

<p style="text-align: center;"><b>Nutrition Services</b> <b>Department of State Health Services</b></p>
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Effective October 1, 2007

Policy No. WV:10.0

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## **Selection of Vendors for WIC Initial Authorization of Site and Calculation and Use of Vendor Competitive Pricing Data**

### **Purpose**

To establish an Interim State Policy to meet the federal mandates cited as "Authority" below, WIC vendor contractual requirements set out in the Texas Administrative Code (TAC Rule) §31.32, §31.34 and §31.35 are superseded and replaced on an interim basis with the requirements of this Policy.

### **Authority**

The Child Nutrition Act, 42 USC §1786, as amended by Public Law 108-265 in conjunction with the Interim Federal Rule entitled "Special Supplemental Nutrition Program for Women, Infants, and Children (WIC): Vendor Cost Containment" published by USDA in the Federal Register on November 29, 2005 in Volume 70, No. 228.

Public Law 109-97, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006

### **Policy**

Applicant retail grocers and pharmacies must be deemed cost competitive by the State Agency (SA) as a prerequisite for initial authorization to participate in the Texas WIC Program as a vendor. Once authorized, WIC vendors are subject to on-going cost competitive standards, the statewide not-to-exceed reimbursement limit per food type, and the maximum allowable reimbursement limits for their individual peer group. Vendors that exceed any of the pricing limits are subject to reductions to their claims, both prior to payment as pre-payment edits and subsequent recoupments after payment. In addition, stores that are non-competitively priced are subject to termination of their agreement.

### **Definitions:**

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**Exempt infant formula** - An infant formula that meets the requirements for an exempt infant formula under § 412(h) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 350a(h)) and the regulations at 21 CFR parts 106 and 107.

**Exempt Pharmacy** – A vendor that is a pharmacy electing to supply only exempt infant formula and/or WIC eligible medical foods.

**Full-line grocery store** – A vendor who has, or is expected to have, WIC food sales that constitute 50 percent or less of his gross food sales. In addition to the foods authorized by the WIC Program, the vendor sells a variety of food products in each of the following four food groups on a continuous basis: meats, poultry or fish; bread or cereal; vegetables or fruits; and dairy. “Continuous basis” means that on any given day of operation, a store offers for sale and normally displays in a public area no fewer than three different varieties of food items in each of the four food groups. A full-line grocery store may elect not to sell infant formula.

**Maximum Allowable Reimbursement** – A price limit derived monthly by the WIC Program’s automated end of process month computer analysis of WIC vendor claims paid equal to: 1) Traditional WIC Stores = 120% of the average prices paid to Traditional WIC vendors in each price region and vendor band for the various WIC food types; 2) Predominantly WIC Stores = 100% of the statewide average prices charged by Traditional WIC Stores.

**Not To Exceed (NTE) Amount** – The price limit that the state will pay for a food type (e.g. milk, juice, cereal, eggs, etc.) meant as a reasonableness amount set high enough so that the food type can be purchased anywhere in the state. The Not To Exceed amount is printed on WIC paper vouchers and established in the Authorized Product List sent electronically to EBT enabled vendors. The Not To Exceed amount, which is enforced by the state as a pre-payment edit, is NOT the end-of-process-month Maximum Allowable Reimbursement limitation defined elsewhere.

**Pharmacy** - A facility at which a prescription drug or medication order is received, processed, or dispensed under Texas Health and Safety Code, Subtitle J, Occupations Code; Chapter 481 or 483, Health and Safety Code;

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or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. §801 et seq.).

**Predominantly-WIC vendor (PWIC)** - A vendor outlet that has, or is expected to have WIC food sales that exceed 50% of the outlet's total sales of foods that are eligible for purchase using benefits issued by the Food Stamp Program.

**Price region** – A geographic area comprised of designated zip codes or one or more counties. Such areas may or may not be contiguous.

**Primary contract brand infant formula** - The specific infant formula for which manufacturers submit a bid to a State agency in response to a rebate solicitation under 42 United States Code, §1786, and for which a contract is awarded by the State agency as a result of that bid.

**State Agency (SA)** - The Texas Department of State Health Services in its role as administrator of the WIC Program.

**Statewide Average Price Paid** – The average price paid to TWIC stores for a food item (paper system) or food category/subcategory (EBT system). Since the data structures are completely different for the two systems (paper vs. EBT), statewide averages can only be computed for like kind transactions (e.g. average prices paid within paper system or average price paid within EBT system). Thus statewide average means statewide within the paper system or statewide within the EBT system but not a statewide average derived from the two systems merged.

