



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

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January 22, 2013

Chris Hoke
1931 Mail Service Center
Raleigh, NC 27699-1931

Re: 10A NCAC 43D .0708

Dear Mr. Hoke:

At its January 17, 2013 meeting the Rules Review Commission objected to the above-captioned rules in accordance with G.S. 150B-21.10.

The Commission objected to this Rule based on ambiguity. In Item (36), page 5 it is unclear what is meant by "vendor location" in lines 13, 14 and 17 and "store" in line 18.

This rule refers to a "change in location" as triggering termination of the WIC Vendor Agreement. But it also adds the proviso that the change in location must be more than three miles from the vendor's previous location. This seems to indicate that if the vendor changes locations and the change is less than three miles, the vendor's agreement is not terminated.

It now becomes important to note that the rule appears to be referring to the "vendor[']s" location rather than the "store[']s" location although this is not explicit. In the definitions rule 43D .0202 "store" means "the physical building located at a permanent and fixed site" (emphasis added).

That leaves open the possibility that this rule could (and should?) be interpreted to mean that if a vendor, whose store is subject to a disqualification period, changes locations and the change is less than three miles, that the vendor's agreement remains in place, the original store is still subject to the disqualification, while the new location is not subject to any disqualification.

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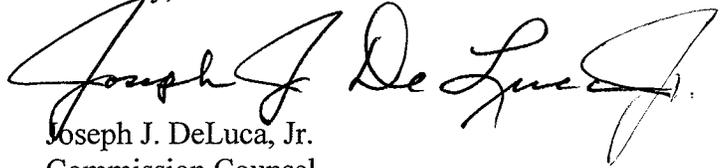
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If that illogical outcome is the intent, then that should be made abundantly clear.
If that is not the intent, then the rule is unclear.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's action, please let me know.

Sincerely,

A handwritten signature in black ink, reading "Joseph J. DeLuca, Jr." in a cursive style.

Joseph J. DeLuca, Jr.
Commission Counsel

JJD:jbe

1 10A NCAC 43D.0708 is proposed for adoption as follows:

2
3 **10A NCAC 43D.0708 AUTHORIZED VENDORS**

4 By signing the WIC Vendor Agreement, the vendor agrees to:

- 5 (1) Process WIC program food instruments and cash-value vouchers in accordance with the terms of the
6 Vendor Agreement and state and federal WIC program rules, regulations and applicable law;
- 7 (2) Accept WIC program food instruments and cash-value vouchers in exchange for WIC supplemental
8 foods. Supplemental foods are those foods which satisfy the requirements of 10A NCAC 43D .0501;
- 9 (3) Provide only the authorized supplemental foods listed on the food instrument, or authorized fruits and
10 vegetables with a cash-value voucher, accurately determine the charges to the WIC program, and
11 complete the "Pay Exactly" box on the food instrument or cash-value voucher prior to obtaining the
12 signature of the WIC customer. The WIC customer is not required to get all of the supplemental foods
13 listed on the food instrument or the full dollar value of the cash-value voucher. However, a WIC
14 customer may obtain more fruits and vegetables than the full dollar value of a cash-value voucher if
15 the WIC customer pays the difference;
- 16 (4) Enter in the "Pay Exactly" box on the food instrument or cash-value voucher only the total amount of
17 the current shelf prices, or less than the current shelf prices, for the supplemental food actually
18 provided and shall not charge or collect sales taxes for the supplemental food provided;
- 19 (5) Charge no more for supplemental food provided to a WIC customer than to a non-WIC customer or no
20 more than the current shelf price, whichever is less;
- 21 (6) Accept payment from the state WIC Program only up to the maximum price set by the state agency for
22 each food instrument within that vendor's peer group. The maximum price for each food instrument
23 shall be based on the maximum prices set by the state agency for each supplemental food, as described
24 in Sub-item (4)(a) of Rule .0707, listed on the food instrument. A food instrument deposited by a
25 vendor for payment which exceeds the maximum price shall be paid at the maximum price set by the
26 state agency for that food instrument;
- 27 (7) Accept payment from the state WIC Program only up to the full dollar value of the cash-value
28 voucher;
- 29 (8) Not charge the state WIC Program more than the maximum price set by the state agency under Item
30 (4)(a) of Rule .0707 for each supplemental food within the vendor's peer group;
- 31 (9) Provide to WIC customers infant formula, exempt infant formula, and WIC eligible medical food
32 purchased only from the sources specified in Item (3) of Rule .0707. Providing infant formula,
33 exempt infant formula, or WIC eligible medical food that has not been purchased from the sources
34 specified in Item (3) of Rule .0707 shall result in termination of the WIC Vendor Agreement;
- 35 (10) For free-standing pharmacies, provide only exempt infant formula and WIC-eligible medical foods;
- 36 (11) Excluding free-standing pharmacies, redeem at least two thousand dollars (\$2,000) annually in WIC
37 supplemental food sales. Failure to redeem at least two thousand dollars (\$2,000) annually in WIC

