards are on duty at a recreational swimming establishment to protect the safety of the

public when that establishment is in operation. Traditionally, the number of lifeguards required at public bathing places, absent any National standards, has been based on the surface area of the facility, the user load (number of swimmers in the pool) or a combination of both.

In this proposed rulemaking, the required number of certified lifeguards would be based on a determination of water surface area. Computations based upon water surface area would provide a consistent method for determining the number of lifeguards needed, even though there could be considerable differences in the design, size and type of facility and a variable user load.

Various states employ different standards for determining the appropriate number of lifeguards for a public bathing facility. There is no single industry standard or consensus regarding an appropriate lifeguard ratio. Nationally recognized lifeguard training organizations, such as the American Red Cross and Ellis and Associates, recommend that each lifeguard be able to survey the lifeguard's assigned area every 10 seconds and be able to respond to a distressed swimmer within 20 seconds. This standard, called the "10/20 rule," is the basis upon which the majority of lifeguards are trained.

The Department has held several stakeholder meetings over the past years to gather input from interested parties on recommended lifeguard staffing ratios. Many pool owner/operators base their lifeguard staff ratios on experience. Some owner/operations will staff at higher levels during the peak periods of the day and week (early to mid-afternoon and weekends) and provide lower staff levels during off-peak hours (early morning hours, late evening hours). The majority of the stakeholders have consistently indicated that a staffing ratio based on the number of swimmers (for example, 1 lifeguard for every 70 swimmers) would be impractical and impossible to enforce or monitor, as the pool personnel and lifeguards would constantly be counting swimmers to determine if there is compliance with the regulatory requirements.

The Department has identified recommended lifeguard ratios. These ratios range from one lifeguard for every 2,000 square feet of water surface area, which is supported by the Great Lakes Upper Mississippi River Basin Commission and the National Environmental Health Association, to one lifeguard for every 6,700 square feet of water surface area, under ideal conditions, which is supported by a joint study conducted by the New York State Department of Health and aquatics expert, Pia Consulting. Given that "ideal conditions" rarely exist in practice, New York State Department of Health and Pia Consulting further recommend that one lifeguard for 3,400 square feet of water surface area would be sufficient coverage under normal operating conditions. Based on discussions with stakeholders and the available data, the Department is proposing a ratio of one lifeguard for every 4,000 square feet of water surface area during periods when the recreational swimming establishment is open for general purpose swimming. This ratio would provide health and safety protection for swimmers as well as provide a uniform standard that would be easily implemented. The proposed rulemaking includes a provision that provides the pool owner/operator with the option to close portions of the water surface area with a rope and float line during periods when the bather load is low in comparison to the size of the pool.

Proposed subsection (c) would state that a lifeguard, while on duty at the waterside at a facility, may not be assigned to other tasks that would divert the lifeguard's attention from the persons using the facility. Additionally,

the Department proposes that, during special events such as swim meets, learn-to-swim programs and lap swimming, at least one lifeguard shall be present whose sole duty is to safeguard the safety of the swimmers in the water. This is based on recommendations from the American Red Cross and Pia Consulting that, even if a swimming instructor or coach is a certified lifeguard, they cannot act simultaneously as an instructor and a lifeguard.

Other provisions for bather safety in proposed subsection (c) relate to wading pools, diving boards and water slides. Proposed subsection (c) would require that, unless there is an unobstructed view of the wading pool from an existing lifeguard station, an additional certified lifeguard be stationed by the wading pool when the recreational swimming establishment is open. Further, if the recreational swimming establishment has a diving board or water slide, a certified lifeguard must be on duty within 50 feet from the diving well or catch area.

The proposed rulemaking provides a very specific and precise formula to calculate the number of certified lifeguards required by a recreational swimming establishment. The formula is capable of a uniform and consistent application by the owners of recreational swimming establishments. Additional assessment by the Department would be triggered only when an unusual configuration of the swimming area compromises the ability of lifeguards to monitor bather safety notwithstanding the regulatory formula for determining the number of lifeguards needed.

The proposed rulemaking identifies three Nationally recognized lifeguard certifying authorities as recognized by the Department. Additionally, the proposed rulemaking lists the specific criteria needed for other lifeguard certifying authorities to be approved by the Department as a recognized lifeguard certifying authority. A list of approved authorities would be published, on an annual basis, in the *Pennsylvania Bulletin*.

#### *Subsection (d)*

Section 8(a) of the act (35 P. S. § 679(a)) requires the Department to enter upon any bathing or swimming place and determine whether the provisions of that act and the rules and regulations of the Department are being satisfied or violated.

If it is determined that a bathing or swimming place is being maintained contrary to those provisions, the facility will be closed to all persons and the bathing or swimming pool is to be drained and kept dry until provision is made to comply with section 8(b) of the act and the Department has given permission to reopen.

If a recreational swimming establishment is found to be in violation of any of the provisions relating to the required number of certified lifeguards, proposed subsection (d) would provide for closing the pool, consistent with Act 75. Unless there are other violations that create a serious risk to the health or safety of the bathers, the Department would not require the pool to be drained. The Department has determined that draining a pool can result in damage to the pool. Also, in a drought or weather conditions limiting the use of water, draining a pool could result in the pool remaining dry and unable to be used for a substantial period of time even after the violations have been corrected.

The Department believes the most practical and efficient provision, consistent with enforcing the requirement that owner/operators of recreational swimming establishments have an adequate number of certified lifeguards on duty at poolside, is to provide for closure of the pool if

there is a determination that the facility has an inadequate number of appropriately certified lifeguards. The pool would remain closed until the Department had conducted a reinspection and provided written authorization to reopen to the owner of the recreational swimming establishment.

The Department intends to conduct the reinspection as soon as possible after the facility owner provides notice that the pool is in compliance with regulatory requirements.

*Persons and Entities Affected*

The proposed rulemaking would affect swimming and bathing facilities, meeting the definition of "recreational swimming establishment," when open for use by the general public and a fee is charged for admission. These establishments would include swimming pools, water rides, wave pools and swimming beaches that are not otherwise excluded by the statutory definition of a "recreational swimming establishment." The proposed rulemaking would enhance the safety of the public when they use recreational swimming establishments.

*Cost and Paperwork Estimates*

The proposed rulemaking would have little fiscal impact on the Commonwealth, local government, the private sector and the general public. Based on current hiring practices, the Department of Conservation and Natural Resources has estimated it may incur \$90,000 in expenses for additional lifeguard salaries.

Most recreational swimming establishments, as defined by Act 75, currently employ lifeguards to protect the safety of their patrons. Many recreational swimming establishments have lifeguard coverage ratios that exceed the standard in the proposed rulemaking; other recreational swimming establishments use a lifeguard coverage ratio that is below the standard in the proposed rulemaking. The exact cost incurred as a result of the proposed rulemaking would depend on the current practices of the individual recreational swimming establishment and the number of additional lifeguards, if any, that would be required to meet the standard in the proposed rulemaking. The costs incurred would primarily be in the form of lifeguard salaries. The proposed rulemaking would not significantly increase paperwork.

*Effective Date/Sunset Date*

The proposed rulemaking would be effective 60 days after publication of final-form rulemaking. No sunset date has been established. The Department would monitor the effectiveness of the regulations on a continuing basis and as part of the annual sanitary inspections conducted by the Department.

*Statutory Authority*

The proposed rulemaking is promulgated under the act. Section 3 of the act (35 P.S. § 675.1) requires the Department to determine appropriate authorities to certify lifeguards and to issue regulations to determine the number of lifeguards required at a recreational swimming establishment.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 11, 2002, the Department submitted a copy of this proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Health and Human Services Committee and the Senate Health and Human Services Committee and the Senate Public Health and

Welfare Committee. In addition to submitting the proposed rulemaking, the Department has provided IRRC and the Committees with a copy of a detailed 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 to the public upon request.

Under section 5(g) of the Regulatory Review Act, if IRRC has objections to any portion of the proposed rulemaking, it will notify the Department within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria that have not been met by the portion of the proposed rulemaking to which an objection is made. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor of objections raised.

*Contact Person*

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed rulemaking to Dennis C. Wilson, Environmental Health Administrator, Department of Health, Bureau of Community Health Systems, Room 628 Health and Welfare Building, P. O. Box 90, Harrisburg, PA, 17108-0090, (717) 787-4366 within 30 days after publication of this notice in the *Pennsylvania Bulletin*. Persons with a disability who wish to submit comments, suggestions or objections regarding the proposed rulemaking may do so by using V/TT (717) 783-6514 for speech and/or hearing impaired persons or the Pennsylvania AT&T Relay Service at (800) 654-5984 (TT). Persons who require an alternative format of this document may contact Dennis Wilson so that necessary arrangements may be made.

ROBERT S. ZIMMERMAN, Jr.,  
*Secretary*

**Fiscal Note:** 10-155 Resubmission. (1) General Fund; (2) Implementing Year 2002-03 is \$50,000; (3) 1st Succeeding Year 2003-04 is \$90,000; 2nd Succeeding Year 2004-05 is \$90,000; 3rd Succeeding Year 2005-06 is \$90,000; 4th Succeeding Year 2006-07 is \$90,000; 5th Succeeding Year 2007-08 is \$90,000; (4) 2001-02 Program—\$62,483,000; 2000-01 Program—\$59,696,000; 1999-00—\$58,420,000; (7) State Parks Operations; (8) recommends adoption. No additional costs to the Department of Health. The Department of Conservation and Natural Resources will incur costs, as outlined above, for additional lifeguards to meet requirements.

**Annex A**

**TITLE 28. HEALTH AND SAFETY**

**PART II. LOCAL HEALTH**

**CHAPTER 18. PUBLIC SWIMMING AND BATHING PLACES**

**GENERAL PROVISIONS**

**§ 18.1. Definitions.**

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

\* \* \* \* \*

**Bather**—A person using a recreational swimming establishment in the water or adjoining deck area for the purpose of swimming, water sports or other recreational activity.

**Bather load**—The total number of bathers in a recreational swimming establishment.

**Certified lifeguard**—An individual who has a current certificate in lifeguarding, issued by a lifeguard certifying authority, as recognized by the Department in a notice published yearly in the *Pennsylvania Bulletin*.

\* \* \* \* \*

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

\* \* \* \* \*

**Maximum bather load**—The maximum number of bathers that the recreational swimming establishment is designed to accommodate, as defined in the plans and specifications submitted as part of the permit application using the guidelines set forth in the Department's publication, *Public Bathing Place Manual*.

\* \* \* \* \*

**Recreational swimming establishment**—A facility that is designed, constructed or designated for use by individuals for the primary purpose of swimming, if a fee is charged for admission.

(i) The term includes swimming pools, water rides, wave pools and swimming beaches and other outdoor swimming facilities.

(ii) The term excludes those facilities owned by condominiums, other property owner associations, rental arrangements that include three or more families or social units, hotels or motels, campgrounds, private clubs and private organizations which do not provide access to the general public, swimming facilities used exclusively for hydrotherapy, and residential swimming facilities used solely by the owner of a residence, the owner's family and personal guests.

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**Rope and float line**—A continuous line, at least 1/4 inch in diameter, that is supported by buoys and attached to opposite sides of a swimming pool.

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**GENERAL SAFETY**

§ 18.42. [ Lifeguards ] Certified lifeguards.

(a) [ *Number*: One or more competent lifeguards in adequate number shall be on duty at the waterside at all times the public bathing place is open to use by bathers, and may not be assigned other tasks which will divert attention from the safety of the bather.

