

CHAPTER 1103. AUTHORIZATION OF STORES

Sec.

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Cross References

This chapter cited in 28 Pa. Code § 1101.2 (relating to definitions).

§ 1103.1. Authorization and reauthorization process and requirements.

(a) *Duration of authorization or reauthorization.* To serve as a WIC authorized store, a store shall be authorized in accordance with subsection (b) or reauthorized in accordance with subsection (c). A store's authorization or reauthorization shall remain in effect until the Department acts on the store's application for reauthorization when the next periodic review is conducted in the trade area in which the store is located, unless terminated earlier in accordance with subsection (d). At least once every 3 years, the Department will conduct a periodic review in each trade area. Failure to submit an application for reauthorization as prescribed under subsection (c) shall result in expiration of the store's authorization or reauthorization. The Department will provide 30 days written notice to the store prior to expiration of authorization or reauthorization for any store failing to submit an application. A store that has received a letter of authorization dated less than 60 days prior to the date of the notice of the periodic review in the store's trade area shall be exempt from the periodic review.

(b) *Authorization process.*

(1) The store's representative shall contact the local agency responsible for the trade area where the store is located to request an application for authorization. The local agency shall send WIC Program information and an application for authorization to the store. The store shall complete the application for authorization and return it to the local agency.

(2) The Department will refuse to accept an application from a store if the store has been provided notice of disqualification or is disqualified from the WIC Program, if the Department determines that the store relocated or effected a change of ownership to avoid a disqualification, or if the store has been denied authorization or reauthorization and is not eligible to apply for authorization.

(3) The Department will not accept an application for authorization less than 90 days prior to the scheduled start date of the periodic review in that trade area unless the Department finds that there would be inadequate partici-

pant access, as set forth in § 1103.7 (relating to inadequate participant access), if it does not consider the application.

(4) If the store's application for authorization is accepted, the local agency shall schedule, as expeditiously as possible, an announced onsite review of the store to determine if the store meets the selection criteria in § 1103.4 (relating to selection criteria for authorization and reauthorization). The local agency shall notify the store in advance of the approximate date of the review.

(5) The Department may request from the store any information necessary for the Department to determine whether the store qualifies as an above-50-percent-store. This information may include official State and Federal Income Tax filings, official State Sales Tax records, inventory purchase records, sales records or a self-declaration from the applicant.

(6) The local agency shall conduct the onsite review and forward the results to the Department for a decision on the store's application.

(7) The Department will deny the application if the selection criteria in § 1103.4 are not satisfied, unless the Department grants probationary authorization under § 1103.2 (relating to probationary authorization). The Department will notify the store in writing whether the store's application for authorization is granted or denied. If the Department denies the application for authorization, the store shall be eligible to reapply for authorization 6 months after the effective date of the denial.

(c) *Reauthorization process.*

(1) The Department will include an application for reauthorization with the notice of periodic review it sends to the store. The local agency will collect the application for reauthorization at the time of the announced onsite review of the store to determine if the store meets the selection criteria in § 1103.4. The local agency shall notify the store in advance of the approximate date of the review.

(2) The Department may request from the store any information necessary for the Department to determine whether the store qualifies as an above-50-percent-store. This information may include official State and Federal Income Tax filings, Official State Sales Tax records, inventory purchase records, sales records or a self-declaration from the applicant.

(3) The local agency shall conduct the onsite review and forward the results to the Department for a decision on the store's application.

(4) The Department will deny the application without advance warning if the selection criteria in § 1103.4 are not satisfied, unless the store requests and the Department grants temporary authorization in accordance with § 1103.3 (relating to temporary authorization) or the Department grants probationary authorization in accordance with § 1103.2. The Department will notify the store in writing whether the store's application for reauthorization is granted or denied. If the Department denies the application for reauthorization, the store shall be eligible to apply for authorization 6 months after the effective date of the denial. If the Department grants and later rescinds temporary authorization,

the store shall be eligible to apply for authorization 1 year from the date of the first onsite review for reauthorization.

