

RULES AND REGULATIONS

Title 28—HEALTH AND SAFETY

DEPARTMENT OF HEALTH

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

Supplemental Nutrition Program for Women, Infants and Children

The Department of Health (Department) adopts amendments to Chapters 1101, 1103, 1105, 1107, 1109 and 1113 to read as set forth in Annex A. This final-form rulemaking governs the authorization, management and appeal rights of stores participating in the Women, Infants and Children (WIC) Program (WIC authorized stores).

A. *Purpose and Background*

The primary purpose of the final-form rulemaking is to achieve compliance with recent amendments to the Federal regulations governing the WIC Program 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.

The final-form rulemaking also implements 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. Prior to the final-form rulemaking, a store desiring to become a WIC authorized store had to satisfy the selection and limitation criteria in § 1103.4 (relating to selection criteria for authorization and reauthorization). Through the final-form rulemaking, the Department will allow any store that meets the revised selection criteria to participate in the WIC Program. The Department has retained all previous 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). Prior to the final-form rulemaking, the Department had maintained 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 has established maximum prices for all allowable foods. Stores are 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 is 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 held a series of meetings for the purpose of soliciting comments from persons affected by the final-form rulemaking. The discretionary changes to the Department's regulations published as proposed rulemaking at 32 Pa.B. 4585 (September 21, 2002) were, to a large measure, the result of the discussions held during these meetings.

The Department's regulations are also 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 promulgating regulations, the Department was required to submit changes to its WIC Program regulations to the USDA-FNS for approval. The Department submitted both the proposed and the final-form regulations to the USDA-FNS, which approved the regulations.

The Department published a proposed rulemaking and provided a 30-day public comment period. Additionally, the Department sent out a Retail Store Alert to each local agency WIC director, local agency WIC retail store coordinator and WIC authorized store informing them of the publication of the proposed rulemaking and directing their attention to the revised sections.

The Department received comments to the proposed rulemaking from four commentators. The comments and the Department's responses to the comments appear in the summary of this final-form rulemaking. If a section is not mentioned in the summary, no comments were received on that section and it was adopted as proposed.

B. *Summary*

One commentator expressed overall support for the stated general purpose of the proposed rulemaking. Additionally, the commentator expressed specific support for the elimination of existing § 1103.4(b) and (c), the imposition of price limitations on all allowable foods in § 1103.4(5), the deletion of references to the appeal rights of local agencies in § 1101.1(b) (relating to background and scope) and Chapter 1113 (relating to store appeals) and the establishment of the Vendor Advisory Workgroup (Workgroup) in § 1101.3(b) (relating to administration).

One commentator expressed agreement with the establishment of the Workgroup in § 1101.3(b) and with § 1103.4(5), which establishes price limitations on WIC allowable foods.

§ 1101.2. Definitions.

One commentator expressed the opinion that all "onsite reviews" should be unannounced to achieve the greatest level of compliance with the terms and conditions that govern participation of authorized stores.

The definition of "onsite review" states that an onsite review may be announced or unannounced. An onsite review for purposes of store authorization or reauthorization is announced for the reason that the review represents the store's single opportunity to demonstrate understanding and compliance with the criteria governing authorization and reauthorization. Under the final-form rulemaking, failure to demonstrate compliance during the announced onsite review results in denial of the store's application for authorization or reauthorization.

Onsite monitoring reviews are unannounced because the purpose of the monitoring review is to assess compliance with terms and conditions for participation in the WIC Program. If the WIC Program provided notice of the monitoring review, a store routinely not complying with terms and conditions of participation could avoid detection and eventual sanction. For that reason no notice is given. To ensure fairness, the WIC Program does not impose a sanction until at least three monitoring reviews reveal violations of terms and conditions of WIC Program

participation. Moreover, the WIC Program notifies the store of the results of each review, gives the store notice that the investigation will continue and imposes training requirements after the second problematic store review. See § 1105.6(b)(3) (relating to monitoring of WIC authorized stores). Unannounced onsite reviews allow the WIC Program to monitor WIC authorized stores for abuse and errors as well as to take corrective action when appropriate as mandated in 7 CFR 246.12(j)(2) (relating to routine monitoring).

§ 1103.4. Selection criteria for authorization and reauthorization.

The Independent Regulatory Review Commission (IRRC) expressed concern that the Department's plan to publish in the *Pennsylvania Bulletin* the maximum allowable prices for allowable foods quarterly, as provided for under proposed § 1103.4(5), would place an undue burden on stores by requiring them to monitor the *Pennsylvania Bulletin* to maintain compliance with the WIC Program. IRRC recommended that the information be made available on the Department's website or mailed directly to vendors.