**Traditional WIC Vendor (TWIC)** – A vendor who has, or is expected to have, WIC food sales that constitute 50 percent or less of the outlet's total sales of foods that are eligible for purchase using benefits issued by the Food Stamp Program.

**Vendor** - A sole proprietorship, partnership, cooperative association, corporation, or other business entity operating one or more stores authorized by the state agency to provide authorized supplemental foods to participants under a retail food delivery system.

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**Vendor account** - A vendor approved by the state agency with one or more vendor outlets.

**Vendor Band** (also known as Sales Volume Band) – Based on monthly WIC sales volume, a comparison group of Traditional WIC Vendor outlets.

**Vendor agreement** - The formal and legally binding agreement between the Department of State Health Services and a vendor authorized to redeem WIC Program food instruments. One or more authorized store locations may be included under the same agreement.

**Vendor interactive training** - A training session for vendors that includes a contemporaneous opportunity for questions and answers.

**Vendor outlet** - An individual store which operates and transacts WIC food instruments at a fixed location, has an electric utility hook-up, is a store structure situated on a cement or pier-and-beam foundation that is not used simultaneously as a residence, has a minimum business area of 500 square feet, has clearly identifying signage that closely matches the vendor outlet name (abbreviated version acceptable) listed on the WIC Vendor Profile Application, and is walk-in accessible directly from the street or parking lot.

## Procedures

As mandated by Public Law 108-265 in conjunction with the USDA Interim Federal Rule entitled "Special Supplemental Nutrition Program for Women, Infants, and Children (WIC): Vendor Cost Containment", the SA's vendor Peer Grouping System distinguishes between WIC vendors who have, or could reasonably be expected to have, WIC food sales that exceed 50% of their total gross food sales (Predominantly WIC vendors) versus all other vendors (Traditional WIC vendors). Total gross food sales are defined as total gross sales of food items that can be purchased with Food Stamp Program benefits. This Peer Group System will be used in the evaluation of applicant vendor sites as well as in the WIC Program's monthly Maximum Allowable Reimbursement analysis.

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**I. Selection of Vendor Sites for WIC Initial Authorization for Participation. Section I does not apply to Exempt Pharmacies covered later in Section III.**

The moratorium on the authorization of new Predominantly WIC store outlets, implemented December 2, 2004, will remain in effect through September 30, 2008.

If an applicant vendor outlet has previously participated in the WIC Program but quit, has been disqualified, terminated and/or their Agreement expired, regardless of the reason, the store is considered a NEW applicant and must meet all the initial selection criteria. If the applicant vendor outlet that previously participated in the WIC Program and was classified as a WIC-Only or Predominantly WIC Vendor (PWIC), the applicant vendor outlet must meet all of the initial selection criteria, including classification as a traditional WIC Vendor (TWIC).

- A. Except as provided by subsection E of this section, the state agency shall evaluate an application for participation as a vendor upon receipt and verification of the following:
1. A written request for evaluation, which must contain at a minimum, the store name, physical address, name of a contact person, and a phone number at which the contact person can be reached;
  2. A completed and properly signed "Gross Food Sales Certification Form" indicating the store's estimated gross food sales, defined as foods that can be purchased with Food Stamp Program benefits, and the percentage estimated to be derived from WIC food sales.
  3. A valid Food Stamp Program Authorization Number for the outlet, if available, which will be verified through the USDA STARS System. Vendors without Food Stamp Program authorization are not eligible for authorization, unless and until the store submits documentation substantiating classification as a Traditional WIC vendor.
- B. A representative from the state agency (SA) or the local agency (LA) shall perform an on-site evaluation of a vendor outlet applying for authorization to redeem WIC food instruments.

