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*Submitted electronically to docket FNS-2022-0015 at <http://www.regulations.gov>*

**RE: Special Supplemental Nutrition Program for Women, Infants, and Children (WIC): Online Ordering and Transactions and Food Delivery Revisions to Meet the Needs of a Modern, Data-Driven Program**

Dear Ms. Post,

On behalf of the National Grocers Association Company (NGA), thank you for the opportunity to provide comments to the U.S. Department of Agriculture (USDA) regarding the proposed rule on “Special Supplemental Nutrition Program for Women, Infants, and Children (WIC): Online Ordering and Transactions and Food Delivery Revisions to Meet the Needs of a Modern, Data-Driven Program.”

NGA is the national trade association representing retail and wholesale grocers that comprise the independent sector of the food retail and distribution industry. An independent community grocer is a privately owned or controlled food retail company operating in a variety of formats. Independents are the true “entrepreneurs” of the grocery industry and are dedicated to their customers, associates, and communities. Much of NGA’s membership consists of family-owned and family-operated small businesses. In fact, nearly half of NGA’s members are single-store operators, and another quarter operates less than five stores. Independent retail and wholesale grocers are an important part of America’s economy. So much so that independent community grocers account for 33% of all grocery sales, exceeding \$250 billion, and more than 1.1 million American jobs. We are inherently tied to the strength and vitality of the markets we serve – at the heart of local communities and the U.S. economy.

<p><b>NGA Members Play a Key Role in Supporting WIC Access and Implementing Online Purchasing</b></p>
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Independent grocers, like those that our members operate nationwide, can be found in areas ranging from urban centers to suburban and rural areas. In many cases, our members provide critical food access for low-income Americans in underserved areas with limited access to grocery stores. In fact, according to USDA Economic Research Service (ERS) analysis, independent grocers tend to locate in rural, low-income, and underserved areas providing critical food access to Americans who would otherwise live in a food desert. Having often been in the business for generations, independent grocers are dedicated to their customers, associates, and communities.

As such, independent grocers like our members account for 36.5% of all WIC-authorized stores and 24.4% of WIC redemption nationwide<sup>1</sup>. Our members take pride in participating in this important program to support the families living in their communities. As key partners in providing access to healthy food to WIC participants, we can provide a unique perspective on the WIC program and are committed to increasing food access through the addition of online purchasing.

NGA members support USDA's efforts to implement online purchasing to ensure increased nutrition security and food access. We believe improvements to this critical program can help increase retailer participation and food access for WIC beneficiaries. To that end, NGA notes that independent grocers have been actively pursuing expansion of their online purchasing platforms, including online SNAP and mobile payment capabilities, to meet the ever-growing consumer demand for online shopping.

### **NGA Recommends USDA Fully Consider the Impact of Its Proposal on Independent Vendors and Provide Robust Technical Assistance to Aid in the Implementation of WIC Online**

As USDA pursues transitioning the WIC program to permit online transactions, it is important to take note of lessons learned from implementing SNAP online and mobile purchasing. While in the proposed rule, the Department notes it has incorporated lessons learned from the SNAP online purchasing pilot, it does not address what these specific lessons are. USDA has previously recognized specific obstacles, such as a lack of resources that have hindered the ability of many smaller retailers to pursue innovative online solutions. Many independent grocers found themselves unable to accept SNAP payments for online purchases due to technical, financial, and bureaucratic hurdles that smaller retailers were less likely to clear than their larger competitors.

Despite these challenges, NGA members worked to implement online solutions utilizing critical USDA guidance documents<sup>2</sup> and by utilizing a 2021 online SNAP implementation toolkit created by NGA.<sup>3</sup> Recognizing the need for continued assistance, USDA recently awarded the National Grocers Association Foundation (NGAF) funding to create resources and establish a technical assistance center that will guide grocers through the process of implementing online SNAP grocery purchasing.<sup>4</sup> This work, while underway, is still in progress.

Given this, NGA was disappointed that there was little emphasis in the proposed rule on the impact on independent grocers (referred to as small vendors/retailers throughout the rule), and the need for technical assistance and funding to successfully implement WIC online. USDA guidance, tools, and resources will be needed to implement WIC online transactions similar to those needed for SNAP online and EBT for WIC implementation.

### **NGA Urges the USDA to Provide Further Clarification to Retailers Before Implementing a Final Rule**

The proposed rule outlines specific changes to improve the delivery of WIC benefits through EBT and increase overall online access for participants. However, there is a lack of general detail and guidance for retailers on how to physically implement online ordering and internet-based transactions

<sup>1</sup> USDA Economic Research Service (ERS) analysis

<sup>2</sup> <https://www.fns.usda.gov/snap/retailer-requirements-provide-online-purchasing>

<sup>3</sup> <https://www.nationalgrocers.org/news/nga-launches-toolkit-to-help-independents-offer-snap-online-purchasing/>

<sup>4</sup> <https://www.nationalgrocers.org/news/nga-foundation-tapped-to-advance-snap-online-programs/>

for WIC. NGA believes that the proposed rule is a helpful first step, but significant clarity, as outlined in our detailed comments below, is needed prior to moving forward.