The Department concurs with this suggestion and will inform each WIC authorized store of the maximum allowable prices for WIC allowable foods by mailing the information to the stores prior to publication in the *Pennsylvania Bulletin*. Section 1103.4(5) has been revised to state that the Department will mail to stores maximum price information for WIC allowable foods.

One commentator expressed concern that an increase in the number of WIC authorized stores as a result of the Department's proposal to eliminate the limitation criteria in § 1103.4(b) and (c), now deleted, would cause an overall increase in the administrative costs associated with mandated onsite reviews. IRRC supported this commentator in its comments and specifically requested that the Department further explain the fiscal impact of this change.

The Department has not revised the final-form rulemaking in response to these comments. The fiscal impact of the increase in store numbers participating in the WIC Program will be neutral for two reasons: (1) while the number of stores participating in the WIC Program and the administrative costs associated with those stores will increase, the total number of onsite store reviews the Department must conduct each year and the costs associated with those reviews will decrease; and (2) the administrative costs associated with the very labor-intensive overcharge recovery system, being replaced by the computer-driven price adjustment system, will be eliminated.

Under prior regulations, WIC authorized stores were reviewed once every 2 years to determine whether the store would continue as a WIC authorized store. Accordingly, the WIC Program conducted onsite reauthorization reviews of 50% of all WIC authorized stores each year. In addition, the WIC Program conducted onsite monitoring reviews in accordance with Federal requirements, of a minimum of 5% of all WIC authorized stores. Therefore, the WIC Program performed onsite reviews of 55% of all WIC authorized stores annually. Under the final-form rulemaking, each WIC authorized store must be reviewed once every 3 years, reducing the number of annual onsite authorization and reauthorization reviews performed by the WIC Program to 34% of all WIC authorized stores. Even considering the Federal monitoring requirement, the overall annual onsite review requirement will be

reduced from 55% to 39% of the total number of all WIC authorized stores. The total number of WIC authorized stores would have to increase by 41% before the cost of onsite reviews required under the final-form rulemaking would equal the previous cost of reviews to the WIC Program.

After store reviews, the next highest cost component of the retail store management area of the WIC Program is the overcharge recovery system. Under the overcharge recovery system, all WIC authorized stores are required to submit to the local agency a quarterly price report in which the store lists its highest price during the quarter for each WIC allowable food. WIC Program staff responsible for direct client services have performed the task of manually entering store specific price data, for each WIC authorized store, into the WIC Program's computer data system. The final-form rulemaking replaces the overcharge recovery system with the price adjustment system, which requires no manual input of store specific price data into the computer data system. Therefore, the cost to the Department will remain neutral.

§ 1103.5. Minimum inventory.

The Department has significantly revised proposed § 1103.5. Proposed § 1103.5 listed all foods to which minimum inventory requirements would apply along with exact quantities of the foods that WIC authorized stores would be expected to have on the store premises at all times. Because exact quantities can vary as a result of manufacturer product or packaging changes, the Department determined that the most effective means to identify the minimum inventory requirements of allowable foods adopted by the Department is to publish in the *Pennsylvania Bulletin* a list of all categories and types of allowable foods for which minimum inventory requirements exist. The list will be published by September 15 of each year and when the Department adopts a revised list. The list will be distributed to all WIC authorized stores at the time of publication of this final-form rulemaking and to any new store when it is authorized to participate in the WIC Program.

The section, as revised, also contains a list of WIC allowable foods for which minimum inventory requirements exist, restricts the minimum inventory requirement of each WIC allowable food to the maximum quantity which could be authorized for one participant for 1 month under 7 CFR 246.10 (relating to supplemental foods), contains a provision for exceptions to the minimum inventory requirements, contains a list of WIC allowable foods for which exceptions may apply and defines when an exception to the minimum inventory requirements expires. Also, as a consequence of the elimination of the list of specific minimum inventory requirements in § 1103.5, the Department has eliminated the reference to the list of minimum inventory requirements in § 1103.4(5).

§ 1103.7. Inadequate participant access.

One commentator expressed concern that the effect of the Department's decision to delete § 1103.7(c)(5)—(7) (relating to inadequate participant access) would be to narrow the definition of "inadequate participant access" which might have an adverse impact on participant access to the supplemental foods the WIC Program provides.