1 supplemental food sales shall result in termination of the WIC Vendor Agreement. The store must
2 wait 180 days to reapply for authorization;

3 (12) Accept WIC program food instruments and cash-value vouchers only on or between the "Issue Date"
4 and the "Participant Must Use By" dates;

5 (13) Prior to obtaining the WIC customer's signature, enter in the "Date Transacted" box the month, day
6 and year the WIC food instrument or cash-value voucher is exchanged for supplemental food;

7 (14) Ensure that the WIC customer signs the food instrument or cash-value voucher in the presence of the
8 cashier;

9 (15) Refuse to transact any food instrument or cash-value voucher that has been altered;

10 (16) Not transact food instruments or cash-value vouchers in whole or in part for cash, credit, unauthorized
11 foods, or non-food items;

12 (17) Not provide refunds or permit exchanges for authorized supplemental foods obtained with food
13 instruments or cash-value vouchers, except for exchanges of an identical authorized supplemental food
14 when the original authorized supplemental food is defective, spoiled, or has exceeded its "sell by,"
15 "best if used by," or other date limiting the sale or use of the food. An identical authorized
16 supplemental food means the exact brand, type and size as the original authorized supplemental food
17 obtained and returned by the WIC customer;

18 (18) Imprint the authorized WIC vendor stamp in the "Pay the Authorized WIC Vendor Stamped Here" box
19 on the face of the food instrument or cash-value voucher to enable the vendor number to be read
20 during the Program editing process;

21 (19) Imprint the vendor's bank deposit stamp or the vendor's name, address and bank account number in the
22 "Authorized WIC Vendor Stamp" box in the endorsement;

23 (20) Deposit WIC program food instruments and cash-value vouchers in the vendor's bank. All North
24 Carolina WIC program food instruments and cash-value vouchers must be deposited in the vendor's
25 bank within 60 days of the "Issue Date" on the food instrument or cash-value voucher;

26 (21) Ensure that the authorized WIC vendor stamp is used only for the purpose and in the manner
27 authorized by the Agreement and be responsible for the unauthorized use of the authorized WIC
28 vendor stamp;

29 (22) Maintain storage of the authorized WIC vendor stamp so only the staff designated by the vendor owner
30 or manager have access to the stamp and report loss of this stamp within two business days to the local
31 WIC agency;

32 (23) Notify the local WIC agency of misuse (attempted or actual) of WIC program food instruments or
33 cash-value vouchers;

34 (24) Maintain a minimum inventory of supplemental foods in the store for purchase. Supplemental foods
35 that are outside of the manufacturer's expiration date do not count towards meeting the minimum
36 inventory requirement. The following items and sizes constitute the minimum inventory of
37 supplemental foods for vendors in Peer Groups I through III of Item (1) of Rule .0706, vendors in Peer