(d) *Termination of authorization or reauthorization.* The Department will terminate a store's authorization or reauthorization if:

- (1) The store has been disqualified.
- (2) The store supplied false information in the application for authorization or reauthorization.
- (3) The store is not serving at least 25 participants 8 months following authorization.
- (4) Ownership of the store changes
- (5) The store relocates in excess of 1 mile of its current location and to a geographical area assigned to another local agency.
- (6) The store closes for more than 3 business days and does not notify the Department.
- (7) The Department does not receive from the store, within 20 calendar days of the store's receipt of a written notice from the Department, the information the Department has requested necessary for it to determine whether the store qualifies as an above-50-percent-store.
- (8) After authorization of the store, the Department determines if the store qualifies as an above-50-percent-Store. This paragraph does not apply to stores solely owned or operated by nonprofit entities.

Authority

The provisions of this § 1103.1 amended under section 2102(g) of The Administrative Code of 1929 (71 P. S. § 532(g)).

Source

The provisions of this § 1103.1 amended December 22, 2000, effective December 23, 2000, 30 Pa.B. 6853; amended October 3, 2003, effective October 4, 2003, 33 Pa.B. 4900; amended September 11, 2009, effective immediately, 39 Pa.B. 5292. Immediately preceding text appears at serial pages (300331) to (300333).

Notes of Decisions

Compliance of Regulatory Scheme

The Department's regulatory scheme which distinguishes between certification/recertification reviews and monitoring reviews, in terms of the sanctions imposed for failure to meet regulatory requirements, is based on a sound rationale. *Giant Food Stores, LLC v. Department of Health*, 808 A.2d 299 (Pa. Cmwlth. 2002).

The Department has the authority to deny a store's application for certification/recertification based upon a single violation of mandatory selection criteria. *Giant Food Stores, LLC v. Department of Health*, 808 A.2d 299 (Pa. Cmwlth. 2002).

Interpretation of Regulations

The Department of Health's interpretations of its own regulations are given great weight unless plainly erroneous or inconsistent with the regulation, neither of which occurred here. *Valesky's Market v. Department of Health*, 779 A.2d 1251 (Pa. Cmwlth. 2001).

Requirements Mandatory

To qualify for WIC recertification, a store must meet all of the selection criteria of § 1103.4(a). *Valesky's Market v. Department of Health*, 779 A.2d 1251 (Pa. Cmwlth. 2001).

Cross References

This section cited in 28 Pa. Code § 1101.2 (relating to definitions); and 28 Pa. Code § 1103.4 (relating to selection criteria for authorization and reauthorization); 28 Pa. Code § 1103.8 (relating to store peer group system); 28 Pa. Code § 1105.3 (relating to terms and conditions of participation); and 28 Pa. Code § 1113.1 (relating to right to administrative appeal).

§ 1103.2. Probationary authorization.

(a) *Criteria for probationary authorization.* If during the onsite review, the store fails to meet selection criteria in § 1103.4(3), (4), (5), (6), (7) or (8) (relating to selection criteria for authorization and reauthorization), the Department will grant probationary authorization to the store for a period not to exceed 6 months when either of the following applies:

- (1) Inadequate participant access would occur if the store is not authorized or reauthorized.
- (2) A store is reviewed prior to opening to the public and the store has not yet stocked its dairy section or its frozen juice section.

(b) *Reviews during probationary authorization period.* If a store receives probationary authorization, the Department will conduct an unannounced onsite review during the probationary authorization period to determine whether the store is in compliance with selection criteria in § 1103.4. The Department will rescind probationary authorization and deny the store's application to serve as a WIC authorized store if the store fails to meet one or more of the selection criteria during this review, unless extension is required under subsection (c). The Department will grant authorization or reauthorization, as applicable, if the store meets all selection criteria during the second onsite review.

