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California Department of Public Health
Women, Infants & Children (WIC) Program
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Re: ARTICLE 4, 70000 ET SEQ – VENDOR AUTHORIZATION CRITERIA

To Whom It May Concern:

On behalf of the California Grocers Association (CGA) and its member companies, I respectfully submit the following comments relative to the proposed Article 4, 70000 et seq, Vendor Authorization Criteria proposed for the California WIC Program.

We thank the Department for providing stakeholders with an opportunity to comment on the proposal and have done our best to coordinate comments from our food retail, wholesale and manufacturing membership. CGA is a non-profit, statewide trade association representing the food industry since 1898. CGA represents approximately 500 retail members including chain and independent supermarkets, convenience stores and mass merchandisers operating over 6,000 food stores in California and Nevada, and approximately 300 grocery supplier companies.

There are few questions and concerns that do not necessarily relate to specific sections of the proposal but rather weave through several sections or the proposal in its entirety. It appears the proposal lacks any information on how vendors will be notified about alleged violations and whether those will occur in connection with monitoring visits, some other mechanism, or a combination thereof. Should vendors expect to receive official letters from the State agency and if so, how long after a monitoring visit or other allegation of violation(s)? Will notification processes and timelines vary based on the nature of the alleged violation? Does the State agency intend to issue a subsequent proposal regarding notifications?

In addition, the proposal lacks any reference to a vendor appeal or dispute process that could be utilized by a vendor at any stage. Will vendors have a mechanism to appeal or dispute denial of authorization or alleged violations? Is it the intention of the State agency to issue a subsequent proposal to outline vendor appeal/dispute process or does the State agency intend to eliminate appeal/dispute processes?

70000 VENDOR AUTHORIZATION CRITERIA

A question has been raised with regard to proposed section 70000(a) and whether peer group assignments may be altered once assigned. If the Department finds it may be appropriate to move a vendor to an alternate peer group will the proposal allow for that rather than vendor termination? It

seems moving a vendor to an appropriate peer group when circumstances change my be more effective than terminating a vendor and could help to preserve customer access.

While it is appropriate for any new criteria to apply to vendors on a going forward basis, language contained in the proposal appears to open the door for retroactive application of the new authorization criteria. Specifically in 70000(c) indicates that, "The Department shall apply the vendor authorization criteria in this article ***to all vendors at any time***…" and further, "If a vendor fails to meet the authorization criteria at ***any time during the authorization period***…", authorization ***shall*** be terminated.

Concerns have been raised that vendors operating under existing authorizations will be in a position of having to comply with new criteria pursuant to the proposal or be subject to automatic termination – without time to review and modify existing practices and processes. For instance, if enacted as proposed the technology requirements could force some vendors to upgrade systems or purchase new ones. Likewise, vendors may be required to review and modify stock rotation and/or inventory tracking policies and processes to achieve compliance. As written, 70000(c) would deem vendors subject to immediate termination upon final approval of regulations even if they meet all requirements in an unexpired, existing vendor agreement in place at that time. **We respectfully request that accommodation be given in those circumstances and companies be given adequate time to review, and to the extent necessary modify, existing practices prior to automatic termination from the WIC program**. This could be accomplished by allowing existing vendor agreements to remain in place through expiration or by fixing the implementation date of the proposed regulations at a date certain in the future.

70100 BUSINESS INTEGRITY

In the proposal, when discussing determination of the concept of adequate participant access, verbiage is different when describing "urban" and "rural" areas. It is unclear whether that difference will have a material impact on vendor authorizations and whether varying word usage was intended. In addition, it appears the criteria for determining participant access in the proposal does not include consideration of geographic barriers. In some instances, access may be limited or eliminated entirely based on geographic barriers.

70300 CASH REGISTER

The proposal requires vendors to utilize cash register systems that record certain information and produce receipts. The proposal further requires certain transaction records to be maintained for a minimum of three years. While one would assume that the requirement for cash register records may be retained in electronic format, **the proposal should be modified to explicitly provide for electronic records retention** by vendors.

In addition, the records retention language notes retention for ***"…a minimum of three (3) years…"*** though no indication is given as to what circumstances would require longer retention or how much longer. **The proposal should be clarified to indicate a time certain for retention of required cash register records**. Otherwise, a vendor has no way of knowing how long records must be retained.

