

Preliminary Significant Legislative Rule Analysis (SA) A rule concerning amending Women, Infants and Children (WIC) Nutrition Program

Chapter 246-790 WAC

Section 1. What is the scope of the rule?

WIC (Women, Infants and Children), a proven and successful public health program, helps give children a healthy start in life by preventing problems before they occur. The Washington State WIC Nutrition Program, a federally funded program, has provided health assessments, referrals, nutrition education, and breastfeeding counseling to at risk families in Washington for over 30 years. In 1978 Washington WIC served 1,300 women, infants and children (participants). Today WIC serves over 193,000 participants each month. Participants receive food checks from trained staff in over 200 clinics and checks are redeemed for nutritious foods in 748 retail locations.

This proposed rule amends chapter 246-790 WAC requirements that regulate Washington State Department of Health (department) WIC Nutrition Program's retail food delivery system. Although the Code of Federal Regulations 7 CFR 246 describes the WIC program's purpose and scope in great detail, there are operational areas where the State has discretion. For example, the department contracts with retailers for its retail food delivery system; these rules establish the authorization process and criteria used for the selection. By establishing the authorization process and criteria in rule stakeholders have the opportunity to provide input and have access to requirements that may impact their future participation as a WIC authorized retailer.

A variety of references, definitions and terms used in the rule are outdated. Key portions of the existing rule need to be updated to be consistent with the most current revised Code of Federal Regulations 7 CFR 246 governing the WIC Nutrition Program. The existing rule also needs to be revised to further define the standards of practices and requirements for administrating and implementing the program assuring consistency between the rule and the contract retailer's sign with the department. Lastly, revisions are necessary to provide clarity for retailer participation in the program.

The primary stakeholders are retailers that own and operate grocery stores. Grocery wholesalers and food manufacturers will also be interested in this rule change.

Section 2. What are the general goals and specific objectives of the proposed rule's authorizing statute?

RCW 43.70.120 allows the department to adopt rules and regulations necessary to administer the federal funded WIC program and provide clients nutritious foods at reasonable prices.

The goal of this rulemaking is to stay in compliance with federal regulation 7 CFR 246. In doing so this will: entitle Washington State to receive federal funds; improve the health of people in Washington State; and assure a fair and reasonable process for stakeholders.

The objectives of this rule amendment are:

1. Align the rule with federal and state requirements.
2. Simplify the rule by removing language that duplicates federal regulations.
3. Make the rule easy and understandable to read.

Section 3. What is the justification for the proposed rule package?

The proposed rule will achieve the authorizing statute’s goals and objectives because the federal requirements delegate to the department the responsibility for an effective and efficient administration of the WIC program. Amending the rule will improve the outcomes of the program.

The department has assessed and determined that there are no feasible alternatives to rulemaking. Revising the existing rules is necessary to ensure the practices and requirements can be administered, implemented and enforced properly.

If this rule is not adopted, the result would be that the department would not be able to comply with the federal grant application requirements, which is called the “annual state plan” and would not have the most current contract terms and conditions in place to enforce. This would put the department at risk of losing federal funding.

Section 4. What are the costs and benefits of each rule included in the rules package? What is the total probable cost and total probable benefit of the rule package?

Identification of total number of rules in rules package

The proposed rule includes eight new or amended sections and the repeal of ten sections.

Table: Non-Significant Rule Identification

The Department of Health has determined that the following sections are not-significant for the reasons provided. These are not included in the following cost/benefit analysis.

Table: Non-Significant Rule Identification

#	WAC Section	Section Title	Section Subject	Reason
1	WAC-246-790-010	Definitions	Definition of terms used	These definitions are not used

			in the rule.	as enforceable standards. These definitions clarify terms used throughout the chapter. Some definitions have been removed because they duplicate those found in Code of Federal Regulations 7 CFR 246 and other terms have been updated.
2	WAC-246-790-055	Adoption by reference	Adoption by reference	The purpose of this section is to incorporate by reference the Code of Federal Regulations 7 CFR 246. The department is not required to analyze requirements set by other regulatory entities that are incorporated without material change.
3	WAC-246-790-086	Requirements of an authorized retailer	Requirements for retailers to stay WIC authorized.	The proposed changes to the rule title and content provide clarity and continuity without changing the existing rule's effect.
4	WAC-246-790-125	Retailer Appeal Process	Describes process	Incorporates federal and Administrative Procedure Act requirements without material change.
5	WAC-246-790-127	Retailer Advisory Committee	Commitment to hold meetings for the purpose of collecting input from key stakeholders.	Clarifies and updates existing requirements without changing the rule's effect.

