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EDMUND G. BROWN JR.  
Governor

February 2, 2018

REGULATORY ALERT 2018-01

## NOTICE OF PROPOSED CHANGES TO THE CALIFORNIA WIC PROGRAM

### Purpose

For the California Department of Public Health (CDPH) to inform stakeholders of the California Special Supplemental Nutrition Program for Women, Infants, and Children (WIC Program) of CDPH's plan to amend California WIC Bulletin Regulations (W.B.R.s) for the WIC Authorized Food List, pursuant to Health and Safety Code section 123322.

### Stakeholder Workgroup Information

In accordance with Health and Safety Code section 123322, CDPH will meet with stakeholders by webinar on February 22, 2018 to receive input on the amendments to the WIC Authorized Food List. If you are interested in participating in this stakeholder workgroup, please send an e-mail by close of business on February 14, 2018 with the subject line reading "WIC Authorized Food List Amendments Stakeholder RSVP" to [WICRegulations@cdph.ca.gov](mailto:WICRegulations@cdph.ca.gov), with the following information included in the body of the e-mail:

Name:

Company Name (if applicable):

Address:

E-mail Address:

Stakeholder Group Represented: (Stakeholders can include, but are not limited to: currently authorized WIC vendors, owners or representatives of a non-WIC authorized store, manufacturers, WIC Local agency representatives, WIC participants, advocates, and consumer groups)

CDPH will contact you by February 16, 2018 with details on how and when to attend a webinar workgroup meeting. Stakeholders participating in a meeting will be assigned to the first available meeting.

### Comment Period

CDPH will accept written comments from affected stakeholders regarding the adoption of the proposed action. The comment period will be open for 33 calendar days, from February 3, 2018 through March 7, 2018. Send your comments electronically to the following e-mail address:

[WICRegulations@cdph.ca.gov](mailto:WICRegulations@cdph.ca.gov).



CDPH Women, Infants and Children (WIC) Division  
3901 Lennane Drive MS 8600 Sacramento, CA 95834  
P.O. Box 997375 MS 8600 Sacramento, CA 95899-7375  
(916) 928-8500 [Division Website](http://www.wicworks.ca.gov) (www.wicworks.ca.gov)



If this proposed action is not withdrawn, CDPH will publish its final action, including responses to the comments received, on its website no later than 120 days after the end of the comment period.

## Proposed Regulation

The California Department of Public Health, which administers the California WIC Program, proposes to amend the following rules in California regulation via regulatory bulletin.

### Article 5. WIC Authorized Food List

#### *82000 WIC Authorized Food List Definitions*

- (a) For the purposes of this article, the following definitions apply:
- (1) Any Brand Foods. Any Brand Foods are foods in a CDPH Food Category or Subcategory that does not identify authorized foods by Brand/product name.
    - (A) Authorized Any Brand Foods for paper food instruments are ones that meet the qualifying authorization criteria specified in a CDPH Food Category or Subcategory.
    - (B) Authorized Any Brand Foods for Electronic Benefit Transfer (EBT) food instruments are ones that:
      - 1. Meet the qualifying authorization criteria specified in the CDPH Food Category or Subcategory; and
      - 2. Are included in the Department's Authorized Product List (APL).
  - (2) Authorized Product List. The Authorized Product List or APL is an electronic file of all Universal Product Codes (UPCs) and Price Look-Up codes (PLUs) for foods authorized by the Department.
  - (3) Brand. Brand is the company name under which a food product is advertised as being marketed or sold.
  - (4) Brand Specific Foods. Brand Specific Foods are foods in a CDPH Food Category or Subcategory that identifies authorized foods by Brand or by Brand and product name.
    - (A) Authorized Brand Specific Foods for paper food instruments are ones that:
      - 1. Are identified in a CDPH Food Category or Subcategory by Brand or by Brand and product name; and