70400 CERTIFY THE INFORMATION PROVIDED ON THE VENDOR APPLICATION IS TRUE AND CORRECT

There is certainly a need to ensure that applicants supply the WIC program with accurate and truthful information in all instances, including those relating to applications. However, as currently written 70400 requires vendors and vendor applicants to certify that information is, "…***true and correct***." **That**

standard should be modified to require certification that information is true and correct to the best of the vendor or vendor applicant's knowledge.

The standard of true and correct to the best of a party's knowledge is a commonly accepted standard. Requiring otherwise creates a situation where a party unknowingly executes a document that contains simple human error or information the party was unaware was incorrect. And yet even in those circumstances the proposed regulation allows for termination of the vendor agreement. Though the regulation attempts to narrow the possibility for that in situations where errors are inadvertent, the only requirement is that the incorrect information was used in the Department's decision. That standard is highly subjective and could ultimately lead to honest mistakes resulting in termination of vendor authorization.

70500 CIRCUMVENTION OF WIC SANCTION

While it is certainly appropriate to address the issue of circumvention of WIC sanctions, and to address situations where a vendor may attempt to do so, the proposal goes far beyond those instances and in fact could lead to lifetime bans for parties that were not involved in such attempts.

70500(b)(3) and (4) require the Department to deny a vendor application when the vendor applicant, "…owns, ***previously owned***, or has a legal interest in a store or business…" with a current sanction or outstanding vendor claim in place. Unfortunately, this language goes far beyond circumstances in which an individual is attempting to circumvent a WIC sanction. The term previously owned is not qualified in any way – meaning an individual could sell a company or an individual store location and subsequent to the sale the company could be subject to a WIC sanction or vendor claim. Notwithstanding that the violation took place after the sale, with the previous owner no longer involved in the business, the previous owner would arguably be barred from approval as a vendor. The problem is compounded when you take into consideration the fact that there is no time qualification on the required denial. If at any time after sale of a business that business was subject to a vendor sanction or outstanding claim, all previous owners and all individuals who previously had a legal interest in the business would be barred from authorization in perpetuity.

It makes little sense to bar individuals from vendor authorization just because a company they previously had an ownership or legal interest in runs afoul of WIC requirements. At a minimum, the proposed criteria should be modified to ensure that only individuals who divest themselves of ownership or legal interest in an attempt to avoid WIC sanctions are penalized. **The proposed criteria should be modified to ensure that the ban on vendor authorization applies only when an individual's ownership or legal interest in a company coincides with violations that lead to sanctions**. **In addition, rather than imposing a lifetime ban, this section should be harmonized with proposed section 70100 regarding Business Integrity** and set time parameters for mandatory denial of authorization. Many individuals with ownership or legal interest are not in fact responsible for store-level operations. They should not be subject to a lifetime ban if they were not directly involved in practices that led to sanctions.

There are also concerns that given current drafting owners with multiple store locations would face disqualification at all current and future authorized locations if and when a sanction or vendor claim was imposed on a single location. For instance, a vendor looking to purchase or build a location in one city would be denied vendor authorization if a store location in a different city were subject to a sanction. Similarly, the combination of proposed sections 70000 and 70500 lead to concerns that if a vendor were subject to sanction at a single store location, the Department would be required to terminate authorization at all locations.

Similarly, challenges exist in the proposed section 70500(c) which would allow the Department, in its sole discretion, to require vendor applicants to obtain, "***...identifying information from the applicant and/or previous owners(s) to enable the Department to conduct a thorough background check...***". It is unclear how a vendor applicant is to obtain such information from previous owner(s) and if they would even have the legal right to do so depending upon whether information beyond that contained in current business documents is requested. While some public records may exist noting company owners, directors, etc… it is unclear whether obtaining that information would be enough. The current proposal leaves open the possibility that the Department could request information protected by California privacy laws, or information not available to a vendor applicant and then deny an application based solely upon a failure to provide the information. Unfortunately, not all business ventures end happily and former owners or stakeholders may be unwilling to provide requested information to current applicants. Likewise, a current applicant may not have a relationship with a former owner or have any way to convince that entity or those entities to produce information required by the Department. Further, there are no limitations to the information the Department could demand from current or former owners and no assurance that requested information is material to the applicant or relevant from business perspective.