(b) *Qualifications*. Lifeguards shall be capable swimmers, skilled in lifesaving methods and in methods of artificial resuscitation as evidenced by the possession of a currently valid certificate or other proof of proficiency from a recognized agency offering instructions in these fields. ]

*Recognized lifeguard certifying authorities*. The Department recognizes the American Red Cross, the YMCA and Ellis Associates as lifeguard certifying authorities.

(1) Other organizations that intend to qualify as certifying authorities shall submit materials, on an

annual basis, to the Department to establish that their lifeguard training courses satisfy the criteria in subsection (b).

(2) The materials shall be submitted to the Department on or before June 30 of each year and shall include a completed form entitled "Application for Recognition as a Lifeguard Certifying Authority" in the submission.

(3) This form is available from the Department.

(4) The Department will publish a list of approved certifying authorities annually, on or before December 1 of each year, in the *Pennsylvania Bulletin*.

(b) *Requirements for a lifeguard certifying authority*. The Department will consider approval of a lifeguard certifying authority if the certifying authority's lifeguard training course satisfies the following requirements:

(1) The course is conducted pursuant to a written training plan, instructor's manual, and text book.

(2) The course provides for confirmation of course completion for certification in cardiopulmonary resuscitation.

(3) The course provides for certification in first aid.

(4) The course includes a system for evaluating swimming ability.

(5) The course provides for instruction in lifeguarding responsibilities.

(6) The course provides a method for testing and certification.

(7) The course includes a certificate which expires, in no longer than 3 years, if renewal criteria are not satisfied.

(8) The instructors of the course have successfully completed a training course that includes:

(i) Certification in lifeguard instruction.

(ii) Student evaluation.

(iii) Program planning.

(iv) Cardiopulmonary resuscitation.

(v) Conducting practice first aid and rescue sessions.

(c) *Required number of lifeguards*. A recreational swimming establishment shall have on duty an adequate number of certified lifeguards to protect the safety of users. To ensure an adequate number of certified lifeguards, the operator of a recreational swimming establishment shall comply with the following requirements:

(1) At least one certified lifeguard for every 4,000 square feet of water surface area, plus one certified lifeguard for any fraction thereof, equal to or greater than 1,000 square feet, shall be on duty at the waterside at all times the recreational swimming establishment is open to use by bathers for general swim purposes. There shall be at least two certified lifeguards present and available to aid bathers whenever the recreational swimming establishment is being used by bathers.

(i) The water surface area shall mean the total surface area of water accessible to the bathers, including any wading pools.

(ii) The operator may reduce the water surface area by closing portions of the swimming area with a rope and float line, provided that the operator maintains adequate notification and supervision to prevent patrons from entering the closed portions of the swimming area. For the purposes of this section, "adequate" means sufficient to accomplish the task, but it does not require any additional certified lifeguards above the minimum number established in this section.

(iii) Under circumstances when the ability of a certified lifeguard to survey 4,000 square feet of water surface area is impaired, such as when the size or shape, or both, of the recreational swimming establishment prevents the certified lifeguard from monitoring the assigned area from a designated location, the Department may require additional certified lifeguards to assure the safety of the bathers.

(2) The bather load of the recreational swimming establishment may not exceed the maximum bather load as defined in the permit application.

(3) During periods when swim meets, swim team practices, learn-to-swim programs, lifeguard training or other special events in which the use of the recreational swimming establishment is restricted to only those persons participating in the special events, at least one certified lifeguard, whose sole duty is to protect the bathers, shall be present at waterside during the event.

(4) When a wading pool is open to the public, the certified lifeguard shall have an unobstructed view of the entire wading pool from a certified lifeguard's assigned station. If the certified lifeguard does not have an unobstructed view, an additional certified lifeguard shall be on duty to guard only the wading pool.

(5) If the recreational swimming establishment has a diving board or water slide, a certified lifeguard shall be on duty to monitor the diving well or catch area when the diving board or water slide is open to the public.

(i) The certified lifeguard shall be stationed within 50 feet of the diving well or slide catch area.

(ii) If the swimming area includes both a diving well and slide catch area, or the recreational swimming establishment has multiple slides or diving boards, the operator may not assign a certified lifeguard to monitor both areas unless that lifeguard is stationed within 50 feet of each and can monitor both areas simultaneously.

(iii) If the diving well or slide catch area is physically separated from the main swimming area, a certified lifeguard shall be assigned to monitor the diving well or slide catch area exclusively, and the operator shall exclude the water surface area of the diving well or slide catch area from the water surface area of the recreational swimming establishment for the purpose of determining the number of additional certified lifeguards required under paragraph (1).

(6) While on duty to watch bathers, a certified lifeguard may not be assigned other tasks which may divert attention from the safety of the bathers, or which are outside the lifeguard's training and certification.

(d) *Violation of certified lifeguard requirement.* The Department may order to be closed to the public any recreational swimming establishment that it finds to be in violation of any of the provisions of subsection (c), until the Department has done the following:

- (1) Performed a follow-up inspection
- (2) Found that the facility has met the requirements of subsection (c).
- (3) Provided that facility with written authorization to reopen.

[Pa.B. Doc. No. 02-1633. Filed for public inspection September 20, 2002, 9:00 a.m.]

[28 PA. CODE CHS. 1101, 1103, 1105, 1107, 1109  
AND 1113]

Supplemental Nutrition Program for Women, Infants and Children

The Department of Health (Department) proposes to amend Chapters 1101, 1103, 1105, 1107, 1109 and 1113 to read as set forth in Annex A. Those chapters govern the authorization, management and appeal rights of stores participating in the Women, Infants and Children (WIC) Program (WIC authorized stores).

A. *Purpose of the Proposed Amendments*

One purpose of the proposed amendments is to achieve compliance with recent amendments to the Federal regulations governing the WIC Program found in 7 CFR Part 246 (relating to supplemental nutrition program for women, infants and children), adopted by the United States Department of Agriculture, Food Nutrition Service (USDA-FNS). The Federal amendments, adopted on December 29, 2000, mandate selection criteria, training requirements, criteria to be used to identify high-risk stores and monitoring requirements, including compliance investigations.

Another purpose of the proposed amendments is to implement the Department's decision, permitted by Federal regulation, to eliminate the limitation criteria used to limit the number of stores authorized to participate in the WIC Program. Currently, a store desiring to become a WIC authorized store has to satisfy the selection and limitation criteria in § 1103.4 (relating to selection and limitation criteria; authorization process). Selection criteria include minimum inventory, product freshness, price and other requirements. Compliance is evaluated during an announced onsite store review conducted by a WIC Program representative. Limitation criteria are applied in the following manner: if the number of stores meeting selection criteria is greater than the number of store slots available in a particular geographic area, the stores with the most competitive prices are assigned to the slots.

Through the proposed amendments, the Department proposes to allow any store that meets the revised selection criteria to participate in the WIC Program. The Department proposes to retain all current selection criteria with some additions and revisions. The most significant of the revisions is to the manner in which the Department imposes price limitations on foods that may be purchased with WIC checks (allowable foods). Currently, the Department maintains limited control on prices for allowable foods by establishing the total maximum allowable cost for two defined "food prescriptions"

consisting of food items that participants purchase most frequently. The Department proposes to establish maximum prices for all allowable foods. Those prices would be published quarterly in the *Pennsylvania Bulletin*. Stores would be required to have allowable foods available at or below the published prices. Payment by the WIC Program of WIC checks submitted for redemption by WIC authorized stores would be limited to no more than the sum total of the maximum prices for each of the WIC food items authorized for purchase on the check.

The Department has engaged in a thorough review of its existing WIC Program regulations under the Governor's Executive Order 1996-1. The Department has held a series of meetings for the purpose of soliciting comments from persons affected by its regulations. The discretionary changes to the Department's regulations, to a large measure, are the result of the discussions held during these meetings.

The Department's regulations are a part of the State Plan of Operations required to be submitted to the USDA-FNS under 7 CFR 246.4 (relating to state plan). Therefore, in addition to meeting the Commonwealth's statutory requirements for amending regulations, the Department must submit any changes to its WIC Program regulations to the USDA-FNS for approval. The Department has submitted the proposed regulations to the USDA-FNS, which has approved the regulations.

#### B. Summary of Amendments

##### § 1101.1. Background and scope.

The Department proposes to revise subsection (b) to delete reference to local agencies in the context of appeal rights. The purpose of the regulations is to establish design and operational requirements for the food delivery system for the WIC Program as they apply to stores. A secondary purpose of the regulations is to provide information about the right to appeal an adverse action of the Department. Information in the regulations concerning stores' and participants' appeal rights build upon requirements set forth in Federal regulations. Because the appeal provisions in the regulations applicable to participants and stores contain information not contained in Federal regulations, and because participants and stores do not have easy access to Federal regulations, Department regulations governing appeal rights for participants and stores are essential. The same is not true with regard to local agencies. Department regulations do not expand upon appeal rights for local agencies set forth in Federal regulations. Moreover, local agencies, under their agreement with the Department, are required to be familiar with and comply with Federal regulations. For these reasons, the Department proposes to further limit the scope of the regulations to address appeal rights for participants and stores only. Local agencies may refer to Federal regulations for an explanation of their appeal rights.

##### § 1101.2. Definitions.

The Department proposes to add a definition for "authorization" and amend the definition of "certification." "Authorization" would be defined as the Department's grant of authority to a store to serve as a WIC authorized store. "Certification" would be defined as the Department's acceptance of an applicant to participate in the WIC Program as a participant. Similarly, the Department proposes to delete the definition of "recertification" and substitute, in its place, the definition of "reauthorization" which would be defined as the Department's renewal of authorization. Accordingly, all references throughout the

regulations to certification and recertification, as those terms now pertain to stores, would be deleted and replaced with references to authorization and reauthorization.

The Department proposes to revise the definition of "authorized representative" to clarify that a "proxy" or "endorser" is considered an "authorized representative" of the participant. The Department also would add a sentence to the definition to provide that the person conducting a "compliance buy" or a "WIC transaction review" is also an "authorized representative."

The Department proposes to add the definition of "claim" as a demand for reimbursement of an overcharge or other improper charge to the WIC Program as a result of a store violation.

The Department proposes to add the definition of "contract brand" as the specific manufacturer brand of an allowable food that the Department is contractually bound to prescribe for participants.

The Department proposes to revise the definition of "inventory audit" to incorporate the use of defined terms and promote clarity.

The Department proposes to delete the definition of "limitation criteria," as the Department proposes to cease applying limitation criteria when determining the stores that will be given permission to serve as WIC authorized stores.

The Department proposes to add the definition of "maximum allowable price" as the maximum price the Department will pay for an allowable food.

The Department proposes to revise the definition of "onsite review" by adding language to explain that an onsite review may be announced or unannounced. Within the text of the regulations, the Department uses the appropriate modifier to indicate whether the onsite review being discussed would be announced or unannounced.

The Department proposes to add definitions of "overcharge" and "overpayment." "Overcharge" would be defined as a charge by a WIC authorized store to the WIC Program, through redemption of a WIC check, for an allowable food in excess of the store's shelf price for that food or in excess of the price charged a non-WIC participant for that food. "Overpayment" would be defined as payment to a WIC authorized store of a WIC check redeemed by the store in an amount in excess of the amount to which the store was entitled based upon the maximum allowable price of each allowable food authorized for purchase on the WIC check. The distinction between the two terms would be based upon whether the Department made the error, by making payment on a redeemed WIC check in excess of the sum total of the maximum allowable prices for the foods authorized for purchase on the check, or the store made the error, by charging the WIC Program more than the store charges its non-WIC customers. The former is an "overpayment;" the latter is an "overcharge."

The Department proposes to add the definition of "periodic review." The term is used in the current version of the regulations. The Department proposes to define the term to mean contemporaneous announced onsite reviews of stores in a trade area conducted not less than once every 3 years for the purpose of selecting stores for authorization and reauthorization.

