



KAREN L. SMITH, MD, MPH
Director and State Public Health Officer

State of California—Health and Human Services Agency
California Department of Public Health



EDMUND G. BROWN JR.
Governor

June 20, 2018

REGULATORY ALERT 2018-03

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 the WIC Bulletin Regulations, Article 4, to revise sections 70600, 70800, and 71100, and adopt section 70750, 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 July 6, 2018, to receive input on the proposed amendments to the WIC Vendor Authorization Criteria. If you are interested in participating in this stakeholder webinar, please send an e-mail by close of business on June 27, 2018 with the subject line reading "VAC Stakeholder RSVP" to 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 June 29, 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.



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)



Comment Period

CDPH will accept written comments regarding the adoption of the proposed action. The comment period will be open for 23 calendar days, from June 21, 2018, through July 13, 2018. Send your comments electronically to the following e-mail address:

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If this proposed action is not withdrawn, CDPH will publish its final action, including responses to the comments received, on its website no later than 120 days after the end of the comment period.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

70600 Competitive Price Criteria.

(a) Prices charged by the vendor or vendor applicant for a combination of all Market Basket items carried must not, at any time, exceed one hundred and twenty percent (120%) of the Average Overall Market Basket price established by the Department for the vendor or vendor applicant's peer group.

(b) The foods in the Market Basket may only include foods in the WIC Authorized Food List. The Market Basket shall consist of the following types of authorized foods:

- (1) Twelve (12) oz. ounce and eighteen (18) oz. ounce Breakfast Cereal
- (2) Sixteen (16) oz. ounce Cheese
- (3) 16 oz. Corn Tortillas
- (4) (3) One (1) lb. pound Bag of Dry Beans, Peas, or Lentils
- (5) (4) One (1) Dozen Large Eggs (chicken only)
- (6) (5) Sixty-four (64) oz. ounce Shelf-Stable Bottled Juice
- (7) (6) One (1) Gallon Milk (whole and lower fat)
- (8) (7) Primary contract brand Mmilk-based infant formula in powdered form currently under contract with the Department, as defined in section 82600
- (9) (8) Sixteen (16) oz. ounce – to eighteen (18) oz. ounce Peanut Butter
- (10) (9) Sixteen (16) oz. ounce Whole Wheat Bread Loaf

(c) Vendors shall submit the shelf price of their highest priced and lowest priced authorized food for each of the nine (9) 10 food types in the Market Basket offered for sale sold in that store during a fourteen (14) day period specified by the Department. For example, if the Market Basket food type is cheese, the vendor shall submit the shelf price of their highest priced cheese and the shelf price of their lowest priced cheese. Vendors shall provide these shelf prices of their Mmarket Bbasket foods every six (6) months upon request of the Department. The Department will provide a thirty (30) day notice of the request for prices and vendors must respond with their shelf prices within thirty (30) days of the date of the notice. Vendor applicants must submit prices for a fourteen (14) day period specified by the Department as part of the vendor application

process. Only regular prices may be submitted; sale or promotional prices may not be included in the price collection. If a Market Basket item had a sale or promotional price during the fourteen (14) day period, the vendor shall determine the highest and lowest prices based on the item's price prior to the sale or promotion. Vendors that stock only one (1) type of a Market Basket item, or offer same priced alternatives of that type, shall submit a single price for that item as the highest and the lowest prices.

(d) The Average Overall Market Basket price will be determined by averaging the Vendor Market Basket price of all vendors in a peer group based on the current semi-annual submissions. Vendors and vendor applicants with a Vendor Market Basket price that exceeds one hundred and twenty percent (120%) of the Average Overall Market Basket price in their peer groups shall be determined non-competitive because they do not meet the competitive price criteria.

(1) For purposes of determining whether a vendor is non-competitive and does not meet the competitive price criteria, the Vendor Market Basket price shall be defined as either:

(A) A single vendor or vendor applicant's average price of all Market Basket items submitted by the vendor or vendor applicant for the applicable period. The Department shall determine the average of the highest and lowest prices of the individual Market Basket items and add the averaged prices together to determine the Vendor Market Basket price; or

(B) The sum of the regular shelf prices of the Market Basket items observed by the Department during a monitoring or compliance visit.

(e) Vendors or vendor applicants that do not meet the competitive price criteria will be issued a written notice of their failure to meet current vendor authorization criteria and of ~~their~~ the need to correct their prices to meet the competitive price criteria. ~~The vendor~~ Vendors will be given thirty (30) days to correct their prices to meet the competitive price criteria. Vendor applicants will be given ten (10) days to correct their prices to meet the competitive price criteria.

(1) If, after thirty (30) days and within a twenty four (24) month period from the date of the notice, the Department makes a subsequent determination that a vendor's prices do not comply with the competitive price criteria, the vendor shall have demonstrated a pattern of failure to meet competitive price criteria and shall be disqualified from participation in the program for a period of one (1) year for failure to meet authorization criteria.

(2) If, after ten (10) days from the date of the notice, a vendor applicant's prices do not meet the competitive price criteria, the vendor applicant will be denied authorization for failure to meet the vendor authorization criteria for competitive price. The applicant will be permitted to submit another application after ~~in~~ no less than six (6) months from the date the Department denied authorization.

(f) A vendor who fails to submit ~~their~~ its semi-annual price information will be issued a written notice of ~~their~~ the vendor's failure to comply with vendor selection criteria. If, after thirty (30) days from the date of the written notice, the vendor has failed to submit

their its semi-annual price information, the Department will terminate the vendor from participation in the program.

70750 Food Item Quality.

(a) All WIC authorized foods offered for sale by vendors and vendor applicants on store shelves in the public area of a vendor's store where merchandise is available for purchase shall be quality food items.

(b) Quality food items are defined as:

(1) Food items, including fresh fruits or fresh vegetables, that are free from evidence of spoilage such as rotting, slime, mold, insects, or pests.

(2) Food items with "Use By" or "Use or Freeze By" dates affixed to, or printed on, the food item's packaging that are sold or offered for sale on or before the "Use By" or "Use By or Freeze By" date.

(3) Infant formula offered for sale before the date affixed to, or printed on, the infant formula packaging as mandated by 21 Code of Federal Regulations parts 106.60(c)(2)(i) and 107.20(c).

(c) A vendor or vendor applicant fails to meet the food item quality authorization criteria when, on any pre-authorization, monitoring, or compliance visit, two (2) or more different WIC authorized food items offered for sale are not quality food items. For purposes of this section, different brands, sizes, flavors, or varieties of WIC authorized foods are considered different food items. For example, a Gala apple is a different food item from a Fuji apple and a half gallon Brand A nonfat milk is a different food item from a gallon Brand A nonfat milk.

(d) Any vendor failing to meet the food item quality authorization criteria shall be issued a written notice of the vendor's failure to meet authorization criteria. If, after thirty (30) days from the date of the notice and within a twenty-four (24) month period from the date of the notice, the vendor subsequently fails to meet the food item quality authorization criteria, the vendor shall have demonstrated a pattern of failure to meet food item quality authorization criteria and shall be disqualified from participating in the program for a period of one (1) year for failure to meet authorization criteria.

(e) A vendor applicant who fails to meet the requirements of this section shall be denied authorization.

70800 Incentive Item Requirements.

(a) The Department shall not authorize, or continue authorization of, an above-50-percent vendor, or make payments to an above-50-percent vendor, which provides or indicates an intention to provide prohibited incentive items to customers.

(1) Above-50-percent vendors are those vendors that the Department has determined derive more than 50 fifty percent (50%) of their annual food sales

revenue from WIC food instruments, or vendor applicants likely expected to meet this criterion. The Department shall determine which vendors are above-50-percent vendors using the assessment process in section 50100.

(2) Evidence of intent to provide prohibited incentive items to customers includes, but is not limited to, the following:

- (A) Advertisement of the availability of the prohibited incentive items;
- (B) Promotion through signage ~~and~~ or labeling of prohibited incentive items on store shelves ~~and/or~~ on the store premises;
- (C) Verbal ~~and~~ or written accounts of prohibited incentives items being offered; or
- (D) Offerings of prohibited incentive items during compliance monitoring, as witnessed by Department staff.

(3) Pursuant to ~~7 C.F.R. § 246.12(g)(3)(iv)(B), p~~ Prohibited incentive items for these above-50-percent vendors include:

- (A) Services which result in a conflict of interest or the appearance of such conflict for the above-50-percent vendor, such as assistance with applying for WIC benefits;
- (B) Lottery tickets provided to customers at no charge or below face value;
- (C) Cash gifts in any amount for any reason;
- (D) Anything made available in a public area as a complimentary gift which may be consumed or taken without charge, unless the incentive item is an allowable incentive item for above-50-percent vendors, as defined in subsection (a)(4);
- (E) An allowable incentive item provided more than once per customer per shopping visit, regardless of the number of customers or food instruments involved, unless the incentive items had been obtained by the vendor at no cost or the total ~~value~~ documented cost to the vendor for of the multiple incentive items provided during one shopping visit; ~~have a value is of less than \$2.00~~ two dollars (\$2);
- (F) Food, merchandise, or services of greater than nominal value provided to the customer, i.e., having a documented cost to the vendor of more than two dollars (\$2);
- (G) Food, or merchandise sold to customers below cost, or services purchased by customers below fair market value;
- (H) Any kind of incentive item which incurs a liability for the WIC Program; or
- (I) Any kind of incentive item which violates any Federal, State, or local law or regulations.

(4) Allowable incentive items for above-50-percent vendors include:

- (A) One or any combination of the following WIC authorized foods; as long as the combined total ~~value~~ cost to the vendor is less than two dollars (\$2) and the food

item(s) meet the requirements for quality food item(s) as defined in section 70750:

1. ~~Prepackaged~~ WIC authorized fresh fruit and vegetables.
2. Fourteen (14) -ounce to sixteen (16) -ounce cans of any brand or variety of mature beans, mature peas, or lentils.
3. Any variety of prepackaged uncooked, plain, dried, mature beans, peas, or lentils.
4. Commercially made, prepackaged, one hundred percent (100%) corn tortillas.
5. Commercially made, prepackaged, one hundred percent (100%) whole wheat bread. Package must state "100% Whole Wheat" on the front label.
6. Five (5) ~~or six (6)~~-ounce cans of chunk light, water-packed tuna.
7. WIC authorized supplemental foods offered as part of a taste testing sample to a participant family.

(B) Minor customer courtesies of the retail food trade, such as bagging supplemental foods for the participant and assisting the participant with loading the supplemental foods into his/ or her vehicle. Minor customer courtesies do not include delivery of the supplemental foods to another location.

(b) The Department shall not authorize, or continue authorization of, a vendor that is not an above-50-percent vendor which provides incentive items solely to WIC participant customers. Incentive items provided by vendors that are not ~~not~~ above-50-percent vendors must be offered to all customers.

