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November 6, 2006

Ms. Patricia Daniels
Director, Supplemental Food Programs Division
Food and Nutrition Service
U.S. Department of Agriculture
3101 Park Center Drive
Room 520
Alexandria, VA 22302

Re: Proposed Rule, Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Revisions in the WIC Food Packages; 71 Fed. Reg. 44784 (August 7, 2006)

Dear Ms. Daniels:

The Food Marketing Institute (FMI) welcomes the opportunity to comment on the U.S. Department of Agriculture's (USDA's) proposed rule to revise the food packages for the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). 71 Fed. Reg. 44784 (August 7, 2006).¹ As partners with USDA and state and local WIC agencies, FMI fully agrees with the important mission of the WIC program and supports its goals completely. Authorized retailers are proud of their role as the primary means of delivering nutritious food to WIC mothers and their children.

The current proposal, which adds fruits and vegetables to the WIC food packages, represents the most significant change in the history of the WIC food package from the vendor perspective. The expansion in the number of potentially eligible products is enormous, so the associated implementation challenges will likewise be significant. Nonetheless, our members believe that the nutritional value that will be provided to WIC recipients is extremely important and we fully support the inclusion of fruits and vegetables. Our specific comments on the implementation are set forth below; comments on the general WIC package precede our remarks specific to the fruit and vegetable benefit.

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.

I. General Comments

A. Establish a Federal WIC Food Package Implementation Advisory Group

Given the magnitude of the changes that will be required to accommodate the revised WIC food packages, we strongly urge USDA to establish a federal WIC Food Package Implementation Advisory Group. Implementation of the expanded food package will present opportunities and challenges for all involved. Accordingly, we recommend that USDA establish an advisory group composed of representatives from all sectors who will need to work together to ensure the most effective and efficient implementation of the food package, including the Food and Nutrition Service (FNS), state WIC agencies, vendors, and WIC recipients. An advisory committee will be an important mechanism for ensuring that issues can be raised and addressed across impacted constituencies.

B. License New Retail Locations To Serve WIC Populations

The proposed expansion of the WIC food package is a fine example of the WIC program's goal of increasing consumer choice, in this case, with respect to the foods WIC mothers may select. WIC mothers should also be entitled to choose from a broad selection of stores at which they can shop, including new stores. Unfortunately, some states are imposing moratoriums on WIC licenses for new stores, which prevents WIC mothers from shopping at the newest and most up-to-date stores in a given neighborhood. Accordingly, we urge USDA to prohibit states from putting a moratorium on new licenses or otherwise numerically restricting the number of stores eligible for WIC licenses.

C. Federal WIC Program Should Authorize All Appropriate Packaging Materials

As USDA is amending the food package regulations, we encourage the Agency to address an issue not included in the proposed regulations: the tendency of states to regulate food *packaging* materials. Specifically, our members have observed that several state WIC agencies are imposing restrictions on the types of materials (e.g., glass, plastic) in which WIC eligible foods must be packaged. Although we understand the need to require some limitations on the size or weight of packages, state-by-state regulations on packaging materials are beyond the scope or mission of the WIC program and add unnecessary costs to the system. Accordingly, we urge USDA to amend the final rules to authorize the inclusion of food packaged in any materials in the WIC food packages.

II. Fruit and Vegetable Benefit Comments

FMI and its members strongly support the goal of providing WIC customers with access to fruits and vegetables as part of their food package. We believe the inclusion of fruits and vegetables in the food package will enhance the overall nutritional profile of the supplement. Nonetheless, this change constitutes a significant expansion of the eligible products listing and, therefore, will present operational challenges for vendors. Currently, a typical WIC agency maintains an eligible products list of a few hundred items. The proposed revision may result in eligible products lists that approach or even exceed 10,000 items. With any kind of change of this magnitude -- no matter how welcome it may be -- a number of operational issues will need to be considered and addressed to achieve effective implementation. The comments below relate specifically to the fruit and vegetable benefit and reflect the input of FMI members who have participated in WIC fruit and vegetable pilots in California and New York.

A. Fruit and Vegetable Benefit Should Be Provided in Incremental Dollar Value Vouchers

Under the proposed regulation, WIC recipients would be provided with vouchers in \$2 increments that can be redeemed for a variety of fruit and vegetable products. We support the proposed distribution method and urge its inclusion in the final rule for the following reasons.