The Department proposes to add the definition of "probationary authorization." The term is used in the

current version of the regulations. The Department proposes to add a definition of the term to avoid potential confusion with the term "temporary authorization." The Department proposes to define the term to mean the Department's probationary authorization of a WIC authorized store when inadequate participant access would occur if the store were not authorized or reauthorized or when the store is reviewed prior to opening to the public and has not yet stocked its dairy section or its frozen juice section.

The Department proposes to add the definition of "routine review" as an unannounced onsite review of a WIC authorized store to evaluate adherence by the store with the requirements in the regulations governing the store's participation in the WIC Program.

The Department proposes to delete the definition of "store slot," as the concept of store slots is the primary component of limitation criteria and the Department is proposing to cease applying limitation criteria.

The Department proposes to add the definition of "store violation" as any intentional or unintentional action by the owners, officers, managers, agents or employees of a WIC authorized store that violate the requirements in the regulations governing the store's participation in the WIC Program and that may result in a claim.

The Department proposes to add the definition of "temporary authorization" as the Department's temporary and conditional authorization of a WIC authorized store that fails to meet specified selection criteria during the initial onsite review for purposes of reauthorization. This addition to the definitions is necessitated by the Department's proposal to change the potential consequence for a WIC authorized store that fails to meet specified selection criteria during the onsite review for reauthorization. Currently, a store that fails to meet one or more selection criteria during the onsite review is denied reauthorization unless participant access to allowable foods would be compromised by denial of the store's application for reauthorization. Otherwise, there is no opportunity to correct violations detected during the onsite review. The Department proposes to incorporate the possibility of temporary authorization in the event a store fails to meet the selection criteria, other than the minimum inventory and price criteria, during the onsite review. There is no possibility of temporary authorization if the store, during the onsite review for purposes of reauthorization, fails to meet minimum inventory and price criteria. The circumstances under which the Department would grant temporary authorization and the terms governing temporary authorization would be set forth in § 1103.3 (relating to authorization of store slots) which would be retitled "Temporary authorization."

Finally, the Department proposes to delete the term "training buy" and to substitute in its place the term "WIC transaction review." The definition would remain the same. The Department also proposes to add the definition of "WIC transaction." The Department proposes to define the term to mean the presentation of a WIC check by a participant to a WIC authorized store resulting in the purchase of one or more of the allowable foods authorized for purchase on the check.

#### § 1101.3. Administration.

The Department proposes to add a new subsection (b). The Department proposes to form a Vendor Advisory Workgroup to function in an advisory capacity to the Department. Representatives would be chosen from the retail store community, appropriate advocacy groups or

associations for retail stores and participants, and from the State and local agencies. The current subsection (b) would become subsection (c).

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

The Department proposes to revise the title and the text of this section to: (1) mirror proposed revisions in the use of terms to describe authorization of stores; and (2) clarify the authorization and reauthorization process and requirements as a result of the elimination of limitation criteria. Thus, the name of this section would become "Authorization and reauthorization process and requirements."

The Department proposes to revise the title and text of subsection (a) which would address "duration of authorization or reauthorization." The Department proposes that this introductory subsection would clarify that a store wishing to serve as a WIC authorized store must be authorized or reauthorized in accordance with the requirements for authorization or reauthorization, set forth in numbered paragraphs in proposed subsections (b) and (c) respectively. Proposed subsection (a) also would state that a store's authorization or reauthorization remains in effect until the Department acts on the store's application for reauthorization when the next periodic review is conducted in the trade area in which the store is located, unless terminated earlier in accordance with subsection (d). Periodic reviews would be conducted once every 3 years, in accordance with changes in Federal regulations. Proposed subsection (a) also would clarify that failure to submit an application for reauthorization in response to the Department's notice of periodic review will result in expiration of the store's authorization or reauthorization. Stores that received a letter of authorization in the 60 days prior to the start of the periodic review would be exempt from periodic review.

The text of subsection (b) would be deleted in its entirety, numbered paragraphs outlining the authorization process would be substituted in its place, and the subsection would be retitled "authorization process." Similarly, the text of subsection (c) would be deleted in its entirety, numbered paragraphs outlining the reauthorization process substituted in its place, and the subsection retitled "reauthorization process." The information to be listed in numbered paragraphs in proposed subsections (b) and (c) is not new information. The Department proposes to take information currently contained in each of this section's existing subsections and to reorganize the information under the headings "authorization" and "reauthorization." The Department believes the reorganization of information is necessary in light of the Department's proposal to eliminate limitation criteria in the store selection process. If limitation criteria are eliminated, as proposed, a store would no longer need to wait until a store slot opened up, or until a periodic review, to apply for authorization. Any store would be able to apply at any time for authorization. Hence, authorization and reauthorization would assume equal significance for purposes of retail store management within the WIC Program with a concomitant heightened need to clarify, in separate subsections, the process and requirements for both.

Accordingly, both proposed subsection (b) and proposed subsection (c) would address the following: (1) how and where to obtain an application for authorization or reauthorization; (2) what to do with the application once it is completed; (3) the circumstances under which the Department will refuse to accept the application; (4) the onsite review to evaluate compliance with selection criteria; (5)

the decision-making process; and (6) eligibility to apply at a later date if the application is denied.

Proposed subsection (d) would address termination of authorization and reauthorization, and would list the circumstances under which the Department could terminate authorization. Termination of authorization or reauthorization would be listed under § 1113.1 (relating to right to appeal) as an adverse action that may be appealed.

*§ 1103.2. Probationary certification.*

The Department proposes to amend the title of this section by substituting "authorization" for "certification." The Department also proposes to amend the text of the section to mirror changes in the title; that is, the Department proposes to delete the terms "certification" and "recertification" and substitute in their place the terms "authorization" and "reauthorization" as appropriate. The Department further proposes to delete references to limitation criteria.

*§ 1103.3. Authorization of store slots.*

Because the limitation criteria and store slots would be eliminated, the Department proposes to delete the current text of this section in its entirety, and to substitute in its place the rules regarding temporary authorization. This section also would be retitled "Temporary authorization." This section as proposed would provide that if a WIC authorized store that applies for reauthorization fails to meet one or more of the selection criteria in § 1103.4 the onsite review, the store may request temporary authorization. A store that failed to meet the price and minimum inventory requirements of § 1103.4(5), however, would be ineligible for temporary authorization. A store that is a high-risk store or the subject of an ongoing compliance investigation also would be ineligible for temporary authorization. Under proposed subsection (b), temporary authorization would be conditioned on the following: (1) the store would have only one more opportunity to meet selection criteria during a second announced onsite review; (2) if the Department rescinds temporary authorization for the store's failure to meet selection criteria a second time, the store would not be eligible to reapply for authorization for 1 year from the date of the initial onsite review for purposes of reauthorization; and (3) the Department would reduce by 10% the maximum allowable prices for the foods authorized for purchase on the WIC checks the store redeems for WIC transactions that occur during the first 90 days of the extended authorization period.

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

The Department proposes to delete references within the title of this section to "limitation criteria" and "authorization process" in accordance with the Department's proposal to eliminate application of limitation criteria as part of the store authorization process. This section as amended would be retitled "Selection criteria for authorization and reauthorization." The proposed revision to the title of the section follows the Department's proposed deletion of subsection (b), which lists limitation criteria, and subsection (c), which addresses the process in the event limitation criteria are required to be applied.

The Department proposes to retain the selection criteria in subsection (a), as revised, but since the other two subsections would be repealed, the subsection (a) designation also would be eliminated. The first paragraph within current subsection (a) that the Department proposes to revise is paragraph (2), which requires a store to serve a

minimum number of participants in order to be authorized. The Department recognizes that it is impossible to impose a requirement in connection with a store seeking initial authorization; hence, the Department proposes to revise paragraph (2) to require that a store seeking reauthorization serve at least 25 participants per month. If the store is not serving at least 25 participants in the most recent month for which the Department has participant data at the time of the review, the Department may deny reauthorization. Because the Department will not have participant data for a store seeking initial authorization, participant data will not be a factor in the initial review process; however, the Department proposes to terminate authorization under § 1103.1(d) if, after 8 months following initial authorization, the store is not serving 25 participants.

The most significant revision to the selection criteria is the proposed revision to paragraph (5). The Department proposes that the prices on the store's minimum inventory items shall be equal to or less than the maximum allowable prices for those items. Currently, the Department does not impose price limitations on all WIC food items. Instead, the Department has price limits on some WIC foods and establishes a maximum allowable cost for each of two food prescriptions made up of foods currently listed in paragraph (6). The Department proposes to delete paragraph (6) in its entirety.

With the deletion of the text of paragraph (6), former paragraph (7) would become paragraph (6) and paragraph (8) would become paragraph (7). The Department proposes to add a new paragraph (9) requiring that a store that has been denied authorization or reauthorization in the last 12 months must be eligible to apply for authorization or reauthorization in accordance with § 1103.1(b) or (c) or § 1103.3(b)(2), as applicable. These provisions address eligibility to apply if authorization or reauthorization is denied or the Department rescinds temporary authorization.

The final proposed revision to the selection criteria is the addition of a paragraph (13) which, in accordance with the Federal mandate, would preclude authorization or reauthorization of a store whose owners, officers, or managers have been convicted of or had a civil judgment entered against them for conduct demonstrating a lack of business integrity.

*§ 1103.5. Minimum inventory.*

The Department proposes to add language to subsection (a) to emphasize, in keeping with the proposed revision to § 1103.4, that the store's prices for minimum inventory items, listed in this section, must be equal to or less than the maximum allowable prices.

The Department also proposes the following specific changes to the list of minimum inventory items in subsection (b): under proposed amendments to paragraph (1)(i), which addresses minimum inventory requirements for milk-based formula, stores would be required to carry thirty-one 13 ounce cans of liquid concentrate, and nine 14.1 ounce cans of powdered milk-based formula. Under proposed amendments to paragraph (1)(ii), which addresses minimum inventory requirements for soy-based formula, stores would be required to carry nine 14-ounce cans of powdered soy-based formula. Under proposed amendments to subsection (b)(2), addressing minimum inventory requirements for milk, stores would be required to carry 10 half gallons of fluid whole milk. Quart equivalents no longer would be permitted. The Department proposes to increase the minimum inventory re-



quirements for nonfat dry milk to four pounds. Also under subsection (b)(2), stores would be required to carry twenty-four 12 ounce containers of evaporated milk. Under proposed amendments to subsection (b)(3), which addresses minimum inventory requirements for cheese, stores would be required to carry 4 pounds total of three varieties of cheese, prepackaged in 8 or 16 ounce packages. Under proposed amendments to subsection (b)(4), stores would be required to carry not less than three 1 dozen containers of eggs. Under proposed amendments to subsection (b)(5), which addresses minimum inventory requirements for juices, stores would be required to carry two varieties of juices, with a total of seven 46 ounce containers, and two varieties of frozen or shelf stable concentrate, with a total of seven 11.5 to 12 ounce containers. Infant juice would need to be contract brand. Under proposed amendments to subsection (b)(6), which addresses minimum inventory requirements for cereal, stores would be required to carry a total of 40 ounces of five varieties of adult cereal, and a total of 24 ounces of two varieties of contract brand infant cereal. Under proposed amendments to subsection (b)(7), which addresses minimum inventory requirements for peanut butter, stores would be required to carry one 15 to 18 ounce container of peanut butter.

The Department proposes deletion in subsection (c) of language providing for the annual publication of maximum prices established by the Department for certain allowable foods. As previously noted, the Department has proposed in § 1103.4(5) that publication of maximum prices for all allowable foods will occur on a quarterly basis.