Adequate participant access is a fundamental concern for the Department. The purpose of § 1103.7(c)(5)—(7) was to reduce for the WIC Program the administrative burden associated with the transfer of a large number of

participants to another store in the context of a denial of reauthorization of a store or a store's disqualification for violation of the terms and conditions that govern participation in the program. Deletion of the paragraphs has no substantive impact on participant access decisions, which are driven by numerous factors. Before denying authorization to a store or disqualifying a store from the WIC Program, the Department gives consideration to availability of public transportation, the proximity of other WIC authorized stores in relation to the number of WIC participants, special dietary needs or ethnicity of participants, existence of physical barriers or other conditions which make access for participants to another WIC authorized store impractical and whether or not there are participants with physical disabilities that cannot be accommodated by another WIC authorized store. By considering all of these factors, and with the increase in the number of WIC authorized stores as a result of the elimination of limitation criteria, the Department is able to ensure adequate participant access to WIC authorized stores that offer a sufficient inventory of fresh WIC allowable foods to meet the nutritional needs of the WIC participants. The Department has not changed the final-form rulemaking in response to this comment.

§ 1107.1. Imposition of sanctions.

Section 1107.1(d)(2), (5), (6), (11) and (12) (relating to imposition of sanctions), as proposed, would have allowed for a 1-year disqualification for the following violations of the terms and conditions governing participation in the WIC Program: providing an allowable food in excess of the amount authorized for purchase on the WIC check (proposed subsection (d)(2)), failing to request a WIC identification card prior to accepting a WIC check (proposed subsection (d)(5)), accepting a WIC check made payable to another store without prior written approval from the Department (proposed subsection (d)(6)), securing the signature of the participant or authorized representative prior to completing the "Pay Exactly" box on the WIC check (proposed subsection (d)(11)) or charging the WIC Program sales tax (proposed subsection (d)(12)). The USDA-FNS commented that 7 CFR 246.12(l)(1)(i)(iv) require a state agency to disqualify a store from participation in the WIC Program after a pattern of each of the previous violations of the terms and conditions governing participation in the WIC Program. The Department revised proposed § 1107.1(d)(2), (5), (6), (11) and (12) to require a pattern before the State agency may impose a 1-year term of disqualification. Subsection (d)(2), (5), (6), (11) and (12) now state that the State agency will disqualify a store for having committed two or more incidences of any of the specific violations.

§ 1113.2. Administrative appeal procedures.

The Department has revised proposed § 1113.2 (relating to administrative appeal procedures). Proposed § 1113.2 provided that an administrative appeal had to be filed within 30 days after the effective date of the adverse action. According to 7 CFR 246.18(a)(2) (relating to effective date of adverse actions against vendors), the Department must set the effective date of denials of authorization and disqualifications (other than those imposed under 7 CFR 246.12(l)(1)(i)) no earlier than 15 days and no later than 90 days after the date of the notice of the adverse action.

Additionally, 7 CFR 246.18(b)(2) provides that the Department must give an authorized store or local agency the opportunity to appeal an adverse action within a time period specified by the Department in its notification of the adverse action. Prior to the proposed rulemaking, the

Department defined the time period for allowance of appeal of an adverse action as 30 days from the date that the Department mailed the notice of adverse action.

Due to the mandatory time period of at least 15 days between the notice of an adverse action and the effective date of that action required under 7 CFR 246.18(a)(2), the language in the regulations as proposed allowed for, at a minimum, a 45-day time period between the date when the Department mailed a notice of an adverse action and expiration of the 30-day time period allowed for any resulting notice of appeal.

The Department has determined that the long standing time period of 30 days from the date a notice of adverse action is mailed is sufficient for an authorized store or local agency to file an appeal. As a result, in the final-form rulemaking, the Department has revised the language of § 1113.2 to state that an authorized store or local agency may appeal an adverse action within 30 days from the date the Department mailed the notice of the adverse action.

C. Fiscal Impact

The WIC Program is 100% Federally funded. No State dollars are involved in the operation of the WIC Program. The amendment to § 1103.3 (relating to temporary authorization), regarding authorization of stores, eliminating 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 the final-form rulemaking, such as deletion of the provisions that imposed limitations on the number of store slots available, deletion of the provisions requiring store input and WIC Program collection of quarterly prices from each retail store, as well as the decrease in the annual onsite review requirement will generate program savings. Overall, the Department anticipates the fiscal impact of the final-form rulemaking to be neutral.

D. Paperwork Requirements

The final-form rulemaking 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 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 and less frequent annual onsite review requirements. 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 temporary authorization, stores may have more than one opportunity to meet selection criteria.

E. Effective Date/Sunset Date

The final-form rulemaking will become effective upon final publication in the *Pennsylvania Bulletin*. The final-form rulemaking will be monitored continually and will be updated as required by changes in Federal statute or

Federal regulations governing the WIC Program. Therefore, no sunset date has been set.