2. Meet the additional authorization criteria for that CDPH Food Category or Subcategory, such as container type, flavor, or fat level.
- (B) Authorized Brand Specific Foods for EBT food instruments are ones that:
1. Are identified in a CDPH Food Category or Subcategory by Brand or by Brand and product name;
  2. Meet the additional authorization criteria for that CDPH Food Category or Subcategory, such as container type, flavor, or fat level; and
  3. Are included in the Department's APL.
- (5) California Department of Public Health Food Category. California Department of Public Health Food Category or CDPH Food Category is the Department's classification of foods by type as listed in the headings of W.B.R. sections 82050-83000. CDPH Food Categories include: Bottled Juice; Breakfast Cereal; Canned Fish; Canned Mature Beans; Cheese; Concentrate Juice; Dry Beans, Peas, or Lentils; Eggs; Fresh Bananas; Fruits and Vegetables; Infant Cereal; Infant Formula; Infant Fruits and Vegetables; Infant Meats; Milk; Peanut Butter; Soy; Tofu; Whole Grains; and Yogurt. CDPH Food Categories may be Any Brand and/or Brand Specific.
- (6) California Department of Public Health Food Subcategory. California Department of Public Health Food Subcategory or CDPH Food Subcategory is a classification of foods within a CDPH Food Category in which multiple subtypes of foods are authorized, e.g., the CDPH Whole Grains Food Category includes the Brown Rice, Bulgur, Corn Tortillas, Oatmeal or Oats, Whole Grain Barley, Whole Wheat Bread, Whole Wheat Pasta, and Whole Wheat Tortillas Subcategories. Each CDPH Food Subcategory has its own authorization criteria. CDPH Food Subcategories may be Any Brand or Brand Specific.
- (7) Department. "Department" is defined as means the California Department of Public Health (CDPH), which administers the California Special Supplemental Nutrition Program for Women, Infants, and Children.
- (8) Non-material Changes. If a manufacturer makes a Non-material eChanges are changes to the Brand or product name of to an authorized in food product categories for which specific brand and/or product names are authorized, the Department will continue to authorize that food for purchase.

~~Non-material changes do not affect authorization of a food product, are changes to brand or product name.~~

- (9) Price Look-Up Codes. Price Look-Up codes or PLUs are standard codes published by the International Federation of Produce Standards (IFPS) for produce.
- (10) WIC Authorized Food List. The WIC Authorized Food List or WAFL is the compilation composed of foods that meet the authorization criteria listed in sections 82050-83000, which meet the criteria specified for the categories of foods. Under an EBT food instrument system, the WAFL is the compilation of foods meeting the authorization criteria listed in sections 82050-83000 that are included in the APL.
- (11) WIC Authorized Food List Shopping Guide. ~~The Department will publish a document, entitled “The “WIC Authorized Food List Shopping Guide.”~~ is a document printed by the Department to help participants and vendors identify authorized foods and ~~This document is intended for educational purposes only. and “The “WIC Authorized Food List Shopping Guide” does not create any rights, obligations, affirmative duties, or replace or supersede the regulations in this Article.~~
- (12) WIC Program. ~~and “The “WIC Program” and “WIC” are defined as the California Special Supplemental Nutrition Program for Women, Infants, and Children.~~

~~(b)~~

~~(c)~~

~~(d)~~

#### 82025 WIC Authorized Food List: Authorized Product List Submissions

### **PROPOSED REGULATION**

- (a) Under an EBT food instrument system, both Brand Specific and Any Brand Foods must be listed by UPC or PLU in the Department’s APL for authorization.
- (1) Any Brand Food products that meet the W.B.R. Food Category authorization criteria may be submitted for inclusion in the APL at any time.
- (2) Brand Specific Food products will be added to the APL only when the Department adopts or amends regulations relating to the Brand Specific Food

Category or Subcategory, however, products for currently-authorized Brand Specific Foods may be submitted for inclusion in the APL at any time if:

- (A) A food manufacturer introduces a new UPC for an authorized Brand Specific Food, including new UPCs resulting from Non-material Changes or UPCs for new sizes of products that are authorized by Brand and product name when a range of sizes are authorized in a CDPH Food Category or Subcategory; or
  - (B) A food manufacturer introduces a new product that meets current authorization criteria in a CDPH Food Category or Subcategory in which products are authorized only by Brand.
- (3) In order to submit a food product for inclusion in the APL, the submitting stakeholder must:
- (A) Provide the Department with detailed information about the product in order for the Department to make a determination about the product's eligibility for authorization. Submission elements include, but are not limited to, the following:
    - 1. Electronic image of product packaging that includes front label, back label, nutrition facts panel, ingredient listing, and UPC;
    - 2. Submitting Company Name;
    - 3. Submitting Company Contact Information;
    - 4. UPC;
    - 5. Brand Name;
    - 6. Product Name;
    - 7. Product Size;
    - 8. Applicable product characteristics, e.g.; container type, noting the presence of sweeteners, fat-level, pasteurization-status, etc.
  - (B) If a product is submitted by a food manufacturer's employee or agent, the manufacturer must notify the Department in writing of all product changes and the effective date of the changes. Examples of product changes include, but are not limited to, changes in container size, ingredients, product name, or discontinuance of a product.
- (4) Unless a Brand Specific Food product is being authorized by a WIC Bulletin Regulation as specified in subsection (a)(2), a food product that the

Department determines meets both federal and state food authorization criteria will be added to the APL within thirty business days from the date of the Department's written notification of the food product's authorization for inclusion in the APL.

