

**TITLE 310. OKLAHOMA STATE DEPARTMENT OF HEALTH  
CHAPTER 410. WIC**

**RULEMAKING ACTION:**

Notice of proposed PERMANENT rulemaking

**PROPOSED RULES:**

Subchapter 3. Vendor Management

Part 1. General Provisions

310:410-3-2 [AMENDED]

Part 3. WIC Vendor Application and Authorization Process

310:410-3-10 [AMENDED]

310:410-3-12 [AMENDED]

Part 9. WIC Vendor Compliance and Sanctions

310:410-3-52 [AMENDED]

**SUMMARY:**

The proposal amends rules to clarify and simplify the existing rules as they pertain to retail vendors in the Women, Infants and Children (WIC) Program. The proposal also updates the existing rules to comply with updated Federal Rules and Regulations pertaining to Civil Money Penalties.

**AUTHORITY:**

Commissioner of Health; Title 63 O.S. § 1-104; and Title 62 O.S. § 34.76

**COMMENT PERIOD:**

November 15, 2022 through the close of the Department's normal business hours, 5 PM, on December 15, 2022. Interested persons may informally discuss the proposed rules with the contact person identified below; or may, through the close of the Department's normal business hours, 5 PM, on December 15, 2022 submit written comment to the contact person identified below, or may, at the hearing, ask to present written or oral views.

**PUBLIC HEARING:**

Pursuant to 75 O.S. § 303(A), the public hearing for the proposed rulemaking in this chapter shall be on December 15, 2022 at the Oklahoma State Department of Health Auditorium, 123 Robert S. Kerr Avenue, Oklahoma City, Oklahoma 73102 from 9:30 AM to 12:30 PM. The meeting may adjourn earlier if all attendees who signed up to comment have completed giving their comments. The alternate date and time in the event of an office closure due to inclement weather is December 19, 2022 in the Auditorium, from 9:30 AM to 12:30 PM. Those wishing to present oral comments should be present at that time to register to speak. The hearing will close at the conclusion of those registering to speak. Interested persons may attend for the purpose of submitting data, views or concerns, orally or in writing, about the rule proposal described and summarized in this Notice. Validated parking will be provided for the parking lot located at the east corner of Broadway and Robert S. Kerr Avenue, subject to availability.

**REQUESTS FOR COMMENTS FROM BUSINESS ENTITIES:**

Business entities affected by these proposed rules are requested to provide the agency with information, in dollar amounts if possible, on the increase in the level of direct costs such as fees, and indirect costs such as reporting, recordkeeping, equipment, construction, labor, professional services, revenue loss, or other costs expected to be incurred by a particular entity due to compliance with the proposed rule. Business entities may submit this information in writing through December 15, 2022, to the contact person identified below.

**COPIES OF PROPOSED RULES:**

The proposed rules may be obtained for review from the contact person identified below or via the agency website at [www.ok.gov/health](http://www.ok.gov/health).

**RULE IMPACT STATEMENT:**

Pursuant to 75 O.S., § 303(D), a rule impact statement is available through the contact person identified below or via the agency website at [www.ok.gov/health](http://www.ok.gov/health).

**CONTACT PERSON:**

Audrey C. Talley, Agency Rule Liaison, Oklahoma State Department of Health, 123 Robert S. Kerr Avenue, Oklahoma City, OK 73102, phone (405) 426-8563, e-mail [AudreyT@health.ok.gov](mailto:AudreyT@health.ok.gov).

**INITIAL RULE IMPACT STATEMENT**

**(This document may be revised based on comment received during the public comment period.)**

**TITLE 310. OKLAHOMA STATE DEPARTMENT OF HEALTH  
CHAPTER 410. WIC**

**1. DESCRIPTION:**

The proposal amends rules to clarify and simplify the existing rules as they pertain to retail vendors in the Women, Infants and Children (WIC) Program. The proposal also updates the existing rules to comply with updated Federal Rules and Regulations pertaining to Civil Money Penalties.

**2. DESCRIPTION OF PERSONS AFFECTED AND COST IMPACT RESPONSE:**

The proposed amended rules will affect authorized Oklahoma WIC Vendors. There is minimal to no impact of cost.

**3. DESCRIPTION OF PERSONS BENEFITING, VALUE OF BENEFIT AND EXPECTED HEALTH OUTCOMES:**

There are no expected health outcomes affiliated with the proposed amended rules. The authorized Oklahoma WIC Vendors will benefit from the clarified rules.