(1) Incentive items for vendors ~~who~~ that are not above-50-percent vendors are defined as:

- (A) Free or reduced price food or other items;
- (B) Cash or cash gift cards;
- (C) Lottery tickets;
- (D) Buy one, get one free;
- (E) Buy one, get one at a reduced price;
- (F) Free amounts added to an item by manufacturer coupons, store loyalty cards, and sales specials for supplemental foods; or
- (G) Free or reduced price services and minor customer courtesies of the retail food trade, such as bagging supplemental foods for the participant and assisting the participant with loading the supplemental foods into his/ or her vehicle.

(c) Vendors found to be out of compliance with this section on the first incidence will be issued a written notice of the vendor's failure to comply with incentive item requirements. If, after thirty (30) days from the date of the notice and within a twenty-

four (24) month period from the date of the notice, the vendor in a subsequent incident fails to comply with incentive item requirements, the vendor shall have demonstrated a pattern of failure to comply with incentive item requirements and shall be disqualified from participation in the program for a period of one (1) year for failure to meet authorization criteria.

71100 Minimum Stocking Requirements.

(a) For participation in the Program, all vendor and vendor applicant locations must, at all times, maintain on the premises of the vendor applicant or authorized location the amounts listed in subsections (b)(1)-(15) below of WIC authorized supplemental foods; WIC authorized supplemental foods stocked by vendors and vendor applicants must be quality food items, as defined in section 70750, to be counted towards the minimum stocking requirements in (b)(1)-(15), adopted as the WIC Authorized Food List and Shopping Guide by WIC Regulatory Bulletin.

(b) Inventory must be stocked on store shelves in the public area of a vendor's store where merchandise is available for purchase unless quantities of stock allowed in storage on the premises of that store location are specified in subsections (b)(10); and (12), and (13). For purposes of this regulation, inventory shall not include inventory on order that has not been delivered. Each vendor and applicant vendor must stock, at a minimum, the following:

(1) Bottled Juice and Concentrate.

- (A) Eight (8) sixty-four (64) ounce bottles of authorized shelf stable juice; or
- (B) Ten (10) eleven and a half (11.5) or twelve (12) ounce containers of authorized frozen juice concentrate.

(2) Breakfast Cereal. At least one hundred forty-four (144) total ounces of any four (4) different types or brands of authorized cereal. Of the total ounces, one (1) type must be of a twelve (12) ounce size box and one (1) type must be of an eighteen (18) ounce size box. Two (2) of the types or brands must be listed as cereals which contain fifty-one percent (51%) or more whole grain by weight in section 82100 whole grain cereals on the WIC Authorized Food List and Shopping Guide.

(3) Canned Fish. ~~Either~~

- (A) Twelve (12) five (5) ounce cans ~~or ten (10) six (6) ounce cans~~ of authorized types of tuna; or
- (B) Four (4) fifteen (15) ounce cans of authorized types of sardines; or
- (C) Twelve (12) five (5) ounce cans, ten (10) six (6) ounce cans, or four (4) fourteen and three-quarters (14.75) ounce cans of authorized types of salmon; or-
- (D) Four (4) fifteen (15) ounce cans of authorized types of mackerel.

(4) Cheese. At least four (4) one (1) pound packages of any combination of authorized types of cheese.

(5) Dry Beans, Peas, or Lentils. At least six (6) pounds of any combination of authorized dry beans, peas, or lentils, in either one (1) pound packages or six (6) pounds in bulk.

(6) Eggs. At least four (4) one (1) dozen containers of authorized types of eggs.

(7) Fresh Bananas. Eight (8) authorized fresh yellow bananas.

(8) Fruits and Vegetables.

(A) ~~Thirty-two~~ Thirty-eight dollars (~~\$32~~) (\$38) worth of a combination of:

1. ~~five~~ Five (5) authorized varieties of authorized fresh fruits; and

2. ~~five~~ Five (5) varieties of authorized fresh vegetables. ~~Dollar amount is based on the vendor shelf price.~~

(B) Any combination of at least ~~Thirty-two~~ thirty-eight dollars (~~\$32~~) (\$38) worth of a combination of three (3) varieties of authorized canned or frozen fruits and ~~(3) varieties of authorized frozen vegetables.~~ Dollar amount is based on the vendor shelf price.

(C) Any combination of at least ~~Thirty-two~~ thirty-eight dollars (~~\$32~~) (\$38) worth of a combination of three (3) authorized varieties of authorized canned or frozen vegetables canned fruits and ~~three (3) varieties of authorized~~ canned vegetables. Dollar amount is based on the vendor shelf price.

(D) Dollar amounts for fruits and vegetables in subsections (b)(8)(A)-(C) will be calculated based on the vendor shelf price.

(E) For the purposes of subsections (b)(8)(A)-(C), "variety" means distinctly different types of fruits or vegetables. For example, a variety of frozen fruits may include authorized frozen strawberries, blueberries, and raspberries. However, a variety does not include different packaging or cuts of the same type of fruit. For example, a variety of canned fruit does not include authorized canned pineapple chunks, pineapple slices, and crushed pineapple. A variety of frozen and canned fruits may include frozen blueberries and canned peaches, but does not include frozen peaches and canned peaches.

(9) Infant Cereal. Two (2) sixteen (16) ounce containers and two (2) eight (8) ounce containers of any authorized brand and type of infant cereal.

(10) Infant Formula. The ~~A~~ authorized primary contract brand milk-based infant formula in powdered form currently under contract with the Department, as defined in section 82600, in the following quantity:

(A) Twenty (20) authorized size containers of the authorized primary contract brand milk-based infant formula in powdered form currently under contract with the Department. Of the twenty (20) containers, at least ten (10) must be

on the shelf with the remainder kept in storage on the premises. For example, if the vendor stocks ~~twenty~~ ten (20) (10) containers on the shelf, no less than ~~four (4)~~ ten (10) containers must be in storage on the premises.

(11) Infant Fruits and Vegetables. ~~Either~~

(A) Fifty-six (56) four (4) ounce containers; or

(B) Sixty-four (64) three and a half (3.5) ounce containers.

~~(12) Infant Meats. Sixty-two (62) two and a half (2.5) ounce containers of authorized infant meats. Of the sixty-two (62) containers at least thirty-one (31) must be on the shelf, with the remainder kept in storage on the premises. For example, if the vendor stocks thirty-one (31) containers on the shelf, no less than thirty-one (31) containers must be in storage on the premises.~~

~~(13)~~ (12) Milk.

(A) Six (6) one (1) gallon containers of authorized fluid whole milk; and

(B) Fourteen (14) one gallon containers of any combination of two percent (2%), one percent (1%), or nonfat authorized fluid milk. Of the fourteen (14) one (1) gallon containers, at least ten (10) must be on the shelf with the remainder kept in storage on the premises. For example, if the vendor stocks ten (10) one (1) gallon containers on the shelf, no less than four (4) one (1) gallon containers must be in storage on the premises; and

(C) Two (2) half-gallon containers of any combination of two percent (2%), one percent (1%), or nonfat authorized fluid milk.

~~(14)~~ (13) Peanut Butter. At least four (4) sixteen (16) to eighteen (18) ounce containers of authorized types of peanut butter.

~~(15)~~ (14) Whole Grain. At least six (6) pounds of authorized whole grains, which must include:

(A) At least two (2) one (1) pound packages of one hundred percent (100%) whole wheat bread loaves; and any combination of four (4) pounds of:

1. (B) At least two (2) one (1) pound packages of white or yellow soft corn tortillas; ~~and~~ or

2. (C) At least two (2) one (1) pound packages or two (2) pounds of bulk oatmeal or oats; or

3. At least two (2) one (1) pound packages or two (2) pounds of bulk brown rice; or

4. At least two (2) sixteen (16) ounce packages of whole wheat pasta.

(c) A vendor who fails to meet the stocking requirements in this section at any time shall be issued a written notice of the vendor's failure to meet authorization criteria. If, after thirty (30) days from the date of the notice and within a twenty-four (24) month period from the date of the notice, the vendor subsequently fails to meet the

stocking requirements of this section, the vendor shall have demonstrated a pattern of failure to meet minimum stocking requirements and shall be disqualified from participation in the program for a period of one (1) year for failure to meet authorization criteria.

Nature of the Regulation

To become or continue as an authorized vendor, vendors or vendor applicants must meet and remain in compliance with authorization criteria throughout the agreement period. (7 C.F.R. § 246.12(g), (h)). CDPH is proposing to amend the criteria used for vendor authorization by regulatory bulletin.

In summary, the proposed regulations would: (1) remove corn tortillas from the Market Basket and specify that the contract infant formula in the Market Basket is the primary contract brand milk-based infant formula in powdered form as defined by the WIC Authorized Food List Bulletin Regulations for infant formula; (2) add new food item quality requirements to the Vendor Authorization Criteria, such that all WIC food items offered for sale by vendors and vendor applicants shall be free from spoilage, sold or offered for sale before the safety date printed on the package, and, in the case of infant formula, sold before the date printed on the packaged required by federal regulations; (3) remove the restriction that above-50-percent vendors can only offer prepackaged WIC authorized fresh fruit and vegetables as incentive items; and (4) change vendor and vendor applicant Minimum Stocking Requirements, including by increasing the dollar amount of fruits and vegetables, lowering the required number of varieties of fruits and vegetables, removing infant meats from the Minimum Stocking Requirements, and revising whole grain requirements to make corn tortillas optional and add whole wheat pasta as an option for whole grains.

Reason for the Regulation

The reasons for this amendment are included in Attachment 1 to 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 WIC Program 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 five (5) from families with eligible income are at special risk with respect to their physical and mental health by reason of inadequate nutrition, 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 USDA, Food and Nutrition Service, pursuant to 7 Code of Federal Regulations, part 246.

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

State:

The California WIC Program was established under the authority of Health and Safety Code section 123275 et seq. The regulations for CDPH WIC'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.

A handwritten signature in blue ink, appearing to read 'C. Lopez', with a long horizontal flourish extending to the right.

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

Attachment 1

Regulatory Alert 2018-03: Amendments to Sections 70600, 70800, and 71100, and Adoption of Section 70750 and Statement of Reasons

**California Special Supplemental Nutrition Program for Women, Infants, and Children
June 20, 2018**

Health and Safety Code section 123322 authorizes the California Department of Public Health to establish regulations regarding the vendor authorization criteria 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 sections 70600, 70800, and 71100, and adopt section 70750 of the WIC Vendor Authorization Criteria.

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70600 Competitive Price Criteria

PROPOSED REGULATION

(a) Prices charged by the vendor or vendor applicant for a combination of all Market Basket items carried must not, at any time, exceed one hundred and twenty percent (120%) of the Average Overall Market Basket price established by the Department for the vendor or vendor applicant's peer group.