- (5) The Department shall remove products from the APL when they are discontinued or if after a review of the product, the Department determines that the product no longer meets federal and/or state food authorization criteria. After the Department makes the determination, the product may be removed from the APL at any time.
- (6) Authorized fruits and vegetables that have PLUs assigned by IFPS will be automatically included by the Department in the APL. Stakeholders may contact the Department requesting the addition of IFPS PLUs if an IFPS PLU is not included in the APL.

### **Nature of the Regulation**

The Department proposes amendment of the WIC Authorized Food List regulatory text as set forth in Attachment 1 of this notice. This proposed regulation would amend existing WIC Authorized Food List regulation to address the effect of EBT implementation on the WIC Authorized Food List.

Federal regulations provide criteria and minimum standards for the Department to comply with when authorizing supplemental foods to be issued to participants and also allow the Department to adopt additional criteria for the Department to consider when authorizing foods. (7 C.F.R. § 246.10(b)(1)(i), (e)(12) (2015).) The Department's criteria for food authorization include but are not limited to the cost and nutritional content of the foods. (Cal. Code Regs., tit. 22, section 40715, subd. (c)(1)-(4).) The Department proposes to amend WIC Authorized Food List regulations in compliance with these sections.

### **Reason for the Regulation**

The reasons for this amendment are included in Attachment 1 of this notice.

### **Authority**

#### *Federal:*

The Child Nutrition Act of 1966, title 42 of the United States Code, section 1786 (Public law 89-645, section 17), as amended, establishes the federal authority under which states may administer the Special Supplemental Nutrition Program for Women, Infants, and Children through local agencies. The WIC Program was established as a result of a Congressional

finding that substantial numbers of pregnant, postpartum and breastfeeding women, infants and young children up to the age of 5 from families with eligible income are at special risk with respect to their physical and mental health by reason of inadequate nutrition or health care, or both. The purpose of the WIC Program is to provide supplemental foods and nutrition education.

In fulfilling this objective, the WIC Program is funded and administered by the United States Department of Agriculture (USDA), Food and Nutrition Service, pursuant 7 Code of Federal Regulations, part 246.

The WIC Program is also subject to federal memoranda and directives from USDA.

*State:*

The WIC Program was established under the authority of Health and Safety Code section 123275 et seq. The regulations for CDPH's administration of the WIC Program are contained in the California Code of Regulations, title 22, sections 40601 through 40815, and in the [WIC Regulatory Bulletins](#) posted at:

<https://www.cdph.ca.gov/Programs/CFH/DWICSN/Pages/LawsandRegulations.aspx>.

**Questions and Additional Information**

If you have any questions, please contact CDPH at [WICRegulations@cdph.ca.gov](mailto:WICRegulations@cdph.ca.gov).



Catherine Lopez, M.Ed.  
Policy and Planning Branch Chief  
Women, Infants and Children Division  
California Department of Public Health

## Attachment 1

# Regulatory Alert 2018-01: WIC Authorized Food List Amendments and Statement of Reasons

**California Special Supplemental Nutrition Program for Women, Infants, and Children**

**February 2, 2018**

Health & Safety Code § 123322 authorizes the California Department of Public Health to establish regulations regarding the authorized foods for the California Special Supplemental Nutrition Program for Women, Infants, and Children using a regulatory bulletin process. The Department is utilizing this process to adopt these regulations. This document is intended to provide reasons why the Department proposes to amend the WIC Authorized Food List Bulletin Regulations revisions in preparation for the effect of EBT implementation on the WIC Authorized Food List as specified in Regulatory Alert 2018-01.



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## 82000 WIC Authorized Food List Definitions

### PROPOSED REGULATION

- (a) For the purposes of this article, the following definitions apply:
- (1) Any Brand Foods. Any Brand Foods are foods in a CDPH Food Category or Subcategory that does not identify authorized foods by Brand/product name.
    - (A) Authorized Any Brand Foods for paper food instruments are ones that meet the qualifying authorization criteria specified in a CDPH Food Category or Subcategory.
    - (B) Authorized Any Brand Foods for Electronic Benefit Transfer (EBT) food instruments are ones that:
      1. Meet the qualifying authorization criteria specified in the CDPH Food Category or Subcategory; and
      2. Are included in the Department's Authorized Product List (APL).
  - (2) Authorized Product List. The Authorized Product List or APL is an electronic file of all Universal Product Codes (UPCs) and Price Look-Up codes (PLUs) for foods authorized by the Department.
  - (3) Brand. Brand is the company name under which a food product is advertised as being marketed or sold.
  - (4) Brand Specific Foods. Brand Specific Foods are foods in a CDPH Food Category or Subcategory that identifies authorized foods by Brand or by Brand and product name.
    - (A) Authorized Brand Specific Foods for paper food instruments are ones that:
      1. Are identified in a CDPH Food Category or Subcategory by Brand or by Brand and product name; and
      2. Meet the additional authorization criteria for that CDPH Food Category or Subcategory, such as container type, flavor, or fat level.
    - (B) Authorized Brand Specific Foods for EBT food instruments are ones that:
      1. Are identified in a CDPH Food Category or Subcategory by Brand or by Brand and product name;
      2. Meet the additional authorization criteria for that CDPH Food Category or Subcategory, such as container type, flavor, or fat level; and
      3. Are included in the Department's APL.
  - (5) California Department of Public Health Food Category. California Department of Public Health Food Category or CDPH Food Category is the