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1. The SA or LA representative shall complete a vendor evaluation form during the on-site visit to the applicant vendor outlet indicating the types of WIC-authorized foods in stock and their shelf prices, if WIC food products are stocked and available for sale, and whether or not the outlet is a full-line grocery store. The state or local agency representative shall document on the Non-WIC Staple Foods Group Availability form the level of food availability offered for sale in the following four food groups: meat, poultry, or fish; breads or cereals; fruits or vegetables; and dairy.
2. If a store does not offer for sale other non-WIC food items as listed above, then the SA will not accept a Self Declaration of estimated sales that shows WIC sales comprising less than 50% of gross food sales. Unless and until the store submits documentation substantiating classification as a Traditional WIC vendor, the store is not eligible for authorization.
3. An applicant vendor outlet representative shall have the opportunity to review the information on the vendor evaluation form and should 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 store representative at the time of the on-site evaluation.
4. If a representative from the SA or LA visits an applicant vendor outlet to conduct the required on-site evaluation at a time previously agreed upon, and the outlet cannot be evaluated and/or is not ready for the evaluation at that time, the vendor outlet shall be deemed to have failed the evaluation, and the applicant vendor outlet shall not be authorized.
5. At the state office, the prices collected during the on-site evaluation will be compared to the average prices charged by Traditional WIC stores, except the state agency may exclude the prices of Wal-Mart, Super Target, or Military Commissaries. If an applicant vendor, expected to be a Traditional WIC vendor, has overall prices that are at or below 108% of the band 1 average for its price region (averages calculated using prices paid to Traditional WIC stores and excluding prices paid to Predominantly-WIC vendors), then the vendor will be deemed price competitive. If an applicant vendor,

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expected to be a Predominantly WIC vendor, has overall prices that are at or below 108% of the statewide average prices paid to Traditional WIC vendors then the vendor will be deemed price competitive. However, a new applicant vendor and/or location expected to be Predominantly WIC will not be approved through September 30, 2008.

- C. The state agency may approve an applicant vendor's initial authorization application upon compliance with the following criteria:
1. The applicant vendor outlet has submitted the Gross Food Sales Certification Form required under subsection I(A)(2) of this section.
  2. The store's shelf prices for approved WIC foods in stock are competitive as defined in I.B.5. above.
  3. The store has sufficient quantities (minimum required stocking) of authorized milk, evaporated milk, cheese, cereal, contract infant formula, contract infant cereal, eggs, peanut butter, and dried beans.
    - a. An applicant vendor outlet that elects to provide only exempt infant formula or medical foods:
      - i. shall not be authorized to redeem WIC food instruments for other WIC-authorized foods, including primary contract brand infant formula; and
      - ii. shall not be asked to submit a valid Food Stamp Program authorization number.
    - b. A vendor may elect not to provide infant formula. Refer to item d. for applicable minimum stocking requirements and disregard infant formula requirements item d. ix.
    - c. A vendor may elect to provide only infant formula. Refer to item d. for applicable minimum stocking requirements item d. ix. Disregard requirements for foods other than infant formula.
    - d. For applicant vendor outlets electing to provide WIC authorized foods and formula, the following quantities of each food type shall constitute minimum stocking required for WIC Program authorization:
      - 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;

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- 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 13.5 gallons of milk, some of which must be available in one-half gallon containers and that includes whole milk and at least two of the following types of milk: low-fat, fat-free, and buttermilk;
  - 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 each of milk and soy concentrate infant formula (contract brand) and nine cans each of milk-based powder formula and soy powder formula (contract brand); and
  - x. at least two 8-ounce boxes or one 16-ounce box of infant cereal.
4. The store provides milk in gallon and half-gallon containers and juice in containers of 46-ounce fluid or 11.5 or 12-ounce frozen.
5. The store's shelf prices for WIC food items do not exceed the Not To Exceed prices printed on WIC food instruments or contained in the Authorized Product File provided electronically to WIC EBT vendors.
6. Receives a recommendation for approval from the state or local agency representative who conducts the on-site evaluation.
7. The applicant vendor outlet has a retail food operations permit or food manufacturer's permit from the applicable city, county, district, or state health authority.
8. The store is clean, with fresh merchandise (not having for sale expired food items).
9. The applicant vendor has no apparent conflict of interest with the local agency in the vendor's price region or with the state agency.
10. The store has posted prices for all WIC food items.



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11. If applicable, the applicant vendor has a history of compliance with WIC Program rules, policies, and procedures.
  12. The applicant 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.
  13. The applicant store 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.
  14. The applicant vendor operates and will transact food instruments at a fixed location. Home delivery of foods purchased with WIC food instruments is not allowed.
  15. An applicant vendor's representative has participated in vendor interactive training.
  16. If an applicant vendor elects to provide infant formula, the vendor shall, purchase all its infant formula directly from entities listed in subparagraphs a-c below:
    - 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); or
    - 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.
    - d. upon request a WIC vendor must make available to department inspectors invoices or receipts documenting the purchase of its infant formulas.
- D. 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.

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- E. 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.
  
