



PROPOSED RULE MAKING

CR-102 (June 2004)

(Implements RCW 34.05.320)

Do NOT use for expedited rule making

Agency: Department of Health

- Preproposal Statement of Inquiry was filed as WSR 10-14-093 ; or
- Expedited Rule Making--Proposed notice was filed as WSR _ ; or
- Proposal is exempt under RCW 34.05.310(4).

- Original Notice
- Supplemental Notice to WSR
- Continuance of WSR

Title of rule and other identifying information: (Describe Subject)

WAC 246-790-010, 050, 060, 065, 070, 080, 085, 090, 100, 120, 130 amending Women, Infants and Children (WIC) Nutrition Program requirements for selecting authorized retailers, submitting food products for approval, and updating non-compliance and fines.

Hearing location(s): Department of Health
310 Israel Road SE
Point Plaza East, Room 152/153
Tumwater, WA 98501

Date: 10/05/11

Time: 2:00 PM

Submit written comments to:

Name: Peter Gayton
Address: Department of Health
PO Box 47886
111 Israel Road SE
Tumwater, WA 98504-7886

Website: <http://www3.doh.wa.gov/policyreview/>
fax (360) 236-2345 by (date) 10/05/2011

Assistance for persons with disabilities: Contact

Peter Gayton by 09/26/2011

TTY (800) 833-6388 or () 711

Date of intended adoption: 10/10/2011

(Note: This is NOT the effective date)

Purpose of the proposal and its anticipated effects, including any changes in existing rules:

The purpose of the proposed rule is to update a variety of references, definitions, and terms; further define the standards of practice and requirements for retailer participation in the program, and to assure consistency between the rule and the retailer contracts. In addition, revisions are necessary to provide clarity for retailer participation in the program.

Reasons supporting proposal:

Key portions of the existing rule need to be updated to be consistent with the revised 7 CFR 246, which governs the WIC Nutrition Program. The department must update the current rules in order to stay in compliance with the federal regulations to maintain funding.

Statutory authority for adoption:

RCW 43.70.120

Statute being implemented:

RCW 43.70.120

Is rule necessary because of a:

- Federal Law? Yes No
- Federal Court Decision? Yes No
- State Court Decision? Yes No

If yes, CITATION:
7 CFR 246

DATE 08/22/2011

NAME (type or print)
Mary C. Selecky

SIGNATURE

TITLE
Secretary

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: August 22, 2011

TIME: 3:29 PM

WSR 11-17-103

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:

None.

Name of proponent: (person or organization) Department of Health

- Private
- Public
- Governmental

Name of agency personnel responsible for:

Name	Office Location	Phone
Drafting..... Peter Gayton	111 Israel Rd SE Tumwater, WA	(360) 236-3788
Implementation.... Carol Wozniak	111 Israel Rd SE Tumwater, WA	(360) 236-3638
Enforcement..... Carol Wozniak	111 Israel Rd SE Tumwater, WA	(360) 236-3638

Has a small business economic impact statement been prepared under chapter 19.85 RCW?

Yes. Attach copy of small business economic impact statement.

A copy of the statement may be obtained by contacting:

Name:

Address:

phone

fax

e-mail

No. Explain why no statement was prepared.

A small business economic impact statement was not prepared. Department economists determined the proposed rule would not impose more than minor costs on small business owners of WIC authorized retailer grocery stores.

Is a cost-benefit analysis required under RCW 34.05.328?

Yes A preliminary cost-benefit analysis may be obtained by contacting:

Name: Peter Gayton

Address: PO Box 47886

Tumwater, WA 98504-7886

phone (360) 236-3788

fax (360) 236-2345

e-mail peter.gayton@doh.wa.gov

No: Please explain:

AMENDATORY SECTION (Amending WSR 06-05-051, filed 2/13/06, effective 3/16/06)

WAC 246-790-010 Definitions. (~~(1) "Alternate endorser" means a person authorized by the WIC client to pick up WIC checks at the local WIC agency and use the WIC checks at the retailer when the client is unable to do so.~~

~~(2) "Appeal hearing" means a formal proceeding to appeal certain program decisions. The appeal hearing process provides a contractor the opportunity to review the case record prior to the hearing, to present its case in an impartial setting, to confront and cross-examine witnesses, and to be represented by counsel.~~