**4. ECONOMIC IMPACT, COST OF COMPLIANCE, AND FEE CHANGES: COST OF COMPLIANCE AND FEE CHANGES:**

There is no economic impact to any authorized Oklahoma WIC Vendor because of this rule being implemented.

**5. COST AND BENEFITS OF IMPLEMENTATION AND ENFORCEMENT TO THE AGENCY:**

There will be no cost associated with implementing the proposed amended rules and by implementing these rules changes the Oklahoma WIC Program will comply with Federal Regulations.

**6. IMPACT ON POLITICAL SUBDIVISIONS:**

There will be no impact on political subdivisions.

**7. ADVERSE EFFECT ON SMALL BUSINESS:**

There is no known adverse effect on small business as provided by the Oklahoma Small Business Regulatory Flexibility Act.

**8. EFFORTS TO MINIMIZE COSTS OF THE RULE:**

There are no less costly means currently identified.

9. **EFFECT ON PUBLIC HEALTH AND SAFETY:**

No effect on public health and safety is projected.

10. **DETRIMENTAL EFFECTS ON PUBLIC HEALTH AND SAFETY WITHOUT ADOPTION:**

There are no detrimental effects on public health and safety.

11. **PREPARATION AND MODIFICATION DATES:**

This rule impact statement was prepared on June 7, 2022.

**TITLE 310. OKLAHOMA STATE DEPARTMENT OF HEALTH  
CHAPTER 410. WIC**

**SUBCHAPTER 3. VENDOR MANAGEMENT**

**PART 1. GENERAL PROVISIONS**

**310:410-3-2. Definitions**

The following words and terms, when used in this Subchapter, shall have the following meaning, unless the context clearly indicates otherwise:

**"Above 50% WIC Vendor"** means a WIC retail vendor who expects to derive more than 50% of their annual food sales revenue from the redemption of WIC food benefits from all of the WIC Programs for which they are authorized.

**"Administrative warning"** means a written notice which describes the nature of a violation to the WIC Program and a request for correction of the violation.

**"APL"** means the Approved Products List.

**"Applicant"** means the individual, partnership, limited partnership, unincorporated association, or corporation applying to be a WIC retail vendor, includes both Above 50% and Regular WIC Vendors.

**"Application"** means the application forms and other required materials submitted by a business entity to notify the department that the business entity desires to become a WIC retail vendor.

**"Authorization"** means the approval of an applicant who has met the WIC vendor criteria and has accepted a WIC vendor agreement as a WIC retail vendor.

**"Business entity"** means the retail business which an applicant or authorized WIC vendor operates at a particular vendor site.

**"Commissioner"** means the Commissioner of the Oklahoma State Department of Health or his designee.

**"Corporate officer"** means the identity of the officer of a corporation as set forth in its articles of incorporation as filed with the secretary of state wherein such entity is incorporated.

**"Department"** means the Oklahoma State Department of Health.

**"Department representative"** or **"Representative of the Department"** means an employee or authorized agent of the department.

**"Food Benefits"** means an electronic benefits transfer card (EBT) that document the specified supplemental WIC approved foods and the quantities of these foods for a specified period of time that have been prescribed for a WIC participant and is used to obtain supplemental WIC approved foods.

**"Grocery store"** means a fixed and permanent retail store whose primary business is the sale of food.

**"Local agency"** means a public or private, non-profit health or human services agency which provides health services, either directly or through an agreement, in accordance with the USDA WIC Regulations, or this Subchapter.

**"MAR"** means the Maximum Allowable Reimbursement amount for WIC approved foods.

**"OAPA"** means the Oklahoma Administrative Procedure Act.

**"Oklahoma WIC retail food delivery system"** means the system in which participants obtain WIC approved foods by processing a food benefit at a WIC retail vendor.

**"Participant"** means authorized pregnant women, breast-feeding women, postpartum women, infants or children who are receiving supplemental WIC approved foods or food benefits under the WIC Program.

**"Participant requested delivery"** means a participant requested delivery of WIC approved foods from a vendor to an address specified by the WIC participant or proxy.

**"Participant/vendor ratio"** means the total number of WIC participants in a given region divided by the total number of WIC retail vendors in the same region.

**"Peer Group"** means the classification of WIC retail vendors with regards to competitive pricing.

**"Pharmacy"** means any store, shop, department, or other place at a fixed and permanent location, where drugs, medicines, or liquid foods prescribed by a physician licensed to practice medicine in all its branches, for an individual are dispensed, or sold or offered for sale at retail value.