- F. After 4 months of operations, a new store site will be reexamined to determine whether it was properly classified as a Traditional WIC or Predominantly WIC vendor.
  - 1. If the store is authorized to accept Food Stamps, then its Food Stamp sales will be examined to determine if they exceeded WIC Program sales. If its Food Stamp sales exceeded WIC sales then the store outlet will be deemed a Traditional WIC vendor. However, if WIC sales exceeded Food Stamp sales, then the store will be classified as a Predominantly WIC store. The store will be given the opportunity to provide documentation, such as its sales tax report submitted to the State Comptroller, that supports WIC food sales for the 4-month period were less than or equal to 50% of total gross food sales counting only foods eligible for sale under the Food Stamp Program. If the store fails to provide such documentation in a timely manner (defined as submittal within 30-days) or documentation fails to support a Traditional WIC vendor classification, then the vendor agreement will be terminated.
  - 2. If the store is not authorized to accept Food Stamps, then the store must provide documentation, such as its sales tax report submitted to the State Comptroller. If the store fails to provide such documentation in a timely manner (defined as submittal within 30-days) or the documentation indicates more than 50% of the store's gross food sales were WIC sales, then the vendor agreement will be terminated.
  - 3. Termination of the vendor agreement shall not be held in abeyance during the pendency of an appeal or hearing in this matter.
  
- G. In the event a vendor purchases or acquires an outlet that was in the process of being disqualified or which was disqualified from the WIC Program at the time of acquisition, the vendor's application for that

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outlet location 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.

- H. If the state agency has disqualified the previous owner of an outlet for noncompliance or notified the previous owner that the outlet has been disqualified due to noncompliance, a new owner's application for that outlet 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.
- I. The state agency may deny an outlet's 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 outlet which has been disqualified or which has violated WIC Program vendor agreement procedures, policies, rules or regulations.
- J. 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.
- K. Previous 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.
- L. A vendor deemed ineligible for initial authorization to participate in the WIC Program due to noncompliance with the pricing requirements of

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subsection I.B.5 may be authorized if the vendor's participation is needed to address inadequate participant access to WIC authorized stores, as determined by the state agency under WIC Policy WV:03.0.

- M. An applicant vendor outlet is not authorized to accept WIC food instruments until the date the SA assigns an account/outlet number to the store, the store receives a copy of the executed Agreement signed by the state and written authorization by the SA. If the applicant outlet accepts a food instrument and submits the food instrument to the SA for payment through an alternate authorized vendor outlet:
1. The food instrument shall not be paid.
  2. The applicant vendor outlet shall not be eligible to apply for WIC authorization for:
    - a. Three years from the date of the applicant vendor's receipt of SA notification; or
    - b. If the applicant vendor outlet is currently disqualified from the Program for a period in excess of three years, the longer period shall apply.
- N. 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.

**II. Calculation and Use of Vendor Competitive Pricing Data and Maximum Allowable Reimbursement. Section II does not apply to Exempt Pharmacies covered under Section III.**

- A. The state agency will compare the prices charged by Predominantly WIC vendors against the prices paid to Traditional WIC vendors. The SA will ensure that the prices ultimately paid (after recoupments) to Predominantly WIC vendors do not exceed the statewide average price paid for foods to Traditional WIC vendors irrespective of their price region or WIC sales volume band. Both Traditional WIC vendors and

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Predominantly WIC vendors will be held to a Maximum Allowable Reimbursement derived from the prices paid to Traditional WIC stores.

- B. Traditional WIC vendors will be held to a Maximum Allowable Reimbursement of 120% of the average price paid by food type, for their respective Price Region (geographic parameter) and WIC sales volume band. When calculating average prices applicable to TWICs for a Price Region and WIC sales volume band, the state agency may exclude Wal-Mart, Super Target, and Military Commissaries.
- C. Predominantly WIC stores will be held to a Maximum Allowable Reimbursement equal to the Statewide Average paid by food type to Traditional WIC stores. Prices paid to Wal-Mart, Super Target, and Military Commissaries will be included in the calculation.
- D. At the State's discretion, some stores, including but not limited to Wal-Mart, Super Target, and Military Commissaries, may be placed into their own peer group for calculation of competitive pricing and Maximum Allowable Reimbursement.
- E. The SA currently operates both a paper voucher system and an Electronic Benefits Transfer (EBT) system. The operation of dual systems for issuance and vendor claims processing will persist in the state for the next several years as the SA works toward statewide rollout of EBT. Since the systems are materially different in nature, the transaction types and resultant pricing data cannot be merged for computation of price region or statewide comparisons. Therefore, the two systems will be discussed separately below.
  - 1. Paper Based System:

