



Protecting, maintaining and improving the health of all Minnesotans

May 26, 2009

Legislative Reference Library
645 State Office Building
100 Constitution Avenue
St. Paul, Minnesota 55155

Re: In The Matter of the Proposed Rules of the State Department of Health
Relating to the WIC Program (Special Supplemental Nutrition Program for
Women, Infants and Children); Governor's Tracking #AR 411

Dear Librarian:

The Minnesota Department of Health intends to adopt rules Department of Health intends to adopt rule amendments related to the Minnesota WIC Program (the Special Supplemental Nutrition Program for Women, Infants and Children). We plan to publish a Dual Notice in the June 1, 2009 State Register.

The Department has prepared a Statement of Need and Reasonableness. As required by Minnesota Statutes, sections 14.131 and 14.23, the Department is sending the Library a copy of the Statement of Need and Reasonableness at the same time we are mailing our Notice of Intent to Adopt Rules.

If you have questions, please contact me at (651) 201-4401.

Yours very truly,

A handwritten signature in blue ink that reads "Rick Chiat". The signature is written in a cursive, flowing style.

Rick Chiat, Food Delivery Unit Supervisor
WIC Program
Minnesota Department of Health

Enclosure: Statement of Need and Reasonableness

Minnesota Department of Health

STATEMENT OF NEED AND REASONABLENESS

Proposed Amendment to Rules Governing the Special Supplemental Nutrition Program for Women, Infants and Children (WIC Program), *Minnesota Rules*, 4617.0002, 4617.0067, 4617.0068, 4617.0084, 4617.0088, 4617.0090, 4617.0100, 4617.0121, and 4617.0176

INTRODUCTION

A. Background

The Special Supplemental Nutrition Program for Women, Infants and Children, commonly known as the WIC program, is a nutrition program that serves income-eligible pregnant women, new mothers, infants and children up to the age of 5 who are at nutritional risk. The WIC program provides participants with nutrition education, nutritious foods, and improved access to health care to prevent nutrition-related health problems in pregnancy, infancy and early childhood. The Child Nutrition Act of 1966 established the WIC program in response to the realization that hunger and poverty were widespread in this country and that inadequate nutrition posed real dangers to pregnant women, new mothers, infants and young children.

The United States Department of Agriculture (USDA) administers the WIC program under United States Code, title 42, section 1786, and the Code of Federal Regulations, title 7, part 246. Within the United States Department of Agriculture, the Food and Nutrition Service (FNS) manages the program. The Minnesota Department of Health (Department) is responsible for the effective and efficient administration of the program in Minnesota. The USDA provides the funds to the Department to operate the state's program. The Department distributes these funds to a network of local agencies that are under contract with the Department to determine eligibility, provide appropriate nutrition education, refer participants to necessary health and social services, and provide supplemental foods to participants (see 7 C.F.R. 246.1). MDH also uses the funds to reimburse authorized retail food stores and pharmacies for the cost of the foods that these vendors have provided to the WIC participants. The WIC program is not an entitlement program; the Department can only serve as many participants as the limited dollars received from USDA allow. Current monthly caseload is 145,000 participants.

To be eligible for the WIC program, an individual must have an identifiable nutritional risk, as determined by a health professional. The supplemental foods provided are foods specifically prescribed to address the individual's nutritional risk. Federal law mandates the types of food and the nutrient content of the prescribed foods.

In Minnesota, local agencies provide supplemental foods to WIC participants by issuing WIC vouchers. WIC vouchers list the types and quantities of WIC foods that are consistent with the participant's nutritional needs, and may be redeemed at retail food stores and pharmacies (for infant foods only) that MDH has authorized to accept Minnesota WIC vouchers. These

authorized businesses (vendors) provide the specified foods, enter on each voucher the price of the food items purchased, and receive reimbursement for the cost of the food items purchased when a voucher is deposited in the appropriate vendor's bank account. Federal regulations governing this method of food delivery are found at 7 C.F.R. 246.12. The supplemental foods which are available through the WIC program are governed by 7 C.F.R. 246.10.

There are currently approximately 1,000 retail food stores and about 100 pharmacies that are authorized Minnesota WIC vendors. For the purpose of vendor administration, the counties in which vendors are located are classified as Tier 1 counties (counties with a population of 250,000 or more) and Tier 2 counties (counties with a population of less than 250,000). As of January 1, 2009, only Anoka, Dakota, Hennepin and Ramsey counties are Tier 1 counties.

B. Reasons for Proposing Rule Revisions

On December 6, 2007, the FNS published in the Federal Register an interim final rule entitled "Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Revisions in the WIC Food Package". This interim final rule substantially revised the list of foods to be provided to WIC participants (see 72 FR 68966 (2007)). The food package changes are intended to increase WIC program participants' consumption of fruits, vegetables and whole grains, while decreasing consumption of saturated fat.

These new regulations became effective on February 4, 2008, and each state must implement them no later than October 1, 2009, as clarified in a regulatory document published in the Federal Register on March 17, 2008 (see 73 FR 14153 (2008)).

Consequently, the state rules governing the WIC program need revising to meet the new federal regulations. Additional changes are needed to respond to changes in the banking and food manufacturing industries, to respond to other recent changes to the federal regulations governing the program, and to make minor technical adjustments and corrections to existing language.

C. Public Contributions to the Proposed Rule Revisions

In drafting the proposed rule revisions, the Minnesota Department of Health followed the Minnesota Administrative Procedures Act's procedures. A Request for Comments was published in the State Register on May 27, 2008 (see 32 SR 2095 (2008)). The Department also mailed this Request for Comments or sent it electronically to persons on the Department's rulemaking mailing list, all Minnesota WIC vendors, members of the Vendor Advisory Group (see below), and the local WIC agencies.