The Department proposes to revise the text and title of subsection (d). The section would be retitled "exceptions to minimum inventory requirements," and the numbered paragraphs, listing circumstances in which an exception may be granted, would be deleted. The Department proposes that the subsection would provide for the possibility of an exception to minimum inventory requirements for an allowable food when the Department's most recent check redemption information for a store shows no purchases of the allowable food for a period in excess of 90 days.

Finally, the Department proposes to revise the list of allowable foods in subsection (e) for which it may grant an exception to minimum inventory requirements by adding the following two items: contract brand milk based with iron liquid concentrate infant formula, and contract brand soy based liquid concentrate infant formula.

#### *1103.6. Waiting list.*

The Department currently maintains a waiting list to track: (1) stores unable to submit an application because of the absence of an available slot; (2) stores whose weighted prices were higher than other stores competing for one or more slots; and (3) stores located within a mile of a WIC authorized store. Elimination of limitation criteria, as is being proposed, would eliminate the need for a waiting list for stores. One other purpose for which the Department currently maintains a waiting list is to track stores unable to submit an application because the Department has imposed a moratorium on the submission of applications under § 1103.1. Since under the regulations as proposed, the Department would consider applications at any time other than during the 90-day period preceding the start date of triennial reviews, stores would be able to simply wait the 90 days and resubmit an application. No tracking mechanism would be required.

Because the need for a tracking mechanism has been eliminated, the Department proposes to delete this section in its entirety.

#### *§ 1103.7. Inadequate participant access.*

The Department proposes to revise subsection (b) to eliminate consideration of participant access and the possibility of probationary authorization for a store undergoing a change of ownership. The Department would revise subsection (b) to state that the Department will consider participant access when deciding whether to impose a civil money penalty in lieu of disqualification under § 1107.1 (relating to imposition of sanctions).

Subsection (c) contains a listing of the factors used to determine whether inadequate participant access exists. Currently, in assessing whether rejection or removal of a store from the WIC Program will adversely affect participant access, the Department considers the distance to the next closest WIC authorized store as well as the numbers of participants who would be required to travel to the next closest WIC authorized store. Changes in the WIC Program's data processing system will ease the administrative burden associated with mass transfers of WIC participants from one store to another. Therefore, the Department proposes to delete from subsection (c) current paragraphs (5)—(7), which define inadequate participant access in terms of volume of a store's participants relative to the distance to the next closest WIC authorized store.

#### *§ 1105.2. Overcharge recovery system.*

The Department proposes to change the title of this section to "Price adjustment." The Department also proposes to repeal the requirements in current subsections (a)—(c) and to revise the lettering of the remaining subsections accordingly. Under this section as it would be amended, WIC authorized stores would no longer be required to submit quarterly price reports for the Department's review and determination of the maximum redemption amount of each WIC check submitted by the store based upon prices provided in the store's quarterly price reports. Instead, in each calendar quarter, the Department would compare the maximum amount for which a WIC authorized store could have redeemed a WIC check based upon the maximum allowable prices for foods authorized for purchase on the check against the actual amount for which each WIC check was redeemed. This revised procedure, as proposed, is set forth in proposed subsection (a) entitled "Determination of overpayment." As set forth in proposed subsection (b), the Department would seek reimbursements from a WIC authorized store when price comparisons reveal overpayments to the store in excess of \$10 for a calendar quarter.

In the proposed subsections (c)—(e), the Department would delete terms appropriate for the overcharge recovery system and substitute terms appropriate for the proposed price adjustment system. Thus, the term "overcharge billing" would be replaced with "overpayment determination," "overcharge" would be replaced with "overpayment," and "reported prices on the Quarterly Price Report" would be replaced with "prices for allowable foods." References to food prescription costs would be deleted and replaced with references to maximum allowable prices. Also, the Department proposes to add language to clarify that the Department's resolution of an overpayment dispute is not an adverse action that may be appealed. This information also is included in amended § 1113.1(a).

Finally, the Department would delete subsection (i), which addresses disqualification in the circumstance in

which the store's reported prices on the quarterly price report exceed the maximum food prescription costs established by the Department. Under proposed revisions to the regulations, maximum food prescription costs would be eliminated and stores would no longer be required to submit quarterly price reports. Thus, the circumstance envisioned by subsection (i) would no longer be a possibility. The Department proposes to maintain control over prices charged by WIC authorized stores for allowable foods by revising § 1105.3(a) (relating to terms and conditions of participation) to require ongoing compliance with selection criteria. Ongoing compliance with selection criteria would include maintaining the minimum inventory of allowable foods required in § 1103.5 (relating to minimum inventory) at shelf prices equal to or less than the maximum allowable prices for those foods. Failure to comply with terms and conditions of participation places the store at risk of the imposition of sanctions under § 1107.1, including disqualification.

*§ 1105.3. Terms and conditions of participation.*

In subsection (a)(4), the Department proposes to substitute, in the place of the specific requirements currently listed in subsection (a)(4)—(8), the general requirement that the store comply with the selection criteria in § 1103.4 throughout the authorization period. Because the Department proposes to delete the text of paragraphs (5)—(8), the Department proposes to renumber the remaining paragraphs accordingly. Proposed paragraph (11), currently paragraph (15), would be revised to further define the kinds of records to which representatives of the Federal, State and local agency agencies are required to have access at any time, not just during an onsite review. Proposed paragraph (12), currently paragraph (16), would be revised to incorporate the Federal mandate that stores agree that authorization does not constitute a license or a property interest, and that the store must apply for reauthorization in accordance with proposed § 1103.1(c), relating to authorization and reauthorization process and requirements. The Department proposes to delete existing paragraph (20), as the Department proposes to address the store's reimbursement obligation in detail in subsection (d). Finally, proposed paragraph (16), currently paragraph (21), would be revised, pursuant to Federal mandates, to require stores to maintain product purchase records for allowable foods and records used for Federal tax reporting purposes, for a minimum period of 2 years.

The Department proposes to revise subsection (b) as follows. Throughout subsection (b), the Department would add "or authorized representative" after "participant" to clarify that the obligation to the participant carries over to an authorized representative, as well. The Department would revise paragraph (3) to clarify that stores are required to provide allowable foods to participants at or below the current price the store charges other customers, and at or below the maximum allowable prices for those foods. The Department would revise paragraph (5) to clarify the prohibition against seeking restitution or payment from participants. The Department would revise paragraph (7) to clarify that stores are required to offer participants the same courtesies offered other customers if no other terms or conditions of participation are violated by doing so. The Department would revise paragraph (9) to substitute more generic language in the place of references to "trading stamps." Thus, the paragraph would require stores to provide a "promotional incentive" for a purchase made with a WIC check if that same promotional incentive is given for a cash purchase. Finally, within subsection (b), the Department has proposed, with the addition of paragraph (12), that the store

provide a promotional incentive for use of a WIC check only if the same incentive is offered for a cash purchase.

Within subsection (c), the Department proposes the following revisions. The Department would revise paragraph (1) for purposes of clarifying, not changing, the requirement set forth in that paragraph. The Department would revise paragraph (5) to substitute, for the requirement that the store compare signatures on the WIC check and the WIC identification card, the requirement that the store compare the family identification number on the WIC check with the family identification number on the identification card. The Department proposes to revise paragraph (13) to delete the prohibition against providing change for the difference between the "Not to Exceed" and the "Pay Exactly" amounts on the WIC check. Under the revised redemption system, as proposed by the Department, which includes maximum allowable prices for WIC foods, WIC checks will not contain a "Not to Exceed" figure. The Department proposes to revise paragraph (14) to clarify that stores may not provide an exchange to replace an allowable food unless the exchange is to replace an identical product that was found to be damaged or otherwise unusable. The Department proposes to add a new paragraph (15) which would preclude the store from refunding money for an allowable food purchased in a WIC transaction that is returned by a participant or authorized representative. Finally, under subsection (c), the Department proposes to delete paragraph (22) as the Department proposes to address the reimbursement requirement in detail in subsection (d).

The Department proposes to delete existing language in subsection (d) and to substitute the following in its place: The Department will deny payment of a check submitted for redemption when the Department is aware, prior to payment of the check, that the store has committed a violation affecting the store's right to payment. If the Department makes payment on the check and later determines a violation occurred, the Department would establish a claim for reimbursement by sending the store a written notice of the overcharge or other improper charge. The store could dispute the Department's claim by giving written notice to the Department. The Department would resolve the dispute and notify the store how the dispute was resolved. The Department's resolution of a claim dispute would not be an adverse action that may be appealed.

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

The Department proposes to clarify subsection (a) which would provide that a store's status as a WIC authorized store is void when a change of ownership of the store occurs. The Department proposes to delete subsection (c), thereby eliminating the possibility of probationary authorization when a change of ownership occurs. The Department proposes to add language to the final subsection, which would become subsection (c), to clarify the circumstances under which it will refuse to accept a store's application for authorization. Under this revised subsection, the Department would not accept a store's application for authorization if the Department determines that the store submitting the application, either under prior ownership or in a previous location, was disqualified and the purpose of the relocation or sale of the store was to avoid a WIC disqualification. Similar language appears in proposed changes to § 1103.1(b).

*§ 1105.5. Changes in availability or location of WIC authorized stores.*

Within this section, the Department proposes to provide that a store relocating within 1 mile of its current

location or within the same geographical area assigned to the local agency will not lose its status as a WIC authorized store. A WIC authorized store relocating in excess of 1 mile of its current location and to a geographical area assigned to another local agency would lose its status as a WIC authorized store and would be required to apply for authorization at its new location.

Also, the Department proposes to lengthen the period of time within which the store is required to reopen at its new location. Currently, the Department requires the store to reopen within 3-calendar days. The Department proposes to require a store to reopen within 15-calendar days to continue as a WIC authorized store.

*§ 1105.6. Monitoring of WIC authorized stores.*

The Department proposes organizational revisions to subsections (a) and (b). Specifically, the Department proposes to relocate to subsection (a), and to clarify, information regarding the purpose and types of monitoring WIC authorized stores currently contained within subsection (b). Types of monitoring tools listed would include compliance investigations, inventory audits, routine reviews and WIC transaction reviews. The term "compliance investigation" would replace "high risk review" and the term "WIC transaction review" would replace "training buy." The Department also proposes to clarify that the monitoring process operates independently of the authorization process and can overlap more than one authorization period. The remainder of the section would be reorganized to contain a description within distinct and successive subsections (b)—(e) of the monitoring tools listed in subsection (a). The final two subsections, except for being relabeled subsections (f) and (g), would remain substantively unchanged.

*§ 1107.1. Imposition of sanctions.*

The Department proposes to add a new subsection (c), which would permit the Department to disqualify a store that has been, assessed a civil money penalty in the Food Stamp Program, unless the disqualification would result in inadequate participant access for WIC participants. If the Department opts to disqualify a store under this section, the length of the disqualification would correspond to the period for which the store would have been disqualified in the Food Stamp Program if that program had not chosen to impose a civil money penalty in lieu of a disqualification. The Department also proposes to clarify that violations documented in a prior authorization period will support a disqualification, by adding language to that effect to proposed subsection (d) (currently subsection (c)). This proposed language mirrors similar proposed language in § 1105.6(a). Finally, the Department proposes to add language to proposed subsection (e), currently subsection (d), to advise the vendor community that applicable Federal regulations may prohibit administrative or judicial review of a disqualification from the Food Stamp Program based upon a disqualification from the WIC Program.

*§ 1107.1a. Disqualifications.*

The Department proposes to add a new paragraph (2) in subsection (d) to require a 1-year disqualification for charging for an allowable food provided in excess of the quantity authorized for purchase on the WIC check. The remainder of the numbered paragraphs, up to paragraph (11), would be renumbered. Paragraph (12) would be deleted in accordance with the Department's proposal to delete price limitations in connection with food prescriptions, and the current paragraph numbering would continue to apply for existing paragraphs (13)—(16).