~~(3) "Applicant retailer" means any retailer, or person representing a retailer, requesting authorization to participate in the WIC program who has submitted a completed request for authorization packet.~~

~~(4) "Authorized" or "authorization" means the retailer has met the selection criteria as required by the United States Department of Agriculture (USDA), received training on WIC program requirements, and signed a contract with the WIC program.~~

~~(5) "CFR" means the Code of Federal Regulations.~~

~~(6) "Contract" or "retailer contract" means a written legal document which encompasses WIC program requirements that bind the contractor and the WIC program.~~

~~(7) "Contractor" means the owner, chief executive officer, controller, or other person legally authorized to represent their corporation, firm, or business and obligate a retailer to a contract.~~

~~(8) "Covertly" means in secret, undercover, or not openly announced.~~

~~(9) "Current shelf life" or "pull date" or "use by date" means a date and code printed on an item that indicates its best quality. This date shows when a product must be either sold or pulled from a shelf.~~

~~(10) "Department" means the Washington state department of health and any of the officers or other officials lawfully representing the department.~~

~~(11) "Disqualification" means the act of revoking the authorization and ending the contract of an authorized retailer permanently or for a specific period of time for noncompliance with WIC program requirements.~~

~~(12) "Effective policy and program to prevent trafficking" means a written document that states what can and cannot be done with WIC checks and the consequences for failing to follow program requirements. Effectiveness is determined by documentation that a retailer has provided this written policy to all employees, including employees' signatures verifying they have been advised of the policy and understand the consequences of noncompliance, both~~

~~for the retailer and for the employee, prior to any noncompliance being detected.~~

~~(13) "Food company" means a manufacturer or broker of food items.~~

~~(14) "Food stamp EBT" means the electronic system that allows a recipient to authorize transfer of their government food benefits from a federal account to a retailer account to pay for products they buy.~~

~~(15) "Local WIC agency" means the contracted clinic or agency where a client receives WIC checks.~~

~~(16) "Maximum price" means the highest amount that can be charged for WIC approved foods as determined by the WIC program based on evaluation of current prices and market conditions.~~

~~(17) "Monetary penalty" means a sum of money imposed by the WIC program for noncompliance with program requirements.~~

~~(18) "Notice of correction" means a written document given to a retailer when the WIC program discovers noncompliance with program requirements. The notice of correction gives the retailer a reasonable period of time to correct the noncompliance without risk of receiving a sanction.~~

~~(19) "Pattern" means more than one documented incidence of noncompliance with WIC program requirements in a contract period.~~

~~(20) "Peer group" means a group of retailers who share similar characteristics. The WIC program considers factors such as location, either rural or urban, and the prices retailers charge when determining a retailer's placement in a peer group.~~

~~(21) "Providing credit" means the retailer takes a WIC check and deposits it for the full amount of the foods listed, even though the client does not receive all the foods at the time, and tells the client to come back later for the rest of the food.~~

~~(22) "Reauthorization" or "subsequent authorization" means the process when a retailer, who has a contract with the WIC program which is expiring, has reapplied, met the selection criteria, and signed another contract with the WIC program.~~

~~(23) "Redeeming WIC checks outside of authorized channels" means not following the requirements regarding who can accept WIC checks and how to redeem them. Examples include, but may not be limited to:~~

~~(a) A retailer accepting WIC checks without having a signed contract with the WIC program;~~

~~(b) A retailer using WIC checks to repay debt at a different authorized retailer; or~~

~~(c) A retailer who accepts and deposits WIC checks from an unauthorized source.~~

~~(24) "Rights and responsibilities" means the rights a client has within the WIC program and the rules clients and caregivers must follow to participate in the program. The rights and responsibilities are explained in a document the client, caregiver, or alternate endorser must sign.~~

~~(25) "Supplemental WIC foods" or "WIC approved foods" means those foods containing nutrients determined to be beneficial for pregnant, breastfeeding, and postpartum women, infants, and children, as prescribed by federal regulations and state~~