Vendors' owners and managers are the persons most likely to be affected by the proposed rule revisions. Vendors were also notified of the proposed rule revisions in the September 2008 newsletter entitled "WIC Matters," which the Department mailed to all vendors, and in interactive group training sessions that the Department held throughout the state in September 2007.

In response to the Request for Comments and mailings to vendors, the Department received 15 comments, and no requests for a copy of the draft rule revisions. The Department has considered all comments received.

The Department maintains an ongoing Vendor Advisory Group to provide input on vendor issues, including any revisions of vendor rules. To date, the committee has considered the possible rule revisions at its meetings on April 24, 2008, May 29, 2008, September 11, 2008, and December 15, 2008. The group consists of representatives from:

- The Minnesota Grocers Association
- The United States Department of Agriculture, Food and Nutrition Services
- 2 food manufacturing firms
- Unity Cooperative Council – a consortium of small retail food stores
- Institute for Agriculture and Trade Policy
- 1 grocery distributor
- 1 small WIC-authorized grocery store in non-metropolitan Minnesota
- 6 small WIC-authorized grocery stores in metropolitan Minnesota
- 7 large WIC-authorized grocery stores in metropolitan Minnesota
- 4 large WIC-authorized grocery stores in non-metropolitan Minnesota
- 2 metropolitan WIC local agencies
- 2 non-metropolitan WIC local agencies

A list of the Vendor Advisory Group members is included as Attachment 1.

ALTERNATIVE FORMAT

Upon request, the Department can make this Statement of Need and Reasonableness available in an alternative format, such as large print, Braille, or cassette tape. Contact Rick Chiat at the Minnesota Department of Health, WIC program, P.O. Box 64882, St. Paul, MN 55164-0882, phone: (651) 201-4401, fax: (651) 215-8951. TTY users may call the Department of Health at (651) 201-5797.

STATUTORY AUTHORITY

The Department's statutory authority to adopt the rules is set forth in:

- (1) Minnesota Statutes section 145.894(k), which provides: "The commissioner of health shall: . . . (k) promulgate all rules necessary to carry out the provisions of sections 145.891 to 145.897;" and
- (2) Minnesota Statutes section 144.11, which provides: "The commissioner may make such reasonable rules as may be necessary to carry into effect the provisions of section 144.10 and alter, amend, suspend, or repeal any of such rules."

Under these statutes, the Department has the necessary statutory authority to adopt the proposed rules. All sources of statutory authority were adopted and effective prior to January 1, 1996, and so Minnesota Statutes, section 14.125, does not apply. See Minnesota Laws 1995, chapter 233, article 2, section 58.

REGULATORY ANALYSIS

Minnesota Statutes, section 14.131, sets out seven factors for a regulatory analysis that must be included in the SONAR. Paragraphs (1) through (6) below quote these factors and then give the agency's response.

“(1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule”

The persons most likely to be affected by the proposed rule amendments are those who own or manage a retail food store or pharmacy that is currently authorized or that might apply to be authorized to accept WIC vouchers.

A few existing retail food vendors and retail food vendor applicants might bear the cost of the proposed revisions to the licensing provisions of 4617.0067. Specifically, stores that have a restriction placed on their operating license that would preclude them from meeting the current or proposed minimum food stock requirements would be prohibited from obtaining vendor authorization or reauthorization.

Existing retail food vendors and retail food vendor applicants will bear the cost of revisions to the minimum food stock requirements (part 4617.0067, subp. 3). All vendors would be required to stock canned beans or legumes, fresh fruits and vegetables, whole grain cereals, baby food fruits and vegetables, and whole grain products other than cereals, if the store does not already carry a sufficient quantity of these items.

Existing retail food vendors and retail food vendor applicants in Tier 1 counties will both benefit from and bear the cost of revisions to the infant formula minimum stock requirements (part 4617.0067, subp. 3). The varieties of infant formula required to be maintained in stock would be reduced for all Tier 1 vendors, so that no vendor would need to maintain stock of any soy-based infant formula or milk-based concentrate infant formula. Tier 1 vendors would need to maintain 18 (instead of 15) cans of milk-based powdered infant formula.

Existing small retail food vendors and retail food vendor applicants might bear the cost of the proposed revisions to the rule regarding provision of fresh fruits and vegetables (part 4617.0067) in that retail food stores that do not have sufficient refrigeration equipment to store fresh fruits and vegetables might need to obtain additional equipment. In addition, retail food stores that do not currently have a scale with which fresh vegetables and fruit can be weighed might need to purchase one.

Existing vendors and vendor applicants would bear the cost of carrying additional quantities of canned fish specified in 4617.0067, Subpart 3. Existing vendors from whom a WIC customer requests one or more items enumerated in 4617.0067, Subpart 3 Item E would bear the cost of stocking these items.

Existing vendors that have not committed a violation of the rule could benefit from the proposed modification that would remove the requirement that vendors display WIC Shelf Labels.

Existing vendors that commit two violations of the types listed in part 4617.0084 Subp. 12 would face the proposed term increase of the resulting disqualification. Under the proposed rule, two instances of the following violations would result in a one-year instead of a six-month disqualification: Duplicating a vendor stamp or using a counterfeit vendor stamp; violating the nondiscrimination clause of the vendor agreement or failing to offer a WIC customer the same courtesies offered to other customers; altering material information on the voucher or signing a voucher that the vendor has accepted without a signature; offering or advertising an incentive, and allowing a WIC customer to exchange infant formula purchased with a voucher.

Existing pharmacy vendors and pharmacy vendor applicants would bear the cost of the proposed language in 4617.0068, which prohibits pharmacy vendors from accepting WIC vouchers for infant foods other than special infant formula; some pharmacies might redeem fewer WIC vouchers as a result of this provision.