All paper voucher claims received for a given Process Month (defined as all paper based claims postmarked or hand delivered to the state in a given calendar month) will be processed using standard edits including first date to spend, last date to spend, and NTE amount. The NTE edit is NOT the Maximum Allowable Reimbursement but rather a statewide reasonableness amount for each type of food (e.g. NTE for milk, or cheese, or juice, etc). NTE edits reduce the reimbursement to the vendor prior to

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payment by the SA, without regard to PWIC or TWIC status, and prior to the Maximum Allowable Reimbursement pricing calculations. At the conclusion of a Process Month, after the last claim for the month is placed onto a payrun, an end-of-month computer analysis will be initiated that will compute the average payment amounts to implement the Maximum Allowable Reimbursement component of the system.

a. TWIC Vendors in the Paper Voucher System:

- i. All food items, except exempt infant formulas and WIC-eligible medical foods, will be used in the maximum allowable reimbursement calculation process:

Food Items	
Beans	Lactose Free Milk
Cereal	Peanut Butter w/o Jelly
Infant Cereal w/o fruit	Tuna Packaged in Water (chunk)
Eggs A or AA Large/Sm/Med	Carrots (Large cello bag or can)
Evaporated Milk	Cheese
Whole Milk Only	Juice
Milk/Buttermilk	All non-exempt Infant Formulas
Dry Powdered Milk	

- ii. Prices for every food instrument and line item type of food will be individually evaluated for exceeding the Maximum Allowable Reimbursement and the corresponding individual line item recoupment adjustments calculated.
- iii. The SA may reassign a TWIC vendor to an alternative comparison group when the TWIC vendor

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is a national discount superstore, a specialty pharmacy, a vendor that has elected to provide only exempt infant formula and WIC eligible medical foods, a military commissary, or a vendor that is not, in the SA's judgment, characteristic of other TWIC vendors in the band. The SA may also reassign a TWIC vendor to an alternative comparison group if the vendor is the only store in a price region or sales volume band.

- iv. TWIC vendors that have one or more food items that exceed 120% of the Average Price for their price region and sales volume band will have a recoupment adjustment identified that will be applied against a subsequent month's claim.
  
- v. The WIC sales volume bands that will be used for TWIC vendors within each of the State's price regions are:

- Band 1 = \$ 0.00 - \$ 1,999.99 WIC sales per month
- Band 2 = \$2,000 - \$ 5,999.99 WIC sales per month
- Band 3 = \$6,000 - \$19,999.99 WIC sales per month
- Band 4 = \$20,000.00 or greater WIC sales per month

- b. PWIC Vendors in the Paper Voucher System:

- i. The end-of-process-month computer analysis described above will also be used for determining Maximum Allowable Reimbursement for PWIC vendors. PWIC vendors' prices paid for food items will be compared to the Statewide Average Price paid, by food item, to TWIC vendors. Amounts paid to a PWIC vendor for food types above the Statewide Average Price threshold will have a recoupment adjustment identified that will be applied against a subsequent month's claims.

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- ii. Computing and application of Maximum Allowable Reimbursement for PWIC stores will be done without regard to price regions or sales volume bands.
- iii. All food items, except exempt infant formulas and medical foods, will be used in the Maximum Allowable Reimbursement calculation process:
- iv. The statewide average for TWIC stores used to set the Maximum Allowable Reimbursement by food item for PWIC stores will include the prices paid to Wal-Mart, Super Target, and Military Commissaries.

Food Items	
Beans	Lactose Free Milk
Cereal	Peanut Butter w/o Jelly
Infant Cereal w/o fruit	Tuna Packaged in Water (chunk)
Eggs A or AA Large/Sm/Med	Carrots (Large cello bag or can)
Evaporated Milk	Cheese
Whole Milk Only	Juice
Milk/Buttermilk	All non-exempt Infant Formulas
Dry Powdered Milk	

- v. Prices for every food instrument and food item will be individually evaluated for exceeding the Maximum Allowable Reimbursement and the corresponding food item recoupment adjustments calculated.
2. Electronic Benefits Transfer (EBT) Based System:  
 All EBT claims received for a given Process Month (defined as claims electronically submitted in a given calendar month) will be processed using standard edits including adjustments for exceeding the NTE amounts. The NTE edit is NOT the Maximum Allowable Reimbursement for Cost Containment but rather a



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statewide reasonableness amount for each type of food (e.g. NTE for milk, or cheese, or juice, etc) applied at the unit level (e.g. per can for formula, per ounce for cereal, per pound for cheese, etc.). NTE edits reduce the reimbursement to the vendor prior to payment by the SA, without regard to TWIC or PWIC status, and prior to the Maximum Allowable Reimbursement pricing calculations. At the conclusion of a Process Month, after the last claim for the month is placed onto a payrun, an end-of-month computer analysis will be initiated that will compute the average payment amounts to implement the Maximum Allowable Reimbursement component of the system.

