



THE VOICE OF FOOD RETAIL

Feeding Families  Enriching Lives

May 29, 2013

Debra R. Whitford
Director, Supplemental Food Programs Division
Food and Nutrition Service
Rm. 520, 3101 Park Center Drive
Alexandria, Virginia 22302

RE: Proposed Rule Supplemental Nutrition Program for Women, Infants and Children (WIC): Implementation of the Electronic Benefit Transfer-Related Provisions of Public Law 111-296

Dear Ms. Whitford;

On February 28, 2013, the United States Department of Agriculture (USDA) Food and Nutrition Service (FNS) announced a proposed rule to implement the Electronic Benefit Transfer – Related Provisions of the Healthy Hunger Free Kids Act (HHFKA). The Food Marketing Institute (FMI) appreciates the opportunity to comment on this important matter.

FMI conducts programs in public affairs, food safety, research, education, and industry relations on behalf of its nearly 1,250 food retail and wholesale member companies in the United States and around the world. FMI's U.S. members operate more than 25,000 retail food stores and almost 22,000 pharmacies with a combined annual sales volume of nearly \$650 billion. FMI's retail membership is composed of large multi-store chains, regional firms and independent operators. FMI's nearly 330 associate members include the supplier partners of its retail and wholesale members.

FMI and its individual members have been long time supporters of the use of electronic benefit transfer (EBT) systems in the delivery of benefits to recipients of nutrition assistance benefits. We were early champions of the use of EBT in the Supplemental Nutrition Assistance Program (SNAP) and have played a key role in the adoption of EBT in WIC to date. In fact, without our members shouldering the cost of development and deployment early on, it is not likely that EBT would have progressed as far as it has as a delivery mechanism for benefits in WIC. It was in recognition of the benefits of EBT to the WIC Program, the clients, stores, state and federal agencies alike, that we eagerly awaited these important rules. And while we endorse much of what is in the proposal, we are dismayed to see a large cost shift to retail food stores. We understand the challenges facing the roll out of EBT in WIC. However, we did not expect to be the

sole sector involved in WIC asked to take on additional financial burdens. Our comments, below, note our particular concerns with the proposed rules.

Cost Shifting

Overall, the cost of these rules to stores authorized to accept WIC and seeking to become authorized to accept WIC is quite large. Some of these costs are readily identifiable and quantifiable. Others, though, are inherent in policies for which there is insufficient detail to be able to quantify the effect. Our specific comments on costs issues follow.

Cost of Equipment and Related Fees: Section 246.12(aa)(4)(i) of the proposal would prohibit state agencies from sharing in the ongoing maintenance, processing fees or operational costs of EBT systems once the state's EBT system is implemented statewide. This is a departure from current practice and from what is currently done in SNAP. Moreover, it does not reflect what the new statutory language says. The statutory language in the HHFKA states: "a state agency may not be required to incur ongoing maintenance costs for vendors using multifunction systems and equipment to support electronic benefit transfer." The proposal expands this beyond what the statute says and *prohibits* state agencies from incurring such costs. The language also expands the statutory language and by applying the prohibition to costs associated WIC-only equipment. This was clearly not contemplated in the statutory language which is addressed to the cost of "multifunction equipment." We recommend that the rule be changed to reflect the language and meaning of the statute.

EBT Readiness: The statute requires that once a state agency has completed statewide implementation of EBT that any store seeking authorization to accept WIC benefits demonstrate that it has the capability to accept electronic WIC benefits before it can be authorized. This statutory provision is incorporated in the regulations at Section 246.12(aa)(4)(ii) but how this provision is to be applied is not included in the rules. An approach to how to apply this provision is addressed in the preamble of the rule but there are no corresponding rules for it. According to the preamble, an applicant store would have to show it is EBT ready but does not suggest how this will happen. The approach outlined in the preamble contemplates a two level process. One is for stores that are already in the program and are expanding, or for stores that are using an already proven third party processor. Another more elaborate process is for new stores with no WIC experience or stores that want to use an "unproven" third party processor. The preamble makes clear that the applicant store would have to pay for all costs associated with being able to show its readiness. (This is not reflected in the regulations).

The lack of specificity of this key provision makes it difficult to evaluate. Clearly there will be an added financial burden to stores but the cost cannot be estimated. While it is

understandable that there would be two levels of testing needed, the approach laid out has the unintended consequence of favoring existing stores and third party processors over new stores and third party processors who would want to be part of the WIC Program. Most troubling is that there is no way to tell what effect this process will have on the overall authorization process. We believe the process will be much longer than it currently is. Presumably a store would have to go through this practice before an authorization decision is made making it a very risky proposition for a store owner.

We recommend that state agencies be given the flexibility to share in these costs . We also recommend that the regulations stipulate that a state agency make a provisional determination of an applicant store's eligibility *before* the store has to undergo the process of proving its EBT readiness. In addition, we recommend that a timeframe for determining the EBT readiness of an applicant store be established so that store owners are able to plan accordingly.