Department's classification of foods by type as listed in the headings of W.B.R. sections 82050-83000. CDPH Food Categories include: Bottled Juice; Breakfast Cereal; Canned Fish; Canned Mature Beans; Cheese; Concentrate Juice; Dry Beans, Peas, or Lentils; Eggs; Fresh Bananas; Fruits and Vegetables; Infant Cereal; Infant Formula; Infant Fruits and Vegetables; Infant Meats; Milk; Peanut Butter; Soy; Tofu; Whole Grains; and Yogurt. CDPH Food Categories may be Any Brand and/or Brand Specific.

- (6) California Department of Public Health Food Subcategory. California Department of Public Health Food Subcategory or CDPH Food Subcategory is a classification of foods within a CDPH Food Category in which multiple subtypes of foods are authorized, e.g., the CDPH Whole Grains Food Category includes the Brown Rice, Bulgur, Corn Tortillas, Oatmeal or Oats, Whole Grain Barley, Whole Wheat Bread, Whole Wheat Pasta, and Whole Wheat Tortillas Subcategories. Each CDPH Food Subcategory has its own authorization criteria. CDPH Food Subcategories may be Any Brand or Brand Specific.
- (7) Department. "Department" is defined as means the California Department of Public Health (CDPH), which administers the California Special Supplemental Nutrition Program for Women, Infants, and Children.
- (8) Non-material Changes. ~~If a manufacturer makes a~~ Non-material eChanges are changes to the Brand or product name of ~~to~~ an authorized ~~in~~ food ~~product~~ categories for which specific brand and/or product names are authorized, the Department will continue to authorize that food for purchase. Non-material eChanges do not affect authorization of a food product. ~~are~~ changes to brand or product name.
- (9) Price Look-Up Codes. Price Look-Up codes or PLUs are standard codes published by the International Federation of Produce Standards (IFPS) for produce.
- (10) WIC Authorized Food List. The WIC Authorized Food List or WAFL is ~~the~~ compilation ~~composed~~ of foods ~~that meet the authorization criteria listed in sections 82050-83000, which meet the criteria specified for the categories of~~ foods. Under an EBT food instrument system, the WAFL is the compilation of foods meeting the authorization criteria listed in sections 82050-83000 that are included in the APL.
- (11) WIC Authorized Food List Shopping Guide. ~~The Department will publish a document, entitled~~ The "WIC Authorized Food List Shopping Guide." ~~is a document printed by the Department to help participants and vendors identify authorized foods and~~ This document is intended for educational purposes only. ~~and~~ The "WIC Authorized Food List Shopping Guide" does not create any rights, obligations, affirmative duties, or replace or supersede the regulations in this Article.

(12) WIC Program. and The “WIC Program” and “WIC” are defined as the California Special Supplemental Nutrition Program for Women, Infants, and Children.

~~(b)~~

~~(c)~~

~~(d)~~

## **AUTHORITY**

### *Federal:*

7 Code of Federal Regulations part 246.3(b) (2017): Delegation to the State agency. The State agency is responsible for the effective and efficient administration of the Program in accordance with the requirements of this part . . . FNS guidelines; and, instructions issued under the FNS Directives Management System.

7 Code of Federal Regulations part 246.10(b)(2) (2017): State agencies must: (i) Identify the brands of foods and package sizes that are acceptable for use in the Program in their States in accordance with the requirements of this section.

7 Code of Federal Regulations part 246.12(a) (2017): Food delivery methods.

*General* . . . By October 1, 2020, each State agency shall implement EBT statewide, unless granted an exemption under paragraph (w)(2) of this section.

### *Federal Guidelines and Instructions:*

United States Department of Agriculture *Operating Rules Women, Infants and Children (WIC) Electronic Benefit Transfer (EBT)* (September 2014), (p. ix and p. 38).