F. *Statutory Authority*

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

There are no State statutes governing the operation or administration of the WIC Program. 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 State regulations governing the WIC Program were 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 (Pa. Cmwlth. 1998). The Commonwealth 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 final-form rulemaking is promulgated under section 2102(g) of The Administrative Code of 1929 (code) (71 P.S. § 532(g)), which provides the Department general power to promulgate regulations to carry out its duties. Section 2102(a) of the code gives the Department the authority and duty to protect the health of the people of this Commonwealth and the *Giant supra* decision.

G. *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 notice of proposed rulemaking, published at 32 Pa. B. 4585, to IRRC and the Chairpersons of the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on August 13, 2003, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on August 14, 2003, and approved the final-form rulemaking. The Attorney General approved the final-form rulemaking on September 4, 2003.

H. *Contact Person*

Questions regarding the final-form rulemaking may be submitted to Greg Landis, Chief, Grants and Retail Store Management Unit, WIC Program, Room 604, Health and Welfare Building, Harrisburg, PA 17108, (717) 783-1289.

Persons with a disability may submit questions in alternative formats such as audio tape or Braille or by using V/TT, (717) 783-6514 for speech or hearing impaired persons or the Pennsylvania AT&T Relay Service, (800) 654-5984 (TT). Persons who require an alternative format of this document (that is, large print, audio tape or Braille) should contact Greg Landis at the previous address or telephone numbers to make necessary arrangements.

I. *Findings*

The Department finds that:

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

(2) A public comment period was provided as required by law and all comments were considered.

(3) The adoption of the final-form rulemaking in the manner provided by this order is necessary and appropriate for the administration of the authorizing statutes.

J. *Order*

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

(a) The regulations of the Department, 28 Pa. Code Chapters 1101, 1103, 1105, 1107, 1109 and 1113, are amended by amending §§ 1101.1—1101.3, 1103.1—1103.5, 1103.7, 1105.1—1105.6, 1107.1, 1107.1a, 1107.2, 1109.2 and 1113.1—1113.5 and by deleting § 1103.6 to read as set forth in Annex A.

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

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

(d) The Secretary shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

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

CALVIN B. JOHNSON, M.D., M.P.H.,
Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 33 Pa.B. 4372 (August 30, 2003).)

Fiscal Note: Fiscal Note 10-169 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 28. HEALTH AND SAFETY

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

CHAPTER 1101. GENERAL PROVISIONS

§ 1101.1 Background and scope.

(a) *Background.* Through an amendment to section 17 of the Child Nutrition Act of 1966 (42 U.S.C.A. § 1786), Congress has authorized the USDA-FNS to contract with state agencies for the establishment of the WIC Program.

The USDA-FNS contracts with and makes funds available to the Department to administer the WIC Program in this Commonwealth.

(1) The purpose of the WIC Program is to provide allowable foods to income eligible pregnant, breast-feeding or postpartum women, infants and children up to 5 years of age, who are at nutritional risk because of medical problems or poor diets. The WIC Program provides these individuals with nutritious foods to supplement their diets during critical stages of growth and development. These foods are chosen to correct, prevent or minimize health and nutritional problems. The foods are not intended to be a complete diet, but, rather, to supplement other foods available to the participants.

(2) In addition to providing supplemental foods, the WIC Program refers applicants and participants to health services and offers nutrition education so that the food will be properly used and will improve the dietary and health habits of the entire family. The Department uses a retail purchase system to provide the majority of food benefits to participants.

(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 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:

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

Applicant—An individual applying to become a participant.

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

Authorized representative—

(i) For an 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 to represent the applicant or participant in administrative proceedings involving the WIC Program.

(ii) For a store, an individual designated by the store to represent it in administrative proceedings involving the WIC Program.

(iii) For a compliance buy or WIC transaction review, the person conducting the compliance buy or WIC transaction review.

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

Certification—The Department's acceptance of an applicant to participate in the WIC Program as a participant.

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

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

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

Compliance buy—A covert purchase at a WIC authorized store, with a WIC check, conducted to enable the Department to evaluate adherence by a WIC authorized store with this part governing the store's participation in the WIC Program.

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

Competent professional authority—

(i) An individual on the staff of the local agency authorized to determine nutritional risk and prescribe supplemental foods. The following persons are the only persons the Department will authorize to serve as a competent professional authority: physicians, nutritionists (Bachelor's or Master's Degree in Nutritional Sciences, Community Nutrition, Clinical Nutrition, Dietetics, Public Health Nutrition or Home Economics with emphasis on nutrition), dieticians, registered nurses, physician's assistants (certified by the National Committee on Certification of Physician's Assistants or certified by the State medical certifying authority), or State or local medically trained health officials.

(ii) The term also applies to an individual who is not on staff at the local agency but who is qualified to provide data upon which nutritional risk determinations are made by a competent professional authority on staff of the local agency.

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

Department—The Department of Health of the Commonwealth.

