TITLE 410 INDIANA STATE DEPARTMENT OF HEALTH

Emergency Rule
LSA Document #09- (E)

DIGEST

Temporarily adds new definitions. Temporarily amends 410 IAC 3.6-2-6 concerning vendor agreements. Temporarily amends 410 IAC 3.6-3-1; 410 IAC 3.6-3-2; 410 IAC 3.6-3-3; and 410 IAC 3.6-3-4 concerning authorization and reauthorization of WIC vendors. Temporarily amends 410 IAC 3.6-3-8 to update minimum stock requirement for WIC vendors. Temporarily amends 410 IAC 3.6-3-10 concerning store applications outside the open authorization period. Temporarily amends 410 IAC 3.6-5-1 concerning routine monitoring visits. Temporarily amends 410 IAC 3.6-5-2; and 410 IAC 3.6-5-3 concerning sanctions. Temporarily amends 410 IAC 3.6-6-1 to update documents incorporated by reference. Authority IC 4-22-2-37.1; IC 16-19-3-5; IC 16-35-1.5-6. Effective October 1, 2009.

SECTION 1. **"Cash value voucher " ("CVV") means a fixed-dollar amount check, voucher, electronic benefit transfer (EBT) card or other document which is used by a participant to obtain authorized fruits and vegetables.**

SECTION 2. **"Contract brand infant cereal" means all infant cereal in all current can sizes produced by the manufacturer awarded the infant cereal cost containment contract. The infant cereal will include eight (8) ounce boxes of any grain or multigrain excluding organic, fruit, formula or variety packs.**

SECTION 3. **"Harm" means any real or potential damage, either tangible or intangible, to one of the following areas:**

(1) physical;
(2) emotional;
(3) financial; or
(4) reputation.

SECTION 4. **"Open authorization period" means the time during which vendors apply to be reauthorized and vendors not currently authorized apply to be authorized. The open authorization period shall be held for a thirty (30) day period in the second quarter, every third year starting in 2009.**

SECTION 5. **(a)This SECTION supersedes 410 IAC 3.6-2-6**
(b) All stores authorized as a vendor by the department shall do the following:
(1) Sign a vendor agreement prescribed by the department in accordance with 7 CFR 246.12(h).
(2) Agree to comply with all applicable federal and state laws and rules, including, but not limited to, 42 U.S.C. 1786 and 7 CFR 246.

(b) Violations of the terms of the vendor agreement may subject the vendor to sanctions, including termination.

SECTION 6. **(a) This SECTION supersedes 410 IAC 3.6-3-1**

(b) A store becomes a vendor when authorized in accordance with this rule.

(c) The department shall authorize vendors in accordance with this rule during the open authorization period.

(d) A store wishing to become a vendor outside the open authorization period must meet the requirements of section 10 of this rule, unless the store can demonstrate it was not open for business and able to apply during the open authorization period. Stores not open for business and able to apply during the open authorization period shall be allowed to submit a WIC food vendor application outside the open authorization period, and notwithstanding the date of submission, such applications shall be reviewed in accordance with section 2 of this rule.

SECTION 7. **(a) This SECTION supersedes 410 IAC 3.6-3-2.**

(b) Stores not currently authorized but seeking authorization as a vendor in the open authorization period shall do the following:

(1) Request an application from the WIC Program.

(2) Complete the application.

(3) Return the application to the WIC Program before the end of the open authorization period.

Incomplete applications will be returned to the store's representative and must be resubmitted within fifteen (15) days from when it was returned to the store to be considered.

(c) Applications received during the open authorization period, or received from a store meeting the exception in section 1(d) of this rule, shall be reviewed using the selection criteria in section 4 of this rule. Applications that:

(1) meet all criteria in section 4 of this rule; and

(2) pass the preauthorization visit;

will be offered a vendor agreement.