The proposed rules repeal the following sections of the Washington Administrative Code for various reasons. Some sections are being repealed because of reformatting, the removal of standards that are duplicated in the federal regulations, and for reasons identified in appendix, Significant Rule Analysis Worksheet.

Specifically section -060 is being repealed because the language duplicates the federal law (7 CFR 246). As suggested by stakeholders, the proposed rule eliminates this redundancy from the rule and instead will be found on the department's website. Grocery wholesalers and food manufacturers will have easier access to the information.

- WAC 246-790-050 What is the WIC program?
- WAC 246-790-060 What are the 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?

3. Significant Rule Analysis

A. WAC 246-790-075 Requirements to become an authorized retailer

Rule Overview:

The proposed rule applies to both first time applicants and authorized retailers that are applying for the next contract cycle. The process includes retailer assessment, selection and contract.

Subsections (1) and (2) are a restatement of existing federal requirements and included in the rule only to provide continuity.

Subsection (3) states “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.”

Cost/Benefit Analysis of subsection (3):

- The benefit of adding the time limit to this rule section is that it clarifies to the retailer the number of days they have to correct their information. This removes ambiguity and reduces the chances for application denial.
- Retailer stakeholders recommended a fifteen day window to correct errors and consider the thirty days more than adequate time to make corrections.
- Specifying a timeframe improves the process. It has been found, without a time limit the application process extends indefinitely which is a resource burden to the department. It requires multiple onsite visits to applicant stores to verify inventory and shelf prices when too much time passes between updates to the application.
- The department assumes there are no costs associated with this section of the rule.

Subsection (4) states “The department may not accept a new application sooner than six months after an applicant’s denial.”

Cost/Benefit Analysis of subsection (4):

- The benefit of adding the number of days to this section of the rule is that it clarifies to the applicant retailer there is a waiting period before reapplying.

- It has been found that retailers who are denied for not meeting business model requirements will hastily reapply without adjusting their business model. This is a resource drain on the department because the department must review each application and conduct a store visit when a new application is filed.
- Retailer stakeholders have agreed six months is a reasonable timeframe for a retailer to assess their business model and make changes necessary to meet WIC requirements if they so desire.
- The department has the authority to make an exception and waive the six month waiting period when a store is needed to assure participant access.
- The department assumes there are no direct costs associated with this section of the rule. However, the department recognizes that a retailer that is denied WIC authorization will not financially benefit from WIC sales before they become an approved retailers

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

Cost/Benefit Analysis of subsection (5):

- The benefit of adding exemption language to this section is that it informs a retailer how they can request an exemption and also identifies the department’s role when considering granting or denying the request.
- Exemptions provide an opportunity for the department to provide participant access.
- The department assumes there are no costs associated with this section of the rule.

B. WAC 246-790-077 Retailer Selection Criteria

Rule Overview:

- This section of the rule provides the criteria the department uses to select a retailer to become approved to sell WIC foods. In addition, this section identifies how a retailer, once authorized, can maintain their authority to sell WIC foods throughout the contract period.
- This section includes language from several other existing sections, some that are proposed to be repealed during this revision. The proposed revision is intended to provide clarity and continuity to the rule and to present a succinct list. The rule has been divided into groups: business license, permit and certification requirements, business model requirements, recordkeeping requirements, additional requirements, and exemptions.
- Subsection (1) reflects business license, permit and certification requirements that apply to all Washington businesses. These requirements are not requirements of the Department of Health, but of other state agencies and are included to provide retailers a

complete list of all requirements of the business. Therefore, the department has not analyzed the effects of this requirement.

- The business model requirements in subsection (2) (c), (d), (f), (g), (h), (i), (j), and (k) are federal requirements and have been incorporated without material change. Subsection (2) (l) and (m) are food safety rules imposed by Local Health Jurisdictions.
- The recordkeeping requirements in subsection (3) (a), (c), (d), (e), (f), and (g) are either requirements of the Department of Revenue or they are federal requirements for WIC participation.
- The additional requirements in subsection (4) (a), (c), (d), and (e) are federal requirements.
- It is possible that changes to the criteria may impact individual store owners in various ways. The proposed rule eliminates some criteria which may make it easier for some stores to qualify. On the other hand, new criteria being proposed may result in the denial of other stores.