Farmers and food manufacturing companies that produce and distribute new foods included in the WIC food package might benefit from increased sales of their products. Some food manufacturers (e.g. juice manufacturers) might see fewer sales as a result of the food package changes.

Existing vendors that redeposit a rejected voucher more than 90 days after the first day to use date on the voucher would bear the cost of the proposed language in 4617.0090, Subp. 2 (B) (1), which reduces the time to 90 days (from 120 days) that the Department must receive a voucher to be eligible for payment.

“(2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues”

There are some anticipated costs to the Minnesota Department of Health associated with the proposed rules. One would be conducting vendor training sessions to explain the new food package and how store personnel are to redeem and process cash-value vouchers. These costs are expected to total less than \$10,000.

The Minnesota Department of Health will experience savings from prohibiting pharmacy vendors from accepting vouchers for products other than special infant formula. Specifically, Department staff will no longer need to conduct annual food sales analyses on these vendors per federal regulations governing the WIC program.

There is no agency other than the Department of Health that will bear any costs or experience any savings from the implementation and enforcement of the proposed rules.

The proposed rules are not anticipated to have any significant effect on state revenues, as the Minnesota WIC program receives no funding from the State of Minnesota.

“(3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule”

Most of the proposed rule amendments are required by federal regulation, thus limiting the Department’s discretion to use methods other than those proposed. The Department is not aware of less costly or intrusive methods for achieving the purpose of the proposed rule.

“(4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule”

The Department considered not changing the minimum stock requirements for vendors to include the new foods provided under the federal regulations, and to instead have the demand for products drive vendors’ stocking decisions. Department staff and the members of the Vendor Advisory Group, however, were concerned that this could result in participants being unable to obtain certain WIC-eligible foods. Therefore, the interested parties determined that establishing minimum stock requirements for these new foods would best ensure their availability. Further, the Vendor Advisory Group members felt that the requirements were not onerous or burdensome even on the smaller retail food vendors.

The new federal regulations add fruits and vegetables to the WIC program. The Department considered authorizing for purchase only fresh fruits and vegetables, and not allowing participants to purchase canned and frozen fruits and vegetables. After receiving comments from interested parties, including several members of the Vendor Advisory Group, the Department determined that participants need the flexibility and thus should have the option to purchase processed fruits and vegetables, too, when the food package changes are implemented.

The Department considered setting price limits for fruits and vegetables. However, Department staff and the members of the Vendor Advisory Group concluded that this would not be a viable option, since the variety of products would differ widely from vendor to vendor, and the prices would fluctuate significantly based on availability and growing season. Instead, the Department will depend upon the market to set reasonable prices; WIC participants will be motivated to use their cash-value vouchers wisely to obtain a fair amount of fruits and vegetables for the cash-value dollar amount listed on their vouchers.

“(5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals”

Grocery stores’ and pharmacies’ probable costs of complying with most of the proposed rule amendments are minimal. There might be a minimal initial cost to some small stores that do not currently carry fresh fruits and vegetables, canned beans or legumes, baby food meats and fruits and vegetables, or whole grain products. The new minimum stock requirements, however, would generally not result in an increased cost to vendors because most vendors already stock the proposed foods in the specified quantities or more.

During the transition to the proposed rule there might be some minor costs to grocery stores if they are unable to sell the foods proposed for elimination from minimum stock requirements. These costs will be mitigated by providing early notice and training to the vendors regarding the changes.

“(6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals”

The primary consequence of not modifying our rules to accommodate these federally-mandated changes would be that WIC participants would have difficulty in obtaining the new WIC foods and this could result in a potential loss of the federal funds supporting the program. In this event, the nutritional status of the WIC participants could suffer, which could in turn result in increased health care costs for the State of Minnesota and federal government.

“(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference”

The Special Supplemental Nutrition Program for Women, Infants and Children is governed by the provisions of the Code of Federal Regulations, Title 7, Part 246. These regulations provide a detailed framework that an individual state must follow in designing its food delivery system. The proposed revisions to the WIC vendor rules are in full compliance with the federal regulations.

PERFORMANCE-BASED RULES

The proposed amendments to the sanctions rule (part 4617.0084) are performance-based in that the amended rule, like the current rule, sanctions vendors for particular types of unacceptable performance. Federal regulations require certain sanctions for particular violations, and allow the state agencies to impose disqualification, fines, or penalties for other violations. Although this entire framework, as established by federal regulations, is in a sense performance-

based, it penalizes poor performance rather than rewarding positive compliance with the rule, and it does not allow flexibility for the stores or the Department.

Although the proposed sanctions rule does not allow flexibility, other rule revisions increase flexibility for regulated parties. The proposed amendment to 4617.0067 Subp. 3 (E) requires a vendor to stock certain WIC foods only if there is demand for the product. The proposed amendment to the rule on shelf labels would allow a vendor to choose not to use shelf labels, unless the vendor had committed a violation. (See proposed part 4617.0068, Subp. 10).

ADDITIONAL NOTICE

We will mail the rules, the Notice of Intent to Adopt, and the Statement of Need and Reasonableness to all members of the WIC Vendor Rules Advisory Committee, which includes representatives from the Minnesota Grocers Association and a food buying consortium of over 200 vendors (see Attachment 1). We will also mail a summary of the proposed rule and the Notice of Intent to Adopt to all authorized WIC vendors (approximately 1,000) and to all WIC local agencies (75).

Our Notice Plan also includes giving notice required by statute. We will mail the rules and Notice of Intent to Adopt to everyone who has registered to be on the Department's rulemaking mailing list under Minnesota Statutes, section 14.14, subdivision 1a. We will also give notice to the Legislature per Minnesota Statutes, section 14.116

CONSULT WITH FINANCE ON LOCAL GOVERNMENT IMPACT

As required by Minnesota Statutes, section 14.131, on the same day this SONAR was signed, the Department sent to the Commissioner of Finance copies of the documents sent to the Governor's Office for review and approval by the Governor's Office. The documents included the Governor's Office Proposed Rule and SONAR Form, final rules, and final SONAR.