~~requirements, and, as approved by the Washington state WIC program.~~

~~(26) "Trafficking" means buying or selling WIC checks for cash.~~

~~(27) "WIC program" or "program" means the federally funded special supplemental nutrition program for women, infants, and children administered in Washington state by the department of health.~~

~~(28) "WIC program requirements" or "program requirements" mean the rules contractors and retailers must follow to participate in the WIC program. The rules are explained in the federal regulations, the retailer contract, the *Retailer Selection Criteria*, the *WIC Approved Foods - Minimum Stock Levels*, the *WIC Retailer Handbook*, and the WIC approved formula supplier list.~~

~~(29) "WIC retailer" or "retailer" means an individual store authorized to participate in the WIC program.~~

~~(30) "Wholesaler" or "distributor" or "supplier" means a business licensed to sell food and other items to a retailer for resale.~~

~~(31) "WIC check" means a negotiable instrument issued to and used by a WIC client, caregiver, or alternate endorser to obtain specified supplemental WIC foods from a WIC retailer.~~

~~(32) "WIC client" or "client" means a woman who is pregnant, breastfeeding, or postpartum, an infant, or a young child receiving WIC benefits.~~

~~(33) "WIC only store" means a for-profit business model that focuses primarily on stocking WIC food items and serving WIC customers.) The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.~~

(1) "C.F.R." means Code of Federal Regulations.

(2) "Contract" means a written legal document binding the contractor and the department to designated terms and conditions. Terms and conditions include those stated in 7 C.F.R. 246.12(h)(3) under "Retail food delivery systems: Vendor agreements, Vendor agreement provisions."

(3) "Department" means the Washington state department of health.

(4) "Retailer" means "vendor" as defined in 7 C.F.R. 246.2.

(5) "Wholesale supplier" means a business licensed to sell food and other goods at prices lower than retail to a retail vendor for resale to customers.

(6) "WIC" means the federally funded special supplemental nutrition program for women, infants, and children as described in 7 C.F.R. 246 and defined in 7 C.F.R. 246.2.

(7) "WIC check" means "food instrument" and "cash-value voucher" as defined in 7 C.F.R. 246.2.

NEW SECTION

WAC 246-790-055 Adoption by reference. Adopted by reference are 7 C.F.R. 246.2, 246.12, 246.18, 246.21, 246.23, and 246.26 special supplemental nutrition program for women, infants, and children revised as of January 1, 2011, and including all amendments and modifications effective as of the date of adoption of this chapter.

Copies of the incorporated sections of 7 C.F.R. 246 are available from the Department of Health, P.O. Box 47886, Olympia, WA 98504-7886, or by calling the WIC nutrition program at 800-841-1410.

NEW SECTION

WAC 246-790-075 Requirements to become an authorized retailer. (1) To become authorized in the WIC program an applicant must:

- (a) Be a food retailer;
- (b) Apply for authorization using department forms;
- (c) Provide complete and truthful information in the application;
- (d) Meet all the retailer selection criteria stated in WAC 246-790-077;
- (e) Allow the department to inspect the store;
- (f) Participate in training on WIC program requirements; and
- (g) Agree to follow WIC program requirements stated in the contract.

(2) The effective date of authorization is the date on which the last party to sign the contract signs it. The department and the retailer are the parties to the contract.

(3) The department shall give an applicant thirty days notice to correct their application when it is incomplete or insufficient in any manner before the department denies authorization.

(4) The department may not accept a new application sooner than six months after an applicant's denial.

(5) An applicant or an authorized retailer may request an exemption to the retailer selection criteria in WAC 246-790-077.

(a) The request must:

- (i) Be in writing;
- (ii) Identify the specific retailer selection criterion or criteria for which the retailer is seeking an exemption and explain the reasons for the request in detail; and
- (iii) Demonstrate how the requested exemption is consistent with the requirements, purpose and objectives of the program.

(b) The department may grant an exemption from retailer selection criteria if the applicant submits a request that satisfies (a) of this subsection.

(c) The department shall respond in writing to a request for exemption with its decision to grant or deny the request.

NEW SECTION

WAC 246-790-077 Retailer selection criteria. An applicant and an authorized retailer shall meet all the following retailer selection criteria to be authorized.

(1) Business license, permit, and certification requirements.