Subsection (2) “Business model requirements”

Cost/Benefit Analysis of subsection (2):

- (2) (a) Provides a description of a “full line grocery store.”
 - The benefit of revising the description of full line grocery store food and general merchandise categories ensures the rule is aligned with food industry descriptions of retail grocery stores, which removes the ambiguity regarding what constitutes a “full line” grocery store.
 - The department assumes there are no costs associated with this section because the Retailer Advisory Committee members indicated that the new categories provide clarity, and currently all WIC retailers statewide have available and sell what’s listed in the food and product categories because this is a current contract requirement.
- (2) (b) Requires a retailer to purchase WIC approved foods directly from a wholesaler.
 - The benefit of adding new language to this section of the rule, which requires purchasing WIC approved foods through wholesale or non-retail channels, is to emphasize where foods must be purchased to satisfy cost-containment requirements and stay competitive with peer retailers.
 - This language brings the rule in alignment with current practice. The wholesaler requirement is in the current contract.
 - The department will consider exemption requests for participant access when there is sufficient justification, such as documentation that purchasing retail will be a significant cost saving to the department.
 - The department assumes there are no new costs from this section because purchasing wholesale is a standard practice within the industry, wholesale is

designed to offer retailers lower priced options and is a current WIC contract requirement.

- (2) (e) Does not allow a retailer to receive or expect to receive more than fifty percent of sales from WIC transactions.
 - The benefit of adding new language to this section is to clarify and emphasize that the majority of the retailer's annual food sales must not be from WIC food redemptions.
 - Federal rule gives states the option to accept or not accept retailers having over fifty percent of their business come from WIC transactions. The department has elected not to use this option because there were not stores in Washington that met the over fifty percent definition when the federal rule was published and we have had no application denials for this reason. Therefore the department currently has as a policy and states in the federally required state plan to not authorize such stores.
 - The department assumes there are no costs associated with this section of the rule because the amendments provide clarity or retailers already comply with the standard.

Subsection (3) (b) and (e) requires a recordkeeping system that includes original documentation and ability to submit information to the department upon request.

Cost/Benefit Analysis of subsection (3) (b) and (e):

- The benefit of this section of the rule is to provide clarity to retailers about what documentation is required. The benefit of this section is that it identifies the record retention timeline. The six year requirement is a change from the current four years stated in the contract. The reason for the change is to come into compliance with current Department of Health Office of Contracts Management practice. The department standard terms and conditions include a six year record retention requirement.
- Retailers may incur minimal costs due to the following two areas.
 - (3) (b) Six year record retention -
The current WIC retailer contract requires records be maintained throughout the contract plus one year; which represents a maximum of four years. Some retailers might need to increase file capacity to maintain hard copy records and documents to meet the six year requirement. The department estimates that approximately 12 current retailers may not have computerized record keeping systems and may need to purchase additional filing containers. The cost is estimated to range from \$24 for two cardboard file boxes to \$600 for a fireproof metal file cabinet.

- (3) (e) Itemized sales receipts -
The requirement was revised to add clarity for retailers to keep and provide upon request documentation of WIC sales. Itemized sales receipts of WIC purchases either through electronic or a manual system are required. It's estimated that 736 of the 748 participating WIC stores have electronic cash registers that produce itemized receipts. For those retailers there is no cost associated with this rule.

Should a retailer decide to purchase an electronic system to meet this requirement, a Casio electronic cash register costs approximately \$200. More sophisticated cash registers with barcode scanners range from \$400-\$2,412. There are programs, such as Community Putting Prevention to Work projects in King County, which may have grant funding available for small business equipment.

The proposed rule includes an option for retailers to use a "manual system", which alleviates the potential cost burden to a retailer who doesn't already have electronic capability by offering an alternate way to meet the itemized sales receipt requirement. Some retailers may need to purchase receipt books to record WIC transactions. A simple receipt book from Staples will cost under \$0.50 when purchasing in bulk. One book provides 50 receipts. It is estimated that a small business is likely to have less than 100 WIC sales per month thus the cost would be approximately \$1.00 per month for 2 receipt books.

An impact to these small businesses may be the processing time. Manually writing out a receipt will slow down transaction time at the checkstand by 30-120 seconds. This may be an inconvenience to WIC participants and other customers.

Documentation of sales is a business license requirement thus it is not considered a "new" cost due to WIC program participation. It is important to WIC federal regulators that records are complete and accurate so that the department can prevent and detect fraud. Increased media attention given to EBT fraud and government accountability in general make recordkeeping of WIC sales essential.

There is an administrative burden to the department when exceptions are used frequently defeating the intent of how exceptions are used. By including an alternative method, hand writing a receipt, a low cost alternative is provided and participant access is maintained.