- a. All category/subcategory food items, except exempt infant formulas and medical foods, will be used in the Maximum Allowable Reimbursement calculation process.
- b. In EBT, the food instrument is a smart card with an integrated circuit chip containing the recipient's benefits embedded, by category and subcategory of foods, recorded in quantities by varying units based on the type of food benefit. Unlike paper food instruments, in EBT the WIC client can redeem any portion of the benefit they wish during each trip to a store typically taking 6 – 8 trips to the store to deplete a month's entitlement.
- c. In the EBT system, it is not possible to implement USDA's mandate that prices are evaluated and recoupment adjustments made for individual food instruments. Rather, the evaluation and recoupment must occur at the category/subcategory level.
- d. NTE amounts are enforced as prepayment edits on each unit of product purchased (e.g. by ounce, pound, can, etc.). NTE amounts are not to be confused with the Maximum Allowable Reimbursement pricing calculated and applied as post payment edits to implement cost containment requirements.
- e. Maximum Allowable Reimbursement pricing for cost containment will be implemented by dividing the total price

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paid for a month for a food category/subcategory by the total number of units redeemed by TWIC vendors in the price region and band.

- i. TWIC EBT vendors:
  - a. Based on the end-of-process-month analysis described above, TWIC EBT vendors' (includes both retail grocers and non-exempt pharmacies) prices will be held to 120% of the vendors' price region and sales volume band Average Prices. Specifically, price computations will include only prices paid via the EBT system to TWIC EBT vendors.
  - b. The state agency may reassign a TWIC EBT vendor to an alternative comparison group when the TWIC EBT vendor is a national discount superstore, a specialty pharmacy, a vendor that has elected to provide only exempt infant formula, a military commissary, or a vendor that is not, in the SA's judgment, characteristic of other TWIC EBT vendors in the band. The state agency may also reassign a TWIC EBT WIC vendor to an alternative comparison group if the vendor is the only store in a price region or sales volume band.
  - c. TWIC EBT WIC vendors that have one or more category/subcategories that exceed 120% of the Average Price for their price region and sales volume band will have a recoupment adjustment identified that will be applied against a subsequent month's claim.
  - d. The WIC sales volume bands that shall be used for TWIC EBT enabled WIC vendors within each of the State's price regions will be:

- Band 1 = \$ 0.00 - \$ 1,999.99 WIC sales per month
- Band 2 = \$2,000 - \$ 5,999.99 WIC sales per month
- Band 3 = \$6,000 - \$19,999.99 WIC sales per month
- Band 4 = \$20,000.00 or greater WIC sales per month

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- ii. PWIC EBT Vendors:
  - a. The end-of-process-month computer analysis described above for TWIC EBT vendors will also be used for determining the Maximum Allowable Reimbursement for PWIC EBT vendors in the EBT system. PWIC EBT vendors' prices paid for category/subcategories will be compared to the EBT Statewide average prices paid by food category/subcategory to TWIC EBT vendors. Amounts paid to PWIC EBT vendors for food categories/subcategories above the TWIC EBT Statewide Average Price threshold will have a recoupment adjustment identified that will be applied against a subsequent month's claims.
  - b. Computing and application of Maximum Allowable Reimbursement for PWIC EBT stores will be done without regard to price regions or sales volume bands.
  - c. All food category/subcategories, except exempt infant formulas and medical foods, will be used in the Maximum Allowable Reimbursement calculation process.
  - d. The statewide average for TWIC EBT stores used to set the Maximum Allowable Reimbursement prices, by food category/subcategory, for PWIC EBT stores will include the prices paid in EBT to Wal-Mart, Super Target, and Military Commissaries.

### **III. Exempt Pharmacy Authorization and Maximum Allowable Reimbursement**

- A. The state agency shall evaluate an application from a vendor that elects to apply as an exempt pharmacy upon receipt and verification of a written request for evaluation, which must contain at a minimum,

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the pharmacy name, physical address, name of a contact person, a phone number at which the contact person can be reached, and a written statement that the pharmacy is requesting authorization to supply only exempt infant formulas and/or WIC-eligible medical foods.