First, although most of the other items in the WIC food package are described in terms of size or weight of the item, this approach would not work well for fruits and vegetables, many of which are sold from bulk bins. Retailers have long observed that consumers prefer to select fresh produce themselves. Bulk bins allow individuals to choose the types and ripeness of items with ease and specificity. Accordingly, much fresh produce is sold in bulk rather than in pre-packaged amounts. Requiring either WIC mothers or retail cashiers to weigh out exact amounts of bulk produce is unnecessarily burdensome. Therefore, we agree that the proposal to allow WIC mothers to purchase a specific dollar value of produce is preferable to any other approach, such as one that would limit the fruit and vegetable purchase by size or weight.

Second, we support the proposed use of incremental dollar value vouchers. Specifically, USDA has proposed a \$6 or \$8 monthly fruit and vegetable benefit. By providing it in \$2 increments, WIC mothers may purchase fresh fruits and vegetables throughout the month. Given the perishability of these products, a voucher for the total amount would only enable WIC mothers to provide fresh produce for themselves and their children for a short window each month. The proposed approach will allow more regular access to fresh produce. In terms of implementation, if the purchase is less than the \$2 increment, the cashier can simply write the actual amount tendered on the voucher itself, without providing change to the customer; if the purchase exceeds the \$2

increment, WIC customers could pay the balance in cash. Accordingly, we strongly urge USDA to include \$2 vouchers in the final regulations.

B. USDA Should Standardize Minimum Stocking Requirements

Variations among state minimum stocking requirements present significant challenges for vendors. These challenges will be compounded with the proposed addition of fruit and vegetables to the WIC package.

Specifically, our members advise that the proposed fruit and vegetable benefit will result in the potential addition of more than 10,000 different varieties of fresh, frozen and canned fruits and vegetables. Produce, particularly seasonal produce items, are subject to the vagaries of nature. Droughts, hurricanes, and other natural and uncontrollable events can significantly influence the availability of produce items. Indeed, USDA recognizes these challenges in the cost-benefit analysis. See 71 Fed. Reg. at 44840.

Accordingly, the federal WIC program should include a flexible federal provision to authorize and allow retailers to substitute appropriate products when specific items are not available. Moreover, the federal program should not permit states to promulgate specific minimum stocking requirements beyond the requirement for vendors to maintain two or more varieties in the fresh, frozen, or canned category of produce. Vendors simply will not be able to maintain minimum stock levels, subject to fines and penalties, for all of the potential varieties of fresh, frozen and canned fruits and vegetables. The goal of the WIC program to provide WIC recipients with fruits and vegetables can be met without imposing a minimum stocking requirement on each and every variety of produce item.

C. Fruit and Vegetable Benefit Should Not Be Included in Cost Containment Reporting

Under the current regulations, state WIC agencies can impose cost containment requirements under certain circumstances. Cost containment requires vendors to report the sales prices for WIC food packages to the state WIC agency on a regular basis.

Although the proposed regulation does not address the matter, we recommend that USDA amend the final rules to prevent state WIC agencies from including the fruit and vegetable benefit in the cost containment reporting requirements. Specifically, the fruit and vegetable benefit is issued in a set dollar amount determined by the federal WIC program. Accordingly, the cost will not vary from retailer to retailer. Indeed, as the fruit and vegetable benefit will be managed via a separate dollar value voucher, it will not be part of the overall WIC food package voucher at all. Given the fact that USDA intends to issue the benefit via pre-determined dollar limit vouchers, we urge USDA to amend the cost containment regulations to prevent state WIC agencies from including the fruit and vegetable benefit in cost containment reporting obligations.

D. Increased Flexibility in Shelf Tags for Foods Eligible for Fruit and Vegetable Benefit

Under the current regulations, state WIC agencies can regulate the use of shelf tags that retailers can use to identify WIC-eligible food products quickly and easily for WIC customers. In this regard, some states require retailers who intend to use this type of system to use shelf tags to identify all WIC-eligible items, rather than just some. Although we understand the goal of ensuring that all WIC-eligible items are equally identified, this approach will be very difficult for retailers to implement in the fruit and vegetable benefit context.

Specifically and as noted above, the fruit and vegetable benefit may increase the number of WIC-eligible items from several hundred to more than 10,000. Ensuring that a shelf tag is present for each and every one of these items, particularly given seasonal variability, is virtually impossible. Prohibiting retailers from using any shelf tags if they cannot guarantee that a shelf tag is present for every single WIC-eligible item will mean that WIC customers will be missing a potentially useful guide that some retailers try to provide. Accordingly, we urge USDA to amend the final regulations to allow retailers to use shelf tags without requiring retailers to identify every single eligible item.