### *State:*

Health and Safety Code section 123280, subdivision (c): In order to be in conformity with federal law and to remain in compliance with federal funding, the department shall adopt all mandatory requirements and guidelines set forth in federal law and federal regulation for the federal Special Supplemental Nutrition Program for the WIC program, including, but not limited to, the Child Nutrition Act of 1966, and the amendments thereto (Chapter 13A (commencing with section 1786) of Title 42 of the United States Code), Part 246 of Title 7 of the Code of Federal Regulations, and federal memoranda and guidance letters clarifying and interpreting those laws and regulations as the requirements for the WIC Program.

Health and Safety Code section 123290, subdivision (d): The department . . . shall . . . designate specific supplemental foods to meet the minimum nutritional requirements for recipients.

Health and Safety Code section 123302, subdivision (a)(1): Notwithstanding any other law, the department may design, implement and fund an electronic benefits transfer (EBT) system for the California Special Supplemental Food Program for Women, Infants, and Children.

Health and Safety Code section 123322, subdivisions (a)(3) and (b): (a) In order to effectively manage and administer the federal and state requirements for the vendors in the WIC Program, and remain in compliance with the conditions of federal funding, the department shall establish requirements for all of the following: . . . (3) The WIC Program authorized foods.  
(b) Notwithstanding any other provisions of law, including the requirement in section 123315 for enacting regulations to implement that section and section 123310, the department may, without taking regulatory action pursuant to Chapter 3.5 (commencing with section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, implement, interpret, or make specific this section by means of an action by bulletin or similar instruction.

## STATEMENT OF REASONS

### *82000 WIC Authorized Food List Definitions*

- (a) The Department proposes to amend subsection (a) to clarify and expand upon the list of terminology used in this Article.
  - (1) The Department proposes to adopt a definition for the term “Any Brand Foods,” defining the term as foods in a CDPH Food Category or Subcategory that does not identify authorized foods by Brand and/or product name. This definition is proposed to differentiate between Any Brand Foods and authorized foods that are listed by Brand and/or product name.
    - (A) Because the Department’s food authorization requirements under a paper food instrument system differ from those used under an EBT food instrument system and the Department anticipates an overlap in its use of these systems, this proposed definition clarifies the food authorization requirements for Any Brand Foods under a paper food instrument system. This definition summarizes the existing requirements for Any Brand Foods under the Department’s current paper food instrument system.
    - (B) 1.-2. The Department proposes these subsections to define Any Brand Foods under an EBT food instrument system. Pursuant to 7 Code of Federal Regulations part 246.12(a), the Department must implement EBT statewide by October 1, 2020. This proposed definition clarifies that Any Brand Foods for EBT food instruments are ones that both meet the qualifying food authorization criteria specified in a CDPH Food Category or Subcategory and are included in the Department’s APL.
  - (2) The Department proposes this subsection to clarify its use of the term Authorized Product List. Derived from the definition found on page ix of USDA’s *Operating Rules Women, Infants and Children (WIC) Electronic Benefit Transfer (EBT)* (September 2014), the Department proposes to define APL to take into consideration the manner in which the Department authorizes foods.
  - (3) The Department proposes this subsection to clarify its use of the term “Brand.”

- (4) The Department proposes to adopt a definition for the term “Brand Specific Foods,” defining this term as authorized foods in a CDPH Food Category or Subcategory that identifies authorized foods by Brand or by Brand and product name. This definition is proposed to differentiate between authorized Brand Specific Foods and authorized foods that are not identified by Brand and/or product name.
- (A)1.-2.The Department proposes this subsection to differentiate between authorized Any Brand Foods and Brand Specific Foods based on the method of food benefit issuance. This proposed subsection clarifies that under a paper food instrument system, authorized Brand Specific Foods are foods that are identified in a CDPH Food Category or Subcategory by Brand or by Brand and product name, in addition to identifying characteristics. This definition summarizes the existing requirements for Brand Specific Foods under the Department’s current paper food instrument system.
- (B)1.-3.The Department proposes to include the definition of Brand Specific Foods under an EBT food instrument system. Pursuant to 7 Code of Federal Regulations part 246.12(a), the Department must implement EBT statewide by October 1, 2020. This definition provides that authorized Brand Specific Foods for EBT food instruments are ones that are included in the Department’s APL and that are identified in a CDPH Food Category or Subcategory by Brand or by Brand and product name along with identifying characteristics.
- (5) CDPH Food Categories are identified in these regulations in the headings of W.B.R. sections 82050-83000. The Department proposes to define CDPH Food Category in these regulations to distinguish between: 1) the Department’s use of food category as a classifying system for its authorized supplemental foods, 2) USDA’s classification of supplemental food types available for states to authorize by category in the Code of Federal Regulations, and 3) the USDA *National Food Category/Subcategory Table*’s use of “category” and “subcategory” as an electronic coding classification system of WIC foods for use by states with EBT food instrument systems.
- (6) The Department proposes to adopt this subsection to define CDPH Food Subcategories as subsets of food types within a CDPH Food Category. The Department proposes to add this definition in order to further distinguish between the types of foods the Department authorizes within a CDPH Food Category and the Subcategory terminology used in USDA’s *National Food Category/Subcategory Table*.
- (7) The Department is proposing to separate this definition from former subsection (a) and re-designate it as (a)(7).
- (8) The Department is proposing to separate this definition from former subsection (c) and re-designate it as (a)(8).
- (9) The Department is proposing to adopt a definition of Price Look-Up codes due to pending EBT implementation. USDA’s *Operating Rules Women, Infants and Children (WIC) Electronic Benefit Transfer (EBT)* (September