Lane Equipage: Section 246.12(z)(2) proposes a formula for determining how many terminals a state agency must ensure a store has to adequately serve its WIC clientele. The formula is the same as the one used for lane equipage in SNAP. This provision contemplates that there are two configurations that would occur in a store. The first is that the store would integrate WIC EBT into its cash register system, which is the preferred approach. The second is that, absent such integration, the state would have to supply terminals to stores.

However, this either/or situation does not cover all scenarios that may occur. For example, a store may have integrated equipment for some of its lanes but not enough lanes to meet the lane coverage requirements. We recommend that the regulations clearly say that the requirement of achieving the level of coverage in the regulations is a state agency obligation so that in a situation where a store is below the level required, the state agency will have to augment the store's equipment with WIC only equipment. In most situations, stores with integrated systems will be able to expand their availability to meet the lane coverage requirements. However, if the store does not, it is not their responsibility to do so. By not providing for this eventuality, the regulation could have the unintended effect of stalling integration or rolling it back – a store may not integrate or remove integration if it cannot add lanes. Not accommodating this situation may discriminate between large and small retailers, or even large retailers with older equipment, where it would be very costly to update multi-lane terminals to accept WIC EBT. We believe that some integration is better than none. Therefore, the regulation needs to be clear: the responsibility for achieving lane coverage is the state agency's not the store's.

We are pleased that the regulation would allow a state agency to offer an alternative for consideration. If stores with their own terminals must step up to the formula would they be allowed to suggest an alternative? We are not sure that the dollar value based

formula for SNAP – which is much larger in participation and benefit value – is the most appropriate for WIC. Thus, we are pleased to see the flexibility granted here and hope that it extends to stores. We also encourage more flexibility. In the regulation FNS clearly states a preference that stores integrate WIC EBT into their electronic cash registers. If that is not possible, the formula for the distribution of WIC only equipment is laid out. Another approach to consider would be to allow SNAP only equipment to be modified to accept WIC. Thus, there would be the possibility of not having to have two government supplied pieces of equipment side by side at the check out. This would be preferable to clients and stores since there is a cross over of clients between the programs, which allows for the integration of state supplied equipment. In addition, we believe this might be less expensive, and we therefore recommend that the rule be changed to allow this.

The provisions, above, reflect a deep concern about the cost of EBT in WIC, a concern that we share. We think that the policies addressing this concern which shift the costs to stores should be re-examined. The EBT environment is changing rapidly as FNS acknowledges in its preamble. The costs of WIC EBT are declining dramatically. Some reports have them as low as one third of what they were initially and in this early stage of implementation it is likely that the costs will continue to decline for state agencies. So rather than shifting costs as done in this proposal, we recommend that FNS adopt a cost neutrality approach much the same as was done in SNAP - allow state agencies to participate in costs as long as they do not exceed their current administrative budgets. This could allow for a quicker roll out of EBT at no cost to the WIC Program. A faster roll out would bring the benefits of EBT to all parties much more quickly.

Operating Rules and Technical Implementation Guide

The proposal relegates many of the “nuts and bolts” of WIC EBT systems to a set of Operating Rules and a Technical Implementation Guide. This recognizes the evolving nature of standards for WIC EBT and the inflexibility of the federal rulemaking process which doesn’t allow regulations to keep pace with a fast changing environment. We recognize this conundrum and appreciate FNS’s attempt to bridge the two worlds. However, we think the approach laid out in the preamble of the regulation needs some changes.

- The Operating Rules (OR’s) and Technical Implementation Guide (TIG) that WIC EBT would follow currently exist. The preamble describes this “required guidance” as having been formulated over the past several years by parties involved in the early EBT experiments in Texas, New Mexico, Michigan and Kentucky. While not precluded from participating in the development of these documents, entities outside those areas were not likely noticing their development or their consequences. Thus, they were developed with a

somewhat small group of interested parties. Now that these documents will have the effect of rules that need to be followed we think that all parties that will be affected by them need to be given a chance to comment on them and shape them. We recommend that the agency put the extant OR's and TIG out for comment before parties are required to abide by them.

- We cannot tell how flexible the “required guidance” embodied in the OR's and TIG will be. We share the recognition that is expressed throughout this proposal that the WIC EBT environment is evolving. We understand that while there needs to be national rules around some issues, there are situations that may arise that would require deviations from the OR's and TIG. Therefore, we hope that there will be a process to consider situational waivers from any of the policies that are included in these documents. We do not think they should be granted freely but they should be allowed.
- The preamble outlines a process that FNS intends to follow to maintain and update these documents. We think that there are some aspects of this process that could be improved.
 - In the preamble to the proposal FNS says it will maintain the OR's and TIG “in a manner similar to how the Quest Operating Rules are maintained in the SNAP environment.” A process of accepting, analyzing and seeking comment through publication on a website will be put in place. This process, while similar, is significantly different from the way the Quest OR's are maintained. The Quest rules are maintained by a group of representatives who essentially volunteer to do this task. They analyze and seek input for changes. Final decisions on changes are made by vote. It is not clear whether that same governance structure will be in place or whether FNS will be the decision maker in all changes. We recommend that this be made clear.
 - The preamble describes the OR's and TIG as “required guidance.” This sets them apart significantly from the Quest rules. There are no enforcement mechanisms for the Quest rules. If a party fails to follow them there would be attempts to bring them into compliance but there are no sanctions for failure to do so. This is, in part, because the Quest rules are not required to be used by SNAP. Many state agencies require their use but FNS does not. SNAP has included in their regulations the basic operating rules and technical information needed to run a SNAP EBT system. So the effect of the WIC OR's and TIG are quite different. The preamble seems to anticipate sanctions for failure to follow the OR's' and TIG. The only sanctions alluded to however are sanctions on stores, and those are not specified. We recommend that the consequences of failure to adhere to the OR's and TIG be carefully and clearly laid out for all parties: stores, State agencies, third parties, system integrators, clients, etc. We are not sure if these sanctions need to be promulgated in regulations through the Administrative Procedure Act process or not. But

we do strongly think that they need to be proposed, input sought and implementation planned. We also strongly advocate that since the aim with the OR's and TIG are to have uniform requirements applicable to all systems that the sanctions and consequences for any failure to abide be national and uniform, not left to State agencies to decide.

- As noted above, the process for maintaining and updating the OR's and TIG are in the preamble to the regulation. There is nothing in the regulation itself that speaks to this. We recommend that the regulation reflect that this process is in place and how it will work. At a minimum the website or manner in which the OR's and TIG are to be accessed and updated need to be in the regulation itself so that future regulation users will see a clear path to the process – the preamble will not exist as to future readers.

“Missing Provisions”

There are provisions pertaining to the operation of SNAP EBT that we expected would be reflected here in WIC EBT rules. While some of these may be in the OR's and/or TIG, as we noted above we are not sure how those would be made available for comment. Some of the provisions that we think need to be reflected in the rules are noted here.

Liability Provisions. EBT systems involve the passing of information that has value – whether it is issuance information or redemption information – back and forth among several parties: stores, third party processors, banks, the State, the EBT processor. SNAP rules identify each of the “passes” and delineate where liability lies if anything goes awry. We recommend that such provisions be included in these regulations so that it is clear who is liable for what should anything go wrong. We do not think that these provisions, being of such import, should be relegated to the OR's or TIG.

Manual Processing/Store and Forward Processes/Disaster Plans. As we see in the SNAP environment and in the commercial world, circumstances arise that cause the electronic processing of benefits to not work as engineered. This could be due to a disaster or a system failure in any of the links in the system. SNAP rules require disaster plans and also set rules for manual processing and the use of store and forward processes. We recommend that these provisions be adapted to WIC and included in the regulations.

System Planning. In our view a key to successful design and implementation of an EBT system for WIC is inclusion of all parties, especially the retail community, in the planning. We recommend that an inclusive planning process be required – one that includes meaningful consultation with all affected parties.

Other Provisions

Section 246.12(y)(2) requires that “if a state agency plans to incorporate additional programs in the EBT system of the state, the state agency shall consult with state agency officials responsible for administering the programs” as part of the planning process. We recommend that FNS take this consultation a step further and require that state agencies planning a WIC EBT system consult with state officials administering the SNAP EBT system in the state. We strongly encourage that state agencies integrate their WIC and SNAP EBT systems whenever practicable and as much as practicable and recommend that the rules require that this integration be explored. We recognize that full, seamless integration may not be possible, but the overlaps in participation between the programs, the fact that almost all WIC stores are SNAP stores and the similarity between the operations of the two programs beg that integration be explored and achieved wherever possible.

Section 246.12(bb)(3) requires the establishment of a 24 hour hotline for EBT cardholder assistance. Such assistance is important for stores as well. Therefore, we recommend that this provision be broadened to require that a 24 hour assistance line be available for stores.

Section 246.12(cc) carries into the regulations the statutory requirement for the development of a UPC database. We recommend that the regulation language be broadened beyond “UPC” so that if the industry switches to some other method of identifying products the regulation will be flexible enough to adapt to the new process.

FMI appreciates the opportunity to comment on these regulations and procedures. We hope that you will carefully consider the comments we have provided. FMI and our members are keenly interested in seeing WIC EBT move forward and succeed by the legislatively mandated deadline of 2020.

Sincerely,

A handwritten signature in black ink, appearing to read "Erik R. Lieberman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Erik R. Lieberman
Regulatory Counsel