(a) A current master business license and unified business identifier number issued by the Washington state department of revenue as required under chapter 19.02 RCW with a major operation category that includes the retail sale of foods, such as grocery store.

(b) A current reseller's permit issued by the Washington state department of revenue as required under chapter 82.32 RCW.

(c) A current food establishment permit issued by the local health jurisdiction as required by the Washington state board of health under chapter 246-215 WAC.

(d) A current weighing and measuring device registration issued by the Washington state department of agriculture as required under chapter 16-674 WAC.

(e) A current authorization as a vendor in the supplemental nutrition assistance program (SNAP).

(f) Comply with all other applicable federal, state, county, and city required licenses, permits and certifications.

(2) Business model requirements.

(a) Be primarily engaged in retail sales of a variety of food products and general merchandise as a full line grocery store. A full line grocery store stocks on a continuous basis, multiple varieties of the following product categories:

(i) Canned foods;

(ii) Frozen foods;

(iii) Dairy products;

(iv) Fresh and frozen meat, fish, and poultry;

(v) Fresh fruits;

(vi) Fresh vegetables;

(vii) Juices;

(viii) Bakery goods including, but not limited to, breads, pastries, and tortillas;

(ix) Dried grains and beans;

(x) Baby products;

(xi) Household cleaners;

(xii) Laundry products; and

(xiii) Health care products.

(b) Purchase WIC approved foods directly from a wholesale supplier or other nonretail supplier, such as a food manufacturer or a fresh produce supplier.

(c) Purchase WIC approved infant formula directly from an

infant formula manufacturer or supplier named on the WIC approved infant formula supplier list.

(d) Not use the WIC program name, acronym, or logo in the store name or advertisement, advertise primarily to WIC customers, offer incentives primarily to WIC customers, or otherwise focus primarily on serving WIC customers.

(e) Not receive or expect to receive more than fifty percent of annual food sales revenue from WIC transactions.

(f) Maintain on store shelves at all times the minimum quantities and varieties of WIC approved foods, including infant formula, required by the contract. Expired foods are not counted as inventory.

(g) Maintain shelf prices for WIC approved foods that are competitive with retailers in the same WIC retailer peer group. A "peer group" means a group of retailers who share similar characteristics established by the department.

(h) Operate from a fixed, permanent location where all WIC transactions take place in the store.

(i) Maintain business hours of at least eight hours per day, six days per week.

(j) Accept various types of tender including cash and SNAP electronic benefit transfer (EBT).

(k) Post WIC food price on the item, on the shelf next to the item, or other means that is clearly visible to customers.

(l) Maintain sanitary conditions that meet food service rules in chapter 246-215 WAC.

(m) Keep fresh fruit and vegetable display areas free of spoiled produce.

(3) Recordkeeping.

(a) Maintain a recordkeeping system that meets the Washington state department of revenue requirements in WAC 458-20-254 including the following:

(i) The recordkeeping system must have original documents and records organized in a logical way that conforms to acceptable accounting methods and procedures.

(ii) Documents and records must be retrievable and in a readable format.

(b) The recordkeeping system must include original, dated documents and records that contain enough detail to prove the purchase, inventory, and sale of WIC approved foods, including infant formula, by brand name, container size and quantity. These documents and records must be kept for a period of six years following the date of final payment.

(c) Submit to the department upon request documents and records showing food is purchased from a wholesale supplier or other nonretail supplier, such as a food manufacturer or a fresh produce supplier.

(d) Submit to the department upon request documents and records showing infant formula is purchased from an infant formula manufacturer or supplier named on the WIC approved infant formula supplier list.

(e) Submit to the department upon request itemized sales receipts for WIC purchases using an electronic cash register or a

manual system. Sales receipts must include the store name, food product name, quantity sold, price of each item, and the date of sale.

(f) Submit to the department upon request annual sales information including gross sales and tax exempt food sales by payment type including cash, SNAP EBT, WIC and credit/debit card.

(g) Submit to the department upon request shelf price and stock level information.

(4) Additional requirements.

(a) Allow access to facilities, including nonpublic storage areas, by the department during normal business hours.

(b) Maintain an active e-mail account that is capable of receiving WIC contract and program information.

(c) Comply with WIC training requirements stated in the contract.

