

APA-1
6/93

TRANSMITTAL SHEET FOR NOTICE OF INTENDED ACTION

Control 420 Department or Agency Alabama Department of Public Health

Rule Number 420-10-2-.06

Rule Title WIC-Vendor Management

New Amend Repeal Adopt by Reference

Would the absence of the proposed rule significantly harm or endanger the public health, welfare or safety? Yes

Is there a reasonable relationship between the state's police power and the protection of the public health, safety or welfare? Yes

Is there another, less restrictive method of regulation available that could adequately protect the public? No

Does the proposed rule have the effect of directly or indirectly increasing the costs of any goods or services involved and, if so, to what degree? No

Is the increase in cost, if any, more harmful to the public than the harm that might result from the absence of the proposed rule? n/a

Are all facts of the rulemaking process designed solely for the purpose of and so they have as their primary effect, the protection of the public? Yes

Does the proposed rule have an economic impact? No

If the proposed rule has an economic impact, the proposed rule is required to be accompanied by a fiscal note prepared in accordance with subsection (f) of §41-22-23, Code of Alabama, 1975.

Certification of Authorized Official

I certify that the attached proposed rule has been in full compliance with the requirements of Chapter 22, Title 41, Code of Alabama, 1975, and that it conforms to all applicable filing requirements of the Administrative Procedure Division of the Legislative Reference Service.

Signature of Certifying Officer  Date 2/21/2012



FORM APA2
11/96

STATE BOARD OF HEALTH
NOTICE OF INTENDED ACTION

AGENCY NAME: Alabama Department of Public Health

RULE NUMBER AND TITLE: 420-10-2-.06, WIC Vendor Management

INTENDED ACTION: Amendment to Rule 420-10-2-.06

SUBSTANCE OF PROPOSED ACTION: The proposed amendments to Rule 420-10-2-.06 simply add language to the state WIC rule to conform to current provisions of the federal WIC rules. More specifically, the proposed amendments add certain types of adverse actions that are subject to full administrative hearings and increase the maximum amount of civil monetary penalties as allowed in federal rules.

TIME, PLACE, AND MANNER OF PRESENTING VIEWS: A public hearing will be held on March 16, 2012 at 201 Monroe Street, RSA Tower, Suite 1366, Montgomery, AL 36104 at 09:00 a.m.

FINAL DATE FOR COMMENTS AND COMPLETION OF NOTICE: Written or oral comments will be received until the close of the record at 5:00 p.m. on April 4, 2012. All comments and requests for copies of the proposed amendments should be addressed to the contact person listed below.

CONTACT PERSON AT AGENCY: Stacey Neumann, Director, Vendor Management Branch, Department of Public Health, 201 Monroe Street, Suite 1300, Montgomery, Alabama 36104. Telephone number (334) 206-5673.



Patricia E. Ivie, Agency Secretary

420-10-2-.06 Appeals For Vendors And Local Agencies.

(a) Adverse actions subject to administrative reviews.

1. Vendor appeals.

(i) Adverse actions subject to full administrative reviews. ~~Except as provided elsewhere in paragraph (a)(1) of this section,~~ The State agency must provide full administrative reviews to vendors that appeal the following adverse actions:

(I) denial of authorization based on the application of the vendor selection criteria for ~~competitive price or for~~ minimum variety and quantity of authorized supplemental foods or on a determination that the vendor is attempting to circumvent a sanction;

(II) termination of an agreement for cause;

(III) disqualification; and

(IV) imposition of a fine or a civil money penalty in lieu of disqualification;

(V) denial of authorization based on the vendor selection criteria for business integrity or for a current Food Stamp Program disqualification or civil money penalty for hardship;

(VI) denial of authorization based on a State agency-established vendor selection criterion if the basis of the denial is a WIC vendor sanction or a Food Stamp Program withdrawal of authorization or disqualification;

(VII) denial of authorization based on the State agency's vendor limiting criteria;

(VIII) denial of authorization because a vendor submitted its application outside the time frames during which applications are being accepted and processed as established by the State agency under 7 CFR §246.12(g)(7)(8);

(IX) termination of an agreement because of a change in ownership or location or cessation of operations;

(X) disqualification based on a trafficking conviction;

(XI) disqualification based on the imposition of a Food Stamp Program civil money penalty for hardship; ~~and~~

(XII) disqualification or a civil money penalty imposed in lieu of disqualification based on a mandatory sanction imposed by another WIC State agency;

(XIII) a civil money penalty imposed in lieu of disqualification based on a Food Stamp Program disqualification under 7 CFR \$246.12(1)(1)(vii);

(XIV) denial of an application based on a determination of whether an applicant vendor is currently authorized by the Food Stamp Program;

(XV) denial of authorization based on the application of the vendor selection criteria for competitive price; and

(XVI) the application of the State agency's vendor peer group criteria and the criteria used to identify vendors that are above-50-percent vendors or comparable to above-50-percent vendors.