- B. A representative from the SA or the LA shall perform an on-site evaluation of an exempt pharmacy outlet applying for authorization and complete a vendor evaluation form, as applicable, during the on-site visit to the pharmacy.
- C. The state agency may approve an exempt pharmacy's initial authorization application upon compliance with the following criteria:
1. The exempt pharmacy's prices for a representative sample of exempt infant formula and/or WIC-eligible medical food items do not exceed the Not To Exceed prices printed on WIC food instruments or contained in the Authorized Product File provided electronically to WIC EBT vendors.
  2. The exempt pharmacy receives a recommendation for approval from the state or local agency representative who conducts the on-site evaluation.
  3. The exempt pharmacy must be licensed in Texas to operate a pharmacy.
  4. The exempt pharmacy outlet is clean, with fresh merchandise (not having for sale expired exempt infant formula and/or WIC-eligible medical foods).
  5. The exempt pharmacy has no apparent conflict of interest with the local agency in the vendor's price region or with the state agency.
  6. The exempt pharmacy has posted prices for exempt infant formula and/or WIC-eligible medical foods stocked on its shelves.
  7. If applicable, the exempt pharmacy has a history of compliance with WIC Program rules, policies, and procedures.
  8. The exempt pharmacy has business integrity as indicated by a lack of activities during the past six years including fraud, antitrust violations, embezzlement, theft, forgery, bribery,

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- falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice, or tax evasion.
9. The exempt pharmacy 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.
  10. The exempt pharmacy operates and will transact food instruments at a fixed location. Home delivery of exempt infant formulas and/or medical foods purchased with WIC food instruments is not allowed.
  11. The exempt pharmacy has participated in vendor interactive training.
  12. The exempt pharmacy shall purchase all its infant formula and WIC-eligible medical foods directly from entities listed in subparagraphs a-c below:
    - 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); or
    - 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.
  13. Upon request, the exempt pharmacy will make available to department inspectors invoices or receipts documenting the purchase of its exempt infant formulas and/or WIC-eligible medical foods.
- G. In the event an exempt pharmacy purchases or acquires an exempt pharmacy outlet that was in the process of being disqualified or which was disqualified from the WIC Program at the time of acquisition, the exempt pharmacy's application for that outlet location 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

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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.

- H. If the state agency has disqualified the previous owner of an exempt pharmacy outlet for noncompliance or notified the previous owner that the outlet has been disqualified due to noncompliance, a new owner's application for that outlet 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.
- I. The state agency may deny an exempt pharmacy's 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 outlet, which has been disqualified or which has violated WIC Program vendor agreement procedures, policies, rules or regulations.
- J. The state agency may hold an authorized exempt pharmacy 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.
- K. Previous 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 exempt pharmacy'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.
- L. An exempt pharmacy deemed ineligible for initial authorization to participate in the WIC Program due to shelf prices higher than the

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current Not to Exceed prices may be authorized if the exempt pharmacy's participation is needed to address inadequate participant access to WIC-authorized stores, as determined by the state agency under WIC Policy WV:03.0.

- M. Exempt pharmacies 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.
- N. Exempt pharmacies that submit a claim for any WIC food item other than an exempt infant formula and/or WIC-eligible medical food will have their status as an exempt pharmacy revoked immediately. The pharmacy may not apply for redesignation as an exempt pharmacy until six months after the date of the State agency's notification to the vendor of exempt status being revoked.
- O. The SA will assess the exempt pharmacy for status as a TWIC or PWIC vendor. Exempt pharmacies are subject to the Not to Exceed amounts but may be exempted from competitive price criteria and maximum allowable reimbursement levels as allowed under the provisions of 7 CFR 246(g)(4)(iv).

#### **IV. Vendor Agreement with the State Agency:**

- A. Once an applicant vendor outlet 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/signed vendor agreement and written SA authorization, the vendor may begin accepting WIC Program food instruments.
- B. A vendor agreement may cover more than one outlet. The disqualification of one outlet does not affect the authorization of other outlets covered by the vendor agreement.