SECTION 8. **(a)This SECTION supersedes 410 IAC 3.6-3-3.**

(b)The store seeking reauthorization as a vendor during the open authorization period shall do the following:

(1) Complete the application for reauthorization.

(2) Return the application to the WIC Program before the end of the open authorization period. Incomplete applications will be returned to the store's representative and must be resubmitted to the WIC Program within fifteen (15) days from when it was returned to the store to be considered timely.

(c) Current vendors will receive an application from the WIC Program in order to apply for reauthorization.

(d) Applications received during the open authorization period shall be reviewed using the selection criteria in sections 4 and 5 of this rule. Currently authorized vendors:

(1) that meet all criteria in sections 4 and 5 of this rule will be offered a vendor agreement; and

(2) shall not receive a preauthorization visit.

SECTION 9. (a) This SECTION supersedes 410 IAC 3.6-3-4.

(b)Only stores meeting all of the following criteria, and having a total number of points assigned, under section 6 of this rule, greater than or equal to the lowest point total of vendors applying in the same WIC service area, will be selected for a preauthorization visit:

(1) The store shall be as follows:

(A) Located:

(i) within this state; or

(ii) in a county contiguous to the Indiana border.

(B) Open for business and able to serve WIC participants at least eight (8) hours per day, six (6) days per week.

(C) Located in a permanent, fixed location where participants may purchase allowable foods with their food instruments.

(2) The store may not be currently disqualified from either of the following:

(A) Participation in the food stamp program or have been assessed a civil money penalty in lieu of a disqualification from the food stamp program that, had it been imposed, would not yet have expired.

(B) The WIC program.

The disqualifications in this subdivision must be final with no appeal pending.

(3) None of the store's current owners, officers, or managers have been convicted of or had a civil judgment entered against them for the following conduct demonstrating a lack of business integrity:

(A) Fraud.

(B) Antitrust violations.

(C) Embezzlement.

(D) Theft.

(E) Forgery.

(F) Bribery.

(G) Falsification or destruction of records.

(H) Making false statements.

(I) Receiving stolen property.

(J) Making false claims.

(K) Obstruction of justice.

(L) Selling counterfeit merchandise.

(4) The store shall:

(A) meet the minimum stock requirements of section 8 of this rule; and

(B) not have redeemed or attempted to redeem food instruments without being authorized as a WIC vendor.

(5) Pharmacies or vendors with a pharmacy must be able to provide any WIC prescribed formula within two (2) working days of the request by a WIC participant unless the failure to provide the WIC prescribed formula is the result of circumstances beyond the control of the vendor such as:

(A) a natural disaster; or

(B) actions or decrees of governmental bodies.

(6) The store must purchase WIC formula from a source on the department's list pursuant to

Section 203(e)(8) of the Child Nutrition and WIC Reauthorization Act of 2004, P.L.108-265.

(7) No conflict of interest shall exist between:

(A) the store; and

(B) any local agency or department employee.

(8) The store:

(A) shall not have attempted to circumvent disqualification from the WIC program through ownership change; and

(B) must:

(i) participate in the food stamp program; and

(ii) have a food stamp number;

unless the store is a pharmacy only.

(9) The store shall not expect to obtain more than fifty percent (50%) of its annual revenue from the sale of food items through WIC food instruments. Failure of a store to provide documentation requested by the WIC program to verify this criterion shall result in denial of the application.

(10) The store must have a policy that the store does not provide refunds, or permit exchanges for foods purchased with WIC food instruments, except for exchanges of an identical authorized food item when the original food item:

(A) is defective;

(B) is spoiled; or

(C) has exceeded:

(i) its "sell by" date;

(ii) its "best if used by" date; or

(iii) another date;

limiting the sale or use of the item.

"Identical authorized food item" means the exact brand and size of the original food item purchased. Participants may only exchange WIC items with a receipt.

SECTION 10. (a) This SECTION supersedes 410 IAC 3.6-3-8.