The Department would revise proposed renumbered paragraph (4) to clarify that the minimum inventory of an allowable food must be priced at or below the current maximum allowable price to avoid a 1-year disqualification. The Department proposes to add to paragraph (14), language permitting a 1-year disqualification for failing to reimburse the Department for overpayments, overcharges or improper charges. Finally, the Department proposes to add a new paragraph (17), which would allow for a 1-year disqualification for providing false information on the application for authorization or reauthorization.

*§ 1113.1. Right to appeal.*

The Department proposes to revise the title of this section to "Right to administrative appeal," to distinguish the subject matter of this section from judicial appeals. Consistent with the intent in proposing revisions to § 1101.1 to limit the scope of the regulations to prescribe appeal procedures to be used by stores and participants only, the Department proposes to revise this section and all sections within Chapter 1113 (relating to local agency and store appeals) to delete references to local agency appeals.

The Department also proposes to revise the first three subsections of this section to define adverse actions that may be appealed, list actions and WIC Program decisions that may not be appealed, and introduce the concept of an "effective date" for an adverse action, as required by amendments to Federal regulations. The Department proposes to delete subsections (d) and (e) as superfluous.

*§ 1113.2. Appeal procedures.*

The Department proposes to revise the title of this section to "Administrative appeal procedures," to maintain consistency with the proposed change in the title of § 1113.1. In subsection (a), the Department proposes to describe in a more succinct manner its notification obligations in the event of an adverse action. In subsection (c), the Department proposes to clarify that the filing deadline for a store appeal shall be within 30 days of the effective date of the adverse action. Also in subsection (c), the Department proposes that the filing of an appeal shall serve to stay the Department's adverse action pending issuance of an adjudication and order by the hearing examiner. The stay would be lifted upon receipt of the hearing examiner's adjudication and order affirming the adverse action, or upon receipt of the store's written notice of withdrawal of the appeal.

*§ 1113.3. Adjudication and order.*

The Department proposes to add a new subsection (c) which would provide that if the hearing examiner upholds the Department's adverse action, the adverse action would be effective as of the date of the store's receipt of written notice of the hearing examiner's adjudication and order. The remaining subsections, currently subsections (c) and (d), would be renamed (d) and (e).

*C. Fiscal Impact*

The WIC Program is 100% Federally funded. No State dollars are involved in the operation of the WIC Program. The proposed regulatory change to § 1103.3, which deals with authorization of stores, to eliminate provisions regarding store slots and competition for those slots based upon prices, in and of itself, has the potential for increasing dramatically the number of stores that may be authorized to participate in the WIC Program. Through introduction of provisions regarding maximum allowable prices for all WIC allowable foods, however, the Department hopes to realize two objectives: (1) to keep the

number of stores applying for authorization within reasonable limits; and (2) to achieve savings in foods costs that may translate into the additional administrative dollars needed to monitor the additional stores. Other aspects of these regulatory changes, such as repeal of provisions imposing limitations on the number of store slots and removal of provisions requiring store input and WIC Program collection of quarterly prices from each retail store, will generate Program savings. Overall, the Department anticipates the fiscal impact of these regulations to be neutral.

D. *Paperwork Requirements*

The proposed amendments will not increase paperwork for WIC Program participants or those grocery stores voluntarily participating in the WIC Program. The increase in the Department's paperwork requirements that will result from the elimination of store slots and the increase in the number of authorized stores will be offset by the decrease in paperwork associated with identifying, based on price calculations, which stores will be awarded available store slots. Paperwork requirements also will decrease as a result of the elimination of the overcharge recovery system. Moreover, the Department anticipates fewer appeals by stores denied authorization. Only stores failing to meet selection criteria will be denied authorization and reauthorization and, through extended authorization, stores may have more than one opportunity to meet selection criteria.

F. *Effective Date/Sunset Date*

The amendments will become effective upon publication as a final-form rulemaking. These proposed amendments 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.

G. *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 the 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. The Women's, Infants' and Children's Nutrition Improvement Act (62 P. S. §§ 2951—2955) 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 at 29 Pa.B. 3841 (July 24, 1999), following the decision of the Commonwealth Court in *Giant Food Stores, Inc. v. Commonwealth of Pennsylvania, Department of Health*, 713 A.2d 177 (1998). The Court 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 (relating to supplemental nutrition program for women, infants and children (WIC Program)). The regulations also deleted §§ 8.41—8.74, the Department's then existing regulations pertaining to WIC Program administrative appeals.

The proposed amendments contained in Annex A are submitted under the Department's general power to promulgate regulations to carry out its duties and its duty to protect the health of the people of this Common-

wealth under section 2102 of The Administrative Code of 1929 (71 P. S. § 532) and the *Giant* decision.

H. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 11, 2002, the Department submitted a copy of the proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare. In addition to submitting the proposed rulemaking, the Department has 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 to the public upon request.

If IRRC has objections to any portion of the proposed rulemaking, it will notify the Department within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review, prior to the final publication of the regulations, by the Department, the General Assembly and Governor, of objections raised.

I. *Contact Person*

Interested persons are invited to submit all comments, suggestions or objections regarding the proposed amendments to Greg Landis, Acting Director, WIC Program, Room 604, Health and Welfare Building, Harrisburg, PA 17108, (717)783-1289, within 30 days after publication of this notice in the *Pennsylvania Bulletin*. Persons with a disability may also submit comments, suggestions or objections regarding the proposed amendments to Greg Landis in alternative formats, such as by audio tape, Braille or by using V/TT: (717) 783-6514. Persons with a disability who require an alternative format of this document (that is, large print, audio tape, braille) should contact Greg Landis so that he may make necessary arrangements.

ROBERT S. ZIMMERMAN, Jr.  
*Secretary*

**Fiscal Note:** 10-169. No fiscal impact; (8) recommends adoption.

**Annex A**

**TITLE 28. HEALTH AND SAFETY**  
**Part VIII. SUPPLEMENTAL NUTRITION**  
**PROGRAM FOR WOMEN, INFANTS AND**  
**CHILDREN (WIC PROGRAM)**

**CHAPTER 1101. GENERAL PROVISIONS**

**§ 1101.1. Background and scope.**

\* \* \* \* \*

(b) *Scope.* This part establishes design and operational requirements for the food delivery system for the WIC Program, and prescribes procedures to be used by applicants, participants[, **local agencies**] and stores to appeal actions of the Department and local agencies that may adversely impact upon them.

**§ 1101.2. Definitions.**

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

\* \* \* \* \*

**Authorization**—The grant of authority to a store to serve as a WIC authorized store.

**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, a proxy or endorser, 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. For a compliance buy or WIC transaction review, the person conducting the compliance buy or WIC transaction review.

\* \* \* \* \*

**Certification**—[ For purposes of this chapter and Chapters 1103, 1105, 1107, 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 ] The Department's acceptance of an applicant to participate in the WIC Program as a participant.

\* \* \* \* \*

**Claim**—A demand for reimbursement of an overcharge or other improper charge to the WIC Program as a result of a store violation.

\* \* \* \* \*

**Contract brand**—The specific manufacturer brand of an allowable food that the Department is contractually bound to prescribe for participants.

\* \* \* \* \*

**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.

\* \* \* \* \*

**Inventory [ audits ] audit**—A comparison of a WIC authorized store's inventory levels [and purchases ] of a particular [WIC product ] allowable food over a specific period of time, to [actual WIC ] purchases of the [same product ] allowable food with WIC checks 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 ] a quantity of the allowable food available for sale during that time sufficient to support its claim for reimbursement for the sale of the allowable food.

[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. ]

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**Maximum allowable price**—The maximum price the Department will pay for an allowable food.

\* \* \* \* \*

**Onsite review**—[An overt ] A 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. An onsite review may be announced or unannounced.

**Overcharge**—A charge by a WIC authorized store to the WIC Program through redemption of a WIC check for an allowable food in excess of the store's shelf price for that food or in excess of the price charged a non-WIC participant for that food.

**Overpayment**—Payment to a WIC authorized store of a WIC check redeemed by the store in an amount in excess of the amount to which the store was entitled based upon the maximum allowable price of each allowable food authorized for purchase on the WIC check.

\* \* \* \* \*

**Periodic review**—Contemporaneous announced onsite reviews of stores in a trade area conducted not less than once every 3 years to select stores for reauthorization.

\* \* \* \* \*

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

**Price adjustment**—The retroactive reduction in the amount paid for a redeemed check as a result of a determination of overpayment.

**Probationary authorization**—The Department's probationary authorization of a WIC authorized store when inadequate participant access would occur if the store were not authorized or reauthorized or when the store is reviewed prior to opening to the public and has not yet stocked its dairy section or its frozen juice section.

\* \* \* \* \*

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

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

**Routine review**—An unannounced onsite review of a WIC authorized store to evaluate adherence by the store to the requirements in this part governing the store's participation in the WIC Program.

\* \* \* \* \*

**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 ] authorization or reauthorization following [ a certification or recertification ] an announced onsite review [ process ].

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

*Selection criteria*—Criteria in § 1103.4 [ (a) ] (relating to selection criteria for authorization and reauthorization) which the Department has established which a store seeking to be [ certified or recertified ] authorized or reauthorized is required to satisfy.

\* \* \* \* \*

[ *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. ]

*Store violation*—Intentional or unintentional action by the owners, officers, managers, agents or employees of a WIC authorized store that violates the requirements in this part governing the store's participation in the WIC Program and that may result in a claim.

*Temporary authorization*—The Department's temporary and conditional authorization of a WIC authorized store that fails to meet specified selection criteria during the initial onsite review for purposes of reauthorization.

*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. ]

\* \* \* \* \*

*WIC authorized store*—A retail food store which is authorized [ through certification or recertification ] or reauthorized in accordance with § 1103.1 (relating to authorization and reauthorization process and requirements) to provide allowable foods to participants by accepting WIC checks.

\* \* \* \* \*

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

\* \* \* \* \*

*WIC transaction*—The presentation of a WIC check by a participant or authorized representative to a WIC authorized store resulting in the purchase of one or more of the allowable foods designated on the check.

*WIC transaction review*—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 the requirements in this part governing the store's participation in the WIC Program.

§ 1101.3. Administration.

\* \* \* \* \*

(b) *Vendor Advisory Workgroup*. The Department will form a Vendor Advisory Workgroup with representation from the retail store community, appropriate advocacy groups and associations for retail stores and participants, and from the State and local agencies. The Department will schedule at least two meetings of the Vendor Advisory Workgroup annually to review and discuss retail store and food delivery issues. The Vendor Advisory Workgroup shall function in an advisory capacity only; acceptance of Workgroup recommendations shall be at the discretion of the Department.

(c) *Local agency responsibilities*. Local agencies shall determine whether participants meet eligibility criteria developed by the Department, develop food prescriptions for participants, provide nutrition education to participants, provide referral information regarding ongoing health services, issue WIC checks to participants to purchase allowable foods and ensure that all participants are served without discrimination. Local agencies shall function as representatives of the Department in conducting [ certification and recertification ] onsite reviews, and in monitoring the activities of WIC authorized stores.

CHAPTER 1103. AUTHORIZATION OF STORES

§ 1103.1. [ Certification and recertification reviews ] Authorization and reauthorization process and requirements.