(c) *Extension of probationary authorization.* If the store fails the review conducted during the probationary authorization period, and inadequate participant access exists as determined by the Department, the Department will extend probationary authorization for an additional 3 months during which time at least one representative of the store who is responsible for training store personnel on the WIC Program shall attend corrective training.

(d) *Extended probationary authorization reviews.* The Department will conduct an unannounced onsite review during the extended probationary authorization period after the store representative has attended corrective training, to determine whether the store is in compliance with the selection criteria in § 1103.4. The Department will rescind probationary authorization and deny the store's application to serve as a WIC authorized store if the store fails to meet one or more of the selection criteria during this review. The Department will grant authorization or reauthorization, as applicable, if the store meets all selection criteria during the third and final unannounced onsite review.

(e) *Rescission of probationary authorization.* If the Department rescinds the probationary or extended probationary authorization of a store, the store is eligible to apply for authorization 6 months from the date of the Department's rescission of probationary or extended probationary authorization.

Authority

The provisions of this § 1103.2 amended under section 2102(g) of The Administrative Code of 1929 (71 P. S. § 532(g)).

Source

The provisions of this § 1103.2 amended December 22, 2000, effective December 23, 2000, 30 Pa.B. 6853; amended October 3, 2003, effective October 4, 2003, 33 Pa.B. 4900. Immediately preceding text appears at serial pages (295339) to (295340).

Cross References

This section cited in 28 Pa. Code § 1103.1 (relating to authorization and reauthorization process and requirements); and 28 Pa. Code § 1105.1 (relating to training).

§ 1103.3. Temporary authorization.

(a) *Failure to meet selection criteria during onsite review.* If a WIC authorized store that applies for reauthorization fails to meet one or more of the selection criteria in § 1103.4 (relating to selection criteria for authorization and reauthorization) during the announced onsite review, the store may request temporary authorization, except that a store that fails to meet the price and minimum inventory requirements of § 1103.4(5) shall be ineligible for temporary authorization. A store that is a high risk store or the subject of an ongoing compliance investigation also shall be ineligible for temporary authorization.

(b) *Conditions of temporary authorization.* Temporary authorization shall be conditioned upon the following:

(1) The Department will conduct a second announced onsite review during the temporary authorization period to determine whether the store is in compliance with the selection criteria in § 1103.4. The Department will grant reauthorization if the store meets all selection criteria during this review. The Department will rescind temporary authorization and deny the store's application for reauthorization if the store fails to meet one or more of the selection criteria during the second review.

(2) If the Department rescinds the temporary authorization of a store, the store is eligible to apply for authorization 1 year after the date of the first onsite review that was conducted following the Department's receipt of the store's application for reauthorization.

(3) The Department will reduce by 10% the maximum allowable prices for foods authorized for purchase on WIC checks the store redeems for WIC transactions that occur during the first 90 days of the temporary authorization period.

Authority

The provisions of this § 1103.3 amended under section 2102(g) of The Administrative Code of 1929 (71 P. S. § 532(g)).

Source

The provisions of this § 1103.3 amended December 22, 2000, effective December 23, 2000, 30 Pa.B. 6853; amended October 3, 2003, effective October 4, 2003, 33 Pa.B. 4900. Immediately preceding text appears at serial pages (295340) and (286005).

Cross References

This section cited in 28 Pa. Code § 1103.1 (relating to authorization and reauthorization process and requirements); 28 Pa. Code § 1103.4 (relating to selection criteria for authorization and reauthorization).

§ 1103.4. Selection criteria for authorization and reauthorization.

