

SUPPORTING STATEMENT FOR
0584-0043

“WIC VENDOR COST CONTAINMENT FINAL RULE”

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A. Justification

1. Circumstances that make the collection of information necessary.

This submission is a revision of a currently approved collection which covers the information collections of the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) OMB #0584-0043. The WIC Program is authorized by the Child Nutrition Act of 1966, as amended, (CNA) and is administered by State agencies in accordance with WIC Program regulations at 7 CFR Part 246. Per §246.2 of the WIC regulations, “State agencies” are health departments or comparable agencies of the States, U.S. Territories, and Indian Tribal Organizations (ITO).

The State agencies administer the WIC Program with funds provided by the USDA Food and Nutrition Service (FNS) pursuant to annual Federal-State agreements. Per §246.2 of the WIC regulations, “vendors” are businesses operating retail stores authorized by State agencies to transact the WIC “food instruments” (e.g., checks or vouchers) used by WIC participants to purchase WIC-authorized food. Per §246.2 of the WIC regulations, “local agencies” include public or private non-profit health or human service agencies, Indian Health Service units, and health clinics of ITOs and intertribal councils or groups. The local agencies administer the WIC Program pursuant to annual or multi-year written agreements with State agencies. The local agencies provide client services directly to program participants, such as certification, issuance of food instruments, and nutrition education.

This submission revises a currently approved collection, OMB No. 0584-0043. The revision incorporates the information collection burden associated with requirements contained in the FNS Final Rule, “WIC Vendor Cost Containment.” This final rule has been submitted to OMB for clearance. This final rule follows up on the WIC Vendor Cost Containment Interim Rule, 70 FR page 71708, on November 29, 2005. This interim rule implemented the vendor cost containment requirements in section 203(e) (10) of the Child Nutrition and WIC Reauthorization Act of 2004 (Public Law 108-265), which amended section 17(h)(11) of the CNA. OMB approved the information collection burden for the interim rule. The information collection burden submitted for the final rule includes recalculations of burden hours for program changes and adjustments based on comments submitted to FNS regarding the interim rule. The “Estimate of the Collection of Information Burden” describes these comments and sets forth the program changes and adjustments in detail, as well as describing in detail all the information collections set forth under OMB #0584-0043.

The information collection and reporting burden included in the final rule is necessary to ensure State agency compliance with legislative and regulatory requirements to contain WIC food costs. WIC State agencies must ensure that the program does not incur higher food costs if participants obtain WIC foods from vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments (“above-50-percent vendors”), rather than from other authorized vendors (“regular vendors”). Also, unless granted an exemption, WIC State agencies must establish a “peer group” system under which a vendor is reimbursed up to a maximum level based on the prices charged by that vendor’s peer group; peer groups are based on such factors as geographic location (e.g., urban, rural, or different parts of a State), number of cash registers, type of ownership (e.g., corporate, solely-owned), and WIC sales volume.

The collection burden of the final rule has three parts. The first part, listed under

§246.4(a)(14)(xv), includes the description of the vendor cost containment system (peer groups, maximum allowable reimbursement levels, average redemption amounts for selected food instruments) in the State Plan, which is an annual requirement; State agency notification to FNS concerning non-profit above-50-percent vendors exempted by the State agency from cost containment requirements, which could occur at any time; request for exemption from vendor peer group requirements, which must be re-approved triennially; information required for FNS for certification of the State agency's vendor cost containment system, which must be re-approved triennially; and, detailed assurances concerning the implementation of the commitments made under existing certifications, which must be provided annually in the State Plan. The second part, listed under §246.12(g)(4)(i), requires the identification of above-50-percent vendors. The third part, listed under §246.12(g)(4)(ii)(B), requires the collecting of vendor food prices every six months following authorization of the vendor.