Disqualification—

(i) For the purposes of Chapters 1101, 1103, 1105, 1107, 1109 and 1113, the term means the action by the Department to end participation of a WIC authorized store in the WIC Program for reasons of fraud, abuse or other violations of this part governing the store's participation in the WIC Program.

(ii) For purposes of Chapter 1111, the term means action by the Department or local agency to end participation of a participant who no longer meets the qualifications necessary to participate in the WIC Program or for reasons of fraud, abuse or violation of standards governing the participant's enrollment in the WIC Program.

Division of WIC—Division of WIC in the Department.

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

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

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

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

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

Infant—A person under 1 year of age.

Inventory audit—A comparison of a WIC authorized store's inventory levels of a particular allowable food over a specific period of time, to purchases of the allowable food with WIC checks during the same period of time, to determine if the store had 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.

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

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

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

- (i) Detrimental or abnormal nutritional conditions detectable by biochemical or anthropometric measurements.
- (ii) Other documented nutritionally related medical conditions.
- (iii) Dietary deficiencies that impair or endanger health.
- (iv) Conditions that predispose persons to inadequate nutritional patterns or nutritionally related medical conditions.

Onsite review—A visit to a store by Federal, Department or local agency personnel to determine if the store meets the selection criteria necessary to be a WIC authorized store, or a visit to a WIC authorized store 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.

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

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

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.

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

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

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

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

Reauthorization—The Department's renewal of authorization.

Redemption—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 with the requirements in this part governing the store's participation in the WIC Program.

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

Sanction—

(i) 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.

(ii) The term does not include a decision to deny authorization or reauthorization following an announced onsite review.

Secretary—The Secretary of the Department.

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

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

Standard formula—Infant formula products that do the following:

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

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

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

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 purpose 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.

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

WIC authorized store—A retail food store which is authorized 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 check—A negotiable instrument issued to participants to purchase allowable foods at WIC authorized stores.

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

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

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

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

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.

(a) *Department responsibilities.* The Department will develop policies and procedures for the operation of the WIC Program, distribute funds to local agencies to assist the Department in operating the WIC Program, authorize stores to participate in the WIC Program, monitor and evaluate WIC Program services provided by WIC authorized stores, maintain fiscal records, submit reports and carry out all other responsibilities delegated to it by the USDA-FNS for the operation of the WIC Program.

(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 onsite reviews, and in monitoring the activities of WIC authorized stores.

CHAPTER 1103. AUTHORIZATION OF STORES

§ 1103.1. Authorization and reauthorization process and requirements.

(a) *Duration of authorization or reauthorization.* To serve as a WIC authorized store, a store shall be authorized in accordance with subsection (b) or reauthorized in accordance with subsection (c). 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 authorization 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) 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 (relating to inadequate participant access), 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) *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 probationary 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) *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.

§ 1103.2. Probationary authorization.

(a) *Criteria for probationary authorization.* If during the onsite review, the store fails to meet selection criteria in § 1103.4(3), (4), (5), (6), (7) or (8) (relating to selection criteria for authorization and reauthorization), the Department will grant probationary 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 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.

(b) *Reviews during probationary authorization period.* If a store receives probationary authorization, the Department will conduct an unannounced onsite review during the probationary authorization period to determine whether the store is in compliance with selection criteria in § 1103.4. The Department will rescind probationary

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.

(c) *Extension of probationary authorization.* If the store fails the review conducted during the probationary authorization period, and inadequate participant access exists as determined by the Department, the Department will extend probationary 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 authorization reviews.* The Department will conduct an unannounced onsite review during the extended probationary authorization period after the store representative has attended corrective training, to determine whether the store is in compliance with the selection criteria in § 1103.4. The Department will rescind probationary 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 authorization.* If the Department rescinds the probationary or extended probationary authorization of a store, the store is eligible to apply for authorization 6 months from the date of the Department's rescission of probationary or extended probationary authorization.

§ 1103.3. Temporary authorization.

(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 ineligible 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 criteria for authorization and reauthorization.

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

(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) A store seeking reauthorization shall serve at least 25 participants per month. The Department will deny 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 onsite review for reauthorization is conducted.

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

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

(5) The store shall have available on the premises at all times the minimum inventory of allowable foods as established by the Department under § 1103.5 (relating to minimum inventory) 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* and mail to all WIC authorized stores, quarterly, the maximum allowable prices for allowable foods for the next quarter.

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

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

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

(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) or § 1103.3(b)(2) (relating to authorization and reauthorization process and requirements; and 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.

(12) The store shall have implemented all required corrective actions resulting from monitoring by the Department, including reimbursement of any overcharges or overpayments, and shall be in compliance with the 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.