(a) [ *Qualifying for certification or recertification* ] *Duration of authorization or reauthorization*. To [ be certified or recertified ] serve 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 ] be authorized in accordance with the requirements in subsection (b) or reauthorized in accordance with the requirements in subsection (c). [ 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). ] A store's authorization or reauthorization shall remain in effect until the Department acts on the store's application for reauthorization when the next periodic review is conducted in the trade area in which the store is located, unless terminated earlier in accordance with subsection (d). At least once every 3 years, the Department will conduct a periodic review in each trade area. Failure to submit an application for reauthorization as prescribed under subsection (c) shall result in expiration of the store's authoriza-

tion or reauthorization. The Department will provide 30 days written notice to the store prior to expiration of authorization or reauthorization for any store failing to submit an application. A store that has received a letter of authorization dated less than 60 days prior to the date of the notice of the periodic review in the store's trade area shall be exempt from the periodic review.

(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.

(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. ]

*Authorization process.*

(1) The store's representative shall contact the local agency responsible for the trade area where the store is located to request an application for authorization. The local agency shall send WIC Program information and an application for authorization to the store. The store shall complete the application for authorization and return it to the local agency.

(2) The Department will refuse to accept an application from a store if the store has been provided notice of disqualification or is disqualified from the WIC Program, if the Department determines that the store relocated or effected a change of ownership to avoid a disqualification, or if the store has been denied authorization or reauthorization and is not eligible to apply for authorization.

(3) The Department will not accept an application for authorization less than 90 days prior to the scheduled start date of the periodic review in that trade area unless the Department finds that there would be inadequate participant access, as set forth in § 1103.7, if it does not consider the application.

(4) If the store's application for authorization is accepted, the local agency shall schedule, as expeditiously as possible, an announced onsite review of the store to determine if the store meets the selection criteria in § 1103.4 (relating to selection criteria for authorization and reauthorization). The local agency shall notify the store in advance of the approximate date of the review.

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

(6) The Department will deny the application if the selection criteria in § 1103.4 are not satisfied, unless the Department grants probationary authorization under § 1103.2 (relating to probationary authorization). The Department will notify the store in writing whether the store's application for authorization is granted or denied. If the Department denies the application for authorization, the store shall be eligible to reapply for authorization 6 months after the effective date of the denial.

(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 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. ]

*Reauthorization process.*

(1) The Department will include an application for reauthorization with the notice of periodic review it sends to the store. The local agency will collect the application for reauthorization at the time of the announced onsite review of the store to determine if the store meets the selection criteria in § 1103.4. The local agency shall notify the store in advance of the approximate date of the review.

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

(3) The Department will deny the application without advance warning if the selection criteria in § 1103.4 are not satisfied, unless the store requests and the Department grants temporary authorization in accordance with § 1103.3 (relating to temporary authorization) or the Department grants pro-

bationary authorization in accordance with § 1103.2. The Department will notify the store in writing whether the store's application for reauthorization is granted or denied. If the Department denies the application for reauthorization, the store shall be eligible to apply for authorization 6 months after the effective date of the denial. If the Department grants and later rescinds temporary authorization, the store shall be eligible to apply for authorization 1 year from the date of the first onsite review for reauthorization.

(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. ]

*Termination of authorization or reauthorization.* The Department will terminate a store's authorization or reauthorization if:

- (1) The store has been disqualified.
- (2) The store supplied false information in the application for authorization or reauthorization.
- (3) The store is not serving at least 25 participants 8 months following authorization.
- (4) Ownership of the store changes.
- (5) The store relocates in excess of 1 mile of its current location and to a geographical area assigned to another local agency.
- (6) The store closes for more than 3 business days and does not notify the Department.

[ (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 ] authorization.

(a) *Criteria for probationary [ certification ] authorization.* If during the [ certification or recertification ] onsite review, the store fails to meet [ one or more of the qualifications in ] selection criteria at § 1103.4 [ (a) and (b) ] (3), (4), (5), (6), (7) or (8) (relating to selection [ and limitation ] criteria [ ; ] for authorization [ process ] and reauthorization), the Department [ may ] will grant probationary [ certification ] authorization 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 ] authorized or reauthorized.

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

(b) [ *Probationary certification reviews* ] *Reviews during probationary authorization period.*

[ (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) ] authorization, the Department will conduct an unannounced onsite review during the probationary [ certification ] authorization period to determine [ if regular status should be granted to ] whether the store is in compliance with selection criteria in § 1103.4. The Department [ may ] will rescind probationary [ certification ] authorization 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, unless extension is required under subsection (c). The Department will grant authorization or reauthorization, as applicable, if the store meets all selection criteria during the second onsite 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 ] authorization.* If the store fails the review conducted during the probationary [ certification ] authorization period,



and inadequate participant access exists as determined by the Department, the Department **[ may ] will** extend probationary **[ certification ] authorization** 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 ] authorization reviews.* The Department will conduct an unannounced onsite review during the extended probationary **[ certification ] authorization** period after the store representative has attended corrective training, to determine **[ if certification should be granted to ] whether the store is in compliance with the selection criteria in § 1103.4.** The Department will rescind probationary **[ certification ] authorization** 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. **The Department will grant authorization or reauthorization, as applicable, if the store meets all selection criteria during the third and final unannounced onsite review.**

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

§ 1103.3. **[ Authorization of store slots ] Temporary authorization.**

**[ (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. ]

(a) *Failure to meet selection criteria during onsite review.* If a WIC authorized store that applies for reauthorization fails to meet one or more of the selection criteria in § 1103.4 (relating to selection criteria for authorization and reauthorization) during the announced onsite review, the store may request temporary authorization, except that a store that fails to meet the price and minimum inventory requirements of § 1103.4(5) shall be ineli-

gible for temporary authorization. A store that is a high risk store or the subject of an ongoing compliance investigation also shall be ineligible for temporary authorization.

(b) *Conditions of temporary authorization.* Temporary authorization shall be conditioned upon the following:

(1) The Department will conduct a second announced onsite review during the temporary authorization period to determine whether the store is in compliance with the selection criteria in § 1103.4. The Department will grant reauthorization if the store meets all selection criteria during this review. The Department will rescind temporary authorization and deny the store's application for reauthorization if the store fails to meet one or more of the selection criteria during the second review.

(2) If the Department rescinds the temporary authorization of a store, the store is eligible to apply for authorization 1 year after the date of the first onsite review that was conducted following the Department's receipt of the store's application for reauthorization.

(3) The Department will reduce by 10% the maximum allowable prices for foods authorized for purchase on WIC checks the store redeems for WIC transactions that occur during the first 90 days of the temporary authorization period.

§ 1103.4. Selection **[ and limitation ] criteria[ ; ] for authorization [ process ] and reauthorization.**

**[ (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:

\* \* \* \* \*

(2) A store seeking reauthorization 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 ] will** deny **[ recertification ] reauthorization** 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 ] onsite review for reauthorization** is conducted.

\* \* \* \* \*

(5) The store shall have available on the premises at all times the minimum inventory **[ requirements ] of allowable foods required** in § 1103.5 (relating to minimum inventory) **[ of allowable foods ] at shelf prices that are equal to or less than the maximum allowable prices for those foods.** The Department will publish in the *Pennsylvania Bulletin* quarterly the maximum allowable prices for allowable foods for the next quarter.

[ (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) ] (6) The store shall be open for business and able to serve participants at least 8 hours per day, 6 days per week.

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

[ (9) ] (8) \* \* \*

(9) If the store has been denied authorization or reauthorization within the past 12 months, the store must be eligible to apply for authorization under § 1103.1(b) or (c) (relating to authorization and reauthorization process and requirements) or § 1103.3(b)(2) (relating to temporary authorization).

(10) The store may not be currently disqualified from participation in the Food Stamp Program or have been assessed a civil money penalty in lieu of a disqualification from the Food Stamp Program that, had it been imposed, would not yet have expired.

(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 ] reimbursement of any overcharges [ to the WIC Program ] or overpayments, and shall be in compliance with all applicable Federal and State regulations.

(13) None of the store's current owners, officers, or managers shall have been convicted of or had a

civil judgment entered against them for conduct demonstrating a lack of business integrity.

[ (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 shall 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 or stores. 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 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, the minimum inventory [ requirements ] of allowable foods at shelf prices equal to or less than the maximum allowable prices.

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

(1) *Formula.*

(i) Contract **brand** milk-based formula with iron:

(A) [ **Sixty-two** ] **Thirty-one** 13 ounce cans of liquid concentrate.

\* \* \* \* \*

(C) [ **Six** ] **Nine** 14.1 ounce cans of powdered.

(ii) Contract **brand** soy-based formula:

\* \* \* \* \*

(C) [ **Six** ] **Nine** 14 ounce cans of powdered.

\* \* \* \* \*

(2) *Milk.*

(i) Fluid whole, vitamin D fortified, [ **fourteen** ] **ten** 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** ] **4** pounds, in 1 or 2 pound containers.

(iv) Evaporated, [ **twelve** ] **twenty-four** 12 ounce cans.

(3) *Natural domestic cheese.* [ **One pound each** ] **Four pounds total** of three varieties prepacked in 8 or 16 ounce packages.

(4) *Grade "A" eggs.* [ **Five** ] **Three**, 1 dozen containers.

(5) *Juices.*

(i) [ **Three** ] **Two** varieties with a total of [ **nine** ] **seven** 46 ounce containers.

(ii) [ **Frozen** ] **Two varieties of frozen** concentrated or shelf stable concentrated, [ **two varieties** ] with a total of [ **nine** ] **seven** 11.5 to 12 ounce containers.

(iii) Infant, three varieties of **contract brand** 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** ] **40** ounces.

(ii) Infant, two varieties of **contract brand in 8 ounce packages**, totaling at least [ **32** ] **24** ounces.

(7) *Peanut butter.* [ **Five** ] **One** 15 to 18 ounce [ **containers** ] **container.**

\* \* \* \* \*

(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 **infant formula, juice and cereal** and, if applicable, the names of [ **allowable** ] brands and types of **allowable** foods [ , and the maximum price permitted for those allowable foods for which the Department establishes a maximum price ].

(d) [ **Waivers** ] *Exceptions to minimum inventory requirements.* The Department [ **may** ] will grant an **exception to the minimum inventory [ waivers ] requirements** for an allowable [ **foods** ] food listed in

subsection (e) [ **under the following circumstances: ] when the Department's most recent check redemption information for a store shows no purchases of the allowable food for more than 90 days.**

[ (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** ] *Allowable foods to which exception may apply.* These foods are:

(1) **Contract brand milk based with iron liquid concentrate infant formula.**

[ (1) ] (2) Contract **brand** milk based with iron ready-to-feed infant formula.

[ (2) ] (3) Contract **brand** milk based with iron powdered infant formula.

(4) **Contract brand soy based liquid concentrate infant formula**

[ (3) ] (5) Contract **brand** soy based ready-to-feed infant formula.

[ (4) ] (6) Contract **brand** soy based powdered infant formula.

[ (5) ] (7) \* \* \*

[ (6) ] (8) \* \* \*

[ (7) ] (9) \* \* \*

[ (8) ] (10) \* \* \*

(f) *Expiration of [ waivers ] exception to minimum inventory requirements.* [ A ] The exception to minimum inventory [ **waiver of** ] requirements for 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** ] **48** hours after presentation of the WIC check.

§ 1103.6. [ **Waiting list** ] (Reserved).

[ (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. ]

**§ 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 [ **recertification** ] authorization or reauthorization, for failure to meet selection [ **and limitation** ] criteria in § 1103.4 [ (a) and (b) ] (relating to selection [ **and limitation** ] criteria [ ; ] for authorization [ **process** ] and reauthorization) during [ **recertification reviews** ] the onsite review.

(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) whether to impose a civil money penalty in lieu of disqualification under § 1107.1 (relating to imposition of sanctions).**

(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.