The Department will use the following selection criteria to identify stores that meet the operational criteria to serve as a WIC authorized store:

- (1) The store shall be located within this Commonwealth.
- (2) A store seeking reauthorization shall serve at least 25 participants per month. The Department will deny reauthorization if the store is not serving 25 participants per month in the most recent month for which the Department has participant data at the time the onsite review for reauthorization is conducted.
- (3) The store shall have allowable foods properly stored and refrigerated.
- (4) The store may not have stale-dated allowable foods on its sales floor.
- (5) The store shall at all times have available on the premises the minimum inventory of allowable foods as established by the Department under § 1103.5 (relating to minimum inventory) at shelf prices that are equal to or less than the competitive prices applicable to the store's peer group for those foods. On a quarterly basis, the Department will publish in the *Pennsylvania Bulletin* and mail to all WIC authorized stores, the competitive prices and maximum allowable prices applicable to all peer groups for allowable foods for the next quarter.
- (6) The store shall be open for business and able to serve participants at least 8 hours per day, 6 days per week.
- (7) The store shall be sanitary. There may not be unremoved rubbish, vermin, or general lack of cleanliness.
- (8) The store shall operate as a full line grocery store in a permanent fixed location where participants may purchase allowable foods with their WIC checks.
- (9) If the store has been denied authorization or reauthorization within the past 12 months, the store must be eligible to apply for authorization under § 1103.1(b) or (c) or § 1103.3(b)(2) (relating to authorization and reauthorization process and requirements; and temporary authorization).

(10) The store may not be currently disqualified from participation in the Food Stamp Program or have been assessed a civil money penalty in lieu of a disqualification from the Food Stamp Program that, had it been imposed, would not yet have expired.

(11) The store may not be currently disqualified from the WIC Program.

(12) The store shall have implemented all required corrective actions resulting from monitoring by the Department, including reimbursement of any overcharges or overpayments, and shall be in compliance with the applicable Federal and State regulations.

(13) None of the store's current owners, officers, or managers shall have been convicted of or had a civil judgment entered against them for conduct demonstrating a lack of business integrity.

(14) The store will not qualify or will not be expected to qualify as an above-50-percent-store. This paragraph does not apply to stores solely owned or operated by nonprofit entities.

(15) The store shall meet the minimum information technology requirements set by the Department. The Department will publish in the *Pennsylvania Bulletin* and mail to all WIC authorized stores, by September 15 of each year, the minimum technology requirements applicable for the following calendar year. This paragraph does not apply to stores authorized prior to September 12, 2009, and maintaining an uninterrupted authorized status.

Authority

The provisions of this § 1103.4 amended under section 2102(g) of The Administrative Code of 1929 (71 P. S. § 532(g)).

Source

The provisions of this § 1103.4 amended December 22, 2000, effective December 23, 2000, 30 Pa.B. 6853; amended October 3, 2003, effective October 4, 2003, 33 Pa.B. 4900; corrected October 10, 2003, effective October 4, 2003, 33 Pa.B. 5080; amended September 11, 2009, effective immediately, 39 Pa.B. 5292. Immediately preceding text appears at serial pages (300335) to (300337).

Notes of Decisions

Interpretation of Regulations

The Department of Health's interpretations of its own regulations are given great weight unless plainly erroneous or inconsistent with the regulation, neither of which occurred here. *Valesky's Market v. Department of Health*, 779 A.2d 1251 (Pa. Cmwlth. 2001).

Minimum Participation

The Department of Health correctly denied WIC recertification where the store had not served 25 participants in the most recent month for which the Department had data. *Valesky's Market v. Department of Health*, 779 A.2d 1251 (Pa. Cmwlth. 2001).

State-dated Allowable Foods not Permitted

The petitioner chose to stock a brand of formula not subject to minimum inventory requirements. Even though not subject to minimum inventory requirements, the formula was a WIC allowable food

and, therefore, subject to product freshness requirements. Therefore, the presence of out-dated lacto-free Enfamil formula was sufficient cause for the Department of Health to deny the petitioner's application for recertification. *Valesky's Market v. Department of Health*, 779 A.2d 1251 (Pa Cmwlt. 2001).