USDA should also address recommendations from the Task Force on Supplemental Foods Delivery Recommendations Report on how to lessen the burden on small vendors.<sup>5</sup> We ask USDA to consider these recommendations as they update the proposed rule including:

- Standardizing requirements for Point of Sale (POS) equipment and working closely with national retailers to leverage already developed solutions that “small vendors” can adopt without having to invest in system design.
- Creating a government-funded plug-and-play standalone solution for commonly available POS system(s) and allow independents to utilize it without cost to the vendor.
- Providing grant funding for technical support as needed to ensure participation by independent and regional grocers.

NGA members support USDA’s efforts to increase WIC participant access through online transactions. To do so effectively, retailers will require technical assistance, detailed guidance from USDA, and sufficient time to implement these changes. We appreciate the agency’s consideration of our comments below to ensure an efficient, thoughtful, and effective rollout of online shopping, payment, and delivery to WIC participants that meets the needs of both retailers and participants.

## NGA Detailed Comments

### NGA Requests USDA Clarify the Definitions and Requirements for “Brick-And-Mortar” and “Internet Vendor”

NGA requests additional clarification from USDA on what types of vendors fall into each new vendor definition proposed by USDA. Moreover, USDA must ensure that program requirements are **consistent and fair** across each of these vendor categories.

We anticipate retailers with a physical location, who determine that they will participate in WIC online sales, will account for the majority of independent grocers across the U.S. Under the proposed rule, “brick-and-mortar vendors” appear to be limited to those stores with a physical location. If that same store decides to provide an online platform for grocery sales, this appears to fall under the category of “internet vendor.”<sup>6</sup>

NGA believes that the proposed rule definitions are not clear in differentiating between situations where an “internet vendor” is tied to a physical store location versus a situation where an “internet vendor” or online platform is not tied or associated with a physical location. This matters because brick-and-mortar WIC locations currently have strict requirements for authorization, stocking, and audits to participate in the program. In situations where “internet vendors” are not associated with a physical store, it is unclear how these vendors will meet the same strict requirements as those required for brick-and-mortar WIC locations. Even more NGA is concerned that, for example, “internet vendors” are not associated with a physical location, how will they be required to maintain stocking requirements or participate in routine audits and are “internet vendors” permitted to sell

<sup>5</sup> <https://www.fns.usda.gov/wic/food-delivery-task-force-recommendations-report>

<sup>6</sup> USDA staff clarified this in a presentation on the proposed rule and new definitions on March 3, 2023. [\[https://www.fns.usda.gov/wic/proposed-rule-stakeholder-briefing\]](https://www.fns.usda.gov/wic/proposed-rule-stakeholder-briefing)

directly to WIC participants anywhere in the country (across state lines), while brick-and-mortar locations are limited to the state in which they reside.

The WIC Task Force addressed these challenges through recommendations for the definition of “hybrid vendor,” which is defined as a vendor with a physical location and virtual shopping platform or a vendor that employs a service that provides virtual shopping services. NGA urges that requirements must be consistent for each of these types of vendors to encourage a transition to online sales and ensure that brick-and-mortar stores can be competitive with “internet vendors.” USDA should clarify if “internet vendors” must source or be associated with a physical location or if they can exist solely through an online platform.

NGA members are also unclear on how third-party grocery providers, such as Instacart or Grocerist, fall under the scope of these definitions. This is critical as many independent grocers utilize such services as their online platform for e-commerce sales. It is important to ensure that retailers have the tools to either create and utilize their own online web pages for internet-based WIC transactions or are empowered to utilize an appropriate third-party system to facilitate online transactions. USDA should clarify how each of these situations falls under the scope of the rule.

#### **NGA Supports Streamlining Authorization and Certification Requirements for Vendors to Participate in WIC Online Transactions**

NGA appreciates that USDA has clarified that all vendors on WIC must be authorized separately to participate in WIC online, even if operated by the same business entity. However, we ask USDA to consider a process that can expedite the authorization of stores for online WIC that are already implementing SNAP online purchase programs if they have other previously approved WIC online stores. If a vendor is already authorized to participate in SNAP and/or WIC online and has the framework and resources to do so, they should be permitted to quickly be authorized and certified for WIC online.

Retailers who provide SNAP online in their e-commerce platform must meet online purchasing requirements, some of which may be duplicative of WIC online requirements. For example, the technology used for SNAP transactions may be duplicative for WIC and should be evaluated for its use in both programs. Streamlining these requirements will help retailers implement WIC online more quickly and reduce the administrative burden on state agencies overall.