2014) p. 38, requires the Department to establish an APL, which includes Price Look-Up codes.

- (10) The Department is proposing to separate this definition of WIC Authorized Food List from former subsection (b) and re-designate it as (a)(10). The Department is proposing to amend the definition to accommodate the pending implementation of EBT. Under an EBT system, in order to be an authorized food, a product must both meet the food authorization criteria in its CDPH Food Category or Subcategory and be included in the Department's APL.
  - (11) The Department is proposing to separate this definition of WIC Authorized Food List Shopping Guide from former subsection (d), re-designating it as (a)(11), and amending for clarity.
  - (12) The definition for the WIC Program was previously combined with the definition for Department. This proposed subsection separates these definitions from the definition of Department in former subsection (a) and re-designates them as (a)(12).
- ~~(b)-(d)~~ The Department proposes to eliminate these subsections as the content of the definitions originally designated as (b)-(d) are incorporated elsewhere in the Department's proposed changes.



# **82025 WIC Authorized Food List: Authorized Product List Submissions**

## **PROPOSED REGULATION**

- (a) Under an EBT food instrument system, both Brand Specific and Any Brand Foods must be listed by UPC or PLU in the Department's APL for authorization.
  - (1) Any Brand Food products that meet the W.B.R. Food Category authorization criteria may be submitted for inclusion in the APL at any time.
  - (2) Brand Specific Food products will be added to the APL only when the Department adopts or amends regulations relating to the Brand Specific Food Category or Subcategory, however, products for currently-authorized Brand Specific Foods may be submitted for inclusion in the APL at any time if:
    - (A) A food manufacturer introduces a new UPC for an authorized Brand Specific Food, including new UPCs resulting from Non-material Changes or UPCs for new sizes of products that are authorized by Brand and product name when a range of sizes are authorized in a CDPH Food Category or Subcategory; or
    - (B) A food manufacturer introduces a new product that meets current authorization criteria in a CDPH Food Category or Subcategory in which products are authorized only by Brand.
  - (3) In order to submit a food product for inclusion in the APL, the submitting stakeholder must:
    - (A) Provide the Department with detailed information about the product in order for the Department to make a determination about the product's eligibility for authorization. Submission elements include, but are not limited to, the following:
      - 1. Electronic image of product packaging that includes front label, back label, nutrition facts panel, ingredient listing, and UPC;
      - 2. Submitting Company Name;
      - 3. Submitting Company Contact Information;
      - 4. UPC;
      - 5. Brand Name;
      - 6. Product Name;
      - 7. Product Size;
      - 8. Applicable product characteristics, e.g.: container type, noting the presence of sweeteners, fat-level, pasteurization-status, etc.
    - (B) If a product is submitted by a food manufacturer's employee or agent, the manufacturer must notify the Department in writing of all product changes and the effective date of the changes. Examples of product

changes include, but are not limited to, changes in container size, ingredients, product name, or discontinuance of a product.

- (4) Unless a Brand Specific Food product is being authorized by a WIC Bulletin Regulation as specified in subsection (a)(2), a food product that the Department determines meets both federal and state food authorization criteria will be added to the APL within thirty business days from the date of the Department's written notification of the food product's authorization for inclusion in the APL.
- (5) The Department shall remove products from the APL when they are discontinued or if after a review of the product, the Department determines that the product no longer meets federal and/or state food authorization criteria. After the Department makes the determination, the product may be removed from the APL at any time.
- (6) Authorized fruits and vegetables that have PLUs assigned by IFPS will be automatically included by the Department in the APL. Stakeholders may contact the Department requesting the addition of IFPS PLUs if an IFPS PLU is not included in the APL.

## **AUTHORITY**

### *Federal:*

7 Code of Federal Regulations part 246.3 (b) (2017): Delegation to the State agency. The State agency is responsible for the effective and efficient administration of the Program in accordance with the requirements of this part . . . FNS guidelines; and, instructions issued under the FNS Directives Management System.