(b) The foods in the Market Basket may only include foods in the WIC Authorized Food List. The Market Basket shall consist of the following types of authorized foods:

- (1) Twelve (12) oz. ounce and eighteen (18) oz. ounce Breakfast Cereal
- (2) Sixteen (16) oz. ounce Cheese
- (3) ~~16 oz.~~ Corn Tortillas
- (4) ~~(3) One (1) lb. pound~~ Bag of Dry Beans, Peas, or Lentils
- (5) ~~(4) One (1)~~ Dozen Large Eggs (chicken only)
- (6) ~~(5) Sixty-four (64) oz. ounce~~ Shelf-Stable Bottled Juice
- (7) ~~(6) One (1)~~ Gallon Milk (whole and lower fat)
- (8) ~~(7) Primary contract brand~~ Milk-based infant formula in powdered form currently under contract with the Department, as defined in section 82600
- (9) ~~(8) Sixteen (16) oz. ounce – to eighteen (18) oz. ounce~~ Peanut Butter
- (10) ~~(9) Sixteen (16) oz. ounce~~ Whole Wheat Bread Loaf

(c) Vendors shall submit the shelf price of their highest priced and lowest priced authorized food for each of the nine (9) ~~40~~ food types in the Market Basket offered for sale ~~in that store~~ during a fourteen (14) day period specified by the Department. For example, if the Market Basket food type is cheese, the vendor shall submit the shelf price of their highest priced cheese and the shelf price of their lowest priced cheese. Vendors shall provide these shelf prices of their Market Basket ~~foods~~ every six (6) months upon request of the Department. The Department will provide a thirty (30) day notice of the request for prices and vendors must respond with their shelf prices within thirty (30) days of the date of the notice. Vendor applicants must submit prices for a fourteen (14) day period specified by the Department as part of the vendor application process. Only regular prices may be submitted; sale or promotional prices may not be included in the price collection. If a Market Basket item had a sale or promotional price during the fourteen (14) day period, the vendor shall determine the highest and lowest prices based on the item's price prior to the sale or promotion. Vendors that stock only

one (1) type of a Market Basket item, or offer same priced alternatives of that type, shall submit a single price for that item as the highest and the lowest prices.

(d) The Average Overall Market Basket price will be determined by averaging the Vendor Market Basket price of all vendors in a peer group based on the current semi-annual submissions. Vendors and vendor applicants with a Vendor Market Basket price that exceeds one hundred and twenty percent (120%) of the Average Overall Market Basket price in their peer groups shall be determined non-competitive because they do not meet the competitive price criteria.

(1) For purposes of determining whether a vendor is non-competitive and does not meet the competitive price criteria, the Vendor Market Basket price shall be defined as either:

(A) A single vendor or vendor applicant's average price of all Market Basket items submitted by the vendor or vendor applicant for the applicable period. The Department shall determine the average of the highest and lowest prices of the individual Market Basket items and add the averaged prices together to determine the Vendor Market Basket price; or

(B) The sum of the regular shelf prices of the Market Basket items observed by the Department during a monitoring or compliance visit.

(e) Vendors or vendor applicants that do not meet the competitive price criteria will be issued a written notice of their failure to meet current vendor authorization criteria and of ~~their~~ the need to correct their prices to meet the competitive price criteria. ~~The vendor~~ Vendors will be given thirty (30) days to correct their prices to meet the competitive price criteria. Vendor applicants will be given ten (10) days to correct their prices to meet the competitive price criteria.

(1) If, after thirty (30) days and within a twenty four (24) month period from the date of the notice, the Department makes a subsequent determination that a vendor's prices do not comply with the competitive price criteria, the vendor shall have demonstrated a pattern of failure to meet competitive price criteria and shall be disqualified from participation in the program for a period of one (1) year for failure to meet authorization criteria.

(2) If, after ten (10) days from the date of the notice, a vendor applicant's prices do not meet the competitive price criteria, the vendor applicant will be denied authorization for failure to meet the vendor authorization criteria for competitive price. The applicant will be permitted to submit another application after ~~in~~ no less than six (6) months from the date the Department denied authorization.

(f) A vendor who fails to submit ~~their~~ its semi-annual price information will be issued a written notice of ~~their~~ the vendor's failure to comply with vendor selection criteria. If, after thirty (30) days from the date of the written notice, the vendor has failed to submit ~~their~~ its semi-annual price information, the Department will terminate the vendor from participation in the program.

AUTHORITY

Federal:

7 Code of Federal Regulations part 246.12(g)(1) (2018): Vendor authorization—General. The State agency must authorize an appropriate number and distribution of vendors in order to ensure the lowest practicable food prices consistent with adequate participant access to supplemental foods and to ensure effective State agency management, oversight, and review of its authorized vendors.

7 Code of Federal Regulations part 246.12(g)(4) (2018): Vendor selection criteria: competitive price. The State agency must establish a vendor peer group system and distinct competitive price criteria and allowable reimbursement levels for each peer group. The State agency must use the competitive price criteria to evaluate the prices a vendor applicant charges for supplemental foods as compared to the prices charged by other vendor applicants and authorized vendors, and must authorize vendors selected from among those that offer the program the most competitive prices. The State agency must consider a vendor applicant's shelf prices or the prices it bids for supplemental foods, which may not exceed its shelf prices. In establishing competitive price criteria and allowable reimbursement levels, the State agency must consider participant access by geographic area. The State agency must inform all vendors of the criteria for peer groups, and must inform each individual vendor of its peer group assignment.

7 Code of Federal Regulations part 246.12(g)(4)(ii) (2018): Implementing effective peer groups. The State agency's methodology for establishing a vendor peer group system must include... (B) Routine collection of vendor shelf prices at least every six months following authorization to monitor vendor compliance with paragraphs (g)(4)(i)(C), (g)(4)(ii)(C), and (g)(4)(iii) of this section and to ensure State agency policies and procedures dependent on shelf price data are efficient and effective.

7 Code of Federal Regulations part 246.12(g)(4)(iii) (2018): Subsequent price increases. The State agency must establish procedures to ensure that a vendor selected for participation in the program does not, subsequent to selection, increase prices to levels that would make the vendor ineligible for authorization.

7 Code of Federal Regulations part 246.12(h)(3)(xxv) (2018): Compliance with vendor selection criteria. The vendor must comply with the vendor selection criteria throughout the agreement period, including any changes to the criteria. Using the current vendor selection criteria, the State agency may reassess the vendor at any time during the

agreement period. The State agency will terminate the vendor agreement if the vendor fails to meet the current vendor selection criteria.

State:

Health and Safety Code section 123310, subdivision (a): The department shall establish criteria to limit the number of retail food vendors with which the department enters into agreements. The criteria, at a minimum, shall include: (a) The prices the vendor charges for foods in relation to other vendors in its peer group.

Health and Safety Code section 123322, subdivisions (a)(2), (b): The department shall establish requirements for... criteria used for vendor authorization... The department may... implement, interpret, or make specific this section by means of an action by bulletin or similar instruction.

STATEMENT OF REASONS

70600 WIC Vendor Authorization Criteria: Competitive Price Criteria

70600 (a) The Department proposes to add commas before and after the words “at any time” to provide clarity and ease of reading. In order to be consistent with other regulation text, the Department is also proposing to change the wording from “120 percent” to “one hundred twenty percent (120%).” Also for consistency, the Department is proposing to add the word “vendor” before the word “applicant’s.”

(b)(1)-(2) For consistency with other regulation text, the Department proposes to spell out all numbers listed, as well as change “oz.” to “ounce”.

(b)(3) The Department proposes to remove corn tortillas from the Market Basket to be consistent with the proposed changes to section 71100 (Minimum Stocking Requirements), which make stocking corn tortillas optional. If the proposed amendment to the minimum stocking requirements is made final, the Department could not require vendors and vendor applicants to submit shelf prices for corn tortillas for competitive price determinations. The proposed removal of corn tortillas from the Market Basket will not affect the Department’s ability to monitor vendor prices for foods on the most commonly redeemed food instruments because the Department also collects shelf price data for another item in the whole grains food category: whole wheat bread.

The Department has considered the impact of removing corn tortillas from the Market Basket on food costs by examining how the costs of foods that comprise the Market Basket correlate with the Department’s authorization of cost-competitive vendors. The Department’s analysis of 2017 competitive shelf price survey data without corn tortillas showed an insignificant impact on vendor and vendor applicant competitive price determinations. Data analysis showed that if corn tortillas were removed from the Market Basket, more than ninety-nine percent (99%) of vendors would remain competitive within their peer group. The Department believes this proposed change in the Market Basket composition will not compromise its ability to exclude vendors with

higher food costs from participating in the program, and therefore will not result in the inflation of WIC food costs.

The Department also conducted analysis on the impact of the removal corn tortillas from the Market Basket and the Maximum Allowable Department Reimbursement rate for above-50-percent (Peer Group Category A) vendors. This analysis indicated that the resulting changes to the Maximum Allowable Department Reimbursement rate will not have a significant impact on food costs and will not jeopardize cost containment.

(b)(3)-(6) With the proposed removal of corn tortillas from the Market Basket, the Department is proposing to re-designate former subsections (b)(4)-(7) as (b)(3)-(6). The Department is also proposing to spell out all numbers listed, as well as change “oz.” to “ounce,” and “lb.” to “pound,” to remain consistent with other regulation text.

(b)(7) The Department is proposing to re-designate former subsection (b)(8) as (b)(7). The proposed amendments would also require vendors and vendor applicants to collect and submit the shelf prices for only the authorized primary contract brand milk-based infant formula in powdered form, which, at the time of writing, is Mead Johnson & Company’s (Mead Johnson’s) Enfamil Infant powdered formula. This proposed amendment would ensure that the shelf price data for infant formula collected by the Department represents each vendor’s prices for the same size and kind of infant formula. Currently, the regulation does not specify the authorized milk-based formula for which a vendor must submit prices. Because the price of Enfamil Infant powdered formula is higher than the price of Enfamil Infant liquid concentrate formula, the Average Overall Market Basket price for a peer group may be skewed lower by vendors who submit prices for liquid formula.

In 2017, the infant formula contract with Mead Johnson added new contract brand milk-based infant formulas in powdered form other than the primary contract brand milk-based infant formula. However, as of April 2018, an average of approximately sixty percent (60%) of participants receiving contract brand infant formula were issued the primary contract brand milk-based infant formula in powdered form, Enfamil Infant powdered formula. Since this is the most commonly issued infant formula, as well as the only infant formula required by the Minimum Stocking Requirements, collecting vendors’ shelf prices for Enfamil Infant powdered formula will provide a more accurate comparison of vendors’ infant formula shelf prices and their competitiveness in this food category.