2. Purpose and use of the information.

The entire information collection involves 36 regulatory provisions. One of these provisions, §246.4 providing the State Plan requirements, consists of 27 paragraphs. The attached "Estimate of the Collection of Information Burden" and "WIC State Plan Information Collection Burden Hours" describes all of these provisions in detail.

a. What information will be collected - reported or recorded?

The information collections for these provisions mostly include participant certification information (e.g., income and nutrition risk); nutrition education documentation; local agency and vendor application and agreement information; vendor sales and shelf price data; data related to vendor monitoring and training; and, financial and food delivery system records. The information collections related to the vendor cost containment final rule include:

I) Under §246.4(a)(14)(xv), the State agency must describe in its annual State Plan a) the vendor peer group system and allowable reimbursement levels; b) information on any non-profit vendors that the State agency plans to exempt from the competitive price criteria and allowable reimbursement levels that are applicable to other retail vendors; c) justification and documentation to support any request seeking an exemption from the vendor peer group system; d) triennially a description of its methodology for ensuring that average payments per food instrument to above-50-percent vendors do not exceed average payments per food instrument to comparable vendors; and, e) annually with the reimbursement amounts of food instruments showing that this methodology has succeeded.

II) Under §246.12(g)(4)(i), the State agency must annually collect food sales data from authorized vendors and vendor applicants in order to identify vendors that meet the above-50-percent criterion. Such information, which must be based on tax documents or other valid documents or systems, must show the sales amounts of eligible food under the Supplemental Nutrition Assistance Program (SNAP, formerly the Food Stamp Program) based on WIC transactions and non-WIC transactions (SNAP, cash, credit, etc.).

FNS now provides the State agencies with an annual report matching the WIC and FSP redemptions of individual vendors; this report has eliminated the need to collect sales information on 88 percent of authorized vendors, since 88 percent of the

vendors have more FSP redemptions than WIC redemptions and thus cannot be above-50-percent vendors, noted under Reporting Requirement # 11 of the Estimate of the Collection Burden.

III) Under 246.12(g)(4)(ii)(B), the State agency collects shelf price data for WIC foods from authorized vendors at least twice annually, in order to ensure that a vendor does not raise prices to levels which would make the vendor ineligible for authorization, and to monitor and interpret changes in food costs and to set allowable reimbursement levels. The final rule adds that FNS may grant an exemption from this requirement if the State agency can show that its alternative methodology for monitoring vendor compliance with price limitations is efficient and effective and that other State agency policies and procedures are not dependent on frequent shelf price data.

The attached "Estimate of the Information Collection Burden" responds to the comments on the interim rule's versions of these provisions.

b. From whom will the information be collected?

The respondents for the information collection in all provisions are State agencies, local agencies, applicants for program benefits, and retail vendors; for the vendor cost containment final rule, the respondents are State agencies and retail vendors. The State agencies are charged with the responsibility to describe their vendor cost containment systems in their annual State Plans, and to semiannually collect sales data and annually collect price data from the vendors unless this is unnecessary because of the WIC-SNAP redemption match in the case of the sales data or an exemption in the case of the price data. The vendors must provide the sales and price data to the State agency.

c. What will this information be used for? Provide ALL uses.

The information collections for all 36 provisions mostly includes participant certification information (e.g., income and nutrition risk); nutrition education documentation; local agency and vendor application and agreement information; vendor sales and shelf price data; data related to vendor monitoring and training; and, financial and food delivery system records.

For the information collections related to the vendor cost containment final rule, the State Plan will be reviewed by FNS to ensure that the State agencies have effective policies and procedures in place for carrying out their vendor cost containment responsibilities. (FNS approval of the State Plan is a prerequisite for FNS approval of the Federal-State Agreement providing the State agency with federal WIC grant funds to operate the program for another fiscal year.) For example, the State Plan submissions must show that the prices charged by above-50-percent vendors are not included with the prices charged by regular vendors when determining the peer group and statewide averages used to establish maximum allowable reimbursement levels, and that the above-50-percent vendors are not paid more on average per food instrument type than the statewide average.