(d) Maintain in-store records documenting employee training on WIC requirements.

(e) Demonstrate business integrity.

(f) Comply with all applicable federal and state laws.

(5) Exemptions.

(a) Oregon and Idaho retailers located on the Washington border and that serve Washington residents are exempt from Washington state business license, permit, and certification requirements. They shall meet all applicable business license, permit and certification requirements for their respective state.

(b) A retailer authorized as an "infant formula only provider" is exempt from the full line grocery store requirement. "Infant formula only provider" means a retailer for whom WIC authorization is limited to the redemption of WIC checks issued for infant formula.

NEW SECTION

WAC 246-790-086 Requirements of an authorized retailer. (1)

An authorized retailer shall:

(a) Comply with the terms and conditions of their contract;

(b) Continue to meet the retailer selection criteria in WAC 246-790-077 throughout the term of the contract;

(c) Notify the department prior to ownership changes; and

(d) Notify the department prior to store closures.

(2) An authorized retailer may reapply at the time of contract expiration; however, neither the department nor the retailer has an obligation to enter into a subsequent contract.

NEW SECTION

WAC 246-790-105 Failure to meet WIC program requirements.

(1) When a retailer is out of compliance with the requirements of 7 C.F.R. 246.12, this chapter, or the contract, the department may initiate appropriate enforcement action which may include notices of violation, unless the department determines that notifying the retailer would compromise the investigation; claims for reimbursement; and disqualification.

(2) The department shall disqualify an authorized retailer for violations stated in 7 C.F.R. 246.12(1).

(3) For violations of the requirements of this chapter, not specified in 7 C.F.R. 246.12(1), the department may take enforcement action based on a pattern of violations. Department actions may include:

(a) Notice of violation and offer of technical assistance for the first incident;

(b) Notice of violation and warning of disqualification for the second incident of the same type of violation;

(c) One year disqualification for the third incident of the same type of violation.

(4) A "pattern" of violations means more than one documented incident of the same type of violation within a thirty-six month period.

(5) An authorized retailer's contract is terminated on the effective date of a disqualification.

(6) An authorized retailer who has been disqualified may reapply at the end of the disqualification period.

NEW SECTION

WAC 246-790-125 Retailer appeal process. (1) The retailer may request an administrative appeal of certain adverse actions as provided in 7 C.F.R. 246.18. Actions that the retailer may not appeal are described in 7 C.F.R. 246.18(a)(1)(iii).

(2) A request for appeal must:

(a) Be in writing, state the issue, and contain a summary of the retailer's position on the issue;

(b) Be filed with the Department of Health, Adjudicative Service Unit, P.O. Box 47879, Olympia, WA 98504-7879, with a copy sent to the WIC Nutrition Program at P.O. Box 47886, Olympia, WA 98504-7886; and

(c) Be received by the department of health, adjudicative services unit within twenty-eight days of the date the retailer receives the notice unless otherwise specified in the program's notification of adverse action.

(3) The administrative hearing procedures of chapter 246-10 WAC apply to retailer administrative appeals. If a provision of

chapter 246-10 WAC conflicts with a provision of 7 C.F.R. 246.18, the federal regulation shall prevail.

NEW SECTION

WAC 246-790-127 Retailer advisory committee. (1) The department shall facilitate a WIC retailer advisory committee.
(2) The committee shall function in an advisory capacity.
(3) Participation is voluntary and there is no compensation.
(4) Invitations for participation may include authorized WIC retailers, retail grocer associations, food manufacturers, wholesale suppliers, and retail checker labor unions.

REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 246-790-050	What is the WIC program?
WAC 246-790-060	What are WIC authorized foods?
WAC 246-790-065	What is the process for getting a food WIC authorized?
WAC 246-790-070	How do I become a WIC retailer?
WAC 246-790-080	What do I need to know about WIC retailer contracts?
WAC 246-790-085	What is expected of WIC retailers?
WAC 246-790-090	How are WIC retailer contracts monitored?
WAC 246-790-100	What happens if I don't comply with the WIC retailer contract or requirements?
WAC 246-790-120	How do I appeal a WIC decision I don't agree with?
WAC 246-790-130	How does the WIC program get input from the food industry?