\* \* \* \* \*

[ (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** ] authorization, the local agency shall provide initial training for the personnel [ **a certified** ] the WIC authorized store designates. The training shall be mandatory and shall occur within 30 days after the date of [ **certification** ] authorization. A store receiving [ **certification** ] authorization 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:

\* \* \* \* \*

(5) Failure to have at least one representative attend training shall result in the Department imposing sanc-

tions against the WIC authorized store [ as in ] under § 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 ] authorization; and monitoring of WIC authorized stores). Attendance is mandatory.

§ 1105.2. [ Overcharge recovery system ] Price adjustment.

(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 ] overpayment. [ The ] In each calendar quarter, 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, ] the maximum allowable prices for foods authorized for purchase on the check against the actual amount for which [ each ] the WIC check [ accepted by the store during a reporting quarter ] was redeemed, to determine [ any overcharge owed to the Department ] whether there was an overpayment.

[ (e) ] (b) *Pursuit of reimbursement.* The Department will seek reimbursements from a WIC authorized store [ for the store's overcharges totaling \$10 or more for ] when the price comparison reveals overpayments to the store in excess of \$10 in a calendar quarter.

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

[ (g) Overcharge disputes ] (d) *Dispute of overpayments.* A WIC authorized store that disputes [ an overcharge billing ] a determination of overpayment 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 ] Reimbursement the Department determines to be owing shall be due within 15-calendar days of the mailing date [ on ] of the Department's notification of its resolution of the dispute. **The Department's resolution of a dispute regarding overpayments is not an adverse action that may be appealed.**

[ (h) ] (e) *Sanctions.* The Department will impose a sanction against a WIC authorized store under § 1107.1a(d)[ (14) ](12) (relating to disqualifications) if the store fails to [ pay overcharges due ] reimburse the Department for an overpayment within the time required under subsections [ (f) ] (c) and [ (g) ] (d).

[ (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 ] under § 1107.1 (relating to imposition of sanctions). A WIC authorized store shall:

\* \* \* \* \*

(3) [ Monitor, supervise and be ] Be accountable for the actions of owners, officers, managers, agents and [ employees ] employees 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 ] Comply with the selection criteria in § 1103.4 (relating to selection criteria for authorization and reauthorization) throughout the authorization period.

[ (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) ] (5) \* \* \*

[ (10) ] (6) \* \* \*

[ (11) ] (7) \* \* \*

[ (12) ] (8) \* \* \*

[ (13) ] (9) \* \* \*

[ (14) ] (10) \* \* \*

[ (15) ] (11) 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, **which includes providing copies if requested by the Department, to [ price and inventory ] purchase records [ during an onsite review ] used for Federal tax reporting purposes and other records as requested to determine compliance with WIC Program requirements**

[ (16) ] (12) Agree that **authorization does not constitute a license or a property interest, that the store must reapply for authorization in accordance with § 1103.1(c) (relating to authorization and reauthorization process and requirements), and 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) ] (13) \* \* \*

[ (18) ] (14) \* \* \*

[ (19) ] (15) Not transfer or assign its WIC [ **certification or recertification** ] authorization or reauthorization 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) [ (16) ] Maintain [ **price and inventory** ] purchase records and records used for Federal tax reporting purposes for allowable foods for a minimum [ **period** ] of [ **6 months from the date of receipt of the inventory** ] 2 years.

(b) *Terms and conditions of participation with regard to participants.* A WIC authorized store shall serve participants and authorized representatives 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** ] a **participant or authorized representative** only as authorized on the WIC food list and as specified on the WIC check.

(2) Not encourage or discourage a participant or **authorized representative** from purchasing an allowable [ **foods** ] food specified on the WIC check.

(3) Provide an allowable [ **foods** ] food to [ **participants** ] a **participant or authorized representative** at or below the current price the store charges other customers, and at or below the maximum allowable price.

(4) Not seek restitution or payment from [ **participants** ] a **participant or authorized representative** for a WIC [ **checks** ] check not reimbursed by the Department, or contact [ **participants** ] a **participant or authorized representative** concerning a WIC [ **transactions** ] transaction that [ **occur** ] occurs in the store.

(5) Not seek restitution or payment from [ **participants** ] a **participant or authorized representative**

for an allowable [ **foods** ] when the price the store charges for the allowable foods exceeds the "Not to Exceed" amount on the WIC check ] food authorized for purchase on the WIC check tendered by the participant or authorized representative.

(6) Not request the personal [ **addresses** ] address, telephone [ **numbers** ] number or other personal identification of [ **participants** ] a **participant or authorized representative**.

(7) Offer [ **participants** ] each **participant or authorized representative** the same courtesies offered other customers, and not distinguish or identify [ **participants** ] a **participant or authorized representative** from other customers, if no other terms and conditions of participation are violated in doing so.

(8) Provide services to [ **participants** ] each **participant or authorized representative** without regard to race, color, age, sex, religion, national origin or disability.

(9) [ **Give trading stamps to participants** ] Provide the same promotional incentive for [ **purchases** ] a purchase made with a WIC [ **checks** ] check [ **if trading stamps are** ] as given for a cash [ **purchases** ] purchase.

(10) Accept cents-off coupons, a store discount card or other discounts from [ **participants** ] a **participant or authorized representative** for an allowable [ **foods** ] food, 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** ] a **participant or authorized representative**.

(12) Provide a promotional incentive for use of a WIC check only if the same incentive is offered for a cash purchase.

(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 and the Department, not the participant.

\* \* \* \* \*

(3) Accept a WIC check only if the participant [ **, endorser or proxy** ] or **authorized representative** 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** ] the WIC transaction.

(5) Accept a WIC check only if the signature of the participant [ **, endorser or proxy** ] or **authorized representative** is obtained [ **,** ] on the WIC check at the time of [ **purchase,** ] the WIC transaction [ **on the WIC check,** ] and the [ **signature on the WIC check**

**matches the signature on the WIC identification card ] family identification number on the WIC check matches the family identification number on the identification card.**

\* \* \* \* \*

(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 ] or authorized representative.

(8) Record in ink, on each WIC check immediately after completion of the WIC transaction and prior to the participant[ , endorser or proxy ] or authorized representative 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 ] or authorized representative 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 ] or authorized representative.

(11) Not provide a substitute [ items, rainchecks ] item, raincheck or cash reimbursement for an allowable [ foods ] food that [ are ] is unavailable.

\* \* \* \* \*

(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 ] a coupon tendered during the WIC transaction.

(14) Not [ refund money or ] provide [ exchanges ] an exchange to replace an allowable [ foods ] food returned by [ participants, endorsers or proxies ] a participant or authorized representative unless the exchange is to replace an identical product that was found to be damaged or otherwise unusable.

(15) Not refund money for an allowable food purchased in a WIC transaction that is returned by a participant or authorized representative.

(16) Not accept a WIC check as payment for [ items ] an item other than an allowable [ foods ] food specified on the WIC check.

[ (16) ] (17) Not charge the WIC Program for an allowable [ foods ] food not received by the [ WIC ] participant or authorized representative or for an allowable [ foods provided ] food in excess of [ those listed ] the quantity prescribed on the WIC check.

[ (17) ] (18) \* \* \*

[ (18) ] (19) Deposit a WIC [ checks ] check 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) ] (20) Not receive, transact, redeem or otherwise dispose of a WIC check [ outside ] in violation of check redemption procedures set forth in this section.

[ (20) ] (21) Not use a WIC check for the purchase of any [ commodity ] item other than an allowable food or for the payment of any debt.

[ (21) ] (22) Not collect sales tax [ on allowable food purchases ] in connection with a WIC transaction.

[ (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). ] When the Department determines, prior to payment of a check submitted for redemption, that the store has committed a violation of this section that affects the payment to the store, the Department will deny payment. If payment already has been made, Department will establish a claim for reimbursement by sending the store a written notice of the overcharge or other improper charge. The store may dispute the Department's claim and shall submit the basis for its dispute in writing within 15 calendar days of the date of the Department's written notice. The Department will notify the store of the resolution of the claim dispute. The Department's resolution of a claim dispute is not an adverse action that may be appealed.

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

(a) [ A certification or recertification ] A store's status as a WIC authorized store is void when a change of ownership of [ a WIC authorized ] the store occurs.

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

The Department will not accept a store's application for authorization if the Department determines

that the store submitting the application, either under prior ownership or in a previous location, was disqualified and the purpose of the relocation or sale of the store was to avoid a disqualification.

**§ 1105.5. Changes in availability or location of WIC authorized stores.**

(a) *Notification of store closing.* A WIC authorized store shall notify the Department at least 15 days prior to a temporary or permanent closing of the store, and [ of ] provide the reason for closing and the expected duration of a temporary closing, if it has at least 15 days prior knowledge. Otherwise, it shall provide this information to the Department immediately after it acquires the information.

(b) *Temporary store closing.* The Department may permit a WIC authorized store to temporarily close for reasons such as a natural disaster, death in immediate family or personal illness, without imposing a sanction against the store. In making a determination to permit a temporary closure, as well as the length of time of the closure, the Department will consider circumstances such as the nature of the disaster, number of WIC authorized stores affected by the disaster, nature and expected duration of illness, length of closing anticipated by the WIC authorized store, number of and distance to other WIC authorized stores, number of participants served by the store, [ number of stores on the waiting list ] or any other information that the Department may determine to be relevant.

(c) *Store closing for remodeling.*

(1) A WIC authorized store that closes for [ more than 24 hours but ] less than [ 3 ] 15 days for remodeling [ will not lose its certification, provided ] shall continue as a WIC authorized store if it notifies the Department at least 15-calendar days prior to the day the store closes for remodeling.

(2) A WIC authorized store that closes in excess of [ 3 ] 15 store operation days for remodeling, shall automatically lose its [ WIC authorization ] status as a WIC authorized store and shall [ reapply ] apply for and secure [ certification ] authorization before it may again serve as a WIC authorized store.

(d) *Store relocations.*

(1) A WIC authorized store that relocates 1 mile or less from its current location or within the same geographical area assigned to the local agency, and reopens within [ 3- ] 15-calendar days at its new location, shall provide the Department with written notification of its new address. The store will [ not lose its certification, provided ] continue as a WIC authorized store if it notifies the Department at least 15-calendar days prior to the day the store closes for relocating.

(2) A WIC authorized store [ relocating ] that relocates in excess of 1 mile of its current location and to a geographical area assigned to another local agency shall [ lose its WIC authorization and shall reapply for certification ] automatically lose its status as a WIC authorized store and shall apply for authorization at its new location to again serve as a WIC authorized store.

(3) A WIC authorized store that closes in excess of 3 store operation days for relocating [ , without applying

for and securing permission from ] shall notify the Department [ to do ] before doing so, or shall automatically lose its status as a WIC [ authorization ] authorized store and shall [ reapply ] apply for [ certification ] authorization to again serve as a WIC authorized store.

\* \* \* \* \*

**§ 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 ] compliance investigations, inventory audits, routine reviews and [ training buys ] WIC transaction reviews. The monitoring process, to determine compliance with applicable Federal and State regulations, operates independently of the authorization process and may overlap more than one authorization period.

(b) [ High risk reviews ] *Compliance investigations.* [ 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) ] (1) \* \* \*

[ (ii) ] (2) \* \* \*

[ (iii) ] (3) 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) ] paragraph (8) applies.

[ (iv) ] (4) 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 ] a statute or regulation governing the store's participation in the WIC Program, unless paragraph (8) applies.

[ (v) ] (5) [ The ] If paragraph 8 does not apply, the Department will [ conduct a third compliance buy at ] continue a compliance investigation of the WIC authorized store after store personnel have attended mandatory corrective training.