(b) In order to ensure adequate participant access to supplemental foods, the following minimum stock shall be available on the shelf or in stock:

(1) Contract brand infant formula as follows:

(A) Sixteen (16) cans of milk based with iron concentrate.

(B) Twenty (20) cans of milk based with iron powder.

(C) Ten (10) cans of soy based iron fortified powder.

(D) Ten (10) cans of milk based powder with reduced lactose, partially broken-down protein, and DHA/ARA.

(2) One hundred percent (100%) dairy milk: twelve (12) gallons total of:

(A) whole;

(B) low fat; and

(C) skim;

milk in gallons.

(3) Cheese:

(A) two (2) kinds; and

(B) three (3) pounds;

of domestic prepackaged blocks or sliced cheese.

(4) Eggs: three (3) dozen large or medium white eggs in one (1) dozen containers.

(5) One hundred percent (100%) juice:

(A) fifteen (15) sixty-four (64) ounce containers, at least three (3) kinds; and

(B) five (5) cans of eleven and five-tenths (11.5) or twelve (12) ounce frozen juice or shelf stable concentrate, or both, at least two (2) kinds.

(6) Cereal:

(A) six (6) kinds of dry; and

(B) one (1) kind of cooked;

cereal, for a total of twenty (20) boxes. Vendor must also stock at least one whole grain cereal.

(7) Peanut butter: five (5) eighteen (18) ounce jars.

(8) Dried beans, peas, and lentils: two (2) kinds for a total of three (3) pounds in one (1) pound bags or one hundred twenty-eight (128) ounces of canned beans. The canned beans include only navy, kidney, garbanzo or refried.

(9) Contract brand infant cereal:

(A) eight (8) boxes; and

(B) two (2) kinds;

of eight (8) ounce dry infant cereal without fruit.

(10) Baby food:

(A) ninety-six (96) glass jars of WIC approved baby food in four (4) ounce jars (fruits and vegetables).

(B) thirty-one (31) glass jars of WIC approved baby food (meat) in two and one half (2.5) ounce jars.

(11) Bread: Ten (10) loafs of whole grain bread.

(12) Fruits and vegetables: Thirty dollars ($30.00) worth of fresh fruit or vegetables, two varieties of each.

(c) Noncompliance with this section will not result in an enforcement action if the vendor can demonstrate that any failure to meet the requirements of subsection (a) was the result of circumstances beyond the control of the vendor such as:

(1) a natural disaster;

(2) actions or decrees of governmental bodies; or

(3) a communication line failure.

(d) The department will provide at least one (1) month written notice of any change in the contract brand infant formula.

SECTION 11. (a) This SECTION supersedes 410 IAC 3.6-3-10.

(b) A store must submit a WIC food vendor application to be considered for authorization.

(c) Applications received outside the open authorization period, except those received from a store meeting the exception in section 1(d) of this rule, shall be reviewed to determine if there is inadequate participant access.

(d) If the department determines that there is not inadequate participant access:

(1) the store will be notified in writing of that determination; and

(2) the application will be denied.

(d) If the department determines that there is inadequate participant access, the following will

occur:

(1) The application will be reviewed using the selection criteria in section 5 of this rule.

(2) If the application:

(A) meets all criteria in section 4 of this rule; and

(B) successfully passes the preauthorization visit;

the store will be offered a vendor agreement.

SECTION 12. (a) This SECTION supersedes 410 IAC 3.6-5-1.

(b) The department is required to conduct routine monitoring visits to assess vendor compliance. Sanctions will be imposed when required.

SECTION 13. (a) This SECTION supersedes 410 IAC 3.6-5-2.

(b) Major violations are violations that could result in harm to WIC participants or the WIC program. The following are major violations:

(1) Claiming reimbursement for the sale of an amount of a specific supplemental food item that exceeds the vendor's documented inventory of that supplemental food item for a specific period of time.