E. Adequate and Transparent Client Education

The fruit and vegetable benefit is an important expansion in the WIC food package. We encourage USDA to amend the educational programs for WIC customers to explain the important components of the benefit. Retailers can bring an important perspective to updating the educational materials and stand ready to assist USDA in this regard. We encourage USDA to prepare standard federal training materials that are used by all states and to provide working drafts to the public so that retailers can identify areas in which WIC customers seem concerned or confused. For example, an FMI member reported a heated discussion with a customer participating in the New York pilot over whether red potatoes are the same as white potatoes. Giving retailers the opportunity to identify some of the concerns expressed at store level may help to improve the overall quality of the educational materials.

F. Inspection on Perishables

Under the current regulations, new stores must have all perishable products in place before they can receive authorization to serve WIC customers. Given the vast array of perishable products that will be available under the expanded fruit and vegetable benefit and the seasonal variability of these items, we urge USDA to amend the federal regulations to limit this requirement to two varieties as outlined in the proposed rule, rather than require retailers to have the full inventory of fresh produce in place that the retailer expects to maintain over the lifetime of the store.

G. Implementation

Notwithstanding the significant nutritional value that WIC customers will gain from the expanded fruit and vegetable package, managing the massive expansion at store level will present logistical challenges. Retailers must be given the tools and the time to allow them to manage their role of delivering food to WIC participants efficiently and effectively.

1. USDA Must Quickly Develop a Comprehensive Federal Fruit and Vegetable Eligible Products Listing Without Brand Limitations

As noted above, FMI and its members support the broad expansion of the WIC food package to include a broad array of fruits and vegetables. To ensure the most efficient vendor management of this very broad universe of food products, USDA must quickly develop a comprehensive list of the fruits and vegetables that are eligible for the benefit. This list must be federally developed and managed.

Moreover, the list cannot be brand specific. Innumerable different growers serve as sources of fresh produce to the retail community. Increasingly, these growers are branding their products to increase sales and customer recognition. Even (or especially) small local growers brand their produce for consumer recognition. Nonetheless, from a nutritional perspective, each type of fresh produce will have the same nutrient profile, regardless of grower brand.² Requiring each brand to be approved will be time-consuming and costly and will undoubtedly prevent some small local farmers -- who often provide the freshest produce given their proximity to the store -- from participating. Therefore, the list of WIC-eligible produce items must not be brand-specific.

2. State WIC Agencies Must Authorize All Items on Federal Fruit and Vegetable List

The current regulations allow each state to choose the food items that will be included in its state WIC food package from the list of WIC-eligible items identified under the federal regulations. Although we understand the basis for this approach for the traditional WIC food package items, USDA's final rules should not permit states to specify individual produce items.

Specifically, state-by-state variations are difficult, confusing and expensive to administer under the current program. The scope of eligible produce items that will be included in the federal program is very large. If states are allowed to specify individual produce items that will be allowed or prohibited from the potential universe of 10,000 items, retailers will be overly burdened simply trying to administer the system.

² FDA's nutrition regulations for fresh produce, which allow posting of a single poster with generic nutritional information for all produce items, regardless of brand, inherently recognize this fact. See 21 CFR 101.44.)

Accordingly, the final federal rules should require states to allow WIC consumers to purchase any of the items on the federal list of WIC-eligible fruit and vegetables.

3. Product Exclusions in Produce Benefit Should Be Limited and Managed on Federal Level

The WIC program has historically excluded certain types of foods from the WIC food package based on added ingredients, such as sugars or oils. Although excluded foods are difficult to manage in the current system, the challenge will increase exponentially with the exponential increase in items that will populate the universe of eligible foods under the expanded fruit and vegetable benefit. FMI recommends the following measures to address the potential challenge.

First, the list of excluded food products should be managed at the federal level for the reasons stated above; fifty state-by-state program variations for the vast number of food products will be impossible for any given store to administer.

Second, no enforcement should take place against retailers if a WIC customer purchases an excluded food item until the federal list discussed above is in place and the program can be managed electronically. As long as the food item is in the family of fruits and vegetables, retailers should not be penalized if the WIC customer presents a produce item that has an excluded ingredient in it, at least until this list is in place and retailers have been given one year to implement. Otherwise, USDA will effectively require every front end cashier to read every can or bag of fruits and vegetables to ascertain whether one of the excluded ingredients is in the product.