[ (vi) ] (6) 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 ] a statute or regulation 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)] (7)** The Department will close the compliance investigation on a WIC authorized store if **the Department discovers no [violations] violation** of a statute or regulation governing the store's participation in the WIC Program **[are discovered]** after two consecutive compliance buys.

**[(viii)] (8)** The Department may withhold notification of compliance buy results, and may withhold providing training or conducting further compliance investigations, when fraudulent **[activities] activity** by the WIC authorized store **[are] is** indicated during a compliance investigation or by local agency or participant complaint.

**[(2)] (c) Inventory audits.** The Department will disqualify **[the] a** WIC authorized store when an inventory audit establishes **[the claim of reimbursement for authorized] that the store has redeemed or attempted to redeem WIC checks for the purported sale of an allowable** food in excess of documented inventory. No warning **[letters] letter** will be issued.

**[(c)] (d) Routine reviews.** The Department will use **routine** 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):

\* \* \* \* \*

(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] the most severe sanction the Department may impose for any one of the violations committed by the store.**

**[(d) Training buys] (e) WIC transaction reviews.** The Department will use **[training buys] WIC transaction reviews** 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] WIC transaction review** is scheduled.

(2) The Department will provide written notification to the WIC authorized store of the results of each **[training buy] WIC transaction review**, 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] WIC transaction review** at the WIC authorized store if the first **[training buy] WIC transaction review** detects **[violations] a violation** of a statute or regulation governing the store's participation in the WIC Program.

(4) The Department will provide the personnel of the WIC authorized store mandatory corrective training after

two **[training buys] WIC transaction reviews** 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] WIC transaction review** 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] WIC transaction review** detects **[violations] a violation** of a statute or regulation governing the store's participation in the WIC Program. If multiple violations are found during the **[training buys] WIC transaction reviews**, the Department will impose **[the sanction]** against the store **[for the term corresponding with the most serious violation] the most severe sanction the Department may impose for any one of the violations committed by the store.**

**[(e)] (f) \* \* \***

**[(f)] (g) 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] on** the notice.

**CHAPTER 1107. SANCTIONS**

**§ 1107.1. Imposition of sanctions.**

(a) The Department may disqualify a **WIC authorized** store or impose a civil money penalty in lieu of disqualification for reasons of **[program] WIC 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] authorization or reauthorization**, or other adverse **[actions] action** that **[affect participation during the agreement performance period] affects the store's status as a WIC authorized store** in accordance with § 1113.1 (relating to right to **administrative** appeal). Expiration of **[an agreement with a store] authorization**, 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 that has been assessed a civil money penalty in lieu of disqualification under the Food Stamp Program unless disqualification of the store from the WIC Program would result in inadequate participant access or would otherwise adversely affect the interest of participants. If the Department disqualifies a store under this subsection, the length of the disqualification will correspond to the period for which the store would otherwise have been disqualified from participating in the Food Stamp Program.

(d) 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] give the store the option of paying a civil money penalty in lieu of disqualification for third or subsequent [sanctions for] violations. A violation committed during a prior authorization period will support a disqualification.

[ (d) ] (e) Disqualification from the WIC Program may result in disqualification as a retailer in the Food Stamp Program under regulations governing the Food Stamp Program. [ The disqualification may not be subject to administrative or judicial review under the Food Stamp Program. ] Applicable Federal regulations may prohibit administrative or judicial review of a disqualification from the Food Stamp Program based upon a disqualification from the WIC Program.

[ (e) ] (f) 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) ] (g) A WIC authorized store that has a sanction imposed against it by the Department for accepting a WIC check for [ items ] an item other than those specified on the WIC check shall also reimburse the Department for [ monies received for the purchase of these items with the ] moneys it receives through the WIC check redemption process after accepting a WIC check for the purchase of the item.

[ (g) ] (h) 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) ] imposed by regulation or in the notice given to the store by the Department [ under § 1105.6(f) (relating to monitoring of WIC authorized stores) ] of the store's obligation to reimburse the Department.

§ 1107.1a. Disqualifications.

\* \* \* \* \*

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

\* \* \* \* \*

(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 WIC check 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 ] overcharges.

(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 ] a WIC check that the store is not authorized to receive, transact or redeem.

\* \* \* \* \*

(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 ] a food item other than an allowable food in exchange for WIC checks[, including charging for allowable food provided in excess of those listed on the WIC check ].

(2) Providing an allowable food in excess of the amount authorized for purchase on the WIC check.

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

[ (3) ] (4) Failing to maintain on the premises at all times minimum inventory requirements of an allowable food at or below the current maximum allowable price for that food.

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

[ (5) ] (6) \* \* \*

[ (6) ] (7) \* \* \*

[ (7) ] (8) Failing to properly store [ and ] or refrigerate an allowable [ foods ] food.

[ (8) ] (9) \* \* \*

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

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

[ (11) ] (12) [ Overcharging ] Charging 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 ]** the person who tenders a WIC check.

(14) Failing to **[ remit payment for an overcharge ]** reimburse the Department for overpayments, overcharges or other improper charges within the specified time frame **[ under either §§ 1105.2(f) and (g) or 1105.6(f) (relating to overcharge recovery system; monitoring of WIC authorized stores) ]**.

\* \* \* \* \*

**(17) Providing false information on the application for authorization or reauthorization.**

(e) *Second mandatory sanction.* **[ When ]** If 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 § 1107.2(c) (relating to civil money penalties).

(f) *Third or subsequent mandatory sanction.* **[ When ]** If 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 ]** permit the store to pay a civil money **[ penalties ]** penalty 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 administrative appeal), the WIC **[ program ]** 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 ]** expiration of authorization as an alternative to disqualification.

(j) *Other violations.* For **[ any ]** a 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 ]** a disqualification. The notice will include the store's appeal rights, if applicable.

(l) **[ Certification ]** Authorization following expiration of disqualification period. A store that has been disqualified from the WIC Program may apply for **[ certification ]** authorization following expiration of the disqualification period. If the store chooses to apply for **[ certification ]** authorization 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 ]** Department will consider the store's application in accordance with § 1103.4 (relating to selection **[ and limitation ]** criteria **[ ; ]** for authorization **[ process ]** and reauthorization) **[ 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 or denial of reauthorization.* The Department may offer to a WIC authorized store the option of paying a civil money penalty in lieu of a denial of **[ recertification ]** reauthorization 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 ]** under § 1107.1a(b)—(d) (relating to disqualifications).

(b) *Calculation of civil money penalty.*

(1) For a civil money **[ penalties ]** penalty in lieu of **[ disqualifications ]** a disqualification under § 1107.1a(b), (c) **[ and ]** or (d)(1) and (2), the Department will calculate the civil money penalty for each violation identified 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) ]** a civil money penalty in lieu of disqualification under § 1107.1a(d)(3)—(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 ]** a store to which the Department may deny reauthorization and 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 ] penalties.* The amount of the civil money penalty will not exceed \$10,000 for each violation. [ When ] If, 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 ] penalty for all violations investigated as part of a single investigation will not exceed \$40,000.

\* \* \* \* \*

(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 ] authorized for 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 ] authorized for the most serious violation. The Department may permit payment of a civil money [ penalties ] penalty 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 ] reimbursement to the Department of [ outstanding overcharges for the acceptance of WIC checks for the sale of unauthorized foods ] overpayments.

#### CHAPTER 1109. ADMINISTRATIVE APPEALS

##### § 1109.2. Scope and purpose.

Chapters 1111 and 1113 (relating to applicant and participant appeals; and [ local agency and ] store appeals) apply to hearings held under 42 U.S.C.A. § 1786(f)(9), relating to the WIC Program. Those chapters supplement the Federal regulations, 7 CFR Part 246 (relating to special supplemental nutrition program for women, infants, and children) governing hearings afforded under this part to applicants, participants, and stores [ denied certification or recertification and local agencies ], and supplement or supersede regulations in 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure) when their application would be inappropriate or inadequate.

#### CHAPTER 1113. [ LOCAL AGENCY AND ] STORE APPEALS

##### § 1113.1. Right to administrative appeal.

(a) A store [ or local agency adversely affected by a Division of WIC action ] has the right to appeal an adverse action of the Division of WIC that affects the store's participation in the WIC Program as a WIC authorized store. [ 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 ] Adverse actions include:

(1) Termination of authorization or reauthorization in accordance with § 1103.1(d) (relating to authorization and reauthorization process and requirements).

(2) Denial of an application for authorization or reauthorization.

(3) Refusal to accept an application for authorization or reauthorization.

(b) [ The following actions are not subject to appeal ] A store may not appeal the following:

(1) The expiration of [ a WIC ] authorization or reauthorization.

(2) [ The Division of WIC's determination regarding participant access ] The validity or appropriateness of selection criteria.

(3) [ Disqualification from the WIC Program of a store as a result of disqualification from the Food Stamp Program ] The validity or appropriateness of the Department's participant access criteria and the Division of WIC's participant access determination.

(4) Disqualification from the WIC Program as a result of disqualification from the Food Stamp Program.

(5) The resolution of an overpayment dispute under § 1105.2(d) (relating to price adjustment) or the resolution of an overcharge dispute under § 1105.3(d) (relating to terms and conditions of participation).

(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. ] A denial of authorization under § 1103.1(b)(6) and a disqualification imposed under § 1107.1a(a) (relating to disqualifications) shall be effective on the date of the store's receipt of notice of the adverse action. All other adverse actions shall be effective on the date set forth in the written notice.

[ (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 ] Administrative 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 ] The Division of WIC will provide to the store written notice of the adverse action, the procedures to follow to appeal the adverse action and the cause for and the effective date of the action.**

(b) *Form of administrative 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 and effect of filing an administrative 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 ] the effective date of the adverse action. The filing of an appeal shall serve to stay the Department's adverse action pending issuance of an adjudication and order by the hearing examiner under § 1113.3 (relating to adjudication and order). The stay shall be lifted upon receipt of the hearing examiner's adjudication and order affirming the adverse action, or upon receipt of the store's written notice of withdrawal of the appeal.

(d) *Scheduling 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 ] Division of WIC or the [ appellant ] store 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 ] determination is based solely on whether the Division of WIC has correctly applied Federal and State statutes, regulations, policies and procedures governing the WIC Program, according to the evidence presented at the hearing.

(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.

\* \* \* \* \*

**§ 1113.3. Adjudication and order.**

\* \* \* \* \*

(b) The hearing examiner shall provide the Director of the Division of WIC and the [ local agency or ] store, or its authorized representative, with the adjudication and order within 60 days after the date of the receipt by the Division of WIC of the appeal, adjusted for any continuance of the hearing that causes it to be held more than 21 days after the date the appeal was filed.

(c) **If the hearing examiner upholds the Department's adverse action, the adverse action shall be effective as of the date of the store's receipt of written notice of the hearing examiner's adjudication and order.**

(d) The hearing examiner shall maintain a written record of the hearing. The record shall include a docket number and caption for the appeal, any documentary evidence submitted, the transcript of the testimony presented at the hearing, the adjudication and order of the hearing examiner, and a copy of the document transmitting the adjudication and order to the [ local agency or ] store, or its authorized representative.

[ (d) ] (e) \* \* \*

**§ 1113.4. Continuing responsibilities.**

Appealing an action does not relieve the [ local agency or ] store from the responsibility of continued compliance with [ the terms of any written agreement or contract with the Department or certification or recertification by the Department ] regulations under this part applicable to a WIC authorized store.

**§ 1113.5. Judicial review.**

If the adjudication and order of the hearing examiner [ is rendered against the local agency or store ] upholds the Department's adverse action, the hearing examiner will inform the [ local agency or ] store within the adjudication and order, or by notice accompanying the adjudication and order, of the right to pursue judicial review of the adjudication and order.

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