COST OF COMPLYING FOR SMALL BUSINESS OR CITY

Agency Determination of Cost

As required by Minnesota Statutes, section 14.127, the Department has considered whether the cost of complying with the proposed rules in the first year after the rules take effect will exceed \$25,000 for any small business or small city. The Department has determined that the cost of complying with the proposed rules in the first year after the rules take effect will not exceed \$25,000 for any small business or small city.

The Department has made this determination based on the probable costs of complying with the proposed rule, as described in the Regulatory Analysis section of this SONAR on pages 4 through 6. In addition, the Department asked the Vendor Advisory Group members (listed in

Exhibit A) whether these costs would exceed \$25,000 during the first year for any small business or city. The Vendor Advisory Group members, which includes representatives from small businesses and local WIC agencies located in small cities, stated that the costs would not exceed \$25,000.

LIST OF WITNESSES

If these rules go to a public hearing, the Department anticipates having the following witnesses testify about the development and the content of the rules:

Betsy Clarke, WIC Director
WIC Program
85 East Seventh Place, Suite 220
St. Paul, MN 55101

Rick Chiat, Vendor Supervisor
WIC Program
85 East Seventh Place, Suite 220
St. Paul, MN 55101

The Department anticipates that the following witnesses will testify about the impact and importance of the foods provided to program participants:

Mary Peick, WIC Program Coordinator
St. Paul Public Health
555 Cedar Street
St. Paul, MN 55101

Patricia Faulkner, Nutrition Unit Supervisor
WIC Program
85 East Seventh Place, Suite 220
St. Paul, MN 55101

RULE-BY-RULE ANALYSIS

GENERAL CHANGES

Cash-value vouchers. Many of the changes to the rule reflect the need to add specific language to accommodate “cash-value vouchers”, which WIC program participants will use to purchase WIC-allowed fruits and vegetables. Cash-value vouchers are required by the federal regulations governing the WIC program (see 7 CFR 246 (2008)). Cash-value vouchers will have a specific cash value assigned to them, and WIC participants will use them to purchase fruits and vegetables. Note that WIC participants will still use

vouchers (non cash-value vouchers) to purchase the other foods provided by the WIC program.

Proposed changes to the rule necessitate renumbering of the following provisions:

- 4617.0002, Subp. 3c (changed to Subp. 3d)
- 4617.0002, Subp. 14f (changed to Subp. 14g)
- 4617.0067, Subp. 3 (A) subitems 7, 9, 10, and 11 (changed to subitems 8, 10, 11, and 12, respectively)
- 4617.0067, Subp. 3 (B) subitems 2, 4, 5, 6, 7, 8, 9, 11, 12, and 13 (changed to subitems 1, 2, 3, 4, 5, 6, 8, 10, 11, and 12, respectively)
- 4617.0084, Subp. 14a (B) subitems 5 through 12 (changed to subitems 4 through 11, respectively)
- 4617.0100, Subps. 1 through 3 (changed to Subps. 2 through 4, respectively)
- 4617.0176, Subp. 2, subitems 1 through 4 (changed to subitems A through D, respectively)
- 4617.0176, Subps. 4 and 5 (changed to Subps. 3 and 4, respectively)

DEFINITIONS

Part 4617.0002

Subp. 2b. **Applicant.** We propose to add the federal regulations' definition for "applicant" to implement the proposed appeal procedures in part 4617.0100: The federal regulations define applicants as:

"...pregnant women, breastfeeding women, postpartum women, infants, and children who are applying to receive WIC benefits, and the breastfed infants of applicant breastfeeding women. Applicants include individuals who are currently participating in the program but are re-applying because their certification period is about to expire."

Subp. 3c. **Cash-value voucher.** The WIC federal regulations now require that state agencies provide WIC program participants with "cash-value vouchers" for the purchase of fruits and vegetables. The federal regulations define a cash-value voucher as:

"...a fixed-dollar amount check, voucher, electronic benefit transfer (EBT) card or other document that is used by a participant to obtain authorized fruits and vegetables."

Subp. 3d. **Cashier.** The change clarifies that an individual only needs to accept one voucher on behalf of a vendor to be considered a cashier.

Subpart 14c. **Food assistance program.** This technical revision changes the official name of the Food Stamp Program to the Supplemental Nutrition Assistance Program ("SNAP"). Removing "the WIC program" from inclusion in this definition is reasonable because of the USDA's characterization of the WIC program as a nutrition program, not a

food program. The Department is also proposing to add language regarding the WIC program where the term “food assistance program” appears in the rule (see 4617.0067 Subpart 6 (B) and (C)), so that the effect of the proposed rule remains the same as the current rule.

Subpart 14f. **Food sales.** This subpart defines “food sales,” a term used several times in the current rule but not defined in the rule. The federal regulations define “food sales” as: “...sales of all Food Stamp Program eligible foods intended for home preparation and consumption, including meat, fish, and poultry; bread and cereal products; dairy products; fruits and vegetables. Food items such as condiments and spices, coffee, tea, cocoa, and carbonated and noncarbonated drinks may be included in food sales when offered for sale along with foods in the categories identified above. Food sales do not include sales of any items that cannot be purchased with food stamp benefits, such as hot foods or food that will be eaten in the store.”

Subp. 44. **Voucher.** This modification accommodates a change in banking industry practice. Specifically, the Check 21 Act, Public Law 108-100, 117 Stat. 1177, (2003), codified at 12 U.S.C. 5001-5018, allows for either electronic images or the printed copies of electronic images to be the legal equivalent of a paper voucher or check. The proposed modification extends the definition of voucher to the legal equivalents now allowed by law.