§ 1103.5. Minimum inventory.

(a) *Minimum inventory requirements.*

(1) The Department will adopt minimum inventory requirements and their effective dates, for the following WIC allowable foods:

- (i) Contract brand infant formula.
- (ii) Milk.
- (iii) Natural domestic cheese.
- (iv) Grade "A" eggs.
- (v) Juice.
- (vi) Cereal.
- (vii) Peanut butter.
- (viii) Dried peas and beans.
- (ix) Tuna.
- (x) Carrots.

(2) The Department will set minimum inventory requirements for all allowable foods for which minimum inventory requirements exist at a level not to exceed the maximum quantity of supplemental food authorized per month as set forth in 7 CFR 246.10(c)(1)–(7) (relating to supplemental foods).

(3) The Department will publish minimum inventory requirements in the *Pennsylvania Bulletin* and distribute those requirements to all WIC-authorized stores by September 15 of each year, and when manufacturer product or packaging changes occur.

(b) *Exceptions to minimum inventory requirements.* The Department will grant an exception to the minimum inventory requirements for an allowable food listed in subsection (c) 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.

(c) *Allowable foods to which exceptions may apply.* These foods are:

- (1) Contract brand milk-based with iron liquid concentrate infant formula.
- (2) Contract brand milk-based with iron ready-to-feed infant formula.
- (3) Contract brand milk-based with iron powdered infant formula.
- (4) Contract brand soy-based liquid concentrate infant formula.
- (5) Contract brand soy-based ready-to-feed infant formula.
- (6) Contract brand soy-based powdered infant formula.
- (7) Nonfat dry milk.
- (8) Evaporated milk.
- (9) Carrots.
- (10) Tuna.

(d) *Expiration of exception to minimum inventory requirements.* The exception to minimum inventory 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 48 hours after presentation of the WIC check.

§ 1103.6. (Reserved).

§ 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 authorization or reauthorization, for failure to meet selection

criteria in § 1103.4 (relating to selection criteria for authorization and reauthorization) during the onsite review.

(b) The Department may consider whether there is inadequate participant access when deciding 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 participant density less than 25 participants per square mile.

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

(iii) Less than 1 mile of the store for counties with 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 participant density less than 25 participants per square mile.

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

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

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

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

CHAPTER 1105. REQUIREMENTS OF WIC AUTHORIZED STORES

§ 1105.1. Training.

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

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

(2) Attendance is mandatory.

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

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

(5) Failure to have at least one representative attend training shall result in the Department imposing sanctions against the WIC authorized store 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 authorization; and monitoring of WIC authorized stores). Attendance is mandatory.

§ 1105.2. Price adjustment.

(a) *Determination of overpayment.* 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 maximum allowable prices for foods authorized for purchase on the check against the actual amount for which the WIC check was redeemed, to determine whether there was an overpayment.

(b) *Pursuit of reimbursement.* The Department will seek reimbursements from a WIC authorized store when the price comparison reveals overpayments to the store in excess of \$10 in a calendar quarter.

(c) *Reimbursement of overpayments.* A WIC authorized store shall reimburse the Department for overpayments within 20-calendar days of the date on the Department's notice of the overpayment, unless the WIC authorized store disputes the determination of overpayment.

(d) *Dispute of overpayments.* A WIC authorized store that disputes 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 notice. Reimbursement the Department determines to be owing shall be due within 15-calendar days of the mailing date 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.

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

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

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

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

(3) Be accountable for the actions of owners, officers, managers, agents and employees in the handling of WIC checks, the selling of allowable foods, and the performance of other conduct related to the WIC Program.

(4) Comply with the selection criteria in § 1103.4 (relating to selection criteria for authorization and reauthorization) throughout the authorization period.

(5) Provide orientation and training to employees regarding applicable regulations governing the WIC Program.

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

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

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

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

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

(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 purchase records used for Federal tax reporting purposes and other records as requested to determine compliance with WIC Program requirements.

(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.

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

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

(15) Not transfer or assign its WIC authorization or reauthorization to another person or entity.

(16) Maintain purchase records and records used for Federal tax reporting purposes for allowable foods for a minimum of 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 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 food specified on the WIC check.

(3) Provide an allowable food to 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 a participant or authorized representative for a WIC check not reimbursed by the Department, or contact a participant or authorized representative concerning a WIC transaction that occurs in the store.

(5) Not seek restitution or payment from a participant or authorized representative for an allowable food authorized for purchase on the WIC check tendered by the participant or authorized representative.

(6) Not request the personal address, telephone number or other personal identification of a participant or authorized representative.

(7) Offer each participant or authorized representative the same courtesies offered other customers, and not distinguish or identify 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 each participant or authorized representative without regard to race, color, age, sex, religion, national origin or disability.

