

PROPOSED ORDER OF
DEPARTMENT OF HEALTH AND FAMILY SERVICES
REPEALING, AMENDING, AND CREATING RULES

The Wisconsin Department of Health and Family Services proposes to repeal HFS 149.03 (7) (d) and (e); to amend HFS 149.02 (6), (17) and (23), and 149.03 (2) (c) and (7) (a); and to create HFS 149.02 (14m), relating to the selection and monitoring of vendors for the special supplemental food program for women, infants and children (WIC), and affecting small businesses.

RULE SUMMARY

Statute(s) Interpreted: Sections 46.016 and 253.06 (5) (a) 1., Stats., and the Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. 108-265, s. 203 (e) (10), 118 Stat. 777.

Statutory Authority: Sections 227.11 (2) (a), and 253.06 (5) (a) 1., Stats., and the Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. 108-265, s. 203 (e) (10), 118 Stat. 777.

Explanation of agency authority:

Section 253.06 (5) (a) 1., Stats., requires the Department to promulgate rules to establish minimum standards for the authorization of vendors in the WIC program, and awarding contract to potential WIC vendors. Public Law 108-265 s. 203 (e) (10) requires state agencies to establish a WIC vendor peer group system and competitive price criteria among the peer groups, and reimbursement levels.

Related statute(s) or rule(s)

Section 253.06, Stats.

Plain language analysis:

Under the WIC program, the federal government provides supplemental foods and nutrition education through payment of cash grants to states that administer the program through local agencies at no cost to eligible persons. The WIC program serves as an adjunct to good health care during critical times of growth and development in order to prevent the occurrence of health problems. In Wisconsin, the WIC program has 112,000 certified participants, comprised of low-income pregnant and breastfeeding women, infants, and children under 5 years of age. Seventy local WIC projects (located in city and county public health departments, private non-profit organizations, and one hospital) administer WIC in designated project service areas. These services include health screening, nutrition assessment and counseling, referrals to other health and social services, and vouchers to purchase nutritious foods at authorized grocery stores and pharmacies (WIC vendors).

The Wisconsin WIC program is responsible for the authorization of some 1,000 vendors to provide food to WIC participants. Applications are screened for basic store and management information, business integrity, and the selection of WIC authorized foods at competitive prices,

as determined by prices charged by all stores in a project service area.

Currently applicants for WIC vendor authorization are required under s. HFS 149.03 (2) (c) to charge a price that is no more than 115% of the average price charged for a standardized combination of foods by other applicants in the project service area in which the grocery store or pharmacy is located. The average price is determined by the Department and based on reported prices of all stores in a project service area for the standardized combination of foods during the previous 6-month period. Applications are screened for basic store and management information, business integrity, and the selection of WIC authorized foods at competitive prices, as determined by prices charged by all stores in a project service area.

The Department believes that this current method of computing average price may impede the ability of smaller stores to obtain or maintain WIC vendor authorization, due to the smaller stores' inability to offer prices that are competitive with that of larger stores.

The Department proposes to amend s. HFS 149.03 (2) (c) to remove the requirement that store prices be competitive with all other stores within a project service area to require that prices be competitive with stores within its vendor peer group of similar stores located throughout the state. This change would result in the Department being able to compute average price based on reported prices of the vendor peer group and, therefore, a more equitable process for small store applicants. Prices of these stores will no longer be compared to the prices of larger stores, who can offer lower prices than their smaller counterparts due to economies of scale.

The Department also proposes to redefine the term contract period and amend s. HFS 149.03 (7) (a) to change the duration of authorization from two years to three years and to specify the beginning and ending dates of contract periods. Instead of ending on October 31 of even-numbered years, authorization would end on October 31 of every third year. This is now allowed per federal regulation and would lessen the burden of reauthorization for both the vendors and the state WIC office. In addition, the Department proposes to repeal s. HFS 149.03 (7) (d) to eliminate the one-year initial certification period. The one-year certification has not proven to be effective in addressing fraud, and is burdensome for both the vendor and the state WIC office.

Summary of, and comparison with, existing or proposed federal regulation:

There are no known proposed or existing federal regulations that address the subject of the proposed rules except that the Department operates the WIC program under a State Plan pursuant to 7 CFR 246.

Comparison with rules in adjacent states:

Iowa: The Iowa WIC Program Administrative Code addresses vendor applications and pricing. They require that the vendor's average price for any category of WIC items, as reported on the application, at the time of the on-site review and throughout the agreement period shall not exceed 115 percent of the price charged for the same category by all other vendors in the same peer group. Vendors must complete a new application and sign a new WIC agreement at least every three years.