7 Code of Federal Regulations part 246.10(b)(1) (2017): State agencies may: (i) Establish criteria in addition to the minimum Federal requirements in Table 4 of paragraph (e)(12) of this section for the supplemental foods in their States.

7 Code of Federal Regulations part 246.10(b)(2) (2017): State agencies must: (i) Identify the brands of foods and package sizes that are acceptable for use in the Program in their States in accordance with the requirements of this section.

7 Code of Federal Regulations part 246.12(a) (2017): Food delivery methods.

*General* . . . By October 1, 2020, each State agency shall implement EBT statewide, unless granted an exemption under paragraph (w)(2) of this section.

### *Federal Guidelines and Instructions:*

United States Department of Agriculture *Food Package Guidance: A Guide for FNS Regional Offices, and WIC State and local agencies* (March 2016), (p. 12).

United States Department of Agriculture *Operating Rules Women, Infants and Children (WIC) Electronic Benefit Transfer (EBT)* (September 2014), (p. 38).

*State:*

Health and Safety Code section 123280, subdivision (c): In order to be in conformity with federal law and to remain in compliance with federal funding, the department shall adopt all mandatory requirements and guidelines set forth in federal law and federal regulation for the federal Special Supplemental Nutrition Program for the WIC program, including, but not limited to, the Child Nutrition Act of 1966, and the amendments thereto (Chapter 13A (commencing with section 1786) of Title 42 of the United States Code), Part 246 of Title 7 of the Code of Federal Regulations, and federal memoranda and guidance letters clarifying and interpreting those laws and regulations as the requirements for the WIC Program.

Health and Safety Code section 123290, subdivision (d): The department . . . shall . . . designate specific supplemental foods to meet the minimum nutritional requirements for recipients.

Health and Safety Code section 123302, subdivision (a)(1): Notwithstanding any other law, the department may design, implement and fund an electronic benefits transfer (EBT) system for the California Special Supplemental Food Program for Women, Infants, and Children.

Health and Safety Code section 123322, subdivisions (a)(3) and (b): (a) In order to effectively manage and administer the federal and state requirements for the vendors in the WIC Program, and remain in compliance with the conditions of federal funding, the department shall establish requirements for all of the following: . . . (3) The WIC Program authorized foods. (b) Notwithstanding any other provisions of law, including the requirement in section 123315 for enacting regulations to implement that section and section 123310, the department may, without taking regulatory action pursuant to Chapter 3.5 (commencing with section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, implement, interpret, or make specific this section by means of an action by bulletin or similar instruction.

## **STATEMENT OF REASONS**

### *82025 WIC Authorized Food List: Authorized Product List Submissions*

- (a) The Department proposes to establish this new W.B.R. section to detail the process for APL submissions. EBT food instrument systems require a product to be included in the Department's APL in order to be purchased or sold through the WIC Program. These proposed regulations specify how stakeholders, particularly food manufacturers and their representatives, may submit Any Brand and certain Brand Specific Food products for inclusion in the Department's APL.
  - (1) USDA's EBT requirements provide that under an electronic food instrument system the Department must create and maintain a file of UPCs and PLUs for all products authorized for reimbursement (i.e., the APL). The Department wants to maintain the flexibility and convenience of choice that Any Brand CDPH Food Categories and Subcategories provide to participants and vendors while complying with this requirement. In order to accomplish this goal, the Department is proposing a process to allow stakeholders to submit foods in these categories for inclusion in the APL. The Department is proposing to accept submissions of Any Brand Foods with UPCs for review for APL inclusion at any time because these foods do

not require the Department to take regulatory action if a new product that meets food authorization criteria becomes available.