The Department also proposes to add a reference to section 82600 (WIC Authorized Food List: Infant Formula), to provide direct access to information that identifies the current WIC-contracted infant formula manufacturer.

(b)(8) The Department is proposing to re-designate former subsection (b)(9) as (b)(8). The Department is also proposing to spell out all numbers listed, change “oz.” to “ounce,” and change the en dash (“-”) to the word “to.”

(b)(9) The Department is proposing to re-designate former subsection (b)(10) as (b)(9). The Department is also proposing to spell out all numbers listed, as well as change “oz.” to “ounce.”

(c) With the proposed removal of corn tortillas from the Market Basket, the number of authorized food types would change from ten (10) to nine (9). The Department is proposing to change the words “sold in that store” to “offered for sale” in order to ensure that vendors submit prices for all Market Basket items available for participants to purchase with WIC food instruments rather than only those items sold within a fourteen (14) day period. To provide ease of reading and for consistency with other regulation text, the Department is proposing to change the words “highest price” to “highest priced,” change the words “provide these shelf prices” to “provide the shelf prices,” and capitalize the first letters in the word “Market Basket.”

For clarity and consistency with other regulation text, the Department proposes to change the words “stock one type of a Market Basket item” to “stock only one (1) type of Market Basket item.” For clarity and ease of reading, the Department also proposes to add commas before and after the words “or offer same priced alternatives of that type.”

(d) The Department proposes to change the word “noncompetitive” to “non-competitive” in order to remain consistent with other regulation text.

(d)(1) The Department proposes to add a comma after the words “does not meet the competitive price criteria” to provide clarity and ease of reading.

(d)(1)(A) The Department proposes to add the word “vendor” before “applicant’s” to remain consistent with other regulation text.

(e) The Department proposes to change the words “their need to correct” to “the need to correct” to provide clarity and ease of reading. For consistency with other regulation text, the Department also proposes to change “The vendor” to “Vendors” and “competitive criteria” to “competitive price criteria.”

(e)(1) The Department proposes to add commas before and after the words “thirty (30) days and within a twenty four (24) month period from the date of the notice” to provide clarity and ease of reading.

(e)(2) The Department proposes to add commas before and after the words “after ten (10) days from the date of the notice” to provide clarity and ease of reading. For greater clarity as to the time period that vendor applicants must wait before submitting another application after being denied authorization for failure to meet competitive price criteria, the Department proposes to change the words “in no less than six (6) months” to “after no less than six (6) months”; the Department also proposes to add the phrase “from the date the Department denied authorization” to clarify when this six (6) month waiting period begins.

(f) The Department proposes to add a comma between “If” and the words “after thirty (30) days from the date of the written notice” to provide clarity and ease of reading. Also to provide clarity and ease of reading, the Department proposes to change both

uses of the phrase “their semi-annual price information” to “its semi-annual price information” and change the words “their failure” to “the vendor’s failure.”

70750 Food Item Quality

PROPOSED REGULATION

(a) All WIC authorized foods offered for sale by vendors and vendor applicants on store shelves in the public area of a vendor's store where merchandise is available for purchase shall be quality food items.

(b) Quality food items are defined as:

(1) Food items, including fresh fruits or fresh vegetables, that are free from evidence of spoilage such as rotting, slime, mold, insects, or pests.

(2) Food items with "Use By" or "Use or Freeze By" dates affixed to, or printed on, the food item's packaging that are sold or offered for sale on or before the "Use By" or "Use By or Freeze By" date.

(3) Infant formula offered for sale before the date affixed to, or printed on, the infant formula packaging as mandated by 21 Code of Federal Regulations parts 106.60(c)(2)(i) and 107.20(c).

(c) A vendor or vendor applicant fails to meet the food item quality authorization criteria when, on any pre-authorization, monitoring, or compliance visit, two (2) or more different WIC authorized food items offered for sale are not quality food items. For purposes of this section, different brands, sizes, flavors, or varieties of WIC authorized foods are considered different food items. For example, a Gala apple is a different food item from a Fuji apple and a half gallon Brand A nonfat milk is a different food item from a gallon Brand A nonfat milk.

(d) Any vendor failing to meet the food item quality authorization criteria shall be issued a written notice of the vendor's failure to meet authorization criteria. If, after thirty (30) days from the date of the notice and within a twenty-four (24) month period from the date of the notice, the vendor subsequently fails to meet the food item quality authorization criteria, the vendor shall have demonstrated a pattern of failure to meet food item quality authorization criteria and shall be disqualified from participating in the program for a period of one (1) year for failure to meet authorization criteria.

(e) A vendor applicant who fails to meet the requirements of this section shall be denied authorization.

AUTHORITY

Federal:

21 Code of Federal Regulations part 106.60(c)(2)(i) (2018): (2) Where the containers are not the same infant formula product or do not all bear the same code established under §106.80, the packaging label shall: (i) Include the product name of each product, the name of the manufacturer, distributor, or shipper of each product, the code established under §106.80 for each product, and a “use by” date that is no later than the “use by” date of the container exhibiting the closest “use by” date applied to satisfy the requirement of §107.20(c) of this chapter.

21 Code of Federal Regulations part 107.20(c) (2018): In addition to the applicable labeling requirements in parts 101 and 105 of this chapter, the product label shall bear:.. A "Use by ____" date, the blank to be filled in with the month and year selected by the manufacturer, packer, or distributor of the infant formula on the basis of tests or other information showing that the infant formula, until that date, under the conditions of handling, storage, preparation, and use prescribed by label directions, will: (1) when consumed, contain not less than the quantity of each nutrient, as set forth on its label; and (2) otherwise be of an acceptable quality (e.g., pass through an ordinary bottle nipple).

7 Code of Federal Regulations part 246.12(g)(1) (2018): *Retail food delivery systems: Vendor authorization—General*. The State agency must authorize an appropriate number and distribution of vendors in order to ensure the lowest practicable food prices consistent with adequate participant access to supplemental foods and to ensure effective State agency management, oversight, and review of its authorized vendors.

7 Code of Federal Regulations part 246.12(g)(3) (2018): *Vendor selection criteria*. The State agency must develop and implement criteria to select stores for authorization.

7 Code of Federal Regulations part 246.12(h)(3)(xxv) (2018): *Compliance with vendor selection criteria*. The vendor must comply with the vendor selection criteria throughout the agreement period, including any changes to the criteria. Using the current vendor selection criteria, the State agency may reassess a vendor at any time during the agreement period. The State agency will terminate the vendor agreement if the vendor fails to meet the current vendor selection criteria.

State:

Health and Safety Code section 113980: All food shall be manufactured, produced, prepared, compounded, packed, stored, transported, kept for sale, and served so as to be pure and free from adulteration and spoilage; shall have been obtained from approved sources; shall be protected from dirt, vermin, unnecessary handling, droplet contamination, overhead leakage, or other environmental sources of contamination; shall otherwise be fully fit for human consumption; and shall conform to the applicable provisions of the Sherman Food, Drug, and Cosmetic Law.

Health and Safety Code section 114094.5, subdivision (a): A retail food facility shall not sell or offer for sale after the “use by” date, infant formula or baby food that is required to have this date on its packaging pursuant to the federal act, as defined in Section 109930, and federal regulations adopted pursuant to the federal act, including, but not limited to, Section 107.20 of Title 21 of the Code of Federal Regulations.

Health and Safety Code section 123322, subdivisions (a)(2), (b): [T]he department shall establish requirements for... criteria used for vendor authorization.... [T]he department may... implement, interpret, or make specific this section by means of an action by bulletin or similar instruction.

STATEMENT OF REASONS

70750 WIC Vendor Authorization Criteria: Food Item Quality

(a) The Department is proposing to require that all WIC authorized foods offered for sale by vendors and vendor applicants be quality food items. This requirement is intended to ensure that WIC Program dollars are not used to purchase spoiled or outdated food items and that WIC authorized foods sold to participants are safe for consumption and provide the intended nutritional benefit.

The Department is also proposing that the food item quality requirements would apply only to WIC authorized foods offered for sale on the shelves in the public area of a vendor’s store where merchandise is available for purchase, i.e., the same area where WIC participants find and select WIC authorized food items; this proposal is consistent with vendor Minimum Stocking Requirements in section 71100, subsection (b). In order to allow vendors the opportunity to dispose of outdated or spoiled foods, subsection (a) would not apply to those WIC authorized foods that have been removed from the shelves in the public area of the vendor’s or vendor applicant’s store.

(b) This proposed subsection defines quality food items for WIC authorized food items.

(b)(1) In order to ensure that authorized vendors provide WIC participants with access to food items that are safe for consumption, the proposed subsection (b)(1) defines the first category of quality food items as food items that are free from rotting, slime, mold, insects, or pests.

(b)(2) This subsection also defines “quality food items” as dated food items that are sold or offered for sale on or before the “Use By” or “Use By or Freeze By” date affixed to or printed on the item’s packaging.

In 2017, the California State Legislature passed, and the Governor signed, Assembly Bill 954, which encourages the use of uniform terms on food product labels to communicate quality dates and safety dates. Safety dates are the “date on a label affixed to the packaging or container of food that communicates to consumers that the food should be consumed or frozen, if appropriate, by the date listed on the package that applies to perishable products with potential safety implications over time.” (Food & Agr. Code § 82000, subd. (b).) Food and Agriculture Code section 82001 identifies the

“Use by” or “Use by or Freeze by” labels as indicating the safety date of a product. (Food & Agr. Code § 82001, subd. (a)(2).) The Department proposes to incorporate this new labeling standard in its definition of quality food items.

(b)(3) The Department proposes to add this subsection to prohibit vendors from selling WIC authorized brands of infant formula after the date stamped, affixed to, or printed on the infant formula packaging. Federal regulation requires that a date is included on infant formula packaging followed by a month and year selected by the manufacturer, packer, or distributor of the infant formula. (21 C.F.R. § 107.20(c).) The date affixed to infant formula is the date that the infant formula, if handled, stored, prepared, and used according to the label directions, will (1) contain not less than the quantity of each nutrient, as set forth on its label, and (2) otherwise be of an acceptable quality (e.g., pass through an ordinary bottle nipple). The Department is proposing to include this requirement in its vendor authorization criteria in order to ensure that vendors offer WIC participants only infant formula that is safe for consumption and provides the intended nutritional benefit.

(c) The Department is proposing that at least two (2) different food items must fail to meet food item quality standards before a vendor or vendor applicant would fail to meet food item quality authorization criteria. The Department is proposing to require that at least two (2) different food items stocked fail to meet food item quality standards in recognition of potential factors outside the vendor’s control that might cause unpredictable rates of spoilage. For example, in the case of fresh fruits and vegetables, a wholesaler could pack or ship ethylene-sensitive produce adjacent to ethylene-producing produce and thereby increase the rate of spoilage without the vendor’s knowledge. In proposing a two (2) item requirement, the Department intends to ensure that participants are offered only those foods that are safe for consumption, while ensuring that WIC authorized vendors and vendor applicants actively rotate, monitor, and re-stock WIC authorized items, including perishable food items and items with safety dates. If a vendor is offering for sale two (2) or more different food items which are not quality food items, this is an indication that the vendor or vendor applicant has not implemented adequate food safety or other quality control practices for WIC authorized food items.