**"Proxy"** means a person who is authorized by the local agency and the WIC participant to accept and/or redeem food benefits on a participant's behalf.

**"Regular WIC Vendor"** means any WIC retail vendor who has not been determined to be an Above 50% WIC Vendor.

**"Retail vendor price survey"** means the current prices, reported to the department, by a vendor or a department representative as charges for WIC Approved Foods.

**"Store type"** means the classification of WIC retail vendors by their gross retail sales per year. Up to 1.5 million dollars in sales is a type 1 vendor site; 1.5 million to 5 million dollars in sales is a type 2 vendor site; over 5 million dollars in sales is a type 3 vendor site. A commissary is a type 4 vendor site and a pharmacy is a type 5 vendor site. An Above 50% vendor is a type 6 vendor site.

**"SNAP"** means the Supplemental Nutrition Assistance Program, formerly "Food Stamp."

**"USDA"** means the United States Department of Agriculture.

**"USDA WIC regulations"** means the regulations of the United States Department of Agriculture, Food and Nutrition Service, Special Supplemental Food Program for Women, Infants, and Children. 7 CFR 246 (1990).

**"Vendor"** or **"WIC retail vendor"** means the individual, partnership, limited partnership, unincorporated association, or corporation authorized by the department to accept food benefits and to provide supplemental food to WIC participants or proxies of WIC participants, includes both Above 50% and Regular Vendors.

**"Vendor number"** means the number assigned to a vendor by the department for tracking food benefit redemptions.

**"Vendor site"** means a fixed and permanent location, operating as a business entity, listed in the WIC vendor application, which has been authorized by the department for purposes of delivery of WIC approved foods to WIC participants or the proxy of a WIC participant.

**"WIC food list"** means the published list of State of Oklahoma authorized WIC approved foods.

**"WIC approved foods"** means those competitively priced foods which have been placed on the WIC food list, which have been determined by the department to be nutritionally qualified for the WIC Program in the state of Oklahoma.

**"WIC service chief director"** means the person responsible for the implementation and administration of the WIC Program.

**"WIC vendor agreement"** means an agreement signed by the WIC retail vendor and the department for the provision of WIC approved foods to participants.

**"Women, Infants and Children Nutrition Program"** or **"WIC"** means the federal special supplemental food program for women, infants and children authorized by Section 17 of the Child Nutrition Act of 1966, as amended (42 U.S.C. 1786).

### **PART 3. WIC VENDOR APPLICATION AND AUTHORIZATION PROCESS**

#### **310:410-3-10. Participant distribution and number of vendors**

(a) Upon receipt of the application, the department shall utilize participant/vendor ratios and shall consider participant needs within geographical locations to determine if the applicant meets the county participant/vendor ratio to be eligible for selection.

(b) The participant/vendor ratio shall be calculated for the counties within the state of Oklahoma to determine the need for WIC retail vendors within such counties.

- (1) The counties will be divided into two classifications:
  - (A) Urban Counties - Counties that have towns/cities located within their boundaries with a population of ~~or~~ 20,000 or greater (per current Census Population). ~~The following counties are considered urban counties:~~
    - (i) ~~Canadian~~
    - (ii) ~~Carter~~
    - (iii) ~~Cleveland~~
    - (iv) ~~Comanche~~
    - (v) ~~Garfield~~
    - (vi) ~~Jackson~~
    - (vii) ~~Kay~~
    - (viii) ~~Muskogee~~
    - (ix) ~~Oklahoma~~
    - (x) ~~Payne~~
    - (xi) ~~Pottawatomie~~
    - (xii) ~~Stephens~~
    - (xiii) ~~Tulsa~~
    - (xiv) ~~Washington~~
  - (B) Rural Counties - Counties that have towns/cities located within their boundaries with a population of less than 20,000 or consist of sparsely populated areas. ~~All counties not listed in (A) of this paragraph as urban counties are considered rural counties.~~
- (2) Participant/vendor ratios for the counties within Oklahoma shall be:
  - (A) Urban Counties - Greater than 200:1
  - (B) Rural Counties - Greater than 150:1
- (3) If an applicant applies for WIC authorization in a county which exceeds the maximum participant/vendor ratio, the application shall be denied. An exception shall be granted when the applicant's charges to the department or shelf price, whichever is lower, for WIC approved foods are at least five percent (5%) below the department's statewide average cost, and the applicant agrees to maintain these charges to the department at such level during the period of authorization or until the distance is such participant's access is restricted or the county becomes unsaturated.