1 Groups I through IV of Item (2) of Rule .0706 and vendors in Peer Group IV of Item (3) of Rule
 2 .0706:
 3

<u>Food Item</u>	<u>Type of Inventory</u>	<u>Quantities Required</u>
<u>Milk</u>	<u>Whole fluid: gallon</u> <u>-and-</u> <u>Skim/lowfat fluid: gallon</u>	<u>2 gallons</u> <u>4 gallons</u>
<u>Cheese</u>	<u>1 pound package</u>	<u>2 pounds</u>
<u>Cereals</u>	<u>2 types: whole grain</u> <u>(minimum package size 12 ounce)</u>	<u>6 packages total</u>
<u>Eggs</u>	<u>Grade A, large, white:</u> <u>one dozen size carton</u>	<u>2 dozen</u>
<u>Juices</u>	<u>Single strength:</u> <u>48 ounce container</u> <u>64 ounce container</u>	<u>4 containers</u> <u>4 containers</u>
<u>Dried Peas and Beans</u>	<u>one pound package</u>	<u>2 packages</u>
<u>Peanut Butter</u>	<u>16 to 18 ounce container</u>	<u>2 containers</u>
<u>Infant Cereal</u>	<u>8 ounce box</u>	<u>6 boxes</u>
<u>Infant Formula</u>	<u>milk-based concentrate; 12.0 – 13.0 ounce</u>	<u>34 cans</u>
	<u>-and-</u> <u>soy-based concentrate; 12.0 to 13 ounce</u>	<u>17 cans</u>
	<u>-and-</u> <u>milk-based powder; 131.0 to 14.0 ounce</u>	<u>10 cans</u>
	<u>-and-</u> <u>soy-based powder; 11.0 to 14.0 ounce</u> <u>Brands must be the primary contract infant formulas</u>	<u>5 cans</u>
<u>Fruits</u>	<u>14 to 16 ounce can: 2 varieties</u>	<u>6 cans total</u>
<u>Vegetables</u> <u>(Excludes foods in</u> <u>Dried Peas and Beans</u> <u>category)</u>	<u>14 to 16 ounce can: 2 varieties</u>	<u>6 cans total</u>

4
 5 All vendors in Peer Groups I through III of Item (1) of Rule .0706, Peer Groups I through IV of Item
 6 (2) of Rule .0706 and Peer Groups IV and V of Item (3) of Rule .0706 shall supply milk, soy-based or
 7 lactose-free infant formula in 32 ounce ready-to-feed or lactose-free powder within 48 hours of request
 8 by the state or local WIC agency;

9 (25) Ensure that all supplemental foods in the store for purchase are within the manufacturer's expiration
 10 date;

11 (26) Permit the purchase of supplemental food without requiring other purchases;

- 1 (27) Attend, or cause a manager or other authorized store representative to attend, annual vendor training
2 upon notification by the local WIC agency. Failure to attend annual vendor training by September 30
3 of each year shall result in termination of the WIC Vendor Agreement;
- 4 (28) Inform and train vendor's cashiers and other staff on WIC Program requirements;
- 5 (29) Be accountable for the actions of its owners, officers, managers, agents, and employees who commit
6 vendor violations;
- 7 (30) Allow monitoring and inspection of the store premises and procedures to ensure compliance with the
8 Agreement and state and federal WIC Program rules, regulations and applicable law. This includes
9 providing access to all Program-related records, including access to all WIC food instruments and
10 cash-value vouchers at the store, vendor records pertinent to the purchase and sale of WIC
11 supplemental foods, including invoices, receipts, copies of purchase orders, and any other proofs of
12 purchase, federal and state corporate and individual income tax and sales and use tax returns and all
13 records pertinent to these returns, and books and records of all financial and business transactions.
14 These records must be retained by the vendor for a period of three years or until any audit pertaining to
15 these records is resolved, whichever is later. Notwithstanding any other provision of this Rule and
16 Rules .0707 and .0710, failure or inability to provide these records for an inventory audit or providing
17 false records for an inventory audit shall be deemed a violation of 7 C.F.R. 246.12(l)(1)(iii)(B) and
18 Subparagraph (a)(1) of Rule .0710. Invoices, receipts, purchase orders, and any other proofs of
19 purchase for WIC supplemental foods shall include:
- 20 (a) the name of the seller and be prepared entirely by the seller or on the seller's business
21 letterhead;
- 22 (b) the date of purchase and the date the authorized vendor received the WIC supplemental
23 food at the store if different from the date of purchase; and
- 24 (c) a description of each WIC supplemental food item purchased, including brand name, unit
25 size, type or form, and quantity;
- 26 (31) Maintain a record of all SNAP-eligible food sales and provide to the State agency upon request a
27 statement of the total amount of revenue derived from SNAP-eligible food sales and written
28 documentation to support the amount of sales claimed by the vendor, such as sales records, financial
29 statements, reports, tax documents or other verifiable documentation;
- 30 (32) Submit a current accurately completed WIC Price List when signing this Agreement, and by April
31 1 and October 1 of each year. The vendor also agrees to submit a WIC Price List within one week of
32 any written request by the state or local WIC agency;
- 33 (33) Reimburse the state agency in full or agree to a repayment schedule with the state agency within 30
34 days of written notification of a claim assessed due to a vendor violation that affects payment to the
35 vendor or a claim assessed due to the unauthorized use of the WIC vendor stamp. Failure to reimburse
36 the state agency in full or agree to a repayment schedule within 30 days of written notification of a
37 claim shall result in termination of the WIC Vendor Agreement. The state agency shall deny payment