(9) Provide the same promotional incentive for a purchase made with a WIC check as given for a cash purchase.

(10) Accept cents-off coupons, a store discount card or other discounts from a participant or authorized representative for an allowable 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 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 the WIC authorized store and the Department, not the participant.

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

(3) Accept a WIC check only if the participant 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 the WIC transaction.

(5) Accept a WIC check only if the signature of the participant or authorized representative is obtained on the WIC check at the time of the WIC transaction and the family identification number on the WIC check matches the family identification number on the identification card.

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

(7) Charge the WIC Program only for the types and quantities of allowable foods specified on the WIC check and selected for purchase by the participant or authorized representative.

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

(11) Not provide a substitute item, raincheck or cash reimbursement for an allowable food that is unavailable.

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

(13) Not provide change for a coupon tendered during the WIC transaction.

(14) Not provide an exchange to replace an allowable food returned by 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 an item other than an allowable food specified on the WIC check.

(17) Not charge the WIC Program for an allowable food not received by the participant or authorized representative or for an allowable food in excess of the quantity prescribed on the WIC check.

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

(19) Deposit a WIC 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.

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

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

(22) Not collect Sales Tax in connection with a WIC transaction.

(d) 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, the 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 store's status as a WIC authorized store is void when a change of ownership of 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 authorization from the prospective new owner of the store prior to a change of ownership.

(c) 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 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, 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 less than 15 days for remodeling 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 15 store operation days for remodeling, shall automatically

lose its status as a WIC authorized store and shall apply for and secure 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 15-calendar days at its new location, shall provide the Department with written notification of its new address. The store will 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 that relocates in excess of 1 mile of its current location and to a geographical area assigned to another local agency shall 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 shall notify the Department before doing so, or shall automatically lose its status as a WIC authorized store and shall apply for authorization to again serve as a WIC authorized store.

(e) *Temporary authorization to accept WIC checks redeemable at other stores.* The Department will temporarily authorize alternate WIC authorized stores to accept WIC checks designated on the face of the check to be used at another WIC authorized store, to provide participants with access to allowable foods when a WIC authorized store has permanently or temporarily closed, the store's authorization has been terminated, or the store has been disqualified 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 compliance investigations, inventory audits, routine reviews and 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) *Compliance investigations.* The following standards apply:

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

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

(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 paragraph (8) applies.

(4) The Department will provide to the personnel of the WIC authorized store mandatory corrective training after two compliance buys detect violations of a statute or regulation governing the store's participation in the WIC Program, unless paragraph (8) applies.

(5) If paragraph (8) does not apply, the Department will continue a compliance investigation of the WIC authorized store after store personnel have attended mandatory corrective training.

(6) The Department will impose a sanction in accordance with § 1107.1 (relating to imposition of sanctions) if three compliance buys detect violations of 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.

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

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

(c) *Inventory audits.* The Department will disqualify a WIC authorized store when an inventory audit establishes 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 letter will be issued.

(d) *Routine reviews.* The Department will use routine reviews as follows to determine whether a WIC authorized store is in compliance with the terms and conditions of participation in § 1105.3 (relating to terms and conditions of participation):

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

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

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

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

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

(6) The Department will impose a sanction in accordance with § 1107.1 against a store if a third routine review detects violations of a statute or regulation governing the store's participation in the WIC Program. If multiple violations are found during the routine reviews, the Department will impose against the store the most severe sanction the Department may impose for any one of the violations committed by the store.

(e) *WIC transaction reviews.* The Department will use WIC transaction reviews to monitor WIC transaction procedures and compliance with statutes and regulations governing the store's participation in the WIC Program. The following standards apply:

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

(2) The Department will provide written notification to the WIC authorized store of the results of each 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 WIC transaction review at the WIC authorized store if the first WIC transaction review detects 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 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 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 if a third WIC transaction review detects a violation of a statute or regulation governing the store's participation in the WIC Program. If multiple violations are found during the WIC transaction reviews, the Department will impose against the store the most severe sanction the Department may impose for any one of the violations committed by the store.

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

(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 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 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 authorization or reauthorization, or other adverse action that affects the store's status as a WIC authorized store in accordance with § 1113.1 (relating to right to administrative appeal). Expiration of 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 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 give the store the option of paying a civil money penalty in lieu of disqualification for third or subsequent violations. A violation committed during a prior authorization period will support a disqualification.

(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. 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.

(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 of the WIC authorized store to a criminal prosecution agency for prosecution under applicable Federal, State, or local laws.

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

(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 imposed by regulation or in the notice given to the store by the Department of the store's obligation to reimburse the Department.