DISQUALIFICATION

Part 4617.0025 The minor technical revision in this provision is the correction of a citation.

VENDOR ELIGIBILITY REQUIREMENTS

Part 4617.0067

Subp. 2. Location, licensing and registration requirements.

Item B (2). Changing “food stamps” to “SNAP benefits” reflects the change of the official name of the Food Stamp Program to the Supplemental Nutrition Assistance Program (SNAP).

Item B (3). A vendor applicant that has a restriction placed on its operating license that would preclude its meeting the minimum stock requirements is not eligible for WIC authorization. Such a store would not be able to legally stock the required WIC foods. The need for this provision arose from a city ordinance that restricted the licenses of some small-sized retail grocery stores to carrying only specialty items, precluding the vendors’ carrying the full complement of WIC foods. A particular store had the required WIC foods at the time of the preauthorization visit to the store, but did not stock

these items after a city licensing inspector found it to have violated its city license. Under the current rules, the Department must address a lack of minimum stock through monitoring visits to the store. After the first monitoring visit in which a store fails to meet minimum stock requirements, the vendor is provided written notice of noncompliance. The Department must then return to the store for a follow-up monitoring visit. If at the time of this second visit the vendor again fails to meet minimum stock requirements, the vendor's agreement can be terminated. It is reasonable to preclude the authorization of a store which will be unable to meet minimum stock requirements, because doing so will significantly reduce the Department's administrative burden and costs.

Subp. 3. **Minimum in-stock food requirements for retail food vendors.**

Earlier amendments to the rule described the methodology by which the minimum stock requirements were established as follows: Vendors in Tier 2 counties were required to have in stock the approximate amount of food needed to redeem the vouchers issued to one infant, one child, and one pregnant woman. Vendors in Tier 1 counties were required to have in stock the approximate amount of food needed to redeem the vouchers issued to two infants, two children, and one pregnant woman. This methodology was chosen because it set a reasonable standard for vendors based on population density.

Item A (3) With the implementation of the new WIC food package, virtually all WIC participants who are over the age of two will be receiving vouchers listing only low-fat or non-fat milk. As a result, approximately 85 percent of issued WIC vouchers listing milk will allow only the purchase of low-fat or non-fat milk. WIC program staff have observed that many stores currently only stock whole and 2 percent milk. This language change is reasonable because it will ensure that vendors stock the low-fat or non-fat milk needed by most WIC participants.

Item A (6) This change is reasonable and necessary because the standard package sizes of dried legumes have changed over time. This change will allow WIC customers greater flexibility in selecting the most appropriate package size for themselves.

Item A (7) The new WIC food package includes canned beans or legumes, which have not been authorized in the past. Therefore, it is reasonable and necessary to add a corresponding minimum stock requirement for this food item.

Item A (8) Since the peanut butter manufacturers have begun to downsize container sizes, changing the language regarding the WIC-allowed container sizes of peanut butter is reasonable and necessary. This change is designed to allow WIC customers greater flexibility in selecting the most appropriate option for themselves.

- Item A (8) – repealed – We propose to repeal the minimum stock requirements for carrots as a superfluous measure, since carrots are included as a requirement under item A, subitem 9.
- Item A (9) The new federally required WIC food package requires that fresh fruits and vegetables be provided. to WIC participants. Requiring that vendors carry at least 24 pounds of fresh fruits and vegetables is reasonable to ensure that the vendor has an amount sufficient for the redemption of the cash-value vouchers issued to the WIC participants that shop at the store. Requiring that the vendor carry at least five varieties is reasonable, because it will provide participants with reasonable choice and will accommodate personal preference. Requiring that at least two of these varieties be bananas and carrots is reasonable; bananas will be routinely listed on vouchers for infants, and bananas and carrots were found to be the most popular fruit and vegetable, respectively, in a survey of WIC participants in a research study published in the Journal of the American Dietetic Association in 2006 (Vol. 106, Issue 5, Pages 740-744, DOI:10.1016/j.jada.2006.02.004). Also, carrots are currently stocked by vendors under the current rule. The Vendor Advisory Group agreed the number of pounds and varieties specified in this provision would be appropriate.
- Item A (10) The new WIC food package will also provide canned fish other than tuna, such as pink salmon. Specifying the total number of ounces that a vendor is required to carry, and removing the can-size restriction, is reasonable since canned fish is now available in other sizes. The required quantity of 30 ounces is the amount listed on the vouchers for one breastfeeding woman for one month.
- Item A (11) The Department proposed to remove the language related to nonfrozen concentrate juice, because WIC program staff have learned that these products have limited availability and were very rarely stocked by vendors. Removing the language, then, will make the rule less complicated. It is reasonable to change from 46 to 64 the container sizes of non-frozen juice, since changes in the federal regulations about how much juice is to be provided to each participant necessitates a different container size for this juice. Specifically, the federal regulations specify that 128 ounces of juice are to be provided to a child participant. One hundred twenty eight is divisible by 64, a commonly manufactured container size. Thus authorizing 64 ounce containers of juice will allow child participants to receive the maximum amount of juice. The Vendor Advisory Group members did not feel converting to this size container would pose a problem to vendors.
- Item A (12) The new WIC food package emphasizes the consumption of whole grains in lieu of refined grains so allowing only whole grain cereals to satisfy the vendors' minimum stock requirements is reasonable. The federal regulations governing the WIC program specify that at least 50% of the

cereals determined by the Department to be WIC-allowed must qualify as a whole-grain product. Ensuring that each WIC vendor has sufficient quantities and varieties of whole grain cereals in stock will help participants receive the full nutritional benefits of the new WIC food package.

