

Department of State Health Services
Council Agenda Memo for State Health Services Council
July 9, 2008

Agenda Item Title: Amendment and Repeals Relating to the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC)

Agenda Number: 3f

Recommended Council Action:

For Discussion Only

For Discussion and Action by the Council

Background: The WIC Program is administered by the Nutrition Services Section in the Family and Community Health Services Division. WIC provides healthy supplemental foods, including infant formula, nutrition education, breastfeeding promotion and support, and aid to clients in accessing other health and human services. WIC serves close to 930,000 low-income pregnant and postpartum women, infants, and children under age five in Texas each month, including 70% of the infants born in the state.

- The program is funded by federal grants and by rebates received from infant cereal and formula manufacturers. The department receives grant funds from the United States Department of Agriculture (USDA) to administer the program, provided the department does so in accordance with federal laws and regulations and in accordance with an annual state plan approved by the USDA. By federal regulation, rebates can only be used to offset WIC food costs. For federal fiscal year 2008, federal grant funds exceed \$552,000,000 with rebates anticipated to be \$235,000,000 for a total budget of \$787,000,000.
- Local service providers prescribe the food benefits for clients who then obtain them at authorized grocery stores known as WIC vendors. Both service providers and vendors operate under contract with the department to provide WIC services.
- WIC is a means-tested program. Any allegations of fraud or program abuse are investigated by the Health and Human Services Commission's Office of Inspector General. Sanctions for fraud range from disqualification to criminal prosecution.

Summary: The proposed amendment is necessary to conform to federal regulations at 7 CFR §246.7 and §245.12 concerning penalties for WIC fraud. Expected outcome from amendment to §31.30 will be that the department will be allowed to immediately disqualify a WIC recipient once evidence of fraud is determined without waiting for the results of any criminal prosecution the department may decide to pursue. Immediate disqualification is required by federal regulations. The rule also clarifies that the department decides when to impose sanctions and may authorize the Office of the Inspector General, Health and Human Services Commission, to perform recovery actions on its behalf.

The expected outcome from the repeal of §§31.32-31.36 will improve administrative efficiency. It is not legally necessary to adopt the provisions concerning WIC vendors and local agencies by rule because these provisions do not affect and do not apply to the general public as required by the definition of the term "rule" at Government Code §2001.003(6)(A)(i), although they may implement, interpret, or prescribe law or policy. These provisions are contractual in nature as applied, and only bind those persons who choose to become or remain WIC vendors or local agencies, as indicated by their annual execution of a WIC Vendor Agreement or a local agency contract. These rules will be reissued as policies or provisions in the agreements and contracts.

Summary of Input from Stakeholder Groups:

The following stakeholders were informed of the rule changes during the development of the rules:

- The Executive Board of the Texas Association of Local WIC Directors (TALWD) representing the 72 local service providers – by e-mail in January 2008.
- The Texas Retailers Association (TRA) – by e-mail and meeting in December 2007.
- Approximately 800 corporate grocery business offices representing all current WIC vendors who participate in the program – by mailed announcement and posting of the same announcement on the WIC website in November 2007.

Summary of feedback from stakeholders:

- TALWD – one member responded with a supportive comment.
- The TRA responded that it supports the change because it will allow the department to respond more timely to vendor requests for change.
- Two vendors submitted feedback: One vendor agreed that having these provisions in policy would be more efficient, but expressed concern that the vendors' ability to provide input into policy decisions would be decreased. A second vendor supports the present system because DSHS must present rule changes to an independent body [the Council] and justify the reasons for change.

No changes were made as a result of the stakeholder input.

Proposed Motion: Motion to recommend HHSC approval for publication of rules contained in agenda item #3f.

Approved by Assistant Commissioner/Director: Evelyn Delgado **Date:** 5/28/08

Presenter: Mike Montgomery **Program:** Nutrition Services Section **Phone No.:** 512-458-7444

Approved by CCEA: Rosamaria Murillo **Date:** May 27, 2008

Title 25. HEALTH SERVICES
Part 1. DEPARTMENT OF STATE HEALTH SERVICES
Chapter 31. Nutrition Services
Subchapter C. Special Supplemental Nutrition Program for Women, Infants, and Children (WIC)
Amendment §31.30
Repeal §§31.32-31.36

Proposed Preamble

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes an amendment to §31.30 and the repeal of §§31.32-31.36 concerning the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC).