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- C. The cessation of operations at an authorized vendor outlet terminates the agreement for that outlet unless:
1. The vendor seeks to relocate the outlet for reason(s) beyond the vendor's control, such as loss of lease or damage to the premises caused by fire, flood, or natural disaster; or
  2. The vendor voluntarily seeks to relocate the outlet to enhance the quality or access to services available to WIC clients; and
  3. For any relocation authorized under this subsection:
    - a. The outlet shall be relocated to another address within the same community;
    - b. The vendor shall provide written notification to the state agency in advance citing the reason(s) for the relocation;
    - c. The relocation will not increase the total number of authorized outlets operated by the vendor and the old and new site are not operational simultaneously for any period of time;
    - d. The new site shall comply with all criteria for initial authorization, except that a Predominantly-WIC vendor is not required to submit a valid Food Stamp Program authorization;
    - e. The old site must have WIC dollar volume of at least \$500.00 per month.
    - f. If the vendor outlet that is relocating has attended face-to-face training within the previous twelve months, no new initial training is necessary.
    - g. If the vendor outlet has not attended face-to-face training within the last 12 months, the vendor must complete the new initial training documentation form and participate in the interactive training by phone. The vendor must also attend a face-to-face training session within one year from the date the outlet is authorized at the new location.
    - h. The outlet must not be disqualified/terminated at the time of the relocation request, or has not received notification of a pending disqualification, termination, or non-renewal at any time prior to or after informing the state agency of the proposed relocation but before the relocation has been completed.



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- D. 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 is 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 is being 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 considered for authorization as a WIC Program vendor. However, a Predominantly WIC store outlet that changes ownership will remain a Predominantly WIC store. The sale of the store terminates the agreement and the new owner will be considered for a WIC agreement only if the State has lifted its moratorium on authorizing new PWIC vendors.

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- a. The applicant vendor must submit a written notification 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 notification 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 ID number of the new owner.
  - c. The authorized vendor (seller) shall provide the state agency with written notification prior to the sale, including the date the outlet being sold will cease to accept WIC food instruments.
- E. WIC food instruments must not be accepted at an applicant store until the store has been duly authorized, including completion of an on-site evaluation, with recommended approval by the local agency, execution of the vendor agreement and vendor profile, assignment of an account/outlet number by the state agency, receipt of a copy of the executed agreement signed by the SA and written SA authorization.
- F. 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.
- G. 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.

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2. The terms of authorization are established in the vendor agreement, and referenced WIC Policies and State Administrative rules which are incorporated by reference as addenda, between the state agency and the vendor and the contractual relationship ends with the expiration of the vendor agreement.
3. The state may amend a WIC vendor Policy or State of Texas Administrative Code rule during the term of the agreement with written notification to the vendor. The vendor may choose to accept the amendment wherein the contract will remain in full force, or the vendor may exercise the option of declining the amendment by written notice to the state agency of termination of the agreement and cessation of WIC operations.
4. 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 disqualification, termination and/or expiration of the vendor agreement.

**IV. Change in Status of a Predominantly-WIC Vendor to a Traditional WIC Vendor**

- A. Predominantly-WIC vendors may petition the state agency for reclassification as a Traditional WIC vendor.
  1. The vendor must submit a written request to the state agency requesting a reclassification stating the grounds upon which the store believes it should be classified as a Traditional WIC Vendor.
  2. The store must be able to show evidence that it should be classified as a Traditional WIC Vendor to include documentation such as their sales tax report submitted to the State Comptroller.
- B. The state's classification of a store as Predominantly-WIC will remain in effect until the conclusion of the state's review and a decision is rendered to modify the classification.

**V. Remaining Competitively Priced:**

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- A. Subsequent to selection for contracting, a vendor outlet must not increase prices to a level that would make the store ineligible for selection to participate in the WIC Program. Per federal regulation 246.12(h)(3)(viii): A vendor's failure to remain price competitive is cause for termination of the vendor agreement, even if actual payments to the vendor are within the maximum allowable reimbursement.
  
  - B. Total payments by the state agency to a vendor outlet for a process month's claims that collectively exceed 108% of the average prices of TWIC vendors paid in the same month constitutes non-competitive pricing.
    - 1. For TWIC vendors, the 108% ongoing competitive pricing level will be calculated from the average prices paid to TWIC vendors in their respective price region and WIC sales volume band prices.
    - 2. For PWIC vendors, the 108% on-going competitive pricing level will be calculated from the statewide average prices paid to TWIC vendors with prices paid to Wal-Mart, Super Target, and Military Commissaries factored into the averages.
  
  - C. 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.
  
  - D. A vendor whose agreement is terminated for non-competitive pricing must wait a period of six months before the state will consider authorization of the outlet. A vendor may apply for authorization after the six-month waiting period.

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