

Nutrition Services Department of State Health Services

Effective: December 1, 2016

Policy No. WV:13.0

WIC Vendor Right to Administrative Review

Purpose

To describe State Agency (SA) process for providing the right of administrative review (also known as Fair Hearing, pursuant to the Texas Administrative Code, Title 25, section § 1.41 to § 1.55) to a WIC vendor who has experienced and wishes to appeal an adverse action exercised by the SA and/or SA representative.

Authority

7 CFR Sections 246.12 and 246.18; the Vendor Agreement; and the Texas Administrative Code, Title 25, section § 1.41 to § 1.55

I. Adverse Actions Subject to Full Administrative Review

The SA will provide vendors the opportunity for a full administrative review, pursuant to the Texas Administrative Code, Title 25, section § 1.41 to § 1.55, to appeal the following adverse actions:

- A. Denial of authorization based on the application of the vendor selection criteria for minimum variety and quantity of authorized supplemental foods or on a determination that the vendor is attempting to circumvent a sanction
- B. Termination of an agreement for cause
- C. Disqualification
- D. Imposition of a fine or a civil money penalty in lieu of disqualification.

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II. *Adverse Actions Subject to Abbreviated Administrative Review*

The SA will provide Abbreviated Administrative Reviews to vendors that appeal the following adverse actions. An Abbreviated Administrative Review is an internal, formal desk review in which the contested issue is evaluated and decided by a neutral employee of the SA, designated by the director or director designee. The SA, at its sole discretion, may decide to provide a full administrative review for any of these types of adverse actions:

- A. Denial of authorization based on the vendor selection criteria for business integrity or for a current Supplemental Nutrition Assistance Program (SNAP), formerly known as the Food Stamp Program, disqualification or Civil Money Penalty (CMP) for hardship.
- B. Denial of authorization based on the application of the vendor selection criteria for competitive price.
- C. The application of the SA'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.
- D. Denial of authorization based on a SA established vendor selection criterion if the basis of the denial is a WIC vendor sanction or a SNAP withdrawal of authorization or disqualification.
- E. Denial of authorization based on the SA's vendor limiting criteria.
- F. Denial of authorization because a vendor submitted its application outside the timeframes during which applications are being accepted and processed as established by the SA.
- G. Termination of an agreement because of a change in ownership or location or cessation of operations.

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- H. Disqualification based on a trafficking conviction.
 - I. Disqualification based on the imposition of a SNAP CMP for hardship.
 - J. Disqualification or a CMP imposed in lieu of disqualification based on a mandatory sanction imposed by another WIC State Agency (i.e. Arkansas, New Mexico);
 - K. A CMP imposed in lieu of disqualification based on a SNAP disqualification; and,
 - L. Denial of an application based on a determination of whether an applicant vendor is currently authorized by SNAP.
- III. The SA will not provide administrative reviews (Full or Abbreviated) to vendors that appeal the following actions:
- A. The validity or appropriateness of the SA's vendor limiting or selection criteria for minimum variety and quantity of supplemental foods, business integrity, and current SNAP disqualification or civil money penalty for hardship.
 - B. The validity or appropriateness of the SA's selection criteria for competitive price, including, but not limited to, vendor peer group criteria and the criteria used to identify vendors that are above-50-percent vendors or comparable to above-50-percent vendors.
 - C. The validity or appropriateness of SA's participant access criteria and the SA's participant access determinations concerning whether disqualification of a vendor would result in inadequate participant access.
 - D. The SA's determination to include or exclude an infant formula manufacturer, wholesale, distributor, or retailer from the SA's

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list of infant formula wholesalers, distributors, and retailers licensed under State law (including regulations), and infant formula manufacturers registered with the Food and Drug Administration (FDA) that provide infant formula.

- E. The validity or appropriateness of the SA's prohibition of incentive items and the SA's denial of an above-50-percent vendor's request to provide an incentive item to customers.
- F. The SA'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.
- G. The SA'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.
- H. Denial of authorization if the SA's vendor authorization is subject to the procurement procedures applicable to the SA.
- I. The expiration of a vendor's agreement.
- J. Disputes regarding WIC EBT food instrument and cash-value benefit payments or claims assessed against a vendor (other than the opportunity to justify or correct a vendor overcharge or other error).
- K. Disqualification of a vendor as a result of disqualification from the SNAP.
- L. The validity or appropriateness of the SA's WIC Vendor Agreement provisions.

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IV. Full Administrative Review Procedures

- A. The SA and/or SA representative shall provide a vendor with written notification of an adverse action, the cause(s) for the action, the effective date of the action, and the right to appeal the adverse action through a Full Administrative Review. The Full Administrative Review process provides the vendor with a fair hearing before a neutral hearing examiner.
- B. The SA and/or SA representative shall provide a vendor with written notice of an adverse action at least 20 days prior to the effective date of the action.

Exception: When a vendor is denied authorization or is disqualified due, in whole or in part, to conviction for trafficking in food instruments or selling firearms, ammunition, explosives, or controlled substances in exchange for food instruments, the SA and/or SA representative must make the denial of authorization or disqualification effective on the date of receipt of the notice of adverse action. This disqualification from WIC may result in disqualification as a retailer in SNAP. Such disqualification is not subject to administrative or judicial review under SNAP.