(d) The Department has determined that thirty (30) days provides sufficient time for vendors participating in the program to correct any violations of the food item quality criteria. A twenty-four (24) month period for assessing patterns of non-compliance with vendor authorization criteria was chosen because the Department determined that it is a fair and reasonable timeframe in which to evaluate whether a vendor has displayed a pattern of failing to meet the food item quality authorization criteria.

(e) Proposed subsection (e) would deny authorization to a vendor applicant that fails to meet the food item quality authorization criteria. Pursuant to 7 Code of Federal Regulations part 246.12(g)(3) and WIC Bulletin Regulations section 70000(c), the Department must deny authorization to vendor applicants who do not meet the vendor authorization criteria.

70800 Incentive Item Requirements

PROPOSED REGULATION

(a) The Department shall not authorize, or continue authorization of, an above-50-percent vendor, or make payments to an above-50-percent vendor, which provides or indicates an intention to provide prohibited incentive items to customers.

(1) Above-50-percent vendors are those vendors that the Department has determined derive more than ~~50~~ fifty percent (50%) of their annual food sales revenue from WIC food instruments, or vendor applicants ~~likely~~ expected to meet this criterion. The Department shall determine which vendors are above-50-percent vendors using the assessment process in section 50100.

(2) Evidence of intent to provide prohibited incentive items to customers includes, but is not limited to, the following:

- (A) Advertisement of the availability of the prohibited incentive items;
- (B) Promotion through signage ~~and~~ or labeling of prohibited incentive items on store shelves ~~and/or~~ on the store premises;
- (C) Verbal ~~and~~ or written accounts of prohibited incentives items being offered; or
- (D) Offerings of prohibited incentive items during compliance monitoring, as witnessed by Department staff.

(3) ~~Pursuant to 7 C.F.R. § 246.12(g)(3)(iv)(B), p~~ Prohibited incentive items for these above-50-percent vendors include:

- (A) Services which result in a conflict of interest or the appearance of such conflict for the above-50-percent vendor, such as assistance with applying for WIC benefits;
- (B) Lottery tickets provided to customers at no charge or below face value;
- (C) Cash gifts in any amount for any reason;
- (D) Anything made available in a public area as a complimentary gift which may be consumed or taken without charge, unless the incentive item is an allowable incentive item for above-50-percent vendors, as defined in subsection (a)(4);
- (E) An allowable incentive item provided more than once per customer per shopping visit, regardless of the number of customers or food instruments involved, unless the incentive items had been obtained by the vendor at no cost or the total value documented cost to the vendor for ~~of~~ the multiple incentive

items provided during one shopping visit; ~~have a value of~~ is less than \$2.00 two dollars (\$2);

(F) Food, merchandise, or services of greater than nominal value provided to the customer, i.e., having a documented cost to the vendor of more than two dollars (\$2);

(G) Food, or merchandise sold to customers below cost, or services purchased by customers below fair market value;

(H) Any kind of incentive item which incurs a liability for the WIC Program; or

(I) Any kind of incentive item which violates any Federal, State, or local law or regulations.

(4) Allowable incentive items for above-50-percent vendors include:

(A) One or any combination of the following WIC authorized foods; as long as the combined total ~~value~~ cost to the vendor is less than two dollars (\$2) and the food item(s) meet the requirements for quality food item(s) as defined in section 70750:

1. ~~Prepackaged~~ WIC authorized fresh fruit and vegetables.
2. Fourteen (14) -ounce to sixteen (16) -ounce cans of any brand or variety of mature beans, mature peas, or lentils.
3. Any variety of prepackaged uncooked, plain, dried, mature beans, peas, or lentils.
4. Commercially made, prepackaged, one hundred percent (100%) corn tortillas.
5. Commercially made, prepackaged, one hundred percent (100%) whole wheat bread. Package must state "100% Whole Wheat" on the front label.
6. Five (5) ~~or six (6)~~-ounce cans of chunk light, water-packed tuna.
7. WIC authorized supplemental foods offered as part of a taste testing sample to a participant family.

(B) Minor customer courtesies of the retail food trade, such as bagging supplemental foods for the participant and assisting the participant with loading the supplemental foods into his/ or her vehicle. Minor customer courtesies do not include delivery of the supplemental foods to another location.

(b) The Department shall not authorize, or continue authorization of, a vendor that is not an above-50-percent vendor which provides incentive items solely to WIC participant

customers. Incentive items provided by vendors that are not ~~non~~ above-50-percent vendors must be offered to all customers.

(1) Incentive items for vendors ~~who~~ that are not above-50-percent vendors are defined as:

- (A) Free or reduced price food or other items;
- (B) Cash or cash gift cards;
- (C) Lottery tickets;
- (D) Buy one, get one free;
- (E) Buy one, get one at a reduced price;
- (F) Free amounts added to an item by manufacturer coupons, store loyalty cards, and sales specials for supplemental foods; or
- (G) Free or reduced price services and minor customer courtesies of the retail food trade, such as bagging supplemental foods for the participant and assisting the participant with loading the supplemental foods into his/ or her vehicle.

(c) Vendors found to be out of compliance with this section on the first incidence will be issued a written notice of the vendor's failure to comply with incentive item requirements. If, after thirty (30) days from the date of the notice and within a twenty-four (24) month period from the date of the notice, the vendor in a subsequent incident fails to comply with incentive item requirements, the vendor shall have demonstrated a pattern of failure to comply with incentive item requirements and shall be disqualified from participation in the program for a period of one (1) year for failure to meet authorization criteria.

AUTHORITY

Federal:

7 Code of Federal Regulations part 246.12(g)(3)(iv) (2018): Provision of incentive items.
The State agency may not authorize or continue the authorization of an above-50-percent vendor, or make payments to an above-50-percent vendor, which provides or indicates an intention to provide prohibited incentive items to customers...

(A) The State agency may approve any of the following incentive items to be provided by above-50-percent vendors to customers, at the discretion of the State agency:

- (1) Food, merchandise, or services obtained at no cost to the vendor, subject to documentation;

- (2) Food, merchandise, or services of nominal value, i.e., having a per item cost of less than \$2, subject to documentation;
- (3) Food sales and specials which involve no cost or less than \$2 in cost to the vendor for the food items involved, subject to documentation, and do not result in a charge to a WIC food instrument for foods in excess of the foods listed on the food instrument;
- (4) Minimal customary courtesies of the retail food trade, such as helping the customer to obtain an item from a shelf or from behind a counter, bagging food for the customer, and assisting the customer with loading the food into a vehicle.

7 Code of Federal Regulations part 246.12(h)(3)(iii) (2018): Treatment of participants, parents/caretakers, and proxies. The vendor must offer program participants, parents or caretakers of infant o[r] child participants, and proxies the same courtesies offered to other customers.

7 Code of Federal Regulations part 246.12(h)(8)(iii) (2018): Allowable and prohibited incentive items for above-50-percent vendors. (iii) The State agency must define prohibited incentive items.

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... The department may adopt these requirements and guidelines by bulletin or similar instruction.

Health and Safety Code section 123310: The department shall establish criteria to limit the number of retail vendors with which the department enters into agreements.

Health and Safety Code section 123322, subdivisions (a)(2), (b): [T]he department shall establish requirements for... criteria used for vendor authorization... [T]he department may... implement, interpret, or make specific this section by means of an action by bulletin or similar instruction.

STATEMENT OF REASONS

70800 WIC Vendor Authorization Criteria: Incentive Item Requirements

(a) The Department is proposing to add commas before and after the words “or continue authorization of” for clarity and ease of reading.

(a)(1) The proposed amendment clarifies that the category of above-50-percent (A-50) vendors means those vendors that the Department has determined derive more than fifty percent (50%) of their annual food sales revenue from WIC food instruments, or

vendor applicants likely expected to meet this criterion. The Department shall make this determination using the assessment process in section 50100. The Department has also changed the word “likely” to “expected” to align the requirements in this section with Section 50100(a). In order to be consistent with other regulation text, the Department is also proposing to change the words “50 percent” to “fifty percent (50%).”

(a)(2) The Department is proposing to add the words “but is not limited to” to permit the introduction of additional evidence of a vendor’s intent to provide prohibited incentive items when encountered during a monitoring or compliance visit.

(a)(2)(B) The Department is proposing to replace the word “and” with “or” to specify that either of the examples listed could be used by the Department to show evidence of intent to provide prohibited incentive items to customers. For clarity and easy of reading, the Department is also proposing to replace the phrase “and/or” with “or.”

(a)(2)(C) The Department is proposing to replace the word “and” with “or” to specify that either of the examples listed could be used by the Department to show evidence of intent to provide prohibited incentive items to customers.

(a)(2)(D) The Department is proposing a minor grammatical change which will not alter the substance of the regulation language by changing the word “Offering” to “Offers of.”

(a)(3) The Department is proposing to eliminate the reference to the federal regulation regarding prohibited incentive items for above-50-percent vendors and to replace the term “these vendors” with “above-50-percent” vendors to prevent any ambiguity or need for cross references.

(a)(3)(D) The Department is proposing to add the words “unless the incentive item is an allowable incentive item for above-50-percent vendors, as defined in subsection (a)(4)” to the end of subsection (a)(3)(D) to clarify that items made available in a public area, including complimentary gifts which may be consumed or taken without charge, will not be considered prohibited incentive items for above-50-percent vendors if they meet the definition of allowable incentive items for above-50-percent vendors under subsection (b)(4).

(a)(3)(E) The Department is proposing to replace the term “value” in this section with “documented cost to the vendor.” The Department is proposing this amendment because the term “value” could be subject to a number of interpretations, including the retail cost, the wholesale price, or the fair market value of the item. The proposed amendment will bring the Department’s prohibited incentive item cost requirement in line with 7 Code of Federal Regulations part 246.12(g)(3)(iv)(A)(3) and (g)(3)(iv)(B)(5). For clarity and consistency with other regulation text, the Department is also proposing to change the words “of multiple incentive items” to “for the multiple incentive items,” remove the semi-colon, change the words “have a dollar value of less than” to “is less than,” and change the words “\$2.00” to “two dollars (\$2).”

(a)(3)(F) The Department is proposing to amend this subsection to better align with the requirements in 7 Code of Federal Regulations part 246.12(g)(3)(iv)(A)(2), clarifying

that, as set forth in federal regulation, “nominal value” means a cost to the vendor of less than two dollars (\$2). As a result, food, merchandise, or services of greater than nominal value have a cost of more than two dollars (\$2).