Item A (13) Baby food fruits and vegetables will be provided with the new WIC food package, so establishing minimum stock requirements for baby food is necessary so participating vendors have them available. The quantity listed is reasonable, since it is sufficient to fill the vouchers issued to one infant in one month.

Item A (14) Establishing minimum stock requirements for whole grains other than cereal is necessary and reasonable, since these products will be provided with the new WIC food package, and therefore must be available in the stores in which WIC participants use their vouchers. The quantity listed is sufficient to fill the vouchers issued to one child and one breastfeeding woman participant.

Item B (1) – repealed Repealing the minimum stock requirement for milk-based concentrate infant formula is reasonable because only approximately 2 percent of WIC participants receiving infant formula receive milk-based concentrate infant formula.

Item B (1) Increasing the number of cans of milk-based powdered infant formula that Tier 1 vendors must stock from 15 to 18 is reasonable because the federal regulations provide for up to 9 cans to be issued to one infant participant per month. Increasing the minimum stock to 18 cans will ensure that vendors will be able to redeem the vouchers issued to two infants at all times, per the overall methodology of the minimum stock rules related to Tier 1 vendors. Powdered formula is currently packaged in six-unit cases, so a vendor will be able to meet minimum stock requirements by purchasing three cases.

Item B (3) – repealed Repealing the minimum stock requirement for soy-based powdered infant formula is reasonable because only approximately 7 percent of the infants receiving infant formula from the WIC program receive soy-based powdered infant formula.

Item B (3) The reasoning behind the proposed amendment to this subitem is the same as that for the corresponding Tier 2 subitem A(3). . . .

Item B (6) The reasoning behind the proposed amendment to this subitem is the same as that for the corresponding Tier 2 subitem A (6). . . .

Item B (7) The reasoning behind the proposed amendment to this subitem is the same as that for the corresponding Tier 2 subitem A (7). . . .

Item B (8) The reasoning behind the proposed amendment to this subitem is the same as that for the corresponding Tier 2 subitem A (8). .

Item B (10) - repealed It is reasonable to repeal the minimum stock requirements for carrots, since carrots are included as a requirement of subitem 9.

Item B (9) The reasoning behind the proposed amendment to this subitem is the same as that for the corresponding Tier 2 subitem A (9). . Requiring that Tier 1 vendors carry at least 30 pounds of fresh fruits and vegetables will ensure that the vendor has a minimum amount sufficient for the redemption of the cash-value vouchers issued to the WIC participants that shop at the store. Requiring that the Tier 1 vendor carry at least seven varieties is reasonable, because it will provide participants with reasonable choice and will accommodate personal preference. Requiring that at least two of these varieties be bananas and carrots is reasonable; bananas will be routinely listed on vouchers for infants, and bananas and carrots were found to be the most popular fruit and vegetable, respectively, in a survey of WIC participants in a research study published in the Journal of the American Dietetic Association in 2006 (Vol. 106, Issue 5, Pages 740-744, DOI:10.1016/j.jada.2006.02.004). Also, carrots are currently stocked by vendors under the current rule. The Vendor Advisory Group thought the number of pounds and varieties specified in this provision would be appropriate requirements for Tier 1 vendors.

Item B (10) The reasoning behind the proposed amendment to this subitem is the same as that for the corresponding Tier 2 subitem (10). . . .

Item B (11) The reasoning behind the proposed amendment to this subitem is the same as that for the corresponding Tier 2 subitem A (11).

.....

Item B (12) The reasoning behind the proposed amendment to this subitem is the same as that for the corresponding Tier 2 subitem A (12). . . .

Item B (13) The reasoning behind the proposed amendment to this subitem is the same as that for the corresponding Tier 2 subitem A (13). . The quantity listed is sufficient to fill the vouchers issued to two infants in one month.

Item B (14) The reasoning behind the proposed amendment to this subitem is the same as that for the corresponding Tier 2 subitem A (14). . The quantity listed is sufficient to fill the vouchers issued to two children and one breastfeeding woman participant.

Item D The modifications in the provision are wording changes to better reference the requirements of Item C.

Item E The language added to item E is reasonable because it will allow WIC participants to receive needed food items within a reasonable time frame, but will not overly burden vendors with regularly stocking products if they are not needed by participants.

Subpart 5 Making an exception to the pricing requirement for fresh fruits and vegetables is necessary since the variety of products will differ widely from vendor to vendor, and the prices will fluctuate significantly based on availability and growing season. Instead, the WIC program will depend upon the market to set reasonable prices. WIC participants will be motivated to use their cash-value vouchers wisely to obtain a fair amount of fruits and vegetables for the cash-value dollar amount listed on their vouchers.

Federal regulation (see 7 CFR 246.12 (2008)) requires state WIC agencies to use a peer group pricing structure unless it has obtained a waiver from doing so. The Minnesota WIC program currently has such a waiver. If, in the future, the Minnesota WIC program is required by USDA to establish a peer group pricing structure, specific descriptions of the peer groups and pricing guidelines will be stated in the annual State Plan submitted to USDA. The State Plan is a public document.

Subpart 6. Special requirements for vendor applicants.

Item B Adding a specific reference to the WIC program is necessary to accommodate the Department's proposal to remove the WIC program from the definition of "food assistance program". This clarifies the distinction between the WIC program and other food assistance programs, since the USDA has emphasized that the WIC program is a nutrition program, not a food program.

Item C For the reasons discussed immediately above, adding language referencing the WIC program to this provision is reasonable.

Item E Changing "food stamp program" to "SNAP" is necessary to reflect the change of the official name of the Food Stamp Program to the Supplemental Nutrition Assistance Program ("SNAP").

OPERATING REQUIREMENTS

Part 4617.0068

Subpart 1. Acceptance and pricing of vouchers and cash-value vouchers.

