



November 25, 2005

United States  
Department of  
Agriculture

Food and  
Nutrition  
Service

3101 Park  
Center Drive

Alexandria, VA  
22302-1500

**SUBJECT:** WIC Final Policy Memorandum #2006-2  
Prohibition Against Authorization of Certain Vendors

**TO:** Regional Directors  
Supplemental Food Programs  
All Regions

The purpose of this memorandum is to provide guidance on the vendor-related WIC provision reflected in Public Law 109-97, Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, which provides WIC funding for Fiscal Year 2006. The provision reads:

“None of the funds made available under this Act shall be available to pay the administrative expenses of a State agency that, after the date of enactment of this Act and prior to receiving certification in accordance with the provisions set forth in section 17(h)(11)(E) of the Child Nutrition Act of 1966, authorizes any new for-profit vendor(s) to transact food instruments under the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) if it is expected that more than 50 percent of the annual revenue of the vendor from the sale of food items will be derived from the sale of supplemental foods that are obtained with WIC food instruments, except that the Secretary may approve the authorization of such a vendor if the approval is necessary to assure participant access to program benefits.”

Report language (H. Rept. 109-255) accompanying the Act states the following: “This moratorium is not intended to restrict the transfer or relocation of existing WIC-only stores.”

After November 10, 2005, and until Food and Nutrition Service (FNS) certification of its vendor cost containment system or October 1, 2006, whichever comes first, no administrative funding will be available to a WIC State agency that authorizes a **new** for-profit vendor that is expected to derive more than 50 percent of its annual revenue from the sale of food items for WIC food instruments, unless that vendor is necessary to assure participant access to program benefits. This includes a new store location for any ownership entity that currently has a WIC authorized store, as well as an entirely new vendor applicant. This provision does not apply to the **reauthorization** of a current store location or the relocation of a store by a currently authorized vendor. This provision does not change section 246.12(h)(3)(xvii) of current WIC regulations which requires a State agency to terminate the vendor agreement when a currently authorized vendor changes a store location, unless the State agency permits the vendor to move a short distance. After a vendor agreement is terminated for relocation of a store, upon reapplication, the State agency may not use the moratorium as a basis for denying an application.

**Determining if a Vendor is Expected to Meet the More Than 50 Percent Criterion**

In determining if a vendor applicant is expected to meet the more than 50 percent criterion, the State agency shall ask each vendor applicant whether it is expected that more than 50 percent of its annual revenue from the sale of food items will be derived from WIC food

instruments. If the answer is “yes,” no further assessment is necessary. The vendor applicant shall not be authorized.

If the answer is “no,” the State agency shall conduct an assessment to determine whether the vendor applicant may be authorized. The State agency shall assess the vendor applicant using the data sources and methodologies listed on the attached chart. At its discretion, the State agency may use additional data sources and methodologies. The State agency shall not authorize a vendor applicant that is expected to meet the more than 50 percent criterion based on its assessment. Failure of a vendor applicant to provide documentation requested by the State agency shall also result in denial of the application.

If the State agency determines that the vendor may be authorized, the onsite preauthorization visit (required in WIC Program regulations at 7 CFR 246.12(g)(4)) shall be used to confirm that the new store is not expected to meet the more than 50 percent criterion. The State agency shall monitor newly-authorized vendors (i.e., those authorized after November 10, 2005) subsequent to authorization to assure that they do not meet the more than 50 percent criterion. Such monitoring shall include a review of food sales data as compared to WIC redemptions for the same time period. The State agency shall terminate newly authorized vendors that are subsequently determined to meet the more than 50 percent criterion.

### **Participant Access Determination**

WIC Program regulations at 7 CFR 246.12(l)(8) currently require each State agency to develop participant access criteria for use in determining appropriate sanction action, i.e., disqualification or civil money penalty, for violative vendors. Further, section 246.4(a)(14)(xiii) of the regulations requires that a description of the participant access determination criteria be included in the State Plan. Each State agency shall use the participant access criteria included in its State Plan to determine if a vendor who meets the more than 50 percent criterion should be exempt from the prohibition due to participant access. With prior FNS approval, a State agency may authorize a vendor expected to meet the more than 50 percent criterion if the vendor is needed to ensure participant access. The State agency’s request for FNS approval must include an explanation of how the vendor met the participant access criteria.

