



November 2005
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Cost Containment of High-Priced Stores in the California WIC Program

Background

Since 1998, the Department of Health Services WIC Branch has been working on revisions to policies for authorizing and reimbursing grocery stores to ensure fairness and consistency and achieve cost containment. During this period, the WIC program experienced a growing problem — the spread of a new type of store that sells *only* WIC foods, serves *only* WIC participants, and charges significantly higher prices for these foods than other retail food stores. These “WIC-only stores” are able to charge more because they face no competitive pressure to keep their prices low enough to attract non-WIC customers. To read in detail about the impact of high-cost stores on the WIC program, see *WIC-Only Stores and Competitive Pricing in the WIC Program*, by Zoe Neuberger and Robert Greenstein, Center on Budget and Policy Priorities, at www.cbpp.org/5-17-04wic.pdf.

WIC-Only stores, which now operate in many states, are raising the cost of the WIC Program by substantial amounts. In California, based on May 2004 data showing the share of WIC sales going to WIC-Only stores was 44%, the Center on Budget and Policy Priorities estimates that the federal government is paying about \$37 million a year more for WIC than the program would cost if the WIC foods purchased in WIC-only stores were instead obtained in regular food stores. The WIC-Only store share of California WIC redemptions has now risen to 47%.

Nationally, the WIC funding level for FY06 is \$5.257 billion, which will likely support current participation. However, WIC, a “domestic discretionary” program, still faces serious fiscal challenges in Congress, including a 2% across-the-board cut. Absent firm corrective action, the added costs created by high-cost WIC stores could mean that significant numbers of eligible low-income women, infants, and children at nutritional risk will soon be turned away from WIC because funds will no longer be sufficient to serve all eligible families that apply.

The clear fiscal impact of high-cost WIC stores on California WIC’s bottom line has been evident for some time. However, state program administrators have had difficulty instituting vendor cost containment measures through state law and regulations alone. Not only is reform of this system fiendishly complex, but it soon became ensnared in pressure group politics. Three years ago, when California WIC officials sought to

institute regulatory reform measures, the WIC-only stores in California, who had formed an association, hired a team of well-connected lobbyists who pressured California policymakers, including Governor Davis, to block those efforts. Draft regulations were informally circulated, but never promulgated.

Without new regulatory authority, California WIC officials were unable to put limitations on authorizing high-cost stores, nor could they implement fair or meaningful reimbursement levels. As a result, the number of WIC-Only stores grew rapidly, and their percentage of WIC voucher redemptions skyrocketed, from 11% in 1997 to over 47% in June 2005—an alarming trend that caught the attention of Congress during reauthorization.

New federal laws are therefore forcing California to freeze new store approvals (with few exceptions) and to get regulations in place that will contain vendor costs.

Recent Changes in Federal Law

WIC Reauthorization Bill. Two years ago, the WIC program, along with other child nutrition programs, was reauthorized. President Bush signed the Child Nutrition and WIC Reauthorization Act (P.L. 108-265) on June 30, 2004.

The bill allows WIC-only stores to continue operating and, in fact, to continue to spread. It contains several modest provisions aimed at strengthening the ability of state WIC programs to prevent WIC-only stores from abusing their insulation from normal market forces to charge much higher mark-ups on WIC foods than other stores do, thereby driving up WIC program costs. Specifically, the new law:

- Defines WIC-only vendors as stores for which more than half the annual revenue from food sales consists of WIC sales (or new stores likely to meet those criteria).
- Requires states to categorize WIC vendors into peer groups. For each peer group, states must establish price criteria, which will be used when assessing vendors' applications for WIC authorization, to make sure that the vendors authorized to participate in WIC charge competitive prices. The state also must limit the amount it will reimburse the vendors in each peer group for specific WIC foods and make sure that prices aren't increased to a level that would prevent the store from being authorized if it were currently being considered. In selecting vendors based on price and limiting reimbursement levels, the state must consider participant access by geographic area.
- Requires states to ensure that its price criteria and reimbursement limits do not result in higher aggregate food costs if WIC participants redeem their WIC vouchers at WIC-only vendors rather than other vendors.
- Requires USDA to certify that a state's price criteria and reimbursement limits do not result in higher average prices at WIC-only vendors than at comparable other vendors.
- Prohibits WIC-Only vendors from providing incentive items or other free merchandise to WIC participants unless the vendor proves to the state that the items were obtained at no cost, except for food or merchandise of nominal value.
- Requires all states to allow participants to redeem WIC food instruments at "any authorized grocer."

- States must have a system in place to address these provisions no later than December 31, 2005.

Federal and state officials are balancing the concerns of WIC-Only store owners with the need to protect the fiscal integrity of the WIC program in a scarce funding environment. California's Department of Health Services, which administers the WIC program, is now awaiting federal regulations before it issues state regulations. Once federal guidance is clear, California will set criteria used to assign vendors to peer groups. These criteria will need to be carefully designed so that cost-containment goals are met, and WIC funds are maximized to serve as many participants as possible.