At a minimum, **the proposal should be modified to allow for potential denial of authorization only if a vendor applicant fails to provide material, relevant information that is otherwise publicly available and not protected by California or Federal privacy and/or confidentiality laws**. It is unreasonable to expect detailed identifying information from an applicant regarding previous owners - especially when there is no time limitation to govern how far back into history an ownership interest may have been and whether the information is realistically and legally available to the vendor applicant.

70600 COMPETITIVE PRICE CRITERIA

While it is understood that the Department is working to effectuate cost containment strategies within the WIC program, the change proposed is quite dramatic and without explanation. New methodology may in fact be in order, but without frame of reference for why the 120% of average market basket it is impossible for the public or program stakeholders to determine whether the change is appropriate. Unintended consequences and significant impacts to vendor viability could result in various peer groups yet without context it is impossible to estimate real life impacts or to suggest viable alternatives to achieve cost containment goals with less market disruption. **At a minimum the Department should disclose to the public and stakeholders methodology behind the decision to utilize 120% of market basket**.

Additionally, the process outlined in 76000(c) is somewhat confusing. It appears that the Department will, every six months, request pricing information from vendors upon a thirty day notice. However, the proposal goes on to say that vendors are afforded fourteen days to respond to the thirty day notice. **The proposal should be redrafted to clarify the process by which shelf prices are collected from vendors and timelines associated with collection**.

70800 INCENTIVE ITEM REQUIREMENTS

While it is appropriate to engage stakeholders in a discussion regarding incentive items in the WIC program, a specific question arises relative to the proposal's prohibition on locally sourced produce. Section 70800(a)(4)(A)(1) allows Above-50-percent vendors to utilize only pre-packaged, WIC authorized produce, "***...purchased from a wholesaler.***" There is no explanation why produce cannot be sourced from a local farm or even another retail channel.

71000 INVENTORY RECORDS

Proposed section 71000 establishes detailed and lengthy requirements for inventory and transfer records preparation and retention for authorized vendors. One overarching question and need for clarification relates to electronic records. It is unclear whether electronic records retention, an increasingly standard business practice, is acceptable for the required inventory and transfer records and if so whether that applies across-the-board or to only certain inventory and transfer records**. It would be our preference that electronic inventory and transfer records suffice but the issue needs to be clarified in the proposal to ensure consistency across inspections and jurisdictions**. This clarification is critical given that proposed 71000(e) calls for termination of a vendor's authorization if they fail to maintain required inventory and transfer records at each location.

In addition, in many instances companies utilize a centralized office to manage inventory. Records and documentation received at individual store locations may be forwarded to that central location and stored there rather than being filed on site. While it is certainly reasonable to expect vendors to maintain proper records and make them reasonably available for inspection, a requirement for physical or electronic copies at each individual store location could be a significant challenge. We suggest that **two years is a more appropriate records retention timeframe and suggest that records maintained at a corporate office should suffice**. Parameters could be established requiring records to be maintained within California and produced within a short, reasonable timeframe. In addition, vendors could be required to notify the State agency of the location of records and make that location available as needed for inspections.

71100 MINIMUM STOCKING REQUIREMENTS

While it is necessary to ensure WIC clients have ready access to WIC-authorized items, it is also necessary to work within the confines of the realities of business operations. The proposal should be modified to allow for usage of common stock rotation and shelf re-stocking practices. As it currently reads, 71100(a) requires minimum stocking to be met, "…***at all times***…" while proposed 71100(b) mandates that in most instances, "***Inventory must be stocked on store shelves in the public area available for purchase***..." Under the proposal, it appears a vendor could be determined to be out of compliance if a customer removes two boxes of cereal from the shelf and they are not immediately replaced – even if some quantity of the product remains on the shelf and even if a WIC customer has ready access to the product by asking a clerk or customer service representative. The proposal **should be modified to provide for usage of normal inventory monitoring practices and warnings or sanctions should not be applied if reasonable steps, such as an inquiry by a WIC customer, result in restocking or a product being made available**. It is unreasonable in many settings to expect immediate restocking of items on store shelves even though adequate quantities of product are on site and restocking takes place on a regular, consistent basis.

71200 MINIMUM TECHNOLOGY REQUIREMENTS

While it is our understanding that the Department is comfortable with access to the technology outlined in proposed section 71200 through accessing a public or shared computer in a library or elsewhere, clarifying language is needed in the proposal. As currently written, there is room for broad interpretation and some could construe the requirement to mean that access at each authorized vendor store location is required. In some instances, that is not feasible nor is it desired by the business owner. Even at some larger chains external internet access is not provided, though such access is available at a regional or corporate office with intranet utilized for store-to-store and store-to-division/corporate communications. **The proposal should be clarified to ensure companies are not forced to install and maintain independent internet access at each authorized store location**.