### **Administrative Review Requirements**

Consistent with 7 CFR 246.18(a)(1)(ii) of the WIC Program regulations, vendor applicants who are denied authorization because the State agency determines that they are expected to meet the more than 50 percent criterion, are eligible for an administrative review. The validity or appropriateness of the State agency’s *criteria* for determining whether a vendor applicant is expected to meet the more than 50 percent criterion is not subject to administrative review, as stated in section 246.18(a)(1)(iii)(A). In addition, the State agency’s participant access determination is not subject to administrative review as stated in section 246.18(a)(1)(iii)(B) of WIC Program regulations.

**Summary**

After November 10, 2005, and until FNS certification of its vendor cost containment system is received or October 1, 2006, whichever comes first, no administrative funding will be available to a WIC State agency that authorizes a **new** for profit vendor that is expected to derive more than 50 percent of its annual revenue from the sale of food items for WIC food instruments, unless that vendor is necessary to assure participant access to program benefits. This provision is not limited to so called "WIC-Only stores"; therefore, every State agency must adhere to the policies outlined in this memorandum. Further, this prohibition does not apply to the **reauthorization** of a current store location operated by a currently authorized vendor who meets the more than 50 percent criterion or to a currently authorized vendor who moves or relocates his/her store.

If FNS determines that a State agency has inappropriately authorized new vendors, FNS will disallow some or all of the administrative expenses incurred by the State agency in authorizing such vendors after November 10, 2005.

/s/ for Debra R. Whitford  
PATRICIA N. DANIELS  
Director  
Supplemental Food Programs Division

Attachment

**Data Sources and Methodologies for Determining if a Vendor is Expected to Meet the More Than 50 Percent Criterion**

<b>Indicator</b>	<b>Data Sources and Methodologies</b>
<p>The vendor applicant currently has one or more WIC-authorized stores where WIC food sales are more than 50 percent of total annual food sales.</p>	<ol style="list-style-type: none"> <li>1) Compare WIC redemptions and food sales as reported by applicant vendor, documented in tax records or other verifiable source.</li> <li>2) Compare WIC redemptions to Food Stamp Program (FSP) redemptions. If WIC redemptions are greater than FSP redemptions, the store may meet the more than 50 percent criterion. In this case, the State agency must consider documentation that shows the amount of revenue that the vendor obtained from other sources (e.g., cash and credit sales).</li> <li>3) If vendor applicant is currently authorized in another State, contact State to determine if vendor applicant meets the more than 50 percent criterion in that State.</li> </ol>
<p>The vendor applicant is expected to accept WIC as the primary form of payment for the sale of supplemental food items.</p>	<ol style="list-style-type: none"> <li>1) Request percentage of current or anticipated food sales by type of payment, i.e., cash, FSP, WIC, credit/debit, etc.</li> <li>2) To the extent possible, validate information against other data sources.</li> </ol>
<p>The vendor applicant is expected to or currently offers for sale primarily WIC-authorized food items (i.e., does not offer a variety of foods in the staple food groups—meat, poultry, or fish; bread or cereal; vegetables or fruits; and dairy).</p>	<ol style="list-style-type: none"> <li>1) Request inventory invoices to substantiate foods that have been purchased for sale.</li> <li>2) Determine if a variety of foods in each of the following staple food groups will be or are currently offered for sale on a continuous basis: meat, poultry or fish; bread or cereal; vegetables or fruits; and dairy. (Continuous basis means that on any given day of operation, a store must offer for sale and normally display in a public area, qualifying staple food items, with no fewer than three different varieties of food items in each of the four staple food categories.)</li> <li>3) Request percentage of foods intended to be offered for sale in each category, i.e., 40% dairy, 2% meat, poultry or fish, etc.</li> </ol>
<p>The vendor applicant is dependent upon WIC authorization before the store can open for business.</p>	<p>Request date the store will open or was opened for continuous business on vendor application.</p>