(a)(3)(G) The Department is proposing to remove the comma after the word “Food” and add the word “or” to clarify that this subsection prohibits A-50 vendors from offering food sold to customers below cost as incentive items, as required by 7 Code of Federal Regulations part 246.12(g)(3)(iv)(A)(1).

(a)(4)(A) The Department is proposing to limit incentive item(s) provided by A-50 vendors to items, or a combination of items, which cost the vendor no more than two dollars (\$2). The existing regulation requires that incentive items provided by A-50 vendors be of a “combined total value” of no more than two dollars (\$2). The Department is proposing this amendment because the term “value” could be subject to a number of interpretations, including the retail cost, the wholesale price, or the fair market value of the item. The proposed amendment will bring the Department’s incentive item cost requirement in line with 7 Code of Federal Regulations part 246.12(g)(3)(iv)(A)(3).

The Department is also proposing to require all incentive food items provided to participants meet the requirements for quality food items in section 70750. Section 70750 is intended to ensure that WIC participants have access to food items that provide the intended nutritional benefit and are safe for consumption. This proposed amendment will make the food quality requirements for allowable incentive items consistent with food quality requirements for WIC authorized food items. Incentive food items, which may assist vendors with attracting WIC participants as customers, should offer optimal nutritional value to participants in the same manner as other authorized food items. Incentive items should also be safe for consumption and free from evidence of spoilage such as rotting, slime, mold, insects, or pests.

(a)(4)(A)1. The Department is proposing to eliminate the requirement that WIC authorized fresh fruits and vegetables offered as incentive items must be prepackaged. The proposed amendment would allow A-50 vendors to offer any authorized fresh fruits and vegetables to participants as incentives. Removal of the “prepackaged” requirement for incentive items would allow A-50 vendors to offer WIC participants a greater range of fresh fruits and vegetables as incentive items. This flexibility allows vendors to offer incentive items that may better reflect WIC participant preference and encourage increased consumption of healthy foods.

(a)(4)(A)2. For consistency with other regulation text, the Department is proposing to remove the hyphens that precede each use of the word “ounce” in this subsection.

(a)(4)(A)4. The Department is proposing to change the wording from “100 percent” to “one hundred percent (100%)” to remain consistent with other regulation text.

(a)(4)(A)5. The Department is proposing to change the wording from “100 percent” to “one hundred percent (100%)” to remain consistent with other regulation text.

(a)(4)(A)6. The Department is proposing to eliminate six (6) ounce cans of tuna as an option for incentive items because the only WIC authorized cans of tuna currently available to participants are five (5) ounce cans. In response to the canned tuna industry's transition from six (6) ounce cans to five (5) ounce cans, WIC Regulatory Bulletin 2015-02 removed six (6) ounce cans of tuna from the list of authorized WIC foods. This proposed amendment makes this section consistent with the WIC Authorized Food List. For consistency with other regulation text, the Department is also proposing to remove the hyphens that precede each use of the word "ounce" in this subsection.

(a)(4)(B) The Department is proposing a minor grammatical edit which will not alter the substance of the regulation language by changing "his/her" to "his or her."

(b) The Department is proposing to add commas before and after the words "or continue authorization of" for clarity and ease of reading. The Department is also proposing to change the wording "non above-50-percent vendors" to "vendors that are not above-50-percent vendors" to remain consistent with other regulation text.

(b)(1) The Department is proposing to change the word "who" to "that" to remain consistent with other regulation text. The Department is also proposing to add a colon at the end of this subsection in order to clarify that subsections (A)-(G) are to follow.

(b)(1)(G) The Department is proposing a minor grammatical edit which will not alter the substance of the regulation language by changing "his/her" to "his or her."

(c) The Department is proposing to add commas before and after the words "after thirty (30) days from the date of the notice and within a twenty-four (24) month period from the date of the notice" for clarity and ease of reading.

71100 Minimum Stocking Requirements

PROPOSED REGULATION

(a) For participation in the Program, all vendor and vendor applicant locations must, at all times, maintain on the premises of the vendor applicant or authorized location the amounts listed in subsections (b)(1)-(15) below of WIC authorized supplemental foods. WIC authorized supplemental foods stocked by vendors and vendor applicants must be quality food items, as defined in section 70750, to be counted towards the minimum stocking requirements in (b)(1)-(15), adopted as the WIC Authorized Food List and Shopping Guide by WIC Regulatory Bulletin.

(b) Inventory must be stocked on store shelves in the public area of a vendor's store where merchandise is available for purchase unless quantities of stock allowed in storage on the premises of that store location are specified in subsections (b)(10), and (12), and (13). For purposes of this regulation, inventory shall not include inventory on order that has not been delivered. Each vendor and applicant vendor must stock, at a minimum, the following:

(1) Bottled Juice and Concentrate.

(A) Eight (8) sixty-four (64) ounce bottles of authorized shelf stable juice; or

(B) Ten (10) eleven and a half (11.5) or twelve (12) ounce containers of authorized frozen juice concentrate.

(2) Breakfast Cereal. At least one hundred forty-four (144) total ounces of any four (4) different types or brands of authorized cereal. Of the total ounces, one (1) type must be of a twelve (12) ounce size box and one (1) type must be of an eighteen (18) ounce size box. Two (2) of the types or brands must be listed as cereals which contain fifty-one percent (51%) or more whole grain by weight in section 82100 whole grain cereals on the WIC Authorized Food List and Shopping Guide.

(3) Canned Fish. ~~Either~~

(A) Twelve (12) five (5) ounce cans ~~or ten (10) six (6) ounce cans~~ of authorized types of tuna; or

(B) Four (4) fifteen (15) ounce cans of authorized types of sardines; or

(C) Twelve (12) five (5) ounce cans, ten (10) six (6) ounce cans, or four (4) fourteen and three-quarters (14.75) ounce cans of authorized types of salmon; or-

(D) Four (4) fifteen (15) ounce cans of authorized types of mackerel.

(4) Cheese. At least four (4) one (1) pound packages of any combination of authorized types of cheese.

(5) Dry Beans, Peas, or Lentils. At least six (6) pounds of any combination of authorized dry beans, peas, or lentils, in either one (1) pound packages or six (6) pounds in bulk.

(6) Eggs. At least four (4) one (1) dozen containers of authorized types of eggs.

(7) Fresh Bananas. Eight (8) authorized fresh yellow bananas.

(8) Fruits and Vegetables.

(A) ~~Thirty-two~~ Thirty-eight dollars (~~\$32~~) (\$38) worth of a combination of:

1. five ~~Five~~ (5) authorized varieties of authorized fresh fruits; and

2. five ~~Five~~ (5) varieties of authorized fresh vegetables. ~~Dollar amount is based on the vendor shelf price.~~

(B) ~~Any combination of at least Thirty-two~~ thirty-eight dollars (~~\$32~~) (\$38) worth of ~~a combination of three (3) varieties of authorized canned or frozen fruits and (3) varieties of authorized frozen vegetables.~~ Dollar amount is based on the vendor shelf price.

(C) ~~Any combination of at least Thirty-two~~ thirty-eight dollars (~~\$32~~) (\$38) worth of ~~a combination of three (3) authorized varieties of authorized canned or frozen vegetables~~ canned fruits and three (3) varieties of authorized canned ~~vegetables.~~ Dollar amount is based on the vendor shelf price.

(D) Dollar amounts for fruits and vegetables in subsections (b)(8)(A)-(C) will be calculated based on the vendor shelf price.

(E) For the purposes of subsections (b)(8)(A)-(C), "variety" means distinctly different types of fruits or vegetables. For example, a variety of frozen fruits may include authorized frozen strawberries, blueberries, and raspberries. However, a variety does not include different packaging or cuts of the same type of fruit. For example, a variety of canned fruit does not include authorized canned pineapple chunks, pineapple slices, and crushed pineapple. A variety of frozen and canned fruits may include frozen blueberries and canned peaches, but does not include frozen peaches and canned peaches.

(9) Infant Cereal. Two (2) sixteen (16) ounce containers and two (2) eight (8) ounce containers of any authorized brand and type of infant cereal.

(10) Infant Formula. The A~~authorized~~ primary contract brand milk-based infant formula in powdered form currently under contract with the Department, as defined in section 82600, in the following quantity:

(A) Twenty (20) authorized size containers of the authorized primary contract brand milk-based infant formula in powdered form currently under contract with the Department. Of the twenty (20) containers, at least ten (10) must be on the shelf with the remainder kept in storage on the premises. For example,

if the vendor stocks ~~twenty ten (20)~~ (10) containers on the shelf, no less than ~~four (4)~~ ten (10) containers must be in storage on the premises.

(11) Infant Fruits and Vegetables. ~~Either~~

(A) ~~Fifty-six (56)~~ four (4) ounce containers; or

(B) ~~Sixty-four (64)~~ three and a half (3.5) ounce containers.

~~(12) Infant Meats. Sixty-two (62) two and a half (2.5) ounce containers of authorized infant meats. Of the sixty-two (62) containers at least thirty-one (31) must be on the shelf, with the remainder kept in storage on the premises. For example, if the vendor stocks thirty-one (31) containers on the shelf, no less than thirty-one (31) containers must be in storage on the premises.~~

~~(13)~~ (12) Milk.

(A) ~~Six (6)~~ one (1) gallon containers of authorized fluid whole milk; and

(B) ~~Fourteen (14)~~ one (1) gallon containers of any combination of two percent (2%), one percent (1%), or nonfat authorized fluid milk. Of the ~~fourteen (14)~~ one (1) gallon containers, at least ~~ten (10)~~ four (4) must be on the shelf with the remainder kept in storage on the premises. For example, if the vendor stocks ~~ten (10)~~ one (1) gallon containers on the shelf, no less than ~~four (4)~~ one (1) gallon containers must be in storage on the premises; and

(C) ~~Two (2)~~ half-gallon containers of any combination of two percent (2%), one percent (1%), or nonfat authorized fluid milk.

~~(14)~~ (13) Peanut Butter. At least ~~four (4)~~ sixteen (16) to eighteen (18) ounce containers of authorized types of peanut butter.

~~(15)~~ (14) Whole Grain. At least six (6) pounds of authorized whole grains, which must include:

(A) At least ~~two (2)~~ one (1) pound packages of one hundred percent (100%) whole wheat bread loaves; and any combination of four (4) pounds of:

1. ~~(B)~~ At least two (2) one (1) pound packages of white or yellow soft corn tortillas; ~~and~~ or

2. ~~(C)~~ At least two (2) one (1) pound packages or two (2) pounds of bulk oatmeal or oats; or

3. At least two (2) one (1) pound packages or two (2) pounds of bulk brown rice; or

4. At least two (2) sixteen (16) ounce packages of whole wheat pasta.

(c) A vendor who fails to meet the stocking requirements in this section at any time shall be issued a written notice of the vendor's failure to meet authorization criteria. If, after thirty (30) days from the date of the notice and within a twenty-four (24) month period from the date of the notice, the vendor subsequently fails to meet the

stocking requirements of this section, the vendor shall have demonstrated a pattern of failure to meet minimum stocking requirements and shall be disqualified from participation in the program for a period of one (1) year for failure to meet authorization criteria.