- C. A vendor wishing to appeal an adverse action shall submit to the SA a written request for a hearing within 20 days of notification of denial or adverse action. The date of notification of denial of authorization or adverse action shall be the date the letter is transmitted to the vendor (e.g.: email date).

The vendor's request for a hearing must be received by the SA on or before the 20th day from the notification of denial or adverse action, with the responsibility for timely submission residing with the affected vendor. The written request shall, at a minimum, describe the action being appealed.

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- D. When a vendor appeals an adverse action, the adverse action may, at the sole discretion of the SA, be postponed until a hearing decision is reached, with the exception in Section IV.B above.
1. Appealing an adverse action does not relieve a vendor permitted to continue participating in the program while an appeal is pending from the obligation of continued compliance with the terms of the written agreement with the SA.
 2. The SA will not postpone the collection of a disallowance or vendor claim and/or an invoice audit disallowance and/or dispute regarding electronic benefit transaction or cash-value benefit transaction disallowance pending a hearing decision.
- E. The SA shall provide a vendor appealing an adverse action the following:
1. At least ten days advance notice of the time and place for the hearing;
 2. The opportunity to only reschedule the hearing one time for a maximum extension of 15 business days from the originally scheduled hearing date. On a case-by-case basis, the Hearing Examiner may consider extreme circumstances for extending beyond the one extension and/or beyond 15 business days.
 3. The opportunity to examine the case file, claim file, and any other documents or records the SA intends to use at the fair hearing at a reasonable time before and during the hearing. There shall be no other discovery.
 4. The opportunity to be represented by counsel if desired.

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5. The opportunity to call witnesses and present documentary evidence.
6. The opportunity to confront and cross-examine adverse witnesses except that such examination shall be conducted behind a protective screen or other device when necessary to protect the identity of monitors.
7. An impartial decision-maker who will prepare a written decision based solely on whether the SA has correctly applied federal and state statutes, regulations, rules, policies and procedures governing the program according to the evidence presented at the hearing.
8. Written notification of the final decision within 90 days from the date of receipt of the vendor's request for a hearing. This timeframe is only an administrative requirement for the state agency and does not provide a basis for overturning the state agency's adverse action if a decision is not made within the specified timeframes.

V. Abbreviated Administrative Review Procedure

- A. The SA shall provide a vendor with written notification of the adverse action, the cause(s) for the action, the effective date of the action, and the right to appeal the adverse action through the Abbreviated Administrative Review procedures described in this Section.
- B. The SA shall provide a vendor notice of the adverse action at least 20 days prior to the effective date of the action, except when the adverse action results from denial of authorization, which is effective on receipt of the notice.
- C. A vendor shall submit to the SA a written request for a review within 20 days of the receipt of the notice of adverse action.

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The vendor's request for a review must be received by the SA on or before the 20th day from receipt of the notice of denial or adverse action, with the responsibility for timely submission residing with the affected vendor. The written request shall, at a minimum, describe the action being appealed and explanations, clarifications, or other factual evidence that the vendor believes relevant to the review.

- D. When a vendor appeals an adverse action through the Abbreviated Administrative Review process with the exception of denial of authorization which must take effect on the date of receipt of the notice, the adverse action may, at the sole discretion of the State WIC Program, be postponed until the review is completed and a decision is rendered by the SA.
1. Appealing an adverse action does not relieve a vendor, permitted to continue participating in the program while a review is pending, from the obligation of continued compliance with the terms of the written agreement or contract with the SA.
 2. The SA will not postpone the collection of a disallowance or vendor claim and/or an invoice audit disallowance and/or dispute regarding electronic benefit transaction or cash-value benefit transaction disallowance pending a hearing decision.
- E. The SA shall provide a vendor appealing an adverse action through the Abbreviated Administrative Review process the following:
1. A review of the adverse action decision and information submitted by the vendor under Section II.C above by a decision-maker other than the person who rendered the initial decision.
 2. A final decision of the reviewing official based solely on whether the SA has correctly applied Federal and State

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statutes, regulations, policies, and procedures governing the WIC Program, according to the information provided to the vendor concerning the cause(s) for the adverse action and the vendor's response.

3. Written notification of the reviewing official's final decision within 30 days from the date of receipt of the request for an Abbreviated Administrative Review by a vendor. This timeframe is only an administrative requirement for the state agency and does not provide a basis for overturning the state agency's adverse action if a decision is not made within the specified timeframes.

- VI. The SA is not responsible for losses incurred by the vendor as a result of disqualification and/or denial of an application to participate.
- VII. If the results in a final decision of Full Administrative Review or an Abbreviated Administrative Review are adverse to the vendor:
 - A. The vendor may seek judicial review of the decision to the extent authorized by state law. The SA or its legal counsel shall not provide legal advice to adverse parties concerning judicial review of final administrative decisions. Appellants must seek advice from their own attorneys.
 - B. The appealed adverse action is effective the date the vendor is notified of the Full or Abbreviated Administrative Review final decision except as noted in Sections IV.B and V.B above.