Item A Currently pharmacy vendors can accept vouchers for any infant food product, including special infant formula. The Department is proposing to limit pharmacy vendors to accepting vouchers for only special infant formula. The vast majority of the vouchers redeemed at pharmacy vendors

are for special formula, so this modification is expected to have a minimal effect on pharmacies. This proposed change reflects a recent change in federal regulation, which requires that the Department conduct an annual food sales analysis on any vendor that redeems vouchers for any product other than special formula. Conducting these analyses on pharmacy vendors has proven to be especially problematic, since pharmacy vendors typically do not track their food sales (including sale of infant formula other than special formula) separate from sale of other products. This has resulted in an administrative burden for Department staff to ensure that the pharmacy vendors are complying with federal regulations. Prohibiting the pharmacies from accepting vouchers for foods other than special infant formula eliminates this problem. Members of the Vendor Advisory Group, and a representative of the company that owns 79% of the pharmacy vendors in the state, approved this change.

Subp. 10. **Shelf labels.** Specifying that vendors must display shelf labels only if the commissioner requests it due to a violation of the chapter adds flexibility to the Department's enforcement and is therefore reasonable. Displaying shelf labels can assist WIC participants and their proxies to identify what foods are approved for purchase with WIC vouchers. Some larger stores, however, have reported that it is sometimes difficult to keep the shelf labels in appropriate places due to frequent relocation and restocking of product. In addition, shelf labels do not readily fit all shelf sizes, and more modern shelves do not have slots for insertion of shelf labels. Even so, most vendors routinely use vendor shelf labels, and the members of the Vendor Advisory Group indicated that most will do so regardless of whether it is a requirement. The Department intends to encourage the use of shelf labels, but removing it as a requirement for all vendors at all times will increase the flexibility of the rules.

If a vendor is found to violate rules, particularly those related to what products are authorized for purchase with WIC vouchers, the Department would require the store to display shelf labels. This would help ensure WIC participants receive only WIC-allowed foods, and would reduce the ability of a vendor to claim that further violations were unintentional.

VENDOR SANCTIONS

Part 4617.0084

Subp. 5. **Redeeming vouchers or cash-value vouchers in excess of inventory.** The current rule requires that an "inventory audit," an analysis of whether a vendor claimed reimbursement for more food than it had in inventory, be conducted over a one-month period commencing on the first and/or last day of a calendar month. This restriction in the timeframe for conducting an inventory audit has resulted in many fewer audits being completed because of scheduling issues. . It is reasonable to amend the

language of this subpart so that the inventory audits do not have to be conducted on the first and/or last day of a calendar month or to be always concluded within a 30 day time period. '.

Subps. 8, 9 and 11 The minor technical modifications in these subparts are self-explanatory.

Subp. 10 **SNAP or food support sanctions.**

This change reflects the name change discussed above and is self-explanatory.

Subp. 12. **One-year disqualification for two violations.** In the current rule, Subp. 11 lists those violations for which one instance will trigger a one year disqualification, and both Subp.12 and Subp. 13 lists those violations for which two instances will trigger a six-month disqualification. Changing from six months to one year the length of disqualification resulting from the violations listed in Subp. 12 is reasonable because the Department considers these violations more serious than the violations listed in Subp. 13 and the one year disqualification timeframe is a reasonable intermediary step between the violations listed in Subp. 11 and Subp. 13. .

Item A(6) We propose to delete this redundant provision because it is already contemplated in Subp. 14a, subitem B(1).

Subp. 14a. **Written warnings; termination.**

Item B (2). This language change corresponds to the changes proposed under 4617.0067, Subp. 2(B)(3).

Item B (4). This provision is no longer necessary, since it is redundant to Item B (1).

Item B (6). This Department must fulfill the training requirements specified in the federal regulations governing the WIC program, which requires interactive training only every three years. This proposed revision reflects those changes.

Item B (9). This provision accommodates the proposed modification to 4617.0068 Subp. 1 (A).

REJECTION OF VOUCHERS AND CASH-VALUE VOUCHERS AND REIMBURSEMENT BY VENDORS

Part **4617.0090**

Subp. 1a. **Return with credit**

Item C. The changes to this provision are necessary because the federal regulations require that the amount paid to a vendor for a cash-value voucher cannot exceed the amount listed on the voucher.

Subp. 2 **Payment of rejected vouchers.**

Item B (1) This change to the time limit by which a vendor must resubmit a voucher is required by federal regulations. (see 7 CFR 246.12 (2008))

APPEALS BY APPLICANTS, PARTICIPANTS, VENDORS, VENDOR APPLICANTS, LOCAL AGENCIES, AND LOCAL AGENCY APPLICANTS

Part **4617.0100**

Subpart 1. **Procedures for appeals by applicants and participants.** It is reasonable to set forth in rules the procedures by which an appeal by a WIC participant or applicant will be heard. The current rule does not specify how the Department is to process appeals from applicants and participants. The absence of such language has resulted in the Department using the appeals process established under the Administrative Procedures Act to handle these appeals. This, in turn, has resulted in the Department being unable to comply with the timeframes under which such appeals are to be processed pursuant to federal regulations (see 7 CFR 246.9).. The proposed language in this subpart is reasonable because it will allow for a more streamlined process for the Department to decide participant and applicant appeals, allowing the Department to meet the timeframes specified by federal regulations.

Additional language in this part results from the need to clarify which provisions apply to which type of appellant.

TRANSITION PERIOD

Part **4617.0121**

Subp. 2. The deleted language in this provision phased in earlier amendments to the rule and is now obsolete. The new language proposes, as a matter of common sense and fairness, that the WIC vendors are only obligated to stock the new WIC food items when vouchers listing these food items are issued.