AUTHORITY

Federal:

7 Code of Federal Regulations part 246.12(g)(3)(i) (2018): *Minimum variety and quantity of supplemental foods.* The State agency must establish minimum requirements for the variety and quantity of supplemental foods that a vendor applicant must stock to be authorized. These requirements include that the vendor stock at least two different fruits, two different vegetables, and at least one whole grain cereal authorized by the State agency. The State agency may not authorize a vendor applicant unless it determines that the vendor applicant meets these minimums.

State:

Health and Safety Code section 123310, subdivisions (b), (c): The department, under any program established pursuant to this article, shall authorize retail food vendors, by written agreement, to accept nutrition coupons and reimbursement according to the system developed by the department. The department shall authorize an appropriate number and distribution of food vendors in order to ensure adequate participant convenience and access and to ensure that state or local officials can effectively manage review of authorized food vendors in their jurisdictions. The department shall establish criteria to limit the number of retail food vendors with which the department enters into agreements. The criteria, at a minimum, shall include:... (b) [t]he ability of the department to ensure that authorized supplemental foods will be provided through in-store compliance purchases; (c) [t]he adequacy of the shelf stock of the authorized supplemental foods.

Health and Safety Code section 123322, subdivisions (a)(2), (b): The department shall establish requirements for... criteria used for vendor authorization... The department may... implement, interpret, or make specific this section by means of an action by bulletin or similar instruction.

STATEMENT OF REASONS

71100 WIC Vendor Authorization Criteria: Minimum Stocking Requirements

(a) The Department is proposing to amend this section to reflect the enacted amendment of WIC Bulletin Regulation section 82000 (WIC Regulatory Bulletin 2015-02), in which the list of foods which meet the criteria in sections 82050–83000 replaced the WIC Authorized Food List Shopping Guide as the list of authorized

supplemental foods. Additionally, the Department is proposing to add commas before and after the words “at all times” to provide clarity and ease of reading.

The Department is also proposing to amend this section to specify that it will not count foods that do not meet the food item quality requirements, as proposed in section 70750, toward minimum stocking requirements. Authorized supplemental foods offered for sale beyond their “Use by” or “Use or Freeze by” dates, or with evidence of spoilage, may not be used by vendors to meet the minimum stocking requirements. This proposed amendment is intended to ensure that WIC funds are not used to purchase expired foods and that the foods sold to participants are safe for consumption and provide the intended nutritional benefit.

(b) The Department is proposing to change the description of where inventory must be stocked from “on store shelves in the public area available for purchase” to “on store shelves in the public area of a vendor’s store where merchandise is available for purchase.” This proposed change ensures consistency between this section and proposed section 70750. This change also makes clear that the Department shall assess whether a vendor meets minimum stocking requirements by counting the supplemental foods stocked on store shelves in the public area of a vendor’s store where merchandise is available for purchase, i.e., the area where WIC participants can find and select WIC-authorized food items.

(b)(1)(A) The Department is proposing to give vendors and vendor applicants the flexibility to meet minimum stocking requirements for bottled juice and concentrate with either shelf stable or frozen juice concentrate. The Department is proposing to add “; or” at the end of subsection (b)(1)(A) to reflect this change.

When enacting WIC Regulatory Bulletin 2013-01, the Department sought to ensure participants were offered a range of juice options by including both shelf stable juice and frozen juice concentrate in the minimum stocking requirements. One stakeholder comment submitted in response to the 2013 regulation indicated that issues with the taste of local water made frozen concentrate an unpopular juice option. While the Department does not have the ability to adjust minimum stocking requirements based on individual community preferences, it has monitored stakeholder feedback regarding the 2013 minimum stocking requirements.

Vendor stakeholder feedback since 2013 indicates that WIC participants’ purchasing patterns favor shelf stable juice over frozen juice concentrate. In response to this feedback, the Department sought to reevaluate the frozen juice stocking requirement. Published reports describing consumer preference for shelf stable juice over frozen juice concentrate substantiate vendor concerns, with national trends showing an overall decrease in consumer demand for frozen juice concentrate as more convenient juice products have become available. For this reason, the Department proposes to give vendors and vendor applicants greater flexibility for meeting minimum stocking requirements for juice by making frozen juice concentrate optional. This proposed change requires that vendors and vendor applicants stock enough juice to fill two (2) of

each of the most commonly prescribed food packages, Standard Child \geq 24 Months and Standard Pregnant, at any given time.

(b)(2) The Department is proposing to amend this paragraph for consistency with the enacted changes in WIC Regulatory Bulletin 2015-02. Specifically, this proposed section eliminates the reference to the WIC Authorized Food List Shopping Guide and replaces it with a citation to the specific regulatory bulletin section in which whole grain cereals are listed. The Department is also proposing to replace the word “of” with “a” and “an” when describing required sizes of boxed cereal, and add a comma after the words “Of the total ounces” for ease of reading.

(b)(3) For consistency with other subsections in this section, the Department is proposing to remove the word “Either” from subsection (b)(3). Subsections (b)(3)(A)-(D) cover more than two (2) items and the use of the word “or” after each semi-colon makes it sufficiently clear that the vendor may choose between the four (4) types of canned fish listed.

(b)(3)(A) The Department is proposing to eliminate the six (6) ounce cans of tuna from the canned fish minimum stocking requirement. WIC Regulatory Bulletin 2015-02 removed six (6) ounce cans of tuna from the list of authorized WIC foods in response to the industry’s transition from six (6) ounce cans to five (5) ounce cans. This proposed amendment will align the minimum stocking requirements with the current WIC Authorized Food List.

(b)(3)(D) Pursuant to WIC Regulatory Bulletin 2015-02, fifteen (15) ounce cans of mackerel were added to the list of authorized WIC foods (section 82150, subsection (a)(2)). In order to give vendors greater flexibility for meeting minimum stocking requirements for canned fish, the Department proposes that mackerel may now be used to meet that requirement.

(b)(4) This proposed amendment would add the word “authorized” to describe cheese in order to prevent vendor confusion regarding the types of cheeses that meet minimum stocking requirements.

(b)(7) This proposed amendment would add the word “authorized” to describe fresh yellow bananas to clarify that only WIC-authorized bananas can be used to meet minimum stocking requirements.

(b)(8)(A) The Department is proposing to amend this subsection to increase the thirty-two dollar (\$32) minimum stocking requirement for fresh fruits and vegetables to thirty-eight dollars (\$38) due to increases in the monthly value of the cash value vouchers (CVVs) for fruits and vegetables mandated by the United States Department of Agriculture (USDA). The original thirty-two dollar (\$32) amount was chosen to reflect two (2) Standard Child \geq 24 Months prescriptions and two (2) Standard Pregnant prescriptions, which are the most commonly prescribed packages for these food items. On October 1, 2015, in accordance with 7 Code of Federal Regulations part 246.16(j), the CVVs for fruits and vegetables for pregnant, postpartum, and breastfeeding women increased from ten dollars (\$10) to eleven dollars (\$11). (See U.S. Dept. of Agr., WIC

Policy Memorandum #2015-4 (June 25, 2015).) Additionally, in accordance with 7 Code of Federal Regulations part 246.10(e)(10), table 2, State agencies were required to increase the CVVs for fruits and vegetables for children from six dollars (\$6) to eight dollars (\$8) no later than June 2, 2014. (79 Fed. Reg. 12274, 12274 (Mar. 4, 2014).) The Department is proposing to increase the minimum stocking requirement for fresh fruits and vegetables to thirty-eight dollars (\$38) because, with these increases in the CVV amounts, thirty-eight dollars (\$38) is enough to fulfill two (2) Standard Child \geq 24 Months prescriptions and two (2) Standard Pregnant prescriptions at any given time.¹

Although stakeholder feedback indicates participants prefer fresh fruits and vegetables to their canned or frozen counterparts, the Department is not proposing to increase the number of fresh fruit and vegetable varieties that vendors must stock to offset the proposed reductions in subsections (b)(8)(B) and (C), described below, due to the perishable nature of fresh fruits and vegetables.

(b)(8)(B) The Department is proposing to reduce the number of varieties of canned or frozen fruits that vendors must stock from three (3) varieties of canned fruits and three (3) varieties of frozen fruits to three (3) varieties of canned or frozen fruits. Feedback from vendor stakeholders indicates that WIC participants prefer fresh fruits and vegetables over canned and frozen fruits and vegetables. In response, the Department is proposing to combine the minimum stocking requirements for canned and frozen fruits, reducing the overall number of varieties of canned or frozen fruits that a vendor must stock. By grouping the requirements for canned and frozen fruit together, the Department intends to give vendors greater flexibility for meeting this part of the minimum fruit and vegetable stocking requirements while allowing participants to have access to the types of canned or frozen fruits they prefer.

The Department is also proposing to increase the dollar amount of canned or frozen fruit that vendors must stock to require at least thirty-eight dollars (\$38) worth of three (3) varieties of authorized canned or frozen fruits. As with the proposed change to minimum stocking requirements for fresh fruits and vegetables under subsection (b)(8)(A), this proposed change to the required dollar amount is intended to reflect recent increases to the fruits and vegetables CVVs for pregnant, postpartum, and breastfeeding women as well as recent increases to the fruits and vegetables CVVs for children. (See U.S. Dept. of Agr., WIC Policy Memorandum #2015-4 (June 25, 2015); 79 Fed. Reg. 12274, 12274 (Mar. 4, 2014).) The Department is proposing to increase the minimum stocking requirement for canned or frozen fruits to thirty-eight dollars (\$38) because this amount is enough to fulfill two (2) Standard Child \geq 24 Months prescriptions at eight dollars (\$8) each (up from six dollars (\$6) each) and two (2) Standard Pregnant prescriptions at eleven dollars (\$11) each (up from ten dollars (\$10) each) at any given time. The Standard Child \geq 24 Months and Standard Pregnant prescriptions are the most commonly prescribed packages for these food items.

¹ Two (2) Standard Child \geq 24 Months prescriptions at eight dollars (\$8) each equal sixteen dollars (\$16); two (2) Standard Pregnant prescriptions for eleven dollars (\$11) each equal twenty-two dollars (\$22); sixteen dollars (\$16) plus twenty-two dollars (\$22) equals thirty-eight dollars (\$38) total.