(2) Submission of false information:

(A) on the retail vendor price survey; or

(B) during the course of inspections of the vendor site.

(3) Receiving, transacting, or redeeming food instruments outside of authorized channels, including the use of an unauthorized vendor or an unauthorized person, or both.

(4) Charging for a supplemental food not received by the participant.

(5) Providing credit or nonfood items, other than:

(A) alcohol;

(B) alcoholic beverages;

(C) tobacco products;

(D) cash;

(E) firearms;

(F) ammunition;

(G) explosives; or

(H) controlled substances, as defined in 21 U.S.C. 802;

in exchange for food instruments.

(6) Failure to attend a required training.

(7) Failure to maintain:

(A) inventory records; or

(B) other records;

the department requires of the vendor.

(8) Providing change when redeeming a food instrument.

(9) Failure to provide authorized WIC program personnel access to the following:

(A) The business premises.

(B) Any redeemed food instruments on hand.

(C) Any other records pertaining to vendor participation.

(10) Alteration of a food instrument other than a legitimate price or "date used" correction.

(11) Home delivery of WIC purchases.
(12) Failure to accept a valid food instrument when accompanied by a valid WIC identification folder.
(13) Recovery or attempted recovery of funds or food from WIC participants.
(14) Failure of a vendor pharmacy to provide special formulas as required by 410 IAC 3.6-3-4(5).
(15) Failure to compare the signature on the food instrument with the signature on the WIC program identification card.
(16) Not allowing WIC participants to participate in sales promotions or manufacturer's specials or refusal to accept coupons when allowed for other customers.
(17) Denial of the purchase of up to the full amount of WIC foods authorized on a food instrument if requested by a WIC participant.
(18) Selling expired infant formula to participants.
(19) Failure to reimburse the department, within thirty (30) days of written request, for amounts paid by the department to the vendor on improperly redeemed food instruments.
(20) Including sales tax or container deposits as part of the actual cost of the authorized food listed on the food instrument or requiring the participant to pay the sales tax or container deposit.
(21) Requiring cash purchases in order to redeem food instruments.
(22) Accepting the return of items purchased with a food instrument for cash or credit towards other purchases or exchanges, with the exception of exchanges of an identical authorized food item when the original food item:
(A) is defective;
(B) is spoiled; or
(C) has exceeded its:
(i) "sell by" date;
(ii) "best if used by" date; or
(iii) another date;
limiting the sale or use of the item.
(23) Threatening or verbally abusing WIC participants or authorized WIC program personnel.
(c) Minor violations are violations that may impose less harm to participants or the program. The following are minor violations:
(1) Failure to supply a timely retail vendor price survey to the department.
(2) Requiring WIC participants to show identification other than WIC identification folders, except in cases when the WIC identification folder is not signed.
(3) Issuing rain checks for specific WIC food types, brand, or quantities listed on the food instrument not available or not received by the participant at the time a food instrument is redeemed.
(4) Failure to maintain the minimum required:
(A) quantity;
(B) size;
(C) type; and
(D) variety;
of WIC-approved foods as set forth in 410 IAC 3.6-3-8.
(5) Requiring a participant to select a specific type or brand of WIC-approved foods when the

food instrument or the food list, or both, does not require the purchase of that specific type or brand.

(6) The:

(A) possession;

(B) display on the shelf in the vendor site;

(C) attempted sale; or

(D) actual sale;

of food products that originated from the Commodity Supplemental Food Program.

(7) Acceptance of food instruments that are signed by a participant or a proxy before the vendor fills in the total actual cost.

(8) Failure to remove out-of-date WIC foods from customer areas.

(9) Failure of the WIC foods identification test by store personnel or scanner system.

(10) Failure to do any of the following:

(A) Maintain WIC food prices within fifteen percent (15%) of other authorized WIC vendors in the WIC service area.