Appropriations Bill Moratoriums. Shortly after the reauthorization bill was signed, the Office of Management and Budget urged Congress to prohibit new WIC-Only Store approvals until states could implement the vendor cost controls required by the new reauthorization law. This resulted in language in the FY 2005 appropriations bill that imposes a nationwide moratorium on any state approvals of any new WIC-Only stores except if necessary to ensure participant access. The President's 2006 budget proposed to extend this moratorium through the coming fiscal year. The FFY 2006 Agriculture Appropriations bill (signed November 10, 2005) requires states to continue the moratorium until their vendor cost containment systems are implemented.

California Laws and Regulations

Attempted State Regs. Existing state vendor regulations have been on the books in California for over twenty years and are inadequate and outdated. Since 1998, in response to retail cost data, as well as new federal regulations and state law (see below), the Department of Health Services WIC Branch has been attempting to promulgate new WIC vendor regulations. Until very recently, these efforts have been stymied due to pressure from WIC-Only store owners, who have hired several influential lobbying firms.

The Branch worked on a comprehensive regulatory package from 2001-2002 with steady input from a WIC Grocer Advisory Committee, whose active members included a large contingent of WIC-Only store owners, as well as other stakeholders. The new regulations were designed to control, in a more sophisticated and market-driven way, the pricing of WIC foods used by the thousands of retail stores who partner with WIC to provide benefits to WIC participants. The elimination of vendor-specific information and the "Must Not Exceed" amounts from the printed WIC check, along with the implementation of vendor peer groups, were key components of the reform package.

In March of 2003, draft regulations were shared with the Grocer Advisory Committee and other interested parties, as an informal input opportunity before formal promulgation of proposed state regulations. Lobbyist representatives from the WIC-Only industry responded actively, and met with members of the Legislature and with Governor Davis. By fall of 2003, it became clear that the regulatory package was not going anywhere, and progress ceased. When the Schwarzenegger administration took office in November 2003, the standstill continued due to the Executive Order putting a moratorium on all regulations.

State Laws and Bill Attempts. While the WIC Branch has been developing changes to the existing grocer policies with stakeholder groups over several years, three state laws have been enacted in regards to WIC retail food pricing and other administrative issues:

1. Senate Bill 1240 (Burton), Chapter 21, Statutes of 1999 – requires the Department of Health Services to create vendor peer groups for price comparison and authorization process, and allows DHS to reimburse grocers “up to” the maximum value printed on the WIC check.
2. Assembly Bill 313 (Goldberg), Chapter 842, Statutes of 2001 – requires the Department of Health Services to implement issuance of WIC food instruments to for use at “any authorized grocer” by July 1, 2002 with a sunset date of January 1, 2005.
3. Senate Bill 801 (Speier), Chapter 15, Statutes of 2002 – establishes a new “any authorized grocer” implementation date of January 1, 2004 and extended the sunset date to July 1, 2006.

Several other bills have been introduced but have failed to pass. These include AB 2101 (Goldberg), AB 1593 (Coto), AB 1541 (Chavez), and AB 766 (Chavez).

USDA-imposed Vendor Authorization Moratorium. In August 2004, the USDA rescinded its approval of the part of California WIC’s State Plan related to vendor authorization until the program revises its competitive pricing policies to more effectively meet federal cost containment requirements and regulations. In response, the Branch imposed a temporary moratorium on the authorization of new grocers, which will remain in effect pending policy guidance from USDA. For more information, go to “Grocer Information” on the WIC Branch website at www.wicworks.ca.gov and look for Grocer Alert Number 2004-07.

Current Status of State Vendor Regulations

According to Branch staff, the WIC vendor authorization and reimbursement system will be revamped to address provisions of the WIC reauthorization bill. The Department of Health Services is awaiting regulations from USDA. Detailed USDA guidance was issued to states in July, and Interim Final regulations have been vetted by OMB and are expected out by the end of 2005. While federal statute requires California to have a comprehensive system in place to address the new federal provisions no later than December 31, 2005, this is unlikely to occur. Instead, it appears that federal guidance (or rules, if they appear) will require California to continue the moratorium and impose broad cost-controls until the new system is implemented.

California’s comprehensive new vendor peer groups and reimbursement levels, when enacted, will contain food costs using vendor peer group averages to establish maximum reimbursement levels instead of the statewide “maximum value” currently printed on the checks.

Specifically the new system will:

- Establish mandatory grocer authorization criteria
- Establish required federal grocer training requirements
- Outline grocer authorization processes, including timelines for each step
- Assign grocers to peer groups and specify grocer reimbursement process using peer groups
- Update the grocer agreement according to federal requirements
- Describe two types of vendor monitoring specified in federal regulations
- Establish a more timely, cost effective appeals process for some adverse actions.
- Limit the use of incentive items to no-cost or to foods or items of nominal value.

Over the next year, Legislative policymakers will need to monitor the WIC Vendor Cost Containment process carefully in order to ensure that it is not derailed again due to political pressures or bureaucratic snafus. At stake is the fiscal integrity of one of the nation's most successful public health programs, and the ability of this program to continue to serve hundreds of thousands of low-income families with literally life-saving benefits.