§ 1107.1a. Disqualifications.

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

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

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

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

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

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

(2) A pattern of claiming reimbursement for the sale of an amount of a specific allowable food, which exceeds the store's documented inventory of that specific allowable food 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 overcharges.

(4) Two or more incidences of receiving, transacting or redeeming a WIC check that the store is not authorized to receive, transact or redeem.

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

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

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

(1) Two or more incidences of providing a food item other than an allowable food in exchange for WIC checks.

(2) Two or more incidences of 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.

(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.

(5) Two or more incidences of failing to request a WIC identification card prior to accepting a WIC check.

(6) Two or more incidences of accepting a WIC check made payable to another store without prior written approval from the Department.

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

(8) Failing to properly store or refrigerate an allowable food.

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

(10) Charging or demanding that a participant or authorized representative pay for an allowable food with money or with another WIC check for purchases made with a WIC check.

(11) Two or more incidences of securing the signature of the participant or authorized representative prior to completing the "Pay Exactly" box on the WIC check.

(12) Two or more incidences of charging the WIC Program Sales Tax.

(13) Giving monetary change to the person who tenders a WIC check.

(14) Failing to reimburse the Department for overpayments, overcharges or other improper charges within the specified time frame.

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

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

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

(e) *Second mandatory sanction.* 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.* 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 permit the store to pay a civil money penalty in lieu of disqualification for third or subsequent 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.

(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) (relating to food delivery systems) and § 1113.1(b)(3) (relating to right to administrative appeal), the WIC Program disqualification is not subject to administrative or judicial review.

(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 expiration of authorization as an alternative to disqualification.

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

(l) *Authorization following expiration of disqualification period.* A store that has been disqualified from the WIC Program may apply for authorization following expiration of the disqualification period. If the store chooses to apply for authorization after expiration of the disqualification, the Department will not consider the prior disqualification when determining eligibility. The Department will consider the store's application in accordance with § 1103.4 (relating to selection criteria for authorization and reauthorization).

§ 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 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 under § 1107.1a(b)—(d) (relating to disqualifications).

(b) *Calculation of civil money penalty.*

(1) For a civil money penalty in lieu of a disqualification under § 1107.1a(b), (c) 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 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 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.* The amount of the civil money penalty will not exceed \$10,000 for each violation. 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 civil money penalty for all violations investigated as part of a single investigation will not exceed \$40,000.

(d) *Written agreement.* If the Department offers and the store agrees to pay a civil money penalty in lieu of disqualification, the Department and store shall set forth the terms of the agreement in writing. The terms may include a probationary period during which the Depart-

ment may conduct monitoring to ensure action has been taken by the store to correct problems. The agreement will be effective when it is signed by the Director of the Division of WIC or the Director's designee.

(e) *Payment of the civil money penalty.* If a WIC authorized store does not pay, only partially pays, or fails to timely pay a civil money penalty assessed in lieu of disqualification, the Department will disqualify the WIC authorized store for the length of the disqualification 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 authorized for the most serious violation. The Department may permit payment of a civil money 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, reimbursement to the Department of overpayments.

CHAPTER 1109. ADMINISTRATIVE APPEALS

§ 1109.2. Scope and purpose.

Chapters 1111 and 1113 (relating to applicant and participant appeals; and store appeals) apply to hearings held under 42 U.S.C.A. § 1786(f)(9), regarding 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, 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. STORE APPEALS

§ 1113.1. Right to administrative appeal.

(a) A store 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. 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) A store may not appeal the following:

- (1) The expiration of authorization or reauthorization.
- (2) The validity or appropriateness of selection criteria.
- (3) 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) 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.

§ 1113.2. Administrative appeal procedures.

(a) *Notification.* 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 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 from the date the notice of adverse action is mailed. 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.*

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

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

(3) The hearing examiner shall send notice to the 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 store appeal.

(5) The Division of WIC or the 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 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 store may be assisted or represented by an attorney or other authorized representative.

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

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

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

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

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

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

§ 1113.3. Adjudication and order.

(a) The adjudication and order shall include findings of fact and conclusions of law. The findings of fact shall be based only on the oral and documentary evidence in the hearing record.

(b) The hearing examiner shall provide the Director of the Division of WIC and the 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 store, or its authorized representative.

(e) Subsections (a)—(c) supersede 1 Pa. Code §§ 35.131, 35.201, 35.202 and 35.205.

§ 1113.4. Continuing responsibilities.

Appealing an action does not relieve the store from the responsibility of continued compliance with regulations under this part applicable to a WIC authorized store.

§ 1113.5. Judicial review.

If the adjudication and order of the hearing examiner upholds the Department's adverse action, the hearing examiner will inform the 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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