



655 15th Street, N.W.
Washington, DC 20005-5701
Tel: (202) 452-8444
Fax: (202) 429-4519
E-mail: fmi@fmi.org
Website: www.fmi.org

November 29, 2006

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: Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Interim Rule on Vendor Cost Containment; 70 Fed. Reg. 71708 (Nov. 29, 2005)

Dear Ms. Daniels:

The Food Marketing Institute (FMI) welcomes the opportunity to comment on the U.S. Department of Agriculture's (USDA's) interim rule on vendor cost containment.¹ 70 Fed. Reg. 71708 (Nov. 29, 2005). As partners with USDA and state and local WIC agencies, authorized retailers are proud of their role as the primary delivery means of nutritious food to WIC mothers and their children and understand the need to control costs in order to serve the maximum number of mothers and children.

Briefly, by way of background, the interim rule under consideration implements the statutory provisions that require State agencies to implement a vendor peer group system, competitive price criteria, and allowable reimbursement levels in a manner that ensures that the WIC Program pays authorized vendors competitive prices for supplemental foods. It also requires State agencies to ensure that vendors who derive more than 50 percent of their annual food sales revenue from WIC food instruments do not charge higher food costs to the program than do other vendors. 70 Fed. Reg. at 71708. Following are our general and specific comments on the interim rule.

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.

A. Impact Significantly Beyond Above 50% WIC

FMI and its members generally support the goals of cost containment and increasing the efficiency of the WIC program that are the basis of the legislative amendment underlying this rule. We are concerned, however, that state implementation of the rule has had a broader impact than Congress intended. Specifically, Congress clearly intended to apply the cost containment measures codified in the interim rule to “above-50-percent” WIC vendors in an effort to ensure that the authorization of primarily WIC stores did not drive up program costs. However, the actual impact of the interim regulation is far more significant and affects the entire vendor community. In some cases, the state implementation plans have had severe impact on the entire vendor community resulting in significant recoupment payments and returned check fees. Moreover, as some of the state implementation plans have only been in effect for six to eight weeks, the long term impact on the overall vendor community is still unknown.

B. Shelf Price Collection

Section 246.12(g)(4)(ii)(B) of the interim rule requires State agencies to collect shelf prices for WIC-approved foods from authorized retail vendors at least every six months. The guidance also suggests that it may be preferable to collect prices on a more frequent basis than twice annually. Indeed, our members advise that some states have chosen to collect shelf prices on a quarterly, or even a monthly, basis.

Clearly, however, semi-annual information collection is sufficient to ensure the general integrity of the program or else USDA would have required more frequent shelf price collection in its regulations. Collecting information any more frequently is, therefore, unnecessary for program integrity purposes. Given the significant labor-intensive burden that shelf price collections place on vendors, state agencies should not exceed the federal semi-annual standard for information collection.

We do, note, however, that in certain extraordinary situations, such as dramatic commodity price fluctuations, it may be appropriate to collect data more frequently in specific areas and we appreciate the special efforts that state agencies have extended in this regard. Quarterly or monthly price collections across all food categories should not, however, be the norm.

C. Annual Determination of Above 50% WIC Vendors

Section 246.12(g)(4)(i) requires each State agency to determine on an annual basis which authorized vendors derive more than 50 percent of their annual food sales revenue from WIC food instruments and which new vendor applicants are expected to meet this criterion. Collectively, these vendors are considered “above-50-percent vendors.” 7 CFR 246.12(g)(4)(i). To make its determination, the State agency is required to consider the relationship of a vendor’s annual revenue from WIC instruments to the vendor’s overall annual revenue from the sale of all food items.

Unfortunately, however, no universal definition of “food sales” exists in the marketplace or regulations today. In fact, attempting to define food sales is a complex and challenging issue that has plagued states and localities in many contexts, not the least of which is in the tax area. As a result, to fulfill their obligation to determine the “above-50-percent” vendor community, state WIC agencies are using a variety of conflicting approaches that lead to disparate results.

For example, in those states that have established an exemption for food sales from state or local taxes, the tax-exempt amount is generally a good tool for determining food sales. Other states rely on Food Stamp sales, but these are generally less than 10% of all sales, so it is not a very reliable indicator. Some state agencies have opted to assemble a food sales list and require vendors to collect sales data in a variety of food category subtotals. For instance, the State of Texas is collecting both the dollar amount and the percent of sales in categories such as meat, fish, poultry, bread, cereal, dairy, candy, soft drinks and snacks. Any subtotals in these categories are only estimates and are often difficult to extrapolate from the reporting departments currently collect in a supermarket. This approach is unnecessarily burdensome and unlikely to produce a very accurate picture.