Taken together, these proposed changes would decrease the required number of varieties of canned or frozen fruits that vendors must stock while increasing the dollar amount of canned or frozen fruits stocked. These proposed changes are intended to give vendors and vendor applicants' additional flexibility for meeting minimum stocking requirements for canned or frozen fruits, while ensuring that vendors have sufficient stock to fulfill at least two (2) of the most commonly prescribed food packages at any given time. For example, based on participant preferences, a vendor may elect to stock only three (3) varieties of canned or frozen fruits (e.g., canned pineapple, frozen strawberries, and frozen mango); however, the vendor will need to stock enough of these three (3) varieties of canned or frozen fruits to meet the thirty-eight dollar (\$38) threshold necessary to fulfill two (2) Standard Child \geq 24 Months prescriptions and two (2) Standard Pregnant prescriptions.

(b)(8)(C) The Department is proposing to reduce the number of varieties of canned or frozen vegetables vendors must stock from three (3) varieties of canned vegetables and three (3) varieties of frozen vegetables to three (3) varieties of canned or frozen vegetables. Feedback from vendor stakeholders indicates that WIC participants prefer fresh fruits and vegetables over canned and frozen fruits and vegetables. In response, the Department is proposing to combine the minimum stocking requirements for canned or frozen vegetables, reducing the overall number of varieties of canned or frozen vegetables that a vendor must stock. By grouping the requirements for frozen and canned vegetables together, the Department intends to give vendors greater flexibility for meeting this part of the minimum fruit and vegetable stocking requirements while allowing participants to have access to the types of canned or frozen vegetables they prefer.

The Department is also proposing to increase the dollar amount of canned or frozen vegetables stocked to require at least thirty-eight dollars (\$38) worth of three (3) varieties of authorized canned or frozen vegetables. As discussed above, this proposed change is intended to reflect recent increases to the fruits and vegetables CVVs for pregnant, postpartum, and breastfeeding women as well as the fruits and vegetables CVVs for children. (See U.S. Dept. of Agr., WIC Policy Memorandum #2015-4 (June 25, 2015); 79 Fed. Reg. 12274, 12274 (Mar. 4, 2014).) The Department is proposing to increase the minimum stocking requirement for canned or frozen vegetables to thirty-eight dollars (\$38) because this amount is enough to fulfill two (2) Standard Child \geq 24 Months prescriptions and two (2) Standard Pregnant prescriptions at any given time. The Standard Child \geq 24 Months and Standard Pregnant prescriptions are the most commonly prescribed packages for this food item.

Taken together, these proposed changes would decrease the required number of varieties of canned or frozen vegetables that vendors must stock while increasing the dollar amount of canned or frozen vegetables stocked. These proposed changes are intended to give vendors and vendor applicants' additional flexibility for meeting minimum stocking requirements for canned or frozen vegetables, while ensuring that vendors have sufficient stock to fulfill at least two (2) of the most commonly prescribed food packages at any given time.

(b)(8)(D) The Department is proposing to separate the information regarding how the dollar amounts for fruit and vegetable minimum stocking requirements will be calculated from former subsections (b)(8)(A)-(C) and re-designate it as (b)(8)(D).

(b)(8)(E) This subsection is proposed to ensure that the Department and vendors have a clear definition of “variety” for the purposes of minimum stocking requirements. This proposed definition of “variety” specifies that vendors must carry multiple kinds of fruits and vegetables in canned or frozen form, not simply different cuts, sizes, or packaging of the same fruit or vegetable. This requirement will help ensure that participants are offered access to multiple sources of nutrition and will give vendors greater flexibility to match their stock to different participant preferences. This proposed amendment is consistent with the definition of “variety” in section 50200 for Full-Line Grocery Peer Group/Category B.

(b)(10) The Department proposes to amend this subsection to change the words “[a]uthorized milk-based infant formula” to “the authorized primary contract brand milk-based infant formula in powdered form currently under contract with the Department.” Section 82600, subsection (a)(2)(A) directs readers to a webpage that identifies the current Department-contracted infant formula manufacturer and the authorized primary contract brand milk-based infant formula in powdered form; at the time of writing, this is Mead Johnson & Company’s Enfamil Infant formula. Under the existing regulation, vendors are permitted to stock any authorized milk-based infant formula under contract with the Department. However, the Department’s analysis of the issuance of infant formulas revealed that as of April 2018, approximately sixty percent (60%) of participants currently receiving milk-based infant formula were issued the primary contract brand milk-based infant formula in powdered form. To ensure its availability to WIC participants, the Department proposes to require that vendors and vendor applicants stock the authorized primary contract brand milk-based infant formula in powdered form in order to meet the infant formula minimum stocking requirements.

(b)(10)(A) For consistency with other regulation text, including the proposed changes to subsection (b)(10) described above, the Department is proposing to change the words “authorized milk-based infant formula in powdered form” to “the authorized primary contract brand milk-based infant formula in powdered form currently under contract with the Department.”

The stocking example for infant formula in subsection (b)(10)(A) is incorrect. To fix the error, the Department proposes to change the example of the number of containers of formula stocked on the shelf from twenty (20) to ten (10) and the number of containers of formula in storage from no less than four (4) to no less than ten (10).

(b)(11) For consistency with other subsections in this section, the Department is proposing to remove the word “Either” from subsection (b)(11).

(b)(12) The Department is proposing to remove infant meats from minimum stocking requirements; this proposed change would result in the removal of former subsection (b)(12) and the re-designation of former subsection (b)(13) as (b)(12). Vendors report low participant demand for infant meats resulting in a high rate of expired products and food waste. The current minimum stocking requirement for infant meats are intended to ensure that two (2) food packages for Fully Breastfed infants age six (6) to eleven (11) months will be available for redemption at any given time. However, this is not a commonly prescribed food package because infants who are Fully Breastfed between the ages of six (6) and eleven (11) months consistently represent only four percent (4%) of all California WIC participants. Additionally, data analysis performed by the Department shows that average redemption of infant meat food instruments is less than fifty percent (50%); in other words, those participants who are issued food instruments for infant meats are redeeming them less than half the time. In response to this low participant demand for infant meats, the Department proposes to remove infant meats from the minimum stocking requirements. The removal of infant meats will not affect the product's authorization.

The Department believes that vendors whose food sales regularly include infant meats will continue to stock these products in response to customer demand, providing families who choose to redeem their infant meat food instruments access to their prescribed benefit. The Department will continue to monitor participant redemption and vendor stocking patterns in order to evaluate future policy changes related to infant meats.

(b)(12)(A) The Department is proposing to add the word "and" after the semi-colon to show that vendors must stock all items listed under subsection (b)(12).

(b)(12)(B) For consistency with subsection (b)(12)(C) and in order to allow vendors greater flexibility for meeting the requirements of this subsection, the Department is proposing to add the words "any combination of" when describing the types of milk that can be used to meet the required amount of milk in gallon containers. In order to be consistent with other regulation text, the Department is also proposing to spell out "one percent" and "two percent" as well as place parentheses around "1%" and "2%." The Department is also proposing to add the word "and" after the semi-colon to show that vendors must stock all items listed under subsection (b)(12).

(b)(12)(C) For consistency with other regulation text, the Department is also proposing to spell out "one percent" and "two percent" as well as place parentheses around "1%" and "2%."

(b)(13) The Department is proposing to re-designate former subsection (b)(14) as (b)(13).

(b)(14) The Department is proposing to re-designate former subsection (b)(15) as (b)(14). Additionally, the Department is proposing to add language specifying that all authorized vendors and vendor applicants must stock at least six (6) pounds of whole grains

(b)(14)(A) The Department is proposing to re-designate former subsection (b)(15)(A) as (b)(14)(A). In order to be consistent with other regulation text, the Department is proposing to change the words “100 percent” to “one hundred percent (100%).”

The Department is also proposing to amend the overall whole grain stocking requirements. The Department currently requires that all authorized vendors and vendor applicants stock at least six (6) pounds of whole grains, including at least two (2) pounds of whole wheat bread, two (2) pounds of white or yellow soft corn tortillas, and two (2) pounds of either oats or brown rice. The Department revisited the whole grain requirement after receiving vendor feedback on participant purchasing habits. As a result, the Department is proposing to change the whole grain requirement so that vendors or vendor applicants must continue to stock at least two (2) one (1) pound packages of one hundred percent (100%) whole wheat bread loaves, but may stock the remaining four (4) pounds of whole grains with any combination of the authorized whole grains in subsections (b)(14)(A)1.-4.

The Department is proposing to keep the two (2) pound minimum for each whole grain stocked in order to minimize the administrative burden borne by both vendors and the Department. For vendors, because minimum stocking requirements require continuous on-shelf availability, a mandate that vendors stock whole grains in two (2) pound increments rather than smaller increments—such as one (1) pound or half pound increments—will reduce the types of whole grain products for which they must continuously monitor availability. For the Department, requiring vendors to stock whole grains in two (2) pound increments rather than smaller increments should reduce the amount of time it takes Department staff to accurately and effectively assess whether the vendor or vendor applicant has met whole grain stocking requirements.

(b)(14)(A)1. The Department is proposing to re-designate former subsection (b)(15)(B) as (b)(14)(A)1. Department analysis shows that participants are more likely to purchase whole wheat bread over corn tortillas; therefore, the Department is proposing to eliminate the mandatory stocking of corn tortillas and make them an option for fulfilling the minimum stocking requirements. This proposed amendment is intended to give vendors and vendor applicants greater flexibility in fulfilling the whole grain minimum stocking requirement, and allow participants greater access to the foods they prefer to purchase.

The Department is also proposing to add the word “or” after “corn tortillas;” to provide greater clarity as to which items are mandatory and which items are optional.

(b)(14)(A)2. The Department is proposing to re-designate former subsection (b)(15)(C) as (b)(14)(A)2. The Department is also proposing to add the word “or” after “oats;” to provide greater clarity as to which items are mandatory and which items are optional.

(b)(14)(A)3. The Department is proposing to separate the brown rice stocking option from the oatmeal or oats stocking option in former subsection (b)(15)(C) and re-designate the brown rice stocking option as (b)(14)(A)3.; this formatting change results in all optional whole grain items having separate subsections. The Department is also proposing to add the word “or” after “brown rice;” to provide greater clarity as to which items are mandatory and which items are optional.

(b)(14)(A)4. 7 Code of Federal Regulations part 246.10, amended in 2014, includes whole wheat pasta as an additional whole grains option for state agencies to authorize at their discretion. (79 Fed. Reg. 12274, 12282 (Mar. 4, 2014).) In March 2016, California WIC authorized selected whole wheat pastas in section 82950. The Department is proposing to add whole wheat pasta as an option for vendors to fulfill part of the whole grain minimum stocking requirements. This addition will provide vendors and vendor applicants with greater flexibility for meeting the whole grain stocking requirements.

(c) The Department is proposing to make minor changes by adding three commas to provide clarity and ease of reading.