(ii) Actions not subject to administrative reviews. The State agency may not provide administrative reviews pursuant to this section to vendors that appeal the following actions:

(I) the validity or appropriateness of the State agency's vendor limiting criteria or vendor selection criteria for minimum variety and quantity of supplemental foods, business integrity, and current Supplemental Nutrition Assistance Program disqualification or civil money penalty for hardship;

(II) the validity or appropriateness of the State agency's participant access criteria and the State agency's participant access determinations;

(III) the State agency's determination whether a vendor had an effective policy and program in effect to prevent trafficking and that the ownership of the vendor was not aware of, did not approve of, and was not involved in the conduct of the violation;

(IV) denial of authorization if the State agency's vendor authorization is subject to the procurement procedures applicable to the State agency;

(V) the expiration of a vendor's agreement;

(VI) disputes regarding food instrument or cash value voucher payments and vendor claims other than the opportunity to justify or correct a vendor overcharge or other error, as permitted by 7 CFR §246.12(k)(3); ~~and~~

(VII) disqualification of a vendor as a result of disqualification from the Food Stamp Program;

(VIII) The validity ~~violation~~ or appropriateness of the State agency's selection criteria for competitive price, including, but not limited to, ~~WIC program's~~ vendor peer group criteria and the criteria used to identify vendors that are above-50%-percent vendors or comparable to above-50%-percent vendors;

(IX) the State agency's determination to include or exclude an infant formula manufacturer, wholesaler, distributor, or retailer from the list required pursuant to 7 CFR §246.12(g)(11);

(X) the validity or appropriateness of the State agency's prohibition of incentive items and the State agency's denial of an above-50-percent vendor's request to provide an incentive item to customers pursuant to 7 CFR §246.12(h)(8); and

(XI) the State agency's determination whether to notify a vendor in writing when an investigation reveals an initial violation for which a pattern of violations must be established in order to impose a sanction pursuant to 7 CFR §246.12(1)(3).

2. Effective date of adverse actions against vendors. The State agency must make denials of authorization and disqualifications imposed under 7 CFR §246.12(1)(1)(i) effective on the date of receipt of the notice of adverse action. The State agency must make all other adverse actions effective no earlier than 15 days after the date of the notice of the adverse action and no later than 90 days after the date of the notice of adverse action or, in the case of an adverse action that is subject to administrative review, no later than the date the vendor receives the review decision.

3. Local agency appeals.

(i) Adverse actions subject to full administrative reviews. ~~Except as provided in paragraph (a)(3)(ii) of this section,~~ The State agency must provide full administrative reviews to local agencies that appeal the following adverse actions:

- (I) denial of a local agency's application;
- (II) disqualification of a local agency; and
- (III) any other adverse action that affects a local agency's participation.

(ii) Actions not subject to administrative reviews. The State agency may not provide administrative reviews pursuant to this section to local agencies that appeal the following actions:

(I) expiration of the local agency's agreement;
and

(II) denial of a local agency's application if the State agency's local agency selection is subject to the procurement procedures applicable to the State agency;

(iii) Effective date of adverse actions against local agencies. The State agency must make denials of local agency applications effective immediately. The State agency must make all other adverse actions effective no earlier than 60 days after the date of the notice of the adverse action and no later than 90 days after the date of the notice of adverse action or, in the case of an adverse action that is subject to administrative review, no later

than the date the local agency receives the review decision.

(b) Full administrative review procedures. The State agency must provide the aggrieved vendor or local agency an opportunity for a full administrative review of the program's adverse action. The State WIC program's administrative review procedures shall provide for the following:

1. Written notification of the adverse action.

(i) The WIC program shall give written notification of a proposed adverse action, the cause(s) for the action, and the effective date of the proposed adverse action. The notification shall also advise the vendor or local agency of its right to a full administrative review, the opportunity to present the case, the opportunity to confront and cross-examine witnesses, the opportunity to be represented by counsel, and the opportunity to examine evidence prior to the full administrative review hearing. The time period for requests for appeal must be given in the notification. Notification will also include the option of an informal review conference before the State WIC director.

(ii) When a vendor is disqualified due in whole or in part to violations in §246.12(1)(1), such notification must include the following statement: "This disqualification from WIC may result in disqualification as a retailer in the Food Stamp Program. Such disqualification is not subject to administrative or judicial review under the Food Stamp Program."