BACKGROUND AND PURPOSE

Under federal and state enabling legislation, the WIC Program is funded entirely by a combination of federal grant funds and by rebates from manufacturers of infant formula and infant cereal that can only be expended to defray WIC food costs. The United States Department of Agriculture (USDA) awards federal grant funds to the department to administer the programs, provided the department does so in accordance with federal law and regulations and in accordance with the department's annual submission of a state plan approved by USDA. USDA deems the following types of changes to be substantive amendments to the state plan that require federal approval: rule or policy changes initiated by legislation, USDA, or the state agency; changes affecting client or vendor services and benefits; changes in the monitoring/oversight of vendors and local agencies; any other operational changes aimed at improving or enhancing program delivery or accountability; and changes in related State procedures.

Revisions to these rules are proposed primarily to comply with federal regulations governing the WIC program in 7 Code of Federal Regulations (CFR) Part 246 and to improve administrative efficiency and effectiveness.

SECTION-BY-SECTION SUMMARY

The amendment to §31.30 conforms to federal regulations governing the WIC Program at 7 CFR §246.7(h)(2) and §246.12(u)(2)(i) concerning mandatory disqualification of WIC clients for fraud or abuse if no administrative hearing is requested. In addition, the department may authorize the Office of Inspector General, Health and Human Services Commission, to perform recovery actions on its behalf.

Repeal of §§31.32-31.36 eliminates redundancy and improves administrative efficiency, because it is not legally necessary to adopt provisions in rule that govern WIC vendors and local agencies since the provisions can be included and enforced by reference in the contracts and agreements executed annually between the department and local agencies and vendors.

FISCAL NOTE

Mike Montgomery, Director, Nutrition Services Section, has determined that for each calendar year of the first five years the section or repeals are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the section or repeals as proposed. All activities required by §31.30 will be performed by existing department staff and with existing funding. Concerning the amendment to §31.30, participant disqualification for alleged fraud or abuse of the WIC Program is mandatory without regard to any final action by the state criminal courts, but the participant retains the right to an administrative hearing in which the participant's rights could be upheld. This change to §31.30 represents the reverse of current practice.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Montgomery has determined that there will be no effect on small businesses or micro-businesses by repeal of §§31.32-31.36 because exactly the same provisions now adopted in rule may lawfully be included and enforced by reference in the contracts and agreements executed annually between the department and local agencies and vendors. In addition, small and micro-businesses are not required to provide WIC services. Mr. Montgomery has also determined that the amendment to §31.30, applicable to "Participant Fraud and Abuse" by individual WIC clients, rather than small businesses and micro-businesses, is necessary to comply with federal regulations. There are no anticipated economic costs to persons, including WIC applicants and WIC recipients, who are required to comply with the amendment to §31.30 or repeal of §§31.32-31.36 as proposed. There is no anticipated negative impact on local employment.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

Mr. Montgomery has determined that the proposed changes have no adverse economic impact on small businesses. Therefore, an economic impact statement and regulatory flexibility analysis for small businesses are not required.

PUBLIC BENEFIT

Mr. Montgomery has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the sections will be assurance that federal funds will be utilized more cost-effectively to deliver services to WIC recipients.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety

of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed amendment and repeal do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Valerie Wolfe, Nutrition Services Section, Division of Family and Community Health MC 1933, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347, 512/458-7444 or by email to Valerie.Wolfe@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' legal authority to adopt.

STATUTORY AUTHORITY

The proposed amendment and repeals are authorized under Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed amendment and repeals affect Health and Safety Code, Chapter 1001; and Government Code, Chapter 531.

Sections for Repeal.

- §31.32. Selection of Vendors for WIC Initial Authorization for Participation.
- §31.33. Selection of Vendors for Reauthorization for Participation.
- §31.34. Calculation and Use of Vendor Competitive Pricing Data.
- §31.35. Vendor Agreement with the State Agency.
- §31.36. The Right of a Local Agency or Vendor to Appeal.

Legend: (Proposed Amendment(s))

Single Underline = Proposed new language

[Bold, Print, and Brackets] = Current language proposed for deletion

Regular Print = Current language

(No change.) = No changes are being considered for the designated subdivision

§31.30. Participant Fraud and Abuse.

(a) (No change.)

(b) If the state agency or the Office of Inspector General, Health and Human Services Commission, determines that a participant or parent, guardian, client-designated proxy, state-agency appointed proxy, or caretaker of a participant has received benefits unlawfully due to WIC Program abuse, including but not limited to dual participation, the matter may be referred for criminal prosecution **[state agency may refer the matter for criminal prosecution]**.

(c) (No change.)

(d) **[If prosecution is declined by the appropriate jurisdiction, the violation does not involve a violation of criminal law, or final disposition of criminal prosecution has occurred the]** The state agency, or local agency as directed by the state agency, **[shall direct the local agency to]** initiate sanctions which may include disqualification from the Program for up to one year.

(e) Upon a final determination by the Office of the Inspector General, Health and Human Services Commission, that a program violation has occurred **[and that final disposition of any criminal prosecution has occurred]**, the following mandatory disqualifications shall apply.

(1)-(3) (No change.)

(f) If after finding that a program violation has occurred, the **[Upon a final determination by the]** Office of Inspector General, Health and Human Services Commission, further determines that the **[a]** program violation **[has occurred that]** does not warrant a one year mandatory disqualification **[and no appeals from any criminal prosecution remain]**, the following sanctions shall apply.

(1)-(6) (no change.)

(g) Exceptions to disqualification:

(1) The state agency **[or the Office of Inspector General, Health and Human Services Commission]** may decide not to impose a disqualification if, for violations which resulted in a claim assessed by the state agency against the participant, parent, guardian, client designated proxy, state agency-appointed proxy, or caretaker of a participant, full

restitution is made within 30 days of receipt of a letter demanding repayment or a repayment schedule is agreed on.

(2)-(3) (No change.)

(h) The state agency [**or the Office of the Inspector General, Health and Human Services Commission, shall**] may attempt to recover, in cash, the value of the benefits received by a participant or the parent, guardian, client-designated proxy, state-agency-appointed proxy or caretaker of a participant as a result of participant abuse. The state agency may request and authorize the Office of the Inspector General, Health and Human Services Commission, to perform this recovery on its behalf.

(1) The state agency or the Office of the Inspector General, Health and Human Services Commission, may [shall] determine the amount of the benefits improperly received by a participant through an independent review of local agency records and such other procedures as the state agency considers necessary under the specific circumstances. The state agency may request and authorize the Office of the Inspector General, Health and Human Services Commission, to perform this recovery on its behalf.

(2) In cases involving criminal prosecutions for violations of law, repayment of cash value of benefits improperly received, may [shall] become a part of any restitution agreement with the prosecutor and approved by the court. In such cases, the participant shall not have the right to a fair hearing by the department.

(3) (No change.)

(i) (No change.)

~~§31.32. Selection of Vendors for WIC Initial Authorization for Participation.~~

~~(a) — A representative from the state agency or the nearest local agency shall perform an on-site evaluation of a vendor applying for authorization to redeem WIC food instruments.~~

~~(1) — The state or local agency representative shall complete a vendor evaluation form during the visit to the vendor indicating the type of WIC authorized foods in stock and their shelf prices.~~

~~(2) — The state or local agency representative shall recommend approval or disapproval of the vendor's application based on the observations during the store visit.~~

~~(3) — The owner or manager or a store representative shall have the opportunity to review the information on the vendor evaluation form and shall sign the form to acknowledge accuracy of shelf prices listed at the time of the evaluation. The evaluator shall provide a copy of the form, including the date, local agency number, and the name of the evaluator, to the vendor at the time of the in-store evaluation.~~

~~(b) — The state agency shall base its decision to authorize a vendor on the following criteria:~~

~~(1) — The vendor's shelf prices for approved WIC foods in stock are competitive for the price region.~~

~~(2) — The vendor has sufficient quantities of authorized milk, evaporated milk, cheese, cereal, contract infant formula, contract infant cereal, eggs, peanut butter, and dried beans.~~

~~(A) — A pharmacy may elect to provide only the designated contract milk and soy formulas and special formulas.~~

~~(B) — A vendor may elect not to provide infant formula.~~

~~(C) — For vendors who elect to provide all authorized foods, the following amounts of each food type shall constitute sufficient quantities:~~

~~(i) — a total of at least 108 ounces of adult cereal, including 36 ounces each of at least three of the following types of cereal: oat, corn, wheat, rice, and multi-grain;~~

~~(ii) — at least six dozen Grade A or AA large, medium, or small size eggs;~~

~~(iii) — a total of at least 18 containers of juice, including at least two varieties of juice in 46 ounce fluid cans and/or 12 ounce frozen cans;~~

- (iv) ~~— a total of at least six pounds of cheese;~~
- (v) ~~— a total of at least nine gallons of milk, some of which must be available in one half-gallon containers;~~
- (vi) ~~— at least three one-pound bags of dry beans;~~
- (vii) ~~— at least three 18-ounce jars of peanut butter;~~
- (viii) ~~— at least eight 12-ounce cans of evaporated milk;~~
- (ix) ~~— at least 31 cans of milk or soy concentrate infant formula (contract brand) and either eight cans of milk-based powder formula or nine cans of soy powder formula (contract brand); and~~
- (x) ~~— at least two 8-ounce boxes or one 16-ounce box of infant cereal.~~

~~(3) — The vendor provides milk in gallon and half-gallon containers and juice in 46-ounce or 12-ounce containers.~~

~~(4) — The vendor's shelf prices do not exceed the maximum prices on WIC food instruments.~~

~~(5) — The recommendation by the state or local agency representative who conducted the on-site evaluation.~~

~~(6) — The vendor has a retail food operations permit or food manufacturer's permit from the applicable city, county, district, or state health authority.~~

~~(7) — The vendor's store is clean, with fresh merchandise (no expired food items).~~

~~(8) — The vendor has no apparent conflict of interest with the local agency in the vendor's service area or with the state agency.~~

~~(9) — The vendor has posted prices for food items.~~

~~(10) — If applicable, the vendor's history of compliance with WIC Program policies and procedures.~~

~~(11) — The vendor has business integrity as indicated by a lack of activities during the past six years including fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice, or tax evasion.~~

~~(12) — The vendor is not currently disqualified from the Food Stamp Program or has not been assessed a civil money penalty for hardship by the Food Stamp Program and the disqualification period that would otherwise have been imposed by the Food Stamp Program has not expired unless denying WIC Program authorization would result in inadequate participant access.~~

~~(13) — The vendor operates and will transact food instruments at a fixed location unless a mobile store is necessary to meet special needs as described in the state agency's state plan and approved by USDA.~~

~~(14) — The vendor has participated in vendor interactive training.~~

~~(15) — If a vendor elects to provide infant formula, the vendor shall make available to department inspectors invoices or receipts documenting purchase of all infant formula directly from:~~

~~(A) — food wholesalers currently licensed in Texas in accordance with the Health and Safety Code, Chapter 431, the Texas Food, Drug, and Cosmetic Act, and Chapter 229 of this title (relating to Food and Drug);~~

~~(B) — food manufacturers registered with the U.S. Food and Drug Administration; or~~

~~(C) — retail food stores holding permits in accordance with the Health and Safety Code, Chapter 437.~~

~~(e) — If the state agency disapproves the application by a vendor for authorization, the reasons for the disapproval shall be provided to the vendor in writing.~~

~~(d) — Vendors who apply for authorization who have been evaluated twice within a six-month period and denied approval both times shall not be evaluated again until at least six months from the last evaluation.~~

~~(e) — In the event a vendor purchases or acquires a store location or business which was in the process of being disqualified or which is disqualified from the WIC Program at the time of acquisition, the vendor's application for that store location or business shall not be considered until the state agency makes a determination that the sale was a bona fide arms-length transaction. The state agency will make this determination no later than six months from the date of application. If the state agency determines that the transfer was not an arms-length transaction, the application shall not be considered until the disqualification period has been served.~~

~~(f) — If the state agency has disqualified the previous owner of a store location or business for noncompliance or notified the previous owner that the store location or business has been disqualified due to noncompliance, a new owner's application for that store location or business shall not be considered until at least six months from the expiration date of the previous~~

owner's last vendor agreement unless the state agency makes an earlier determination that the sale was a bona fide arms-length transaction.

(g) — ~~The state agency may waive the requirement for an on-site evaluation when a grocery chain comprising 20 or more outlets authorized to participate in the WIC Program purchases or merges with another chain with 20 or more authorized outlets if the merger or purchase does not materially change the stores' staff or pricing structure.~~

(h) — ~~Upon request, the state agency may provide an applicant vendor with tentative authorization to redeem WIC food instruments starting the day the store opens.~~

(1) — ~~To obtain tentative authorization, the vendor shall comply with all of the following criteria:~~

(A) — ~~The owner of the applicant store owns ten or more stores that have been participating in the WIC Program under the current ownership for at least the six-month period prior to application for authorization.~~

(B) — ~~For the six-month period prior to application for authorization, fewer than 20% of the applicant's participating stores' authorizations have been terminated for exceeding the competitive pricing criteria for either the woman/child package or the infant food package for their respective price regions and vendor bands.~~

(C) — ~~None of the participating stores has been disqualified from program participation for two or more months within the 12-month period prior to application for authorization.~~

(D) — ~~The applicant store notifies the state agency prior to the official opening date.~~

(E) — ~~The applicant store's manager or assistant manager acknowledges receipt and understanding of the vendor agreement including its attachments, training materials and manuals, the allowable foods list, and vendor rules and policies.~~

(F) — ~~The applicant store's manager or assistant manager has scored at least 70% on a written test provided by the state agency and returned to the state agency no later than five days prior to the applicant store's opening date.~~

(2) — ~~If, after evaluation, a store which has received tentative authorization from the state agency does not meet all authorization criteria, the store shall be notified of its tentative agreement expiration date and instructed to discontinue redeeming the WIC Program food instruments. The state agency shall honor properly redeemed food instruments from the opening date until the tentative agreement expiration.~~

(i) — ~~On a temporary basis, the state agency may consider and approve applications from new vendors for the following reasons:~~

~~(1) — the vendor has been authorized to accept Food Stamps;~~

~~(2) — the disqualification of an existing authorized vendor in a local agency service area would create inadequate access for WIC Program participants;~~

~~(3) — a currently authorized vendor outlet(s) changes ownership; or~~

~~(4) — authorization of a new vendor would result in a significant cost advantage to the WIC Program.~~

~~(j) — The state agency may deny an application to participate as a vendor if an owner, partner, principal stockholder, officer, director, manager, or operator of the applicant was an owner, partner, principal stockholder, officer, director, manager, or operator of another vendor which has been disqualified or which has violated WIC Program vendor agreement procedures, policies, rules or regulations.~~

~~(k) — The state agency may hold an authorized vendor individually responsible for previous violations by an owner, partner, manager, or principal stockholder of the vendor when considering renewal of the vendor's agreement or future applications for vendor agreements.~~

~~(l) — A history of noncompliance with the WIC Program's federal and state statutes and regulations, rules, policies, and procedures shall be considered by the state agency when evaluating an authorized vendor's application for authorization of new outlets. The state agency will not authorize new outlets for a vendor where 50% of the vendor's outlets are in a disqualification or termination status at the time of a request to authorize new outlets.~~

~~§31.33. Selection of Vendors for Reauthorization for Participation. Vendors with a current vendor agreement who seek reauthorization shall reapply and shall be evaluated for issuance of a subsequent vendor agreement under WIC Program procedures, policies, rules, and regulations and shall be reauthorized unless notified in writing by the state agency at least 15 days before expiration of the vendor agreement.~~

~~§31.34. Calculation and Use of Vendor Competitive Pricing Data.~~

~~(a) — The state agency shall use the following calculation to determine whether a vendor's prices are competitive with those of similar vendors in the price region.~~

~~(1) — The state agency data system calculates by vendor outlet the average unit costs to the state agency for each food type based on the food instruments redeemed by that vendor outlet.~~

~~(2) — Authorized vendor outlets within a price region are grouped into vendor bands based on similar characteristics.~~

~~(3) — Utilizing food type averages for each vendor outlet within a vendor band, the state agency determines the price region average standard food package costs for an infant and/or a woman/child participant for each vendor band.~~

~~(4) — A vendor outlet's average standard food package costs are determined based on the store evaluation for an applicant vendor or actual WIC redemption data for authorized vendors.~~

~~(5) — The state agency compares the vendor outlet's standard food package costs to the price region's average standard food package costs for that vendor band. Price region averages for a prior period will be used. An outlet's standard food package costs are considered competitive if they are less than or equal to 108% of the price region's average standard food package costs for that vendor band.~~

~~(6) — The state agency may make adjustments to the price region averages due to anomalies, such as those caused by sharp wholesale price increases or crop failures since the prior period in which the averages were calculated.~~

~~(7) — The state agency may reassign a vendor to an alternative comparison group when the vendor, such as a high volume, national discount superstore, or a primarily WIC only store, is not characteristic of other vendors in the band; when the vendor is the only store in a rural area within the price region; or when the vendor is the sole occupant of a band.~~

~~(b) — The state agency may perform a preliminary review of the vendor's compliance with competitive pricing at any time during the term of the vendor agreement. The state agency shall provide a noncompliant vendor with written notification of noncompliance determined from the preliminary review. If on a subsequent assessment within a 12-month period the noncompliant vendor fails to comply with competitive pricing, the state agency will terminate the vendor agreement. If at the time of the assessment the vendor charges prices in excess of those allowed by the selection criteria, the vendor shall repay the excess charges to the state agency.~~

~~§31.35. Vendor Agreement with the State Agency.~~

~~(a) — Once a vendor has been approved to participate in the WIC Program, a written agreement shall be executed and signed by authorized officials of the state agency and the vendor. Upon receipt by the vendor of the executed and signed vendor agreement, the vendor may begin accepting WIC Program food instruments.~~

~~(b) — A change of ownership of an authorized outlet or account terminates the agreement between the state agency and the vendor. A change of ownership occurs when all, or substantially all, of the property or assets of a vendor are acquired by a purchaser in a bona fide arms-length transaction.~~

~~(1) — In the event a store location/business under previous ownership was disqualified or is in the process of being disqualified at the time of acquisition, the new owner's application for that store location/business shall not be considered until the state agency makes a determination that the sale was a bona fide arms-length transaction. The state agency will make this determination no later than six months from the date of application. If the state agency determines that the transfer was not a bona fide arms-length transaction, the application shall not be considered until the disqualification has been served.~~

~~(2) — If the state agency has notified the previous owner that the vendor's agreement for a store location/business shall be allowed to expire, the new vendor's application for that store location/outlet shall not be considered until at least six months from the expiration date of the previous vendor's last agreement unless the state agency makes an earlier determination that the sale was a bona fide arms-length transaction.~~

~~(3) — If a store/location under previous ownership is not disqualified or is not in the process of being disqualified at the time of acquisition, and/or the previous owner has not been notified that the vendor agreement for that store location/business will be allowed to expire, and the acquiring party is in compliance with the rules, regulations, and vendor qualification criteria of the WIC Program, the acquiring party may, upon request, be authorized as a WIC Program vendor.~~

~~(A) The applicant vendor must submit a written affidavit stating that a change of ownership has been effected and duly executed by the seller and purchaser or their duly authorized officers or other agents.~~

~~(B) The affidavit shall include, at a minimum, the following information and any other information the state agency deems necessary: name and business address of the seller; name and business address of the purchaser; WIC vendor account number and outlet number, if applicable; name(s) and street address(es) of the outlet location(s); effective date of ownership change; and State of Texas Comptroller tax number of new owner.~~

~~(c) — WIC food instruments redeemed at an applicant store shall not be paid until the store has been duly authorized, including completion of an on-site evaluation, approval by the local agency, execution of the vendor agreement and vendor profile, and assignment of an account/outlet number by the state agency.~~

~~(d) — A vendor's unilateral termination of a vendor agreement after receipt of notification by the state agency of a violation shall not deprive the state agency of jurisdiction to impose sanctions for WIC Program violations.~~

~~(e) — The vendor agreement does not constitute a license, since a vendor does not require the state agency's approval to engage in the retail grocery business in Texas and the~~

vendor would not effectively be deprived of this right in the absence of WIC Program authorization.