Cross References

This section cited in 28 Pa. Code § 1101.2 (relating to definitions); 28 Pa. Code § 1103.1 (relating to authorization and reauthorization process and requirements); 28 Pa. Code § 1103.2 (relating to probationary authorization); 28 Pa. Code § 1103.3 (relating to temporary authorization); 28 Pa. Code § 1103.7 (relating to inadequate participant access); 28 Pa. Code § 1105.3 (relating to terms and conditions of participation); and 28 Pa. Code § 1107.1a (relating to disqualifications).

§ 1103.5. Minimum inventory.

(a) *Minimum inventory requirements.*

(1) The Department will adopt minimum inventory requirements and their effective dates, for the following WIC allowable foods:

- (i) Contract brand infant formula.
- (ii) Milk.
- (iii) Natural domestic cheese.
- (iv) Grade "A" eggs.
- (v) Juice.
- (vi) Cereal.
- (vii) Peanut butter.
- (viii) Dried peas and beans.
- (ix) Tuna.
- (x) Carrots.

(2) The Department will set minimum inventory requirements for all allowable foods for which minimum inventory requirements exist at a level not to exceed the maximum quantity of supplemental food authorized per month as set forth in 7 CFR 246.10(c)(1)—(7) (relating to supplemental foods).

(3) The Department will publish minimum inventory requirements in the *Pennsylvania Bulletin* and distribute those requirements to all WIC authorized stores by September 15 of each year, and when manufacturer product or packaging changes occur.

(b) *Exceptions to minimum inventory requirements.* The Department will grant an exception to the minimum inventory requirements for an allowable food listed in subsection (c) when the Department's most recent check redemption information for a store shows no purchases of the allowable food for a period in excess of 90 days.

(c) *Allowable foods to which exceptions may apply.* These foods are:

- (1) Contract brand milk-based with iron liquid concentrate infant formula.
- (2) Contract brand milk-based with iron ready-to-feed infant formula.
- (3) Contract brand milk-based with iron powdered infant formula.
- (4) Contract brand soy-based liquid concentrate infant formula.

- (5) Contract brand soy-based ready-to-feed infant formula.
- (6) Contract brand soy-based powdered infant formula.
- (7) Nonfat dry milk.
- (8) Evaporated milk.
- (9) Carrots.
- (10) Tuna.

(d) *Expiration of exception to minimum inventory requirements.* The exception to minimum inventory requirements for an allowable food granted by the Department shall expire upon the presentation to the store, on behalf of a participant, of a WIC check for the purchase of that allowable food. The WIC authorized store shall provide the food item within 48 hours after presentation of the WIC check.

Authority

The provisions of this § 1103.5 amended under section 2102(g) of The Administrative Code of 1929 (71 P. S. § 532(g)).

Source

The provisions of this § 1103.5 amended December 22, 2000, effective December 23, 2000, 30 Pa.B. 6853; amended October 3, 2003, effective October 4, 2003, 33 Pa.B. 4900. Immediately preceding text appears at serial pages (286008) to (286010).

Notes of Decisions

Interpretation of Regulations

The Department of Health's interpretations of its own regulations are given great weight unless plainly erroneous or inconsistent with the regulation, neither of which occurred here. *Valesky's Market v. Department of Health*, 779 A.2d 1251 (Pa. Cmwlth. 2001).

Grace Period Limited

The grace period is provided to give a store time to come into compliance with minimum inventory requirements for a WIC allowable food for which the store had been granted a waiver. No grace period is provided to achieve compliance with product freshness requirements. If a store chooses to stock a WIC allowable food not subject to minimum inventory requirements, the food must meet product freshness requirements. *Valesky's Market v. Department of Health*, 779 A.2d 1251 (Pa. Cmwlth. 2001).

Cross References

This section cited in 28 Pa. Code § 1103.4 (relating to selection and limitation criteria; authorization process).

§ 1103.6. [Reserved].

Source

The provisions of this § 1103.6 amended December 22, 2000, effective December 23, 2000, 30 Pa.B. 6853; amended October 3, 2003, effective October 4, 2003, 33 Pa.B. 4900. Immediately preceding text appears at serial pages (286010) to (286011).