Third and most importantly, state WIC agencies should educate WIC recipients on the best products for them to purchase for both value and nutritional benefit. Presumably, the purpose of the WIC program is to instill long-term nutritional practices for WIC recipients. WIC customers are only eligible to receive the WIC benefit for a limited amount of time. If they are dependent on retailers to police their food choices, they will not be prepared to make sound food choices once they are no longer eligible for the WIC benefit and one of the important goals of the WIC program will not be achieved. Accordingly, WIC recipients should be encouraged through education to choose food products wisely, rather than to depend on retailers to police their food choices.

4. Development of National UPC Database and Standard PLU Listings Will Be Critical

Given the broad expansion of the WIC food package, the development and implementation of a national Uniform Product Code (UPC) database with state product lists identified and flagged is more important than ever before. A transitional interim approach for list development, flagging and enforcement should be in effect until the national UPC database is available for this purpose.

Similarly, standardization of the Price Look Up (PLU) numbers for fresh produce becomes increasingly important with the inclusion of the fruit and vegetable benefit in the WIC food package. USDA's regulations should adopt federally and encourage state use of generic PLU numbers as maintained by the International Federation of Produce Standards.

5. We Encourage USDA To Exercise Reasonable Enforcement Measures

We urge USDA to implement the new fruit and vegetable benefit with reason, discretion and an emphasis on compliance rather than enforcement. As noted above, the expansion of the benefit is enormous, and the potential complexities are innumerable. Vendors will need adequate time to program all of the front end changes that will be required to accommodate at least the federal list of newly authorized foods. Cashiers will need to be trained to understand the new requirements and appropriately counsel confused consumers. Of course, none of these measures can be implemented until final rules are issued, otherwise confusion will abound.

Accordingly, we recommend that USDA implement a reasonable effective date for retailer compliance with the regulations. The final rules should include a comprehensive list of produce items that are eligible for the benefit and the effective date should be no sooner than twelve months following promulgation of the regulation and the list.

Moreover, we urge USDA to exercise reasonable discretion and emphasize compliance over enforcement in the first twelve months after the effective date. Retailers will need time to ensure that all cashiers are trained on the complexity of the new benefit and that all necessary programming has been accomplished. Therefore, enforcement should be very limited and only on items that are clearly outside of the produce category until at least twelve months after the final regulation with the national UPC database is live and any unavoidable state flags have been identified on the federal list. For example, a store should not be disqualified for selling red potatoes or a can of mixed vegetables that includes diced white potatoes as one of the four vegetables, etc, until systems can be fully programmed and complete employee training can occur.

We anticipate significant programming needs in order to allow retailers to enter data electronically (i.e flagging) and to split tender. Moreover, despite the recent statutory amendments, our members continue to advise of incidents where retailers are not told about violations from undercover buys until several have been accumulated and the state WIC agency moves for a severe penalty or disqualification. While this is an important issue under the current regulations, and one that we raised in the recent rulemaking that USDA conducted on the vendor rules, the importance of the issue increases significantly with the impending inclusion of 10,000 produce items. A first time warning would help significantly to identify issues that need to be addressed.

Ms. Patricia Daniels, USDA

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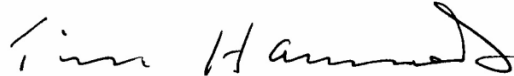
H. Future Use of EBT Will Ameliorate Many Issues

Electronic delivery of the enhanced WIC food package would solve many of the logistical issues discussed above, provided, of course, that adequate funding is available and a realistic implementation time frame is established. Clearly, EBT is not a short term solution, nor should it be considered in the short term. Even when a state is fully implemented with electronic delivery programs, it will take significant technological work to integrate the new package changes. Nonetheless, the relative ease with which the new benefit could be incorporated in an electronic system is worth noting as the food package will undoubtedly continue to change over time.

* * *

We commend USDA for the proposal to include fruits and vegetables in the WIC food package and respectfully request that you consider our comments in this regard. We look forward to continuing to work with you.

Sincerely,

A handwritten signature in black ink that reads "Tim Hammonds". The signature is written in a cursive, slightly slanted style.

Tim Hammonds
President and CEO