(iii) Vendors must be given fifteen (15) days advance notice before the effective date of the adverse action.

(iv) Local agencies shall be given sixty (60) days advance notice of disqualification or thirty (30) days before termination.

2. Vendors have a right to examine and copy, prior to and during the full administrative review hearing, the documents and records which support the WIC program's adverse action.

3. Vendors must request a full administrative review hearing within 15 days of receipt of a notice of adverse action.
4. Requests for a full administrative review hearing must be submitted in writing to: Alabama Department of Public Health, Bureau of Family Health Services, Division of WIC, 201 Monroe Street, Montgomery, AL 36104.
5. The WIC program shall give an aggrieved vendor at least 10 days advance written notice of the time, place and date of the full administrative review hearing. A hearing must be scheduled within 30 days from the date the request is received by the WIC program.
6. An aggrieved vendor shall have the opportunity to present its case and at least one opportunity to reschedule the administrative review date upon specific written request.
7. An aggrieved vendor shall have opportunity to cross-examine adverse witnesses. When necessary to protect the identity of WIC Program investigators, such examination may be conducted behind a protective screen or other device (also referred to as an "in camera" examination).
8. The opportunity to be represented by counsel at the full administrative review hearing.
9. The opportunity to examine prior to the full administrative review hearing the evidence upon which the State agency's action is based.
10. An impartial decision-maker, whose determination is based solely on whether the State agency has correctly applied Federal and State statutes, regulations, policies, and procedures governing the program, according to the evidence presented at the review.
11. Written notification of the review decision, including the basis for the decision, within 90 days from the date of receipt of a vendor's request for an administrative review. These This time frames are is only an administrative requirements for the State agency and de does not provide a basis for overturning the State agency's

adverse action if a decision is not made within the specified time frame.

(c) Abbreviated Review Hearings - The State WIC Program provides full administrative reviews in all adverse actions referenced in 7 CFR §246.18(a)(1)(ii). Therefore, pursuant to 7 CFR §246.18(A)(1)(ii) and 7 CFR 246.18(c), abbreviated reviews are not offered to aggrieved parties.

(d) Informal Conferences. The purpose of the informal conferences is to review the evidence supporting the adverse action, to answer questions by the vendor or his/her representatives and to verify appropriateness of the adverse action. At his/her discretion, the aggrieved vendor may choose not to have an informal review conference. A request for an informal review conference shall not be considered a request for a formal hearing; however, the aggrieved vendor may request both an informal review conference and a hearing after notification of the adverse action. If the adverse action is resolved at the informal review conference, the request for a hearing may be withdrawn by the aggrieved vendor. If the adverse action is not resolved through the informal conference, all testimony and evidence disclosed at the informal conference may be introduced at any subsequent full administrative review hearing. The informal conference is not considered part of the formal appeal process.

(e) The hearing official and WIC director have the authority to impose a civil monetary penalty or fine in lieu of disqualification if inadequate participant access exists. The calculations used to compute the amount(s) is found in 7 CFR, Part 246.12 and §22-12C-5, Code of Ala. 1975 Ala. Code 1975. Civil monetary penalties may not be imposed in lieu of disqualification for third or subsequent sanctions for violations listed in the Vendor Sanctions, Category VII, Category VI, and Category V. A civil monetary penalty or fine shall not exceed ~~\$10,000~~ \$11,000 for each violation. The total amount of civil monetary penalty imposed for violations investigated as part of a single investigation shall not exceed ~~\$40,000~~ \$49,000.

(f) Continuing responsibilities. Appealing an action does not relieve a vendor or local agency that is permitted to continue program operations while its appeal is in process from the responsibility of continued compliance with the terms of any written agreement with the

State agency. The WIC Program Director shall allow a vendor to continue in the program while an administrative review is in process, except for a vendor disqualified due to trafficking conviction and a vendor disqualified based upon a food stamp program disqualification, which shall not be subject to an administrative or judicial review under the program.

Author: James M. Richard

Statutory Authority: Code of Ala. 1975, §§22-2-2(6), 22-12c-2 and 3.

History: **New Rule:** Filed October 24, 1995; effective November 28, 1995. **Repealed and New Rule:** Filed October 20, 1999; effective November 24, 1999. **Amended:** Filed May 16, 2002; effective June 20, 2002. **Repealed and New Rule:** Filed November 20, 2003; effective December 25, 2003. **Repealed and New Rule:** Filed August 20, 2004; effective September 24, 2004. **Amended:** Filed November 8, 2006; effective December 13, 2006.