**310:410-3-12. Authorization criteria and procedures**

(a) Only WIC retail vendors authorized by the department shall be eligible to accept food benefits or otherwise provide supplemental foods to WIC participants. Any applicant seeking authorization to become a WIC retail vendor has an obligation to meet the following criteria before authorization. In addition, any approved vendor has a continuing obligation to meet the below listed criteria during the period of authorization:

- (1) The vendor site shall be located within the boundary lines of the state of Oklahoma.
- (2) The vendor site shall have a fixed and permanent location. This site shall be the address indicated on the WIC vendor application and shall be the location where a WIC participant or proxy shall select WIC foods during business hours.
  - (A) This site shall not be at an address or within any building where food benefits are distributed to WIC participants without written agreement from the State, i.e., extenuating circumstances, outreach, participant access, and/or rural areas. Provided, however, the Department retains the right to place a service location within the same building where food benefits are redeemed.
  - (B) The price charged to the WIC Program for WIC foods provided through participant requested delivery shall not exceed those prices charged to cash paying customers nor the prices posted at the vendor site. The vendor shall not charge for delivery of WIC foods.

- (3) Each vendor site listed in the application shall have seventy percent (70%) or more gross receipts from the sale of products other than beer, hot foods and motor fuel.
  - (4) Authorization to participate in the USDA SNAP or any other federal food program is not a prerequisite for authorization as a WIC retail vendor. If, however, an applicant or vendor has been authorized to participate in the USDA SNAP or other federal food program, he shall not have been denied, suspended, disqualified, terminated, or assessed a civil money penalty during the two (2) years preceding application for authorization as a WIC retail vendor.
  - (5) Neither the applicant, vendor, nor any officers or officials shall have been involved in bribery as prohibited under Oklahoma Purchasing Act.
  - (6) Neither the applicant, vendor, its officers, directors, individual partners, nor their spouses or minor children who own more than seven and one-half percent (7 1/2%) ownership or beneficial interest in the business entity seeking authorization to participate in the WIC Program shall be employed by the state or county health departments directly or indirectly involved in the delivery or administration of WIC services.
  - (7) Neither the applicant, nor the vendor shall have been convicted of a misdemeanor involving fraud, misuse or theft of state or federal funds or of any felony. A certified copy of conviction may be offered and admitted into evidence as proof of such conviction.
  - (8) Neither the applicant, vendor, nor any owner of thirty percent (30%) or more ownership shall have been terminated from the WIC Program in the previous two (2) years.
  - (9) The applicant or vendor shall adhere to the provisions of the USDA WIC Regulations and this part.
- (b) Applicants shall be authorized as WIC retail vendors based upon the following:
- (1) An application and all supporting documents shall be properly completed and verified by the department. No application shall be deemed complete unless it includes all necessary supporting documents required by this part.
  - (2) The applicant's proposed vendor site may be initially inspected by the department.
    - (A) The department may conduct an initial inspection of the proposed vendor site after receipt of a completed application. Such inspection shall determine whether the applicant has the minimum quantities, sizes, and types of WIC foods and shall verify any business or financial information submitted by the applicant.
    - (B) If the inspection discloses that the applicant's proposed vendor site does not have the minimum quantities, sizes, or types of WIC foods necessary, or that business or financial information supplied by the applicant is erroneous, inaccurate, or insufficient, the department shall advise the applicant of the deficiencies and conduct another inspection of the vendor site.
    - (C) If the second inspection by the department discloses that the applicant's proposed vendor site does not meet the minimum quantities, sizes, and types of WIC foods or if business or financial information supplied by the applicant remains erroneous, inaccurate or insufficient, the application shall be denied.
  - (3) The minimum quantities, sizes, and types of WIC foods necessary at a vendor site are those specified in the WIC Vendor Agreement. A copy of this list shall be provided to each applicant and approved vendor.
  - (4) The department shall complete a retail vendor price survey of WIC foods during the initial inspection by collecting the lowest posted shelf prices for WIC foods. If the regular vendor applicant's prices are ten percent (10%) above the average prices in the same peer group for WIC foods, the application shall be denied. If the above 50% WIC vendor applicant's prices are above the statewide average prices for WIC foods ~~their required peer group prices~~, the application shall be denied.
  - (5) The applicant shall be notified by the department within sixty (60) calendar days, whether or not the inspection or the proposed vendor site, the business, the financial, or other information

provided by the applicant meet the criteria set forth in this part. If the applicant meets such criteria, he shall be notified of approval to attend the initial retail vendor training course.