APPROVAL PROCESS FOR WIC FOODS OTHER THAN INFANT FORMULA

Part **4617.0176**

Subpart 1. **Approval process.**

Item A This additional language excludes infant formula from the food approval process, since infant-formula approval is decided under 4617.0171.

Item B The language adds a cultural, religious or ethnic need for a food here to replace the language proposed for deletion in Subpart 3 of this part. This is a housekeeping measure.

Subpart 2. Approval criteria.

Item A – repealed – This item is no longer needed here because the foods analyzed for approval are now listed in Part 4617.0176, Subpart 1 (A) of the proposed Rule.

Item A The reference to Part 4617.0067, Subpart 3 (B) is added to clarify which foods the Commissioner must consider for approval. These foods are the same as those found in 4617.0067, Subpart 3 (A). Also, it is reasonable to include the foods listed in 4617.0067, Subpart 3 (E), for they are additional foods that may be listed on WIC participants' vouchers, and the Department will therefore need to review the foods to ensure they meet the requirements of the WIC program.

Item D A price analysis for fresh fruits and vegetables is excluded from the approval process, since the federal regulations define the fresh fruits and vegetables approved for purchase with the new cash-value vouchers and there are huge price variations between the various fruit and vegetable products that are available at stores. In addition, the cash-value vouchers for fruits and vegetables contain a preset dollar amount, so there is no additional cost to the Department, even if a WIC customer purchases fruits and vegetables at a store that charges higher prices.

Item B – repealed It is reasonable to delete the language in this item to increase rule flexibility. In the past, the Department has been required to consider availability and preference for cereal products before authorizing them for purchase. With the forthcoming changes in the WIC food package and the ever-changing list of products available for purchase, it is no longer feasible to assess availability and preference. Further, it has been the Department's practice to ensure that authorized cereals contain no more than the maximum amount of sucrose or other sugars allowed by the federal regulations, but has not, in fact, given preference to those cereals with lesser amounts of sucrose or other sugars. Consequently, the Department proposes to eliminate this impractical language.

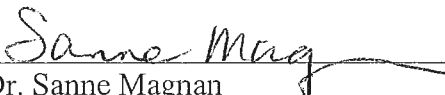
Subpart 3 – Nutritional, cultural, religious, or ethnic need - repealed

This subpart is no longer needed, since the language now appears in proposed Subpart 1, Item B.

CONCLUSION

Based on the foregoing, the proposed rules are both needed and reasonable.

Feb. 5, 2009
~~January, 2009~~


Dr. Sanne Magnan
Commissioner of Health

2008 Minnesota WIC Program Vendor Advisory Group Members

Name	Organization	Address
Abdikafar Aden	Afrik Grocery	613 Cedar Avenue South Minneapolis, MN 55454
Patty Horton	Byerly's	800 West 78 th Street Chanhassen, MN 55317
Kathy Blais	Carlton County Health Services	30 North 10 th Street Cloquet, MN 55720
Jacqueline Reyes	Carniceria Valeries	2219 Central Avenue NE Minneapolis, MN 55418
Silvia Daly	Children's Hospital WIC Program	2525 Chicago Avenue South Minneapolis, MN 55404
Sherry Lundquist	Chisago County WIC Program	6133 402 nd Street North Branch, MN 55056
Chris Spanier	Coborn's Inc.	1445 East Highway 23, PO Box 6146 St. Cloud, MN 56302
John Helling	Core-Mark	1035 Nathan Lane Plymouth, MN 55441
John Ziegler	Cub Foods	421 S. Third St., P.O. Box 9 Stillwater, MN 55082-0009
Tammy Seitel	General Mills	P.O. Box 1113 Minneapolis, MN 55440
Vincent Xiong	Golden Harvest	900 East Maryland Avenue St. Paul, MN 55106
Stephanie Taylor	HyVee	5820 Westown Parkway West Des Moines, Iowa 50266
Joanne Berkenkamp	Institute for Agriculture and Trade Policy	2105 First Avenue South Minneapolis, MN 55404
Jackie Bloden	Jerry's Foods	5101 Vernon Ave. S. Edina, MN 55436
Majed Abusara	Jimmy's Foods	1121 12 th Avenue North Minneapolis, MN 55411
Jose Lala	LaGuadalupeana Inc.	1522 East Lake Street Minneapolis, MN 55407
Jessica Orgas	Malt-O-Meal company	2700 IDS Tower, 80 South 8th Street Minneapolis, MN 55402-2297
Jamie Pfuhl	Minnesota Grocers Association	533 St. Clair Avenue St. Paul, MN 55102
Angela Davis	Mississippi Market	622 Selby Avenue St. Paul, MN 55104
Virginia Nelson	Nelson's Store	103 Main St., P.O. Box 355 Evansville, MN 56326
Kathy Christensen	Radermachers Foods	110 Lexington Avenue LeCenter, MN 56057
Diane Krueger	Rainbow Foods	1694 Vierling Drive East Shakopee, MN 55379
Nick Seeberger	Seward Coop	2111 East Franklin Avenue Minneapolis, MN 55404
Mary Peick	St. Paul-Ramsey County WIC Program	555 Cedar Street St. Paul, MN 55101
Mindy Anderson	Super Target	1515 West County Road B Roseville, MN 55113

Name	Organization	Address
Jeff Zillman	SuperValu	101 Jefferson Avenue South Hopkins, MN 55343
Hussein Khatib	Unity Cooperative Council	7362 University Ave. N.E., Suite 305 Fridley, MN 55432
Sue Elle	USDA-FNS	375 Jackson St., Suite 610 St. Paul, MN 55101
Mike Martin	Wal-Mart Regional Office	1650 Southwest 82nd Street, Ste 100 Bloomington, MN 55431
Wade Swenson	Wal-Mart Stores, Inc.	10240 Hudson Road Woodbury, MN 55129