Minnesota: Minnesota WIC Program Rules require the vendor's prices for each of the

authorized foods be no more than 115% of the average price charged by other vendors. The rules do not appear to specify whether the prices are compared with all vendors, or those within a peer group. Vendor applications are accepted throughout the contract period, except that reauthorization requests must be received before 5 months from the existing contract expiration date. The Minnesota WIC program amended their rules from a maximum two-year vendor contract to be up to three years.

Michigan: The Michigan WIC Program does not have administrative rules for WIC; all vendor requirements are either in the vendor contract or in policy. They currently have a two-year contract but plan to move to a three-year contract in the near future. Michigan also accepts applications throughout the year, but has a limitation policy based on the number of participants per zip code and participant access. They have 21 different vendor peer groups that are determined by type of store (chain, convenience, etc), geographic location, and number of registers. With regard to pricing limitations, Michigan requires that prices charged are no more than 130% of a four-week rolling average of that draft type for each peer group.

Illinois: The Illinois WIC Program limits the number of authorized vendors for each of the geographic regions (Wisconsin does not limit the number of vendors). Illinois classifies each vendor by "store type" which means the number of active customer check-out lanes/cash registers, e.g. one or two lanes is a type 1 vendor site. This classification by store type is equivalent to Wisconsin's "peer group" which is currently using the number of cash registers to determine the peer group. Illinois is apparently still using a one-year contract. The rules do not specify the pricing parameters, but Illinois has a long history of using very tight pricing requirements.

Summary of factual data and analytical methodologies:

The Department referred to all of the following to determine the impact on small businesses, specifically grocers and pharmacies that are directly affected by the proposed rules:

1. The 1997 Economic Census – Wisconsin Geographic Series, which is compiled by the U.S. census bureau every 5 years for each year ending in "2" and "7" and is the latest available economic data compiled on businesses located in Wisconsin.
2. Criteria adopted by the Department and approved by the Wisconsin Small Business Regulatory Review Board to determine whether the Department's proposed rules have a significant economic impact on a substantial number of small businesses. Pursuant to the Department's criteria, a proposed rule will have a significant economic impact on a substantial number of small businesses if at least 10% of the businesses affected by the proposed rules are small businesses and if operating expenditures, including annualized capital expenditures, increase by more than the prior year's consumer price index or reduces revenues by more than the prior year's consumer price index. For the purposes of this rulemaking, 2004 is the index year. The consumer price index is compiled by the U.S. Department of Labor, Bureau of Labor Statistics and for 2004 is 2.7%.
3. DHFS WIC records databases.
4. Section 227.114 (1) (a), Stats., which defines "small business" as a business entity, including its affiliates, which is independently owned and operated and not dominant in its field, and which employees 25 or fewer full-time employees or which has gross annual sales of less than

\$5,000,000.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report:

The proposed rule will affect industries in the Food and Beverage Stores subsector and the health and personal care stores subsector of the retail trade sector (sector 44-45) as classified by the North American Industry Classification System (NAICS).

In Wisconsin, the Food and Beverage Stores subsector includes approximately 2,372 establishments with revenues of approximately \$7,830,155 and approximately 61,524 paid employees. Industries in the Food and Beverage Stores subsector usually retail food and beverage merchandise from fixed point-of-sale locations. The specific industry group affected by the proposed rules in this subsector is grocery stores which includes supermarkets and other grocery (except convenience) stores, and convenience stores. This industry group accounts for over half of the Wisconsin Food and Beverage Stores subsector, or 1,410 establishments, revenues of \$7,288,475 and 56,204 paid employees.

The Health and Personal Care Stores subsector includes approximately 1,348 establishments with \$1,904,229 in revenues, and 17,190 paid employees. Industries in the Health and Personal Care Stores subsector retail health and personal care merchandise from fixed point-of-sale locations. The specific industry group affected by the proposed rules in this subsector is pharmacy and drug stores which includes establishments primarily engaged in retailing prescription drugs and selling other items, such as proprietary drugs, medicines, and health and first-aid products; cosmetics; toiletries; greeting cards; magazines; tobacco; and candy; beauty preparations; household supplies; and candy and prepackaged snacks. This industry group includes approximately 724 establishments, \$1,646,621 in revenues and 14,058 paid employees.

As of July 21, 2005, the Department authorizes 861 grocery stores and 160 pharmacies for a total of 1,041 authorized WIC vendors. The proposed rules will affect all 1,041 currently authorized WIC vendors and approximately 1,113 potential applicants for WIC vendor authorization.