## **PART 9. WIC VENDOR COMPLIANCE AND SANCTIONS**

### **310:410-3-52. WIC vendor sanctions**

Any Class A or B violation shall subject the vendor to reimburse the department for any overcharges, charges for items not received by WIC participants, and monies paid for products not authorized as WIC approved foods.

(1) Any Class A violation shall constitute grounds for disqualification of authorization to the WIC Program. If the department determines that disqualification of the vendor would result in inadequate participant access, the department shall impose a civil money penalty in lieu of disqualification. The length of each disqualification is listed below.

(A) Permanent disqualification: A vendor convicted of trafficking in food benefits or selling firearms, ammunition, explosives, or controlled substances (as defined in section 102 of Controlled Substances Act (21 U.S.C. 802) in exchange for food benefits.

(B) Six-year disqualification:

(i) One incidence of buying or selling food benefits for cash (trafficking); or

(ii) One incidence of selling firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food benefits.

(C) Three-year disqualification:

(i) One incidence of sale of alcohol or alcoholic beverages or tobacco products in exchange for food benefits; or

(ii) A pattern of claiming reimbursement for sale of an amount of a specific WIC food item which exceeds the store's documented inventory of that WIC food item for a specific period of time; or

(iii) A pattern of charging participants more for WIC food than non-WIC customers or charging participants more than the current shelf or agreement price; or

(iv) A pattern of receiving, transacting and/or redeeming food benefits outside of authorized channels, including the use of an unauthorized vendor and/or an unauthorized person; or

(v) A pattern of charging for WIC food not received by the participant, proxy, or department representatives; or

(vi) A pattern of providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food benefits.

(D) One-year disqualification: A pattern of providing unauthorized food items in exchange for food benefits, including charging for supplemental foods provided in excess of those listed on the food benefit.

(E) Disqualification period equal to SNAP disqualification:

(i) Permanent disqualification, disqualification or suspension from participation in the USDA SNAP, or imposition of a civil money penalty by SNAP;

(ii) Such sanction shall not be subject to administrative or judicial review under the WIC program.

(F) Voluntary withdrawal or non-renewal of agreement:

(i) The department shall not accept voluntary withdrawal of the vendor from the Program as an alternative to disqualification for violations listed in this section, but shall enter the disqualification on the record; or

(ii) The department shall not use non-renewal of the vendor agreement as an alternative to disqualification.

(G) Civil Money Penalty (For each violation subject to a mandatory sanction):

(i) The department shall impose a Civil Money Penalty in lieu of WIC Program disqualification if such disqualification of the vendor would result in inadequate WIC participant access. The Civil Money Penalty is set forth in 7 CFR 246.12(l)(x)(C) and 7 CFR 3.91(b)(3)(v).

~~(ii) The civil money penalty shall not exceed \$15,041 for each violation and shall not exceed \$60,141 for a single investigation.~~

- (2) Any Class B violation shall constitute grounds for the following sanctions:
  - (A) For the first Class B violation, the WIC retail vendor shall be given written notice of the violation and shall be given an administrative warning.
  - (B) For the second Class B violation committed within one (1) year of the first Class B violation, the vendor shall be subject to a fine assessment of five hundred dollars (\$500). The vendor shall also be required to attend a compliance training workshop.
  - (C) The third Class B violation committed within two (2) years of the first Class B violation shall subject the vendor to a fine assessment of one thousand dollars (\$1,000).
  - (D) The fourth Class B violation committed within two (2) years of the first Class B violation shall be grounds for termination of the vendor authorization, and a fine assessment of two thousand, five hundred dollars (\$2,500).
- (3) Any Class C violation shall constitute issuance of an administrative warning. Five (5) Class C violations within a one (1) year period shall be grounds for termination of the vendor authorization for a period of one (1) year.
- (4) Second mandatory sanction, a vendor, who previously has been assessed a sanction for any of the violations listed in this part, receives another sanction for any of these violations, the department shall double the sanction.
- (5) Third or subsequent mandatory sanction, a vendor, who previously has been assessed two or more sanctions for any of the violations in this part, receives another sanction for any of these violations, the department shall double the third sanction and all subsequent sanctions. The department shall not impose civil money penalties in lieu of disqualification for third or subsequent sanctions for violations listed in this part.
- (6) The time period shall commence from the time the notice of violation, termination, or fine assessment is issued by the department.
- (7) All fine assessments shall be paid by cashier certified check or money order in United States currency.