71500 STORE LOCATION AND HOURS

The proposal requires all vendor locations to be open, "***…at least either (8) hours per day, six (6) days per week.***" At least four of those hours must be during "core" hours which are defined as, "***…9:00 a.m. to 5:00 p.m.***" While potentially infrequent, there may be instances where customer demand does not necessitate a full 48 hours of operation weekly. In addition, there could be instances where a store is located in a location where weekend access is difficult if not impossible based on landlord restrictions or other factors. **The proposal should be amended to provide an opportunity for vendors to demonstrate to the Department that customer access can adequately be met through alternate, site-specific days and hours of operation**.

71700 VENDORS MUST BE SNAP/CALFRESH AUTHORIZED

While it is our understanding that many vendors currently authorized to accept WIC in California are also authorized to accept CalFresh it is unclear why such dual authorization should be required. The business model of dual authorization may work well in some instances, but in others it may not be a desired or beneficial arrangement for a vendor. It is possible that the Department's assertion that dual authorization could compliment the goals of the WIC program but it does not appear authority exists in Federal regulations to mandate such dual participation. The State agency is required to authorize vendors and to develop authorization criteria but there is no apparent requirement to force authorized vendors to participate in the CalFresh program when they do not desire to do so. **The proposed regulation should be modified to eliminate this requirement altogether or at a minimum to provide an incentive to any vendor applicant choosing to additionally participate in the CalFresh program**.

71800 VENDOR TRAINING

We applaud the Department's efforts to ensure all WIC vendors are appropriately trained and possess a degree of knowledge that reinforces program integrity. It may be beneficial to modify the proposed language to allow for annual training conducted by the Department **or an entity approved by the Department to conduct training**. Some other mandatory training programs, such as food handler cards for restaurant workers, authorize entities to develop and submit training modules for approval by the regulator. In some instances, companies opt to create approved programs that incorporate customer service practices or store policies specific to that company. This kind of flexibility works well and as long as programs are approved by the Department, will meet the objective of training and competency.

71900 VISIBLE POSTED PRICES

While it is important all customers, not just WIC customers, have an opportunity to understand and evaluate the price of every item they wish to purchase before that purchase it, the proposed language regarding posted prices is overly restrictive and could lead to unnecessary disqualifications. Specifically, in 71900(a), the proposal limits price posting options to on-item, on-display, or on the shelf "***…directly below the product…***" This is a significant challenge as stores move away from traditional display models and increasingly list product information, including price, next to or above categories of food. Under a plain reading of the proposal, a vendor choosing to post prices on the side of a narrow shelf display rather than on the front would be subject to sanction even though the price was readily visible and identifiable for the product. **The proposal should be modified to allow more flexibility in pricing and to allow vendors to modify store displays**.

In addition, there is significant concern that the proposal lacks any requirement for documentation of the violation. Unfortunately, it is routine in the retail setting to have customers move products, remove stickers from products, knock shelf tags off, or move components of a display. Most retailers have policies in place to periodically monitor these issues and correct them as detected. **Without a requirement for some sort of documentation, it is frankly far too subjective an issue and impossible for a vendor to defend**. The concern is even greater when recognizing that the proposal lacks any outline of vendor appeal or dispute processes.

Again, thank you for the opportunity to comment on the proposed regulations. We look forward to a continued dialogue and to being provided with an opportunity to comment on a revised version of the proposal that addresses concerns raised by our industry and other stakeholders. As you know, it is of critical importance that the process be an open dialogue that leads to outcomes that are workable for both the "public" and "private" of this program, which is after all the consummate example of a public-private partnership. It is imperative that the vendor community be afforded an opportunity to work collaboratively with the Department to ensure that proposed changes to vendor authorization do not result in unnecessary vendor impacts or disqualifications. It would be a grave disservice to WIC participants were that to happen.

Please do not hesitate to contact me with any questions regarding our comments or if you would like to discuss any aspects of our industry comment letter in more detail.

Sincerely,

Keri Askew Bailey
Senior Vice President
Government Relations & Public Policy
California Grocers Association