Currently applicants for WIC vendor authorization are required under s. HFS 149.03 (2) (c) to charge a price that is no more than 115% of the average price charged for a standardized combination of foods by other applicants in the project service area in which the grocery store or pharmacy is located. The average price is determined by the Department and based on reported prices of all stores in a project service area for the standardized combination of foods during the previous 6-month period. Applications are screened for basic store and management information, business integrity, and the selection of WIC authorized foods at competitive prices, as determined by prices charged by all stores in a project service area.

The Department believes that this method of computing average price may impede the ability smaller stores to obtain or maintain WIC vendor authorization, due to the smaller stores' inability to offer prices that are competitive with that of larger stores.

The proposed changes will allow the Department to compute average price based on reported prices of a vendor's peer group. The Department believes that the proposed method of

computing average price will result in a more equitable process for small store applicants. Prices of these stores will no longer be compared to the prices of larger stores, who can offer lower prices than their smaller counterparts due to economies of scale.

Also, by eliminating the one-year contract for newly authorized vendors, and extending the vendor contract from two to three years, authorized grocery stores and pharmacies (WIC vendors) will experience a slight cost savings due to the reduction in the time that vendors spend on completing applications for vendor authorization. It is not possible to estimate the reduction in expenditures resulting from this proposed rule change.

Effect on small business:

The proposed rules will affect a substantial number of small grocers, and pharmacies, however, the proposed rules will not have a significant economic impact on these small businesses.

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Place where comments are to be submitted and deadline for submission:

Comments may be submitted to the agency contact person that is listed above and via the Wisconsin Administrative Rules website at <http://adminrules.wisconsin.gov> until 4:30 p.m. on September 27, 2005. A public hearing will be held from 2:00 p.m. to 4:00 p.m. on September 20, 2005 at 1 W. Wilson St., Room B155, in Madison, Wisconsin. The deadline for submitting comments and the notice of public hearing are posted on the Wisconsin Administrative Rules website at <http://adminrules.wisconsin.gov>.

RULE TEXT

SECTION 1. Chapter HFS 149 (title) is amended to read:

HFS 149 (title) SELECTION AND MONITORING OF VENDORS FOR THE SPECIAL SUPPLEMENTAL FOOD NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN (WIC)

SECTION 2. HFS 149.02 (6), (17), and (23) are amended to read:

HFS 149.02 (6) "Contract period" means a the period of 2 years beginning November 1 of the even numbered years, except as otherwise indicated in s. HFS 149.03 (7) of time that a vendor is authorized by the state WIC office to accept WIC drafts and be reimbursed by the state WIC office for foods provided to participants.

(17) "Standardized combination of foods" means a group of specific types of authorized foods ~~identified on commonly used drafts~~ selected by the state WIC office for the purpose of calculating average prices charged by ~~vendor applicants~~ vendors in the same peer group.

(23) "WIC" means the special supplemental ~~food nutrition~~ program for women, infants and children authorized by section 17 of the Child Nutrition Act of 1966, as amended, 42 USC 1786.

SECTION 3. HFS 149.02 (14m) and Note are created to read:

HFS 149.02 (14m) "Peer group" means WIC vendors and vendor applicants who have similar characteristics as determined by the state WIC office.

Note: Examples of types of characteristics that may be used to determine vendor peer groups include but are not limited to: the number of cash registers; food sales; WIC redemptions.

SECTION 4. HFS 149.03 (2) (c) is amended to read:

HFS 149.03 (2) (c) Charge a no more than 115% of the average price charged by vendors in the same peer group, as determined by the state WIC office for a standardized combination of foods ~~which is comparable to the average price charged for those foods by other vendor applicants in the project service area in which the grocery store or pharmacy is located, as determined by the state WIC office. In this paragraph, "comparable" means no more than 115% of the average price in the project service area in which the grocery store or pharmacy is located. Beginning March 1, 1987 and every 6 months thereafter, the state WIC office shall adjust the average price for each project service area based on statewide prices shown in redeemed drafts for the standardized combination of foods during the previous 6 month period;~~

SECTION 5. HFS 149.03 (7) (a) is amended to read:

HFS 149.03 (7) DURATION OF AUTHORIZATION. (a) ~~Except for initial authorizations, all authorizations~~ Contract periods shall begin on November 1 and expire every 3 years on October 31 of even numbered years regardless of when an authorization was granted. A new

application shall be submitted for each contract period, including the contract period that begins immediately following the date of initial authorization.

SECTION 6. HFS 149.03 (7) (d) and (e) are repealed.

SECTION 7. EFFECTIVE DATE. The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22 (2), Stats.

Wisconsin Department of Health
and Family Services

Dated: November 21, 2005

By: _____
Helene Nelson,
Secretary

SEAL: