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VIA FIRST CLASS MAIL

Ms. Patricia Daniels
Director, Supplemental Food Programs Division
Food and Nutrition Service
U.S. Department of Agriculture
3101 Park Center Drive
Room 528
Alexandria, VA 22302

Re: Proposed Rule, Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Discretionary WIC Vendor Provisions in the Child Nutrition and WIC Reauthorization Act of 2004; 71 Fed. Reg. 43371 (August 1, 2006)

Dear Ms. Daniels:

The Food Marketing Institute (FMI)[1] welcomes the opportunity to comment on the U.S. Department of Agriculture's (USDA's) proposed rule amending the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) by adding requirements mandated by the Child Nutrition and WIC Reauthorization Act of 2004. 71 Fed. Reg. 43371 (August 1, 2006). FMI and its members fully support the important mission of the WIC program. Authorized retailers are proud of their role as the primary delivery means of nutritious food for WIC mothers and their children. Accordingly, our industry has a significant interest in ensuring the integrity and efficiency of the WIC program.

As discussed more fully below, the most important provisions of the instant proposal relate to the implementation of the statutory amendment requiring WIC State agencies to notify WIC-authorized retail vendors of an initial violation in writing before documenting a subsequent violation. The vendor community wholeheartedly supports the statutory provision, but we are deeply concerned that the proposed regulation does not adequately

[1] FMI conducts programs in research, education, industry relations and public affairs on behalf of its 2,300 member companies — food retailers and wholesalers — in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores with a combined annual sales volume of $340 billion — three-quarters of all food retail store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets. Its international membership includes 200 companies from 60 countries.

reflect the statutory standard. Indeed, the statute is clear: vendors must be notified unless one exception exists. As proposed, the exception would swallow the rule. Accordingly, we urge USDA to promulgate final regulations to reflect Congressional intent.

Separately, the vendor community supports the provision requiring WIC-authorized retail vendors to purchase infant formula only from sources identified on a state-maintained list of authorized wholesalers, distributors, retailers and manufacturers of infant formula. We believe this provision will help to curb organized retail theft of and trafficking in infant formula, thereby helping to ensure the safety and efficacy of the product when it is consumed by children.

1. USDA Regulations and Preamble Must Accurately Reflect Congressional Notification Standard

The most critical provisions of the proposal to the vendor community implement the statutory amendment requiring WIC State agencies to notify WIC-authorized retail vendors of an initial violation in writing before documenting a subsequent violation. In this regard, the WIC Reauthorization Act of 2004 provides as follows:

> If a State agency finds that a vendor has committed a violation that requires a pattern of occurrences in order to impose a penalty or sanction, the State agency shall notify the vendor of the initial violation in writing prior to documentation of another violation, unless the State agency determines that notifying the vendor would compromise an investigation.

P.L. 108-265, Sec. 203(c)(5), codified at 42 USC 1786(f)(26). Congress added this provision to assist vendors in meeting their obligations under the WIC program. Store management personnel in authorized stores have the obligation, along with state agencies to preserve the integrity of the WIC program to the best of their ability, but if they are unaware of a problem because they have not been notified of an error, they cannot fully meet that responsibility.

In addition, Congress intended this provision to address the use of "gotcha" enforcement that had been practiced in some localities. For example, compliance buyers would at times conduct multiple buys in the course of a weekend without notifying the retailer of a problem or giving the retailer an opportunity to correct it. So, for example, if the problem was a single clerk who was making an unintentional error, the retailer could be exposed to fines in excess of $30,000, as well as disqualification from both WIC and the Food Stamp Program before the owner or manager of the store ever knew there was a problem. While retailers recognize that USDA considers even unintentional errors actionable under the WIC rules, disqualification is certainly disproportionate in circumstances such as this. A notice of violation would solve the problem without inconveniencing the WIC customers who would need to find another store if the retailer was disqualified as a result of this type of enforcement activity. Congress enacted the provision cited above to address this type of enforcement approach.

Of course, notification of the vendor will not be appropriate in every situation, such as when the State agency has sound reason to believe that the vendor itself is involved in fraud against the WIC program. Therefore, we recognize that the State agency will need to balance the equities in some cases, and that is clearly what Congress intended by adding the phrase at the end of Section 203(c)(5). Direction from USDA that reflects Congressional intent is essential in order to bring uniformity to the decision-making that will of necessity be exercised in each state. Otherwise, the exception will swallow the important new rule that Congress wrote into the WIC Reauthorization Act.

a. Statute Requires Vendor Notification Except in Limited Circumstances

The statutory amendment establishes a clear standard. The rule Congress set forth is that State agencies must notify the vendor in writing of a violation prior to documentation of a subsequent violation. Congress, also, however, establishes a narrow circumstance under which the State agency is excused from the notification requirement: if "the State agency determines that notifying the vendor would compromise an investigation." Thus, before the State agency may exercise the exception rather than the rule, the State must make an affirmative determination that notifying the vendor would compromise an ongoing investigation.

Unfortunately, the language of the proposed regulation coupled with the explanation provided in the preamble eviscerate Congressional intent here. Specifically, the proposed regulation interprets the statutory amendment as follows:

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

Proposed 7 CFR 246.12(l)(3), 71 Fed. Reg. at 43384 (emphasis added). The primary additions that USDA has made in converting the statutory language to a proposed regulation are the addition of the phrases, "in its discretion" and "on a case-by-case basis". We agree that the determination should be made on a case-by-case basis, otherwise, theoretically, a state agency could determine that, in all instances, the notification of a vendor about a problem observed during the course of a compliance buy would compromise any investigations that happened to be on-going.[2] Clearly, Congress intended the WIC agency to

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[2] Indeed, Kentucky has already promulgated a regulation that makes the sweeping determination that whenever an investigation is "covert" (which would cover all compliance buys) and whenever "the investigator reports a potential initial violation during the course of the investigation" (without such observation no notice would be necessary anyway), the agency will not provide notice to the vendor. See, e.g., Kentucky Administrative Regulations, Title 902, Chapter 4, Section 040. Clearly, the exceptions here completely subsume the statutory rule.

make an affirmative determination in each specific case and, therefore, the inclusion of the "case-by-case basis" language helps to clarify the obligation of the State agency to view each case individually rather than to adopt sweeping universal standards.[3]

However, we are concerned that the language "in its discretion" (particularly coupled with the preamble explanation) significantly undermines Congressional intent. Webster's dictionary defines "discretion" as follows: "Freedom or power to act or judge on one's own." Although the statutory amendment obviously envisions some decision-making on the part of the State agency, the use of the word "discretion" implies an unfettered ability of the State agency to choose when and if it will notify the vendor.

The examples given in the preamble likewise undermine Congressional intent. For example, the preamble states as follows:

> The notice could compromise an investigation if the investigation is covert, such as a compliance buy investigation, which involves an investigative agent posing as a WIC participant and transacting WIC food instruments. In such circumstances the notice would reveal the existence of an investigation which had been previously unknown to the vendor.

71 Fed. Reg. at 43377. The type of transaction cited by USDA comprises the substantial majority of all WIC investigatory activity. Notifying the vendor that a violation was allegedly observed during a compliance buy is not, in and of itself, revelatory of an investigation, but only of an inspection. If no compliance buy transactions were subject to the notification requirement, Congress would have written entirely pointless legislation, which is clearly contrary to the rules of statutory interpretation.[4] Notification is not necessary in circumstances in which the WIC compliance person identifies herself to the store manager and provides information on the violation at the time of the inspection – in that case the store manager has received notification. Therefore, the primary type of situation that Congress was attempting to redress was compliance buys.

Please note that we are **not** suggesting that undercover WIC shoppers identify themselves to the owner or manager before exiting the store in the same fashion that all other compliance buyers identify themselves to the manager (alcohol, tobacco, food stamps, etc.). We understand that the undercover WIC shoppers do not want their identities known to store personnel. In keeping with the statute, however, WIC compliance buyers should be required to send some type of communication that can be quickly received, acknowledged, and acted upon by the store owner/manager so that any problems can be corrected as quickly as possible.[5] The preamble to the final rule should state as much to prevent the incorrect

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[3] As discussed more fully below, we do not, however, believe that the factors USDA recommends that the State agency consider in making their case-by-case determinations are appropriate.

[4] See, e.g., *Montclair v. Ramsdell*, 107 US 147 (1883) .

[5] This notice should be sent to the corporate headquarters, as are other communications of importance, to ensure that the issue is addressed as quickly as possible.

interpretation that is being advanced in some states that the use of a compliance buy technique is itself sufficient to vitiate the statutory notification requirement in every circumstance. See, e.g., footnote 2, above.

USDA also states that an investigation conducted by a separate agency could be grounds for the State agency to avoid its notification obligations under the WIC Reauthorization Act. 71 Fed. Reg. at 43377. We disagree. The coincidental existence of an investigation by an unrelated government agency should not be sufficient grounds for a State agency to avoid its statutory obligation to notify vendors of the results of a WIC inspection. The fact that another agency may (correctly or incorrectly) believe that the vendor is not in compliance with other laws and regulations does not necessarily have bearing on the status of the vendor's compliance with the WIC program.[6] Thus, the existence of such an investigation should not, in and of itself, be a sufficient basis for the State agency to fail to notify the vendor of the results of a WIC inspection.

The preamble also provides guidance on the factors that a State agency should consider in making the required case-by-case notification determinations, and recommends that the States consider the following: (1) the severity of the initial violation; (2) the compliance history of the vendor; or (3) whether the vendor has been determined to be high risk. 71 Fed. Reg. at 43377. The preamble continues by giving the State agency complete discretion in determining which of these factors to consider and how much weight should be assigned to each. Id.

The guidance USDA gives here is well beyond the scope of the statute. The statute allows the State agency to avoid notification in one circumstance: if the State determines that notification would[7] compromise an investigation. Perhaps the factors that USDA enumerates would be helpful in determining whether the State agency should launch an investigation. However, unless there is already an ongoing investigation that would be compromised, the State agency has no discretion to decide whether or not to notify the vendor, let alone complete discretion to weigh factors unrelated to the statutory determination.

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[6] We are unclear on the meaning of the preamble discussion with respect to "different violations" and respectfully request that the Agency provide further clarity on this issue in the final rule. See, 71 Fed. Reg. at 43377, ("A State agency may determine that any notification based on a different violation occurring during a subsequent compliance buy visit would compromise the investigation, even though the State agency had not determined that the notification following the previous compliance buy visit would compromise the investigation. The State agency may choose not to notify the vendor regarding a different violation identified in a subsequent compliance buy visit.") We believe this may mean that the State agency may consider the risk of compromising investigations thru notification to increase if a violation observed in one inspection is again observed in subsequent inspections but we would appreciate further clarification.

[7] Note, too, that the statute requires the State agency to make an affirmative determination about the impact that notification would have on an investigation. That is, the State agency must determine that notification "would" compromise an investigation, not whether it "may" or "might" compromise an investigation. Clearly, Congress State agencies to notify retailers, except in very specific circumstances.

Moreover, the statute requires notification before a subsequent violation can be recorded. Accordingly, the State agency must make a determination as to whether or not notification would compromise an ongoing investigation before conducting a subsequent inspection. The State agency should not be allowed to bootstrap subsequent alleged violations to support what should be an initial determination that notification would compromise an ongoing investigation – such circular logic reinstates the status quo that existed before Congress passed the WIC Reauthorization Act.

Accordingly, we recommend that USDA take the following actions in the final rule with respect to the notification provision:

(1) Remove the regulatory language granting State agencies discretion that they do not have under the statute;
(2) Clarify that the statute requires the State agency to notify the vendor of the results of an inspection, except in certain limited circumstances;
(3) Remove the examples in the preamble that suggest that the use of a compliance buy or the presence of an investigation by another agency are sufficient in and of themselves to mitigate the State's obligation to notify vendors;
(4) Provide clear guidance about the circumstances under which an ongoing investigation might be compromised by notifying the vendor, e.g., the State has a substantial basis to believe and is actively investigating whether the retailer is committing fraud against the WIC program; and
(5) Require the State to make an affirmative determination that notification would compromise an ongoing investigation and document the results of the determination before conducting a subsequent inspection.

b. State Agency Determination Not To Notify Vendor Must Be Subject to Review To Satisfy Due Process

As discussed more fully above, the legislative amendment requiring State agencies to notify vendors in writing of a violation before conducting a subsequent inspection is an important statutory amendment. Congress authorizes State agencies to decide not to notify a vendor, but only if the State agency first determines that such notice will compromise an investigation. Given the importance of the determination, it is essential that USDA ensure that the determination is subject to administrative review under Section 246.18(a).

Under the current proposal, however, the State determination not to notify the vendor is not subject to administrative review. See proposed 7 CFR 246.18(a)(1)(iii)(F). USDA supports the proposal by stating that "administrative review of the absence of such notification would be inconsistent with the discretion provided to the State agency by the statute." 71 Fed. Reg. at 43382. As discussed more fully above, the statute does not give the State agency unfettered discretion to determine whether or not to notify the vendor of a violation and, indeed, the circumstances under which a State agency may avail itself of the exception to notification are narrowly drawn by the statute. To hand the State agency

complete and non-reviewable discretion in its determination of whether or not to grant the due process notification required by the statute flies in the face of Congressional intent.

We urge USDA to amend the final rule to allow administrative review of the State agency determination not to notify a vendor, particularly if the lack of notice and resulting pattern of offenses result in civil money penalties or suspension or disqualification from the program.

2. Vendors To Purchase Infant Formula from Sources Authorized by State Agencies

The vendor community supports the provisions of the proposal that (1) require State agencies to maintain a list of State-licensed wholesalers, distributors, retailers and manufacturers of infant formula and (2) require WIC-authorized retail vendors to purchase infant formula only from entities so listed. We have seen a significant increase in the magnitude of complex organized retail crime, much of which involves illegal trafficking in infant formula.

Indeed, one of the ten items most frequently stolen from grocery stores is infant formula. This is important not just in terms of loss and inconvenience to customers when infant formula is unavailable for purchase, but also because of the health issues that could arise if a customer unknowingly purchases black market product that may be adulterated or unsafe for consumption because of inadequate climate controls maintained by crime rings. Initially, the problem was concentrated in border states like Texas, Arizona and California. Recently, however, the crime rings have spread. USDA's national regulations are likely to significantly reduce the ease with which large quantities of stolen formula may be resold, thereby reducing the attractiveness of the product to crime rings.

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We appreciate the opportunity to share our comments on this proposed rule. We look forward to continuing to work with you to implement these and other changes to the WIC program.

Sincerely,

/S/

Deborah R. White
Vice President &
Associate General Counsel

Cc: House Committee on Education and the Workforce
Senate Committee on Agriculture, Nutrition and Forestry