The sales data will be used by the State agencies to identify above-50-percent vendors from amongst the 12 percent of vendors which have not been identified as regular vendors by the WIC-SNAP redemption match. If the total of WIC redemptions is greater than the total of the other food sales, then the vendor is

designated as an above-50-percent vendor.

The price data will be used by the State agencies, for example, to ensure that vendors do not exceed price levels to the point that those vendors become ineligible for WIC authorization. Many State agencies calculate a "market basket" of the prices of the most commonly purchased WIC-authorized foods, and deny authorization or terminate an authorized vendor if its market basket total is greater than that of its peers.

d. How will the information be collected?

Most State agencies submit their State Plans as attachments to email or through the regular mail. State agencies have also developed various methods for local agencies to submit certification and financial data to the State agencies; although State agency practices vary, this includes submission of data either directly through an integrated computer network, or via email attachments or by facsimile. Most of the vendors submit information or forms to the State agencies in a paper format, although some use e-mail to streamline this process, and a few States have established automated downloads of price data for vendors which have this capability. The information will be collected using various forms developed by FNS for State agency use approved by OMB:

OMB #0584-0045: Expiration date 9/30/2011, FNS-798 & FNS 798A, WIC Monthly Financial Management and Participation Report and Addendum (Section 246.25(b)(1)).

OMB #0584-0332: Expiration date 10/31/2009, FNS-339, Federal/State Agreements (Section 246.3 (c)).

OMB #0584-0401: Expiration date 2/29/2012, FNS-698, 699 and 700, The Integrity Profile (TIP) Report (Section 246.12(i)(3)).

OMB #0584-0431: Expiration date 7/31/2011, FNS-648, WIC Local Agency Directory (Section 246.25(c)).

e. How frequently will the information be collected?

The certification and financial information is reported monthly. The State Plan the vendor sales information, the vendor infant formula list, and the vendor incentive item requests for approval are collected annually, and each retail State agency provides a notification of violations on average to 26 vendors per year, or documents the reason for not doing so. The vendor price data is collected semiannually.

f. Will the information be shared with any other organizations inside or outside USDA or the government?

The information may be made available to the Government Accountability Office and other Congressional offices. The information may also be made available to private contractors conducting research for FNS. The information may also be made public when the reports drafted by the contractors are issued. To protect the confidentiality of participants and vendors, this information made available to the public is provided only in aggregate form, without identifying individual participants or vendors.

g. If this is an ongoing collection, how have the collection requirements changed over time?

Collections have increased more for food delivery system requirements (vendor management and the processing of food instruments) than for any other program area during the current decade, reflecting the increased concern of the Administration and Congress for holding down program food costs and protecting program integrity. However, despite this substantial increase, the resulting total of all burden hours for food delivery systems is only 16 percent of the total of all burden hours for OMB No. 0584-0043.

There were 73,822 burden hours for food delivery systems during the 1990's. Then, the Food Delivery Systems Final Rule, 65 FR 83248, December 29, 2000, added 102,354 burden hours for food delivery systems. FNS further added 136,230 burden hours based on the Vendor Cost Containment Interim Rule, 70 FR page 71708, November 29, 2005. FNS submitted 107,082 burden hours to OMB for the Discretionary Vendor Final Rule (including adjustments), 74 FR 544, January 6, 2009. Now FNS is submitting 143,869 for the vendor cost containment final rule, which, when combined with the other food delivery burden hours, will result in the grand total of 563,357 burden hours for food delivery. The grand total of all burden hours under OMB No. 0584-0043 will be 3,595,075.

3. *Use of information technology and burden reduction.*

FNS makes every effort to comply with the E-Government Act of 2002. FNS encourages its State agency partners to offer electronic submission to local agencies and vendors whenever it is feasible and offers earmarked funding for enhancing State agency Management Information Systems (MIS).

Regarding vendor cost containment, FNS has developed an automated method for matching a vendor's WIC redemptions with that vendor's SNAP redemptions in order to determine whether that vendor is an above-50-percent or regular vendor; if a vendor's SNAP redemptions exceed its WIC redemptions, then that vendor is considered a regular vendor and no further documentation, such as tax records, are needed to determine its status. This process has shown that the SNAP redemptions exceed WIC redemptions for 88 percent of authorized vendors, thus eliminating the need for further documentation for 88 percent of the authorized vendors.

Many WIC State agencies have automated management information and food delivery systems with funding from FNS. Ongoing improvements in these systems at the State and local levels continue to reduce the time and effort required to collect and transmit data. For example, State agency use of automated management information systems minimizes the burden associated with the performance of many other activities, including performing and documenting vendor training, collecting certification data, developing local agency nutrition education plans, and documenting monitoring visits to retail vendors. Improved and extended use of automated approaches to program management and services delivery is a priority within the WIC Program.

4. *Describe efforts to identify duplication and use of similar information.*

There are no similar information collection efforts.

5. *Impacts small businesses or other small entities.*

The information collection has been held to the minimum required for the intended

use. FNS has determined that the requirements for this information collection do not adversely impact small businesses or other small entities. Although smaller local agencies, retail vendors, and contractors submit fewer business transactions involving the WIC Program, they delivered the same program benefits and perform the same function as any other business' or entities. Thus, they maintain the same kinds of information on file. FNS estimates the portion of the 39,167 vendors which are small businesses, that number would be 29,461 ($39,167 \times .7531914 = 29,461.08$), and the number of these small businesses most affected by the rule would be 1,415 ($29,461 \times .0480225 = 1,414.7908$) FNS also estimates that 388 of the 1,960 State and local agencies are small State and local agencies, including 355 local agencies and 33 ITO State agencies. The 3 of these ITO State agencies which authorize above-50-percent vendors were more affected by the rule than the other ITO State agencies or the small local agencies. In total, there are 29,849 small businesses or other small entities ($29,461 + 388 = 29,849$).

This final rule includes an exemption process regarding the requirement for the collection of shelf prices twice a year. Also, FNS has provided the State agencies with an automated system for matching WIC and SNAP redemptions to help identify above-50-percent vendors; this procedure eliminates 88 percent of vendors from the need to provide documentation to State agencies, thus significantly reducing the impact of the above-50-percent identification process on small vendors.

6. *Consequences of collecting the information less frequently.*

If the information were collected less frequently, the efficiency and effectiveness of the Program would be jeopardized, the likelihood of misuse or improper use of Federal funds would increase, and FNS' ability to detect violations or abusive behavior would diminish greatly. The Department and State agencies would be out of compliance with Federal laws, and therefore at risk of losing funding for the WIC Program.

7. *Special circumstances relating to the Guideline of 5 CFR 1320.5:*

• *Requiring respondents to report information to the agency more often than quarterly;*

The reporting of WIC participation and expenditure data occurs monthly, rather than quarterly, to enable FNS to meet a statutory requirement to reallocate funds from a State agency not using the funds to a State agency which needs the funds. The ability to promptly reallocate funds is vitally important because WIC is not an entitlement program. A State agency in need of additional funds must cease certifying new participants until more funds are received. Since WIC food benefits are provided to participants on a monthly basis, monthly reporting provides FNS with the most up-to-date information on the level of WIC grant funds remaining with the State agencies. Participation and expenditure data reporting is covered by OMB collection #0584-0045 (expiration date 9/30/2011).

• *Requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records for more than three years;*

Under §246.25(a)(2) of the WIC regulations, all records shall be retained for a minimum of three years following the date of submission of the final

expenditure report for the period to which the report pertains; if any litigation, claim, negotiation, audit or other action involving the records has been started before the end of the three-year period, the records shall be kept until all issues are resolved, or until the end of the regular three-year period, whichever is later. This provision is based on 36 CFR 1207.42(b)(2) of the National Archives and Records Administration regulations.

There are no other special circumstances. The collection of information is conducted in a manner consistent with the guidelines in 5 CFR 1320.5(d)(2).

8. *Comments in response to the Federal Register Notice and efforts to consult with outside agencies.*

The invitation for comments was set forth on page 71711 of the WIC Vendor Cost Containment Interim Rule, 70 FR 71708, November 29, 2005.

Several State agencies submitted formal comments pertaining to the administrative burden of the interim rule. As previously noted the "Estimate of the Collection of Information Burden" describes the comments and sets forth the resulting program changes and adjustments in detail.

Additionally, FNS consulted extensively with State agencies concerning the implementation of the interim rule, as discussed in the preamble of the final rule. Because the WIC Program is a State-administered, federally funded program, FNS regional offices have formal and informal discussions with State agencies on an ongoing basis regarding program implementation and policy issues. This arrangement allows State agencies to raise questions and provide comments that form the basis for many of the implementation decisions in this and other WIC Program rules.

Indeed, prior to the publication of the interim rule, several regional offices convened meetings with State WIC staff that included discussion of the vendor cost containment provisions of P.L. 108-265. In addition, in October 2004, also prior to publication of the interim rule, FNS Headquarters convened a meeting of WIC State agency representatives, USDA headquarters and regional office staff, and an outside expert on competitive pricing systems, to obtain more information on State agencies' current vendor cost containment systems.

During the implementation of the interim rule, FNS further clarified the meaning of the cost containment provisions in response to numerous issues raised by the certification and exemption requests submitted by State agencies. These questions and informal comments received on the interim rule have assisted FNS in making the final rule responsive to State agency concerns.

Also, FNS Headquarters staff met with representatives of the Food Marketing Institute, National Grocers Association, and the Nutritional Grocers Association on January 25, 2005, to discuss the best ways to collect food sales, shelf price, and market forces data needed for the implementation of vendor cost containment.

In total, formal comments on the interim rule were provided by 11 WIC State agencies; 2 non-WIC State agencies; 25 WIC local agencies; 5 retailer advocacy organizations; 41 individual vendors; 5 public interest organizations; and 8 members of Congress. Nine of these comments addressed the administrative burden of the interim rule, although only two of these comments addressed the burden hours involved.

9. Explanation of any payment or gift to respondents.

There are no payments or gifts to respondents.

10. Assurance of confidentiality provided to respondents.

State agencies are required to comply with confidentiality requirements set forth in §246.26(d)(e)(f)(g) and (h) of the WIC regulations. Section 246.26(d)(1)(ii) states that . . . “the State agency must restrict the use and disclosure of confidential applicant and participant information to persons directly connected with the administration or enforcement of the WIC Program whom the State agency determine have a need to know the information for WIC Program purposes.” Section 246.26(e) states that “the State agency must restrict the use or disclosure of confidential vendor information to . . . Persons directly connected with the administration or enforcement of the WIC Program or the Food Stamp Program who the State agency determines have a need to know the information for purposes of these programs,” and to “Persons directly connected with the administration or enforcement of any Federal or State law or local law or ordinance.” Information obtained from program applicants, participants and vendors, is kept confidential and will not be disclosed to anyone but the individuals involved with this data collection or investigation, except as otherwise permitted or required by law or the above-noted provisions of the WIC regulations.

11. Justification for sensitive questions.

This submission does not ask any questions of a sensitive nature.