Subsection (4) (b) requires the retailer to maintain an active e-mail account.

Cost/Benefit Analysis of (4) (b):

- The benefit is to assure cost effective and timely communication between the department and the retailers. Adding the email requirement brings the rule in line with the current contract requirements, which already requires retailers to have an email address.
- The department currently requests email addresses from applicant stores. There is only one store on record of the 748 contracted stores that does not have an email address. The department granted this store an exemption to assure participant access. The department mails contract and program information to this store.
- The department communicates with contracted retailers primarily by email as a cost saving measure. Funding for printed material was given up in a department budget reduction.
- There are minimal costs associated with this section of the rule. Obtaining an e-mail address is free. If a retailer does not currently have access to the internet, they may access e-mail using a public computer, such as a public library.

C. WAC 246-790-105 Failure to meet WIC Program Requirements

Rule Overview:

- The proposed amendments clarify what state enforcement action will be taken for program violations not specifically addressed in federal regulations and define a “pattern of violations.”
- Simplifies the existing rule by replacing the lengthy federal sanction table with a reference to federal regulation.
- Subsections (1), (2), (5) and (6) are federal requirements and provided for continuity.

Subsection (3) (a-c) Identifies state enforcement actions based on a pattern of violation.

Cost/Benefit Analysis of subsection (3):

- The benefit of adding new language to this section is to inform retailers of enforcement action the department may take.
- State enforcement actions are currently in policy. By placing enforcement actions in rule, the department has the authority to enforce what previously was in the policy.
- No fines are included in the enforcement action.
- There are no costs associated with this rule unless the retailer violates the state rules.

Subsection (4) defines the term “Pattern” and adds a timeframe.

Cost/Benefit Analysis of subsection (4):

- The benefit of adding a timeframe to the definition of a pattern is that retailers will have a better understanding of the consequences of their actions.
- Federal regulations use the term pattern without defining it. The definition of “more than one documented incident of the same type of violation” is in the current rule and has not been controversial with stakeholders.
- Stakeholders asked for the addition of a timeframe. The proposal for adding “thirty-six months” was discussed with stakeholders. Stakeholders did not express concerns.
- The department assumes there are no costs associated with this rule.

4. Rule Package Cost/Benefit Conclusion

The majority of the proposed changes clarify existing retailer requirements for the WIC food delivery system. For the above rules that have significant changes, the department’s assumption is that the proposed rules will not impose significant new costs to authorized or applicant WIC retailers because the majority of stores already comply with the proposed rules in the normal course of being a full line grocery store. The overall benefit of the proposed rule is that it assures department policy and existing contract requirements are enforceable by rule. The proposed rule clearly states roles and responsibilities, which will make the program more effective and efficient. Therefore, the probable benefits of the proposed rules exceed the probable costs.

Section 5. What alternative versions of the rule did we consider? Is the proposed rule the least burdensome approach?

Some portions of the rule are mandated. The department identified key portions of the current rules that required updating to accurately reflect the revisions to the Code of Federal Regulations 7 CFR 246 governing the WIC Nutrition Program. Those portions of the rule the department has discretion on were presented to stakeholders for input.

Descriptions of alternative considered

The department presented several informal WAC revision proposals to stakeholders and the Assistant Attorney General. Alternative versions that were considered included: repealing additional sections; updating certain portions of the rules specifically components of the retailer selection criteria; the process for submitting food products for approval; and sanctions and fines for non-compliance. The informal process resulted in a revision that meets the needs of both stakeholders and the department.

Least burdensome determination

Compared with the alternative version, the proposed rule is less burdensome for those required to comply with it because it will align these rules with federal and state requirements, simplify rules

by removing language that duplicated federal regulations, and makes the rules easy and understandable to read.

Section 6. Did we determine that the rule does not require anyone to take an action that violates another federal or state law?

The rule does not require those to whom it applies to take an action that violates requirements of federal or state law.

Section 7. Did we determine that the rule does not impose more stringent performance requirements on private entities than on public entities unless the difference is required in federal or state law?

The department determined that the rule does not impose more stringent performance requirements on private entities than on public entities.

Section 8. Did we determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, did we determine that the difference is justified by an explicit state statute or by substantial evidence that the difference is necessary?

The rule does not differ from any applicable federal regulation or statute.

Section 9. Did we demonstrate that the rule has been coordinated, to the maximum extent possible, with other federal, state, and local laws applicable to the same activity or subject matter?

The Assistant Attorney General has reviewed the proposed rule giving consideration to 7 CFR 246, other Washington state laws and rules. There are no other applicable laws.