- (2) The Department is proposing to add newly authorized Brand Specific Foods to the APL only when amending the regulations for a Brand Specific CDPH Food Category or Subcategory, since Brand Specific Foods are authorized and listed in W.B.R. by Brand or by Brand and product name. However, the Department is proposing to accept APL submissions for Brand Specific Food products that are already authorized in the Bulletin regulations at any time. The Department is proposing to accept these APL submissions for already authorized Brand Specific Food products in order to accommodate Non-material Changes, such as new authorized package sizes or types, and new products that are authorized only by Brand, as these may result in the creation of new eligible UPCs.
  - (A) The Department is proposing to accept submissions for review for APL inclusion at any time in Brand Specific CDPH Food Categories or Subcategories that list authorized foods by Brand and product name when a food manufacturer introduces a new UPC for an authorized Brand Specific Food. These new UPCs can be the result of Non-material Changes, such as the creation of a new UPC due to a product flavor name change from “plain” to “original.” These new UPCs may also result from a manufacturer’s introduction of a new authorized version of a Brand Specific Food listed in W.B.R. (such as a new eligible size or package type) that meets the current W.B.R. requirements for that CDPH Food Category. For example, any plain Cheerios in a 12 to 36 ounce box is authorized in the Brand Specific CDPH Breakfast Cereal Food Category. If the food manufacturer introduces a new size of plain Cheerios that falls into the authorized size range, such as 24 ounce, the new size may be submitted for inclusion in the APL at any time. This proposed subsection will provide stakeholders with a method for alerting the Department about changes to authorized Brand Specific Food products that may need to be included in the APL, which will help ease the burden of product change confusion for participants and vendors.
  - (B) For Brand Specific CDPH Food Categories or Subcategories that list authorized foods by Brand name only, the Department is proposing to accept submissions for review of products for APL inclusion at any time when the authorized Brand introduces a new product that meets the food authorization criteria for the CDPH Category or Subcategory. For example, infant fruits and vegetables products may be added to the APL at any time as long as they are marketed as an authorized Brand in that CDPH Food Category and also meet that Food category or Subcategory’s additional authorization criteria. The Department is proposing this subsection in order to provide authorized Brand’s manufacturers with the ability to submit newly created Brand Specific Food products that meet food authorization criteria in categories that list authorized foods by Brand only for

addition to the APL. This proposed submission process will help keep the Department's APL up to date.

- (3) The Department proposes to require that food product submissions for APL inclusion meet certain standards in order to help verify the authorization eligibility of products submitted for potential inclusion in the APL and to assist the Department in maintaining the accuracy of its APL.
- (A) In its *Food Package Guidance: A Guide for FNS Regional Offices, and WIC State and local agencies*, page 12, USDA specifies that "WIC SAs [State Agencies] are responsible for ensuring that the WIC foods on State-approved food lists meet minimum Federal WIC requirements." Therefore, the Department is proposing this subsection to ensure that before a product is added to the APL, the Department has the necessary information to conduct a review of the product to confirm it meets federal and state food authorization criteria.
- 1.-8. The Department is proposing to require that when a stakeholder submits a product for review, the information submitted must include the product elements necessary for the Department to verify that the product meets both federal and state food authorization criteria. Additionally, the Department is proposing to require that the submissions include sufficient information for the Department to accurately identify authorized products in the APL. These proposed regulations provide a list of information that the Department may ask for, with the list subject to change depending on the CDPH Food Category or Subcategory of the product submitted. The Department proposes to require the submission of company contact information in order to confirm that the Department has a record of the submission and a way to contact the submitter should there be need for additional information about submitted products.
- (B) The Department is proposing to include this subsection for food manufacturer/representative product change notification to the Department in order comply with USDA's *Food Package Guidance: A Guide for FNS Regional Offices, and WIC State and local agencies*, page 12, requirement that "WIC SAs [State Agencies] are responsible for ensuring that the WIC foods on State-approved food lists meet minimum Federal WIC requirements." This subsection would require that manufacturers who wish to have their foods included in the APL work with the Department to provide the WIC Program with up to date information about both material and Non-material product changes. This proposed requirement will help ensure the APL is updated to reflect changes to authorized food products in a timely fashion, thereby easing the burden that these changes may have on vendors and participants.
- (4) The Department proposes to include this provision to explain to stakeholders under which circumstances authorized food products that meet the criteria

for APL submission at any time described in (a)(1) and (a)(2)(A)-(B) will be added to APL. The Department is proposing this provision to ensure that the process for inclusion of a submitted product in the APL incorporates the USDA-required review of the product by the Department to confirm it meets both federal and state food authorization criteria. The Department is proposing to add approved products to the APL within thirty business days from the date of its written approval of a food product for inclusion in the APL because this timeframe gives the Department a reasonable amount of time to comply with its administrative duties, including mandatory reporting to USDA. A thirty business days timeframe reasonably balances the Department's needs while ensuring that food manufacturers' products are added to the APL in a timely fashion.

- (5) The Department proposes to include this provision to explain to stakeholders under which circumstances authorized food products will be deleted from the APL. Moreover, this proposed provision will allow the Department the ability to maintain the APL in compliance with federal requirements. In order to ensure that foods in the APL also meet state food authorization requirements, the Department is proposing to remove food products from the APL when they are discontinued or when a product change has affected a product's eligibility for authorization. Combined with the notification requirement in (a)(3)(B), this proposed subsection will help ensure that only food products that continue to meet federal and state food authorization criteria are included in the APL.
- (6) Although the Department will add IFPS PLUs to its APL, these proposed regulations allow stakeholders to request inclusion of an IFPS PLU for produce if it is not in the APL. This subsection is intended to offer stakeholders a method of providing input on the PLUs in the APL to help avoid problems with vendor produce transactions.