1 or assess a claim in the amount of the full purchase price of each food instrument or cash-value
2 voucher invalid under Subparagraphs (a)(2), (a)(5), (a)(6) or (a)(7) of Rule .0704 of this Section.
3 Denial of payment by the state agency or payment of a claim by the vendor for a vendor violation(s)
4 shall not absolve the vendor of the violation(s). The vendor shall also be subject to any vendor
5 sanctions authorized under Rule .0710 for the vendor violation(s):

6 (34) Not seek restitution from the WIC customer for reimbursement paid by the vendor to the state agency
7 or for WIC food instruments or cash-value vouchers not paid or partially paid by the state agency.
8 Additionally, the vendor shall not charge the WIC customer for authorized supplemental foods
9 obtained with food instruments or cash-value vouchers;

10 (35) Not contact a WIC customer outside the store regarding the transaction or redemption of WIC food
11 instruments or cash-value vouchers;

12 (36) Notify the local WIC agency in writing at least 30 days prior to a change of ownership, change in
13 location, cessation of operations, or withdrawal from the WIC Program. Change of ownership, change
14 in location of more than three miles from the vendor's previous location, cessation of operations,
15 withdrawal from the WIC Program or disqualification from the WIC Program shall result in
16 termination of the WIC Vendor Agreement by the state agency. Change of ownership, change in
17 location, ceasing operations, withdrawal from the WIC Program or nonrenewal of the WIC Vendor
18 Agreement shall not stop a disqualification period applicable to the store;

19 (37) Return the authorized WIC vendor stamp to the local WIC agency upon termination of the Agreement
20 or disqualification from the WIC Program;

21 (38) Not discriminate on the basis of WIC participation, such as failing to offer WIC customers the same
22 courtesies offered to other customers or requiring separate WIC lines;

23 (39) Reapply to continue to be authorized beyond the period of its current WIC Vendor Agreement.
24 Additionally, a store must reapply to become authorized following the expiration of a disqualification
25 period or termination of the Agreement. In all cases, the vendor applicant is subject to the vendor peer
26 group criteria of Rule .0706 and the vendor selection criteria of Rule .0707; and

27 (40) Comply with all the requirements for vendor applicants of Items (3), (4) and (7) through (16) of Rule
28 .0707 throughout the term of authorization. The state agency may reassess a vendor at any time during
29 the vendor's period of authorization to determine compliance with these requirements. The state
30 agency shall terminate the WIC Vendor Agreement of any vendor that fails to comply with Items (3),
31 (4), (8), (9), (10), (11), (12), (13) or (15) of Rule .0707 during the vendor's period of authorization,
32 and terminate the Agreement of or sanction or both any vendor that fails to comply with Items (7), (14)
33 or (16) of Rule .0707 during the vendor's period of authorization.

34 *History Note: Authority G.S. 130A-361; 7 C.F.R. 246; 42 U.S.C. 1786*