12. Estimates of hour burden including annualized hourly costs

The estimated total respondent burden is 10,785,225 burden hours over the 3 year clearance period (3,595,075 annual burden hours x 3). This estimate includes approximately 1,990,276 respondents per year. 0.11 burden hours (6 minutes and 36 seconds) is the estimated average number of burden hours per respondent. The actual respondent burden is dependent upon respondent type. For the details, see ATTACHMENT A: WIC PROGRAM REPORTING AND RECORDKEEPING REQUIREMENTS (OMB #0584-0043)

The following table shows the monetary costs of these burden hours for each type of respondent, and the total monetary costs for all of the respondents:

Table A.12.1 Burden Estimates and annualized cost to respondents

(a) Description of the Collection Activity	(b) Estimated Total Annual Burden on Respondents (Hours)	(c)* Estimated Average Income per Hour	(d) Estimated Cost to Respondents
#0584-0043 State and local staff	3,109,795	\$24.69	\$76,780,838.55
#0584-0043 Applicants	292,983	\$6.55	\$1,919,038.65
#0584-0043 Vendor staff	192,297	\$21.16	\$4,069,004.52

(a) Description of the Collection Activity	(b) Estimated Total Annual Burden on Respondents (Hours)	(c)* Estimated Average Income per Hour	(d) Estimated Cost to Respondents
Totals	3,595,075	---	\$82,768,881.72

These median hourly rates were obtained from the U.S. Department of Labor, Bureau of Labor Statistics, May 2007 National Industry-Specific Occupational Employment and Wage Estimates. The average of the State and local staff average rates is \$24.69, as shown above. The \$6.55 hourly rate for applicants for program benefits is the Federal minimum wage as of July 2008 (U.S. Department of Labor Employment Standards Administration, September 23, 2008, www.dol.gov/esa/minwage/chart.htm). For vendor staff, the hourly rate shown above is \$21.16.

13. Estimates of other total annual cost burden to respondents or record keepers.

There are no capital/start-up or ongoing operation/maintenance costs associated with this information collection.

14. Annualized cost to the Federal government.

(a) Federal cost of rulemaking (promulgation, preparation of guidance, and implementation):

(1) FNS National Office Staff: 10 Full Time Equivalents (FTEs)
 FNS Regional Staff: 10 FTEs
 20 FTEs x \$76,799* =
 Subtotal: \$1,535,980

(2) Overhead cost, travel, office supplies, etc.: \$166,000
 Mailing and telephone: 4,000
 Publication costs: 4,000
 Distribution costs: 2,000
 Subtotal: \$176,000

Federal Rulemaking Costs: \$1,711,980

(b) Federal cost of program maintenance (reporting and recordkeeping, monitoring, assistance, review and analysis):

(1) FNS National Office Staff: 16 FTEs
 FNS Regional Staff: 40 FTEs
 56 FTEs x 76,799* =
 Subtotal: \$4,300,744

* Based on an average \$76,799 annual salary (Average of GS-11, 12, 13 salaries, Step 6, from the U.S. Office of Personnel Management Salary Table 2008-RUS effective January 2008.)

(2) Overhead cost, travel, office supplies, etc.:	\$276,000
Mailing and telephone:	<u>\$4,000</u>
Subtotal:	\$280,000

Federal Program Maintenance Costs: \$4,580,744 =(4,300,744 + 280,000)

TOTAL FEDERAL COSTS: \$6,292,724 (\$1,711,980 + \$4,580,744)

15. Explanation for any program changes or adjustments.

FNS is requesting 3,595,075 burden hours for an overall increase of 143,869 (240 burden hours due to program changes and 143,629 burden hours due to adjustments). The adjustments are based on comments on the administrative burden of the interim rule. The program change increase in burden hours is based on the estimated burden hours for State agency use of the exemption process introduced by the final rule regarding the requirement for collection of shelf prices twice a year.

16. Plans for tabulation and publication and project time schedule.

The public FNS WIC web site is updated monthly with aggregate financial and participation data under "Funding and Program Data" with data from the funding and participation reports provided to FNS by the State agencies. Also, aggregate vendor data based on the annual State agency TIP reports provided to FNS are presented annually on the FNS WIC web site in a document entitled "TIP Report" under "Resources."

17. Reason display of OMB expiration date is inappropriate.

This submission is not seeking OMB approval to not display the expiration date.

18. Exceptions to certification for Paperwork Reduction Act submissions.

There are no exceptions to the certification statement.