(1) — ~~The vendor agreement conveys no property interest since federal law does not give rise to a legitimate claim of entitlement for vendors.~~

(2) — ~~The terms of authorization are established in the vendor agreement between the state agency and the vendor, and the contractual relationship ends with the expiration of the vendor agreement.~~

(3) — ~~The state agency as well as officers, agents, and employees of the state agency are not responsible for losses incurred by a vendor as a result of the expiration of the vendor agreement.~~

~~§31.36. The Right of a Vendor or Local Agency to Appeal.~~

(a) — ~~A local agency or vendor has the right to appeal when an application for participation is denied and/or any other adverse action affecting participation is taken. The only exceptions to this rule are:~~

(1) — ~~expiration of the vendor agreement or local agency contract;~~

(2) — ~~disqualification of a vendor as a result of disqualification or civil money penalty imposed by the Food Stamp Program; and~~

(3) ~~a determination by the state agency WIC Program concerning whether disqualification of a vendor would result in inadequate participant access.~~

(b) — ~~The state agency shall provide a local agency or vendor with written notification of an adverse action, the cause(s) for the action, the effective date of the action, and the right to appeal the adverse action.~~

(c) — ~~The state agency shall provide a local agency notice of disqualification at least 60 days prior to the effective date.~~

(d) — ~~The state agency shall provide a vendor notice of an adverse action at least 15 days prior to the effective date of the action except when the adverse action results from conviction for trafficking in food instruments or selling firearms, ammunition, explosives, or controlled substances in exchange for food instruments, which is effective on receipt of the notice.~~

(e) — ~~A local agency or vendor shall provide the state agency with a written request for a hearing within 15 days of the receipt of the notice of denial or adverse action. The written request shall, at a minimum, describe the action being appealed.~~

~~(f) — When a participating local agency appeals an adverse action, the adverse action shall be postponed until a hearing decision is reached.~~

~~(g) — When a vendor appeals an adverse action, the adverse action may be postponed until a hearing decision is reached at the discretion of the state agency WIC Program.~~

~~(h) — Appealing an adverse action does not relieve a local agency or a vendor permitted to continue participating in the program while an appeal is pending from the obligation of continued compliance with the terms of the written agreement or contract with the state agency.~~

~~(i) — The state agency shall provide the local agency or vendor the following:~~

~~(1) — at least ten days advance notice of the time and place for the hearing;~~

~~(2) — the opportunity to reschedule the hearing one time;~~

~~(3) — the opportunity to review all written case records prior to the hearing;~~

~~(4) — the opportunity to be represented by counsel if desired;~~

~~(5) — the opportunity to call witnesses;~~

~~(6) — the opportunity to confront and cross-examine adverse witnesses except that such examination shall be conducted behind a protective screen or other device when necessary to protect the identity of WIC Program monitors;~~

~~(7) — an impartial decision maker who will prepare a written decision based solely on whether the state agency has correctly applied federal and state statutes, regulations, rules, policies and procedures governing the program according to the evidence presented at the hearing; and~~

~~(8) — written notification of the final decision within 90 days from the date of receipt of the request for a hearing by a vendor and within 60 days from the date of receipt of a local agency's request for a hearing. These timeframes are only administrative requirements for the state agency and do not provide a basis for overturning the state agency's adverse action if a decision is not made within the specified timeframes.~~

~~(j) — The state agency is not responsible for losses incurred by the local agency or vendor as a result of disqualification and/or denial of an application to participate.~~

~~(k) — If the hearing results in a final decision adverse to the local agency or vendor, the appellant may seek judicial review of the decision to the extent authorized by state law. The state agency or its legal counsel shall not provide legal advice to adverse parties concerning judicial review of final decisions in administrative hearings. Appellants must seek advice from their own attorneys.~~