Therefore, we urge USDA to establish a federal standard that would allow vendors to provide a simple declaration to the relevant state agency as to whether or not the vendor’s WIC sales exceed 50% of its overall food sales. A self-certification of this nature from an officer of the company would be binding and subject to strict governmental penalties if it was inaccurate. Furthermore, it would be a relatively easy, efficient and cost-effective way for the State agency to meet its obligation to ascertain which if its authorized vendors were above-50-percent vendors. Given the variety of different approaches currently used by the states and the varying results that they provide, self-certification would be more reflective of the true sales picture than an inconclusive, but expensive estimate of sales in a particular food category.

D. Competitive Price vs. Allowable Reimbursement Levels

If stores meet the competitive price criteria then it would stand to reason logically that they should not be exceeding allowable reimbursement levels, but that is not always the case. Stores that meet the competitive price criteria are still finding that they owe the state agency significant recoupment fees. Clearly, vendors have always operated under maximum prices, but now any amount over their competitor’s average price is considered exceeding the maximum allowable reimbursement level. The amount the state intends to collect from the vendor in recoupment is not provided to the vendor until 6-8 weeks after the pricing violation occurred.

Some states, such as New Mexico, have addressed this problem by designating a weighted average instead of a simple average and a standard deviation instead of a variance on each food instrument. Using these tools may be more likely to yield a fair result.

E. Peer Group Pricing Must be Transparent

Peer group pricing is an important method of cost containment that is supported by vendors if it is done in a manner that facilitates vendor involvement and compliance. Based on our members' experience, the following criteria are essential to an effective peer group pricing system.

The most important element is transparency. To facilitate transparency, state agencies that utilize peer group pricing should ensure that key information is available to the vendor community and all such information should be available on line. For example, states should provide the criteria used by the state agency to formulate peer groups and the actual peer groups created. Such transparency will ensure that vendors understand their peer groups and can advise the state agency if the peer group is inappropriate.

Vendors must also have the opportunity to appeal peer group assignments. For example, depending on which criteria are used by the state, a vendor may be eligible for multiple different peer groups, such as when actual WIC food sales or straight food sales might place the vendor in one category but the overall number of cash registers might place the vendor in a different group. (In some cases, a store may have a high number of cash registers because they are placed throughout the store in multiple departments -- floral, garden, pharmacy, deli, fast food, etc. -- but the overall level of food sales may be quite low.) Accordingly, retailers should have an opportunity to appeal their peer group assignments to the state agency and explain their specific situations to ensure that the peer groupings are equitable.

F. Item Pricing vs. Category Pricing

In implementing the cost containment rule, some states have moved from item-driven pricing to category pricing. Category pricing is unfair to retailers because it requires the retailer to adjust the price on every product in the category for all customers.

For example, in the peanut butter or cheese category when a least expensive brand is not designated, the customer is allowed to select from every size and every brand. To meet its obligation to the WIC program, retailers must adjust the prices on every item for all customers in order to fall within the competitive pricing criteria. Particularly in the cheese category, the price range can be very large. To rectify this situation, USDA should either prohibit category pricing or, for items that allow "store brand" or "lowest price," the Agency should ask for high and low retail amounts on each product in a category to allow for a fair redemption amount.

G. WIC Electronic Benefits Transfer (EBT)

FMI and its members recognize that EBT may serve as a possible solution for some of the pricing and transparency issues discussed above. Although EBT should some day allow for more efficient price comparisons, reduce complexities, and mitigate recoupments, full implementation of EBT will not occur until well into the future.

Ms. Patricia Daniels

November 29, 2006

Page 5

In this regard, many states have advised that they still do not have adequate information technology systems to accommodate a move to EBT. Although Michigan tested an on-line WIC EBT system at a very basic level, no live test has been conducted on an on-line WIC EBT system in a high volume multi-lane integrated environment. Demonstrating that an approach can work for one customer in a stand beside system with only a few participants is very different than a statewide caseload in an integrated system. Until a truly comprehensive pilot is performed in Michigan or elsewhere, the TX/NM off-line approach is the only current tested approach that will accommodate those features.

H. Timeframe for Implementation

Finally, although the interim rule was promulgated in November 2005, the rule was not implemented in many states until the summer or fall of 2006. Retailers advise that implementation issues continue to surface and adjustments may well need to be made. Therefore, USDA should amend and republish the interim rule as recommended above with an additional opportunity to comment six months after the second interim rule is published.

* * *

We appreciate the opportunity to share our comments on the interim rule and look forward to our continuing work with you on this issue. If you have any questions on the foregoing, please do not hesitate to contact me at 202-220-0734.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Hatcher".

Jennifer Hatcher
Senior Director,
Federal Government Relations