(B) Accurately show the price of WIC foods on the food:

(i) package;

(ii) container;

(iii) shelf; or

(iv) sign.

(C) Offer WIC participants the same courtesies and services offered to the general public.

(11) Using a cash register without a current WIC-approved food list at the cash register.

(12) Failure to allow the purchase of a WIC authorized food.

(13) Accepting a food instrument:

(A) before the "first day to use"; or

(B) after the "last day to use".

(14) Accepting an altered food instrument, other than a legitimate price or "date used" correction.

(15) Failure to provide a WIC participant with a cash register receipt for foods purchased with a food instrument.

(16) Retaining WIC identification or any information that identifies a person as a WIC participant or proxy or disclosing information regarding a participant of the WIC program to any person without a valid court order, other than to the department, its designee, or a federal WIC program official.

(d) Sanctions will be imposed as follows:

(1) For the first major violation the vendor shall receive a warning letter indicating the following:

(A) The violation.

(B) How to remedy the violation.

(2) For the second major violation within a twenty-four (24) month period, a vendor may be sanctioned as follows:

(A) A fine up to the lesser of one thousand dollars ($1,000) or ten percent (10%) of the vendor's monthly average redemptions for:

(i) the greater of the twelve (12) months preceding the date of the sanction notice; or

(ii) a lesser number of months the vendor has been authorized.

(B) Disqualification from the WIC program for up to one (1) year.

(3) For the first minor violation within a twenty-four (24) month period, the vendor shall receive a warning letter indicating the following:

(A) The violation.

(B) How to remedy the violation.

(4) For a vendor's second minor violation within a twenty-four (24) month period, a vendor shall either:

(A) receive a second warning letter; or

(B) be required to participate in a conference with the department and local agency about the violation, either in person or by telephone;

(C) both.

After the letter or conference, the vendor shall submit written documentation of the corrective action that will be taken.

(5) For a vendor's third minor violation within a twenty-four (24) month period, a vendor may be fined three percent (3%) of the vendor's monthly average redemptions for the greater of the following:

(A) The twelve (12) months preceding the date of the imposition of the sanction.

(B) A lesser number of months the vendor has been authorized.

(6) For any subsequent minor violations within a twenty-four (24) month period, a vendor may be fined five percent (5%) of the vendor's monthly average redemptions for the greater of the following:

(A) The twelve (12) months preceding the date of the sanction notice.

(B) A lesser number of months the vendor has been authorized.

(7) Multiple violations found may result in a cumulative penalty assessment based upon this subsection.

(8) The maximum fine and maximum disqualification term shall be not more than the limits set forth in 7 CFR 246.12(l)(2)(i).

(9) For the fourth violation of subsection (b)(4) within a twenty-four (24) month period, the sanction will be disqualification from the WIC program for up to one (1) year.

(e) A vendor remaining in the program after an imposed sanction shall provide the following:

(1) Certification that the situation giving rise to the sanction has been corrected.

(2) Documentation regarding the correction as requested by the department.

SECTION 14. (a) This SECTION supersedes 410 IAC 3.6-5-3.

(b) The department shall notify a vendor in writing when an investigation reveals an initial incidence of a violation for which a pattern of incidences must be established in order to impose a sanction, before another such incidence is documented, unless the department determines, in its discretion, on a case-by-case basis, that notifying the vendor would compromise an investigation.

SECTION 15. (a) This SECTION supersedes 410 IAC 3.6-6-1.

(b) When used in this article, references to the following publications shall mean the version of that publication listed in this subsection. The following publications are hereby incorporated by reference:

(1) 7 CFR 246 (February 4, 2008)
(2) 42 U.S.C. 1786.
(3) 21 U.S.C. 802.
(c) Federal rules that have been incorporated by reference do not include any later amendments than those specified in the incorporated citation. Sales of the Code of Federal Regulations are handled exclusively by the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

SECTION 16. Sections 1 through 15 of this document take effect October 1, 2009.