§ 1103.7. Inadequate participant access.

(a) The Department will consider whether there is inadequate participant access when considering whether to place a store on probation, rather than deny authorization or reauthorization, for failure to meet selection criteria in § 1103.4 (relating to selection criteria for authorization and reauthorization) during the onsite review.

(b) The Department may consider whether there is inadequate participant access when deciding whether to impose a civil money penalty in lieu of disqualification under § 1107.1 (relating to imposition of sanctions).

(c) Inadequate participant access is any of the following:

(1) Ten or more participants whose specific nationality, ethnicity or religious dietary needs can not be served properly by another WIC authorized store located in accordance with one of the following:

(i) Less than 3 miles of the store for counties with participant density less than 25 participants per square mile.

(ii) Less than 2 miles of the store for counties with participant density of 25 to 100 participants per square mile.

(iii) Less than 1 mile of the store for counties with participant density greater than 100 participants per square mile.

(2) Ten or more participants will be required to travel in accordance with one of the following:

(i) Three or more miles to the next closest WIC authorized store for counties with participant density less than 25 participants per square mile.

(ii) Two or more miles to the next closest WIC authorized store for counties with participant density of 25 to 100 participants per square mile.

(iii) One or more miles to the next closest WIC authorized store for counties with participant density greater than 100 participants per square mile.

(3) A participant has a physical disability that cannot be accommodated by another WIC authorized store in accordance with one of the following:

(i) Within 3 miles of the store for counties with participant density less than 25 participants per square mile.

(ii) Within 2 miles of the store for counties with participant density of 25 to 100 participants per square mile.

(iii) Within 1 mile of the store for counties with participant density greater than 100 participants per square mile.

(4) Ten or more participants are affected by physical barriers or conditions which make normal travel to another WIC authorized store impractical.

Authority

The provisions of this § 1103.7 amended under section 2102(g) of The Administrative Code of 1929 (71 P. S. § 532(g)).

Source

The provisions of this § 1103.7 amended December 22, 2000, effective December 23, 2000, 30 Pa.B. 6853; amended October 3, 2003, effective October 4, 2003, 33 Pa.B. 4900. Immediately preceding text appears at serial pages (286011) to (286012).

Cross References

This section cited in 28 Pa. Code § 1103.1 (relating to authorization and reauthorization process and requirements); 28 Pa. Code § 1107.1 (relating to imposition of sanctions); and 28 Pa. Code § 1107.2 (relating to civil money penalties).

§ 1103.8. Store peer group system.

(a) The Department will establish a store peer group system, including distinct competitive pricing criteria and allowable reimbursement levels for each peer group.

(b) The Department will create peer groups based upon at least two criteria selected by the Department. These criteria may include the size of a store sales floor, number of cash registers in the store, number of stores owned, and a measure of geography, such as metropolitan or other statistical areas that form distinct labor and product markets. The Department will annually publish the peer group selection criteria in the *Pennsylvania Bulletin*.

(c) The Department will place a store seeking authorization into an appropriate peer group based upon information gathered from the store's application as completed by the store and returned to the local agency in accordance with § 1103.1(b)(1) (relating to authorization and reauthorization process and requirements). The Department will notify a store of its peer group classification prior to conducting an onsite review under § 1103.1(b)(5). A WIC authorized store seeking reauthorization shall remain in the peer group previously selected for the store unless otherwise notified by the Department.

(d) A WIC authorized store shall adhere to the competitive prices and maximum allowable prices applicable to the store's peer group.

(e) A WIC authorized store shall inform the Department of any store changes applicable to the peer group selection criteria in effect.

Authority

The provisions of this § 1103.8 adopted under section 2102(g) of The Administrative Code of 1929 (71 P. S. § 532(g)).

Source

The provisions of this § 1103.8 adopted September 11, 2009, effective immediately, 39 Pa.B. 5292.

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(345224) No. 420 Nov. 09

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