#### **NGA Recommends USDA Provide Clearer Guidance on the Types of Payments Permitted Through WIC Online**

Through the proposed rule, USDA permits WIC State agencies to explore and adopt new payment technologies beyond the EBT card (*e.g.*, mobile payments). NGA appreciates the need for flexibility in payment systems that can be used for WIC purchases, as this will evolve over time with innovation and new technologies. As states explore other payment options, we ask USDA for guidance and encourage working with retailers to address challenges faced when implementing these systems. It will also be critical for States to ensure adequate time for independent grocers to implement these new technologies. As an example, some retailers allow and accept mobile payments through applications for purchases. Fees for retailers for these systems differ across each system, and they are not consistently utilized as a payment option in each store. It would therefore be helpful for USDA to create technology guidelines on standardized requirements for point-of-sale transactions

and payment processing. There should be clear criteria around what payment methods are permitted for WIC online in each state to aid retailers and to set expectations for WIC participants.

Additionally, NGA would like to ensure that USDA provides clear guidance for consumers in using multiple forms of payment during a transaction. In store, cashiers are trained to scan the WIC cards first, the SNAP card second, other closed loop cards next, and they debit, credit, or cash. This ensures that the right items end up in the right payment category. We do not want customers upset with the retailers if some of their WIC items were swept up in their SNAP transaction. Clarification of this issue will be critical to the interoperability of these systems and online shopping moving forward.

### **NGA Supports USDA's Initial Approach to Fees for Services Related to Online WIC Purchases**

NGA broadly supports USDA's approach of having WIC participants pay the fees (*e.g.*, delivery, service, convenience, bag fees) for online ordering and food delivery. We believe that WIC benefits should not be used to pay for fees related to online ordering and that a separate tender should be permitted to cover the cost of allowable fees. We believe that this is generally in line with current requirements on SNAP online for participants to pay for their own fees when using online shopping, payment, and/or delivery. However, NGA believes it would be helpful to have clear guidance from USDA on the responsibilities of states, vendors, and participants in paying fees for online transactions. NGA members question if participants are required to pay for all online fees. These often differ by the online platform or virtual vendor that is used for e-commerce sales.

- **Price increase through third-party sellers:** Some third-party online delivery services pass fees on to participants through increasing product prices in an e-commerce setting, for example. In this case, the cost of an item online would be greater than if it was purchased in a physical store. In this situation, would a retailer be required to pay this fee, the third-party platform, or the participant in the form of the elevated cost for the product? As prices are generally set on WIC products, it would be helpful to have guidance for vendors to make sure they are not charging participants more in those situations and to have better clarity on how those fees will be covered.
- **Fees in the case of "internet vendors":** NGA also asks for clarification on how fees will be treated for "internet vendors." NGA sees challenges in ensuring that "internet vendors" and "brick-and-mortar" vendors are considered on equal footing. Food prices for "internet vendors" should be competitive with their assigned peer group in each state. State agencies should not be allowed to group "internet vendors" separately from "brick-and-mortar vendors," and guardrails should be established to ensure similar pricing between products sold through virtual platforms and those sold at physical locations. USDA should consider additional guidance on this topic as new virtual platforms are introduced into the WIC space.

NGA believes that even if WIC participants are paying for online transactions and delivery fees, retailers should make every effort to provide equal treatment in dealings with online sales. This includes consideration for minimum purchase requirements. For example, as included in the task force report,<sup>2</sup> NGA members believe that if a retailer has a policy that requires a minimum purchase amount for free delivery, the same policy should be applied to WIC orders as well.

### **NGA Recommends the USDA Provide Guidance on Appropriate Product Replacement and Substitution in a Virtual Setting**

USDA must provide guidance on how retailers and third-party delivery systems, and online stores can manage appropriate product substitutions in an online setting. As noted in NGA’s comments to USDA’s WIC food package revisions, ensuring appropriate product substitutions or replacements is often a challenge in the WIC program. As there is not a federal approved product list (APL) for the WIC program, and state APLs are often outdated, it is often a challenge for retailers to understand what new product sizes and options are authorized for sale. These same concerns must be addressed in an online format and approved products coded into digital systems. Retailers (“internet vendors” or “brick-and-mortar”) are not qualified and should not be expected to determine if a participant can utilize substitutions or if products are permitted for each WIC participant’s specific needs. These substitutions must be accounted for and determined in advance and communicated clearly with beneficiaries. NGA urges USDA to help standardize the APL process across all State agencies to develop and maintain the APL with input from retailers in each state. A standardized process would more easily allow for appropriate product substitutions during online transactions.

From the implementation of SNAP online, we have learned that during digital transactions, participants may not always be available to approve a product change if it is out of stock. To approve product substitutions, SNAP participants must input their Personal Identification Number (PIN) each time a substitution is needed. If they are unable to do so, online retailers must charge the excess cost of any replacement items directly to a participant’s personal credit card at the participant’s expense. NGA urges USDA to consider learnings from SNAP online to ensure that WIC participants are able to approve product substitutions easily and that appropriate information is available for retailers to know which products are approved for substitutions.

**NGA Requests USDA’s Continued Efforts to Reduce Vendor Administrative Obligations in Proposing to Update Shelf Price Collection, Vendor Monitoring/Audits, and Terms of Vendor Agreements**

NGA understands the thought process behind the approach to utilizing EBT data over routine shelf-price collection every six months to alleviate some burden on retailers. But, while NGA members understand the theory of reducing the burden of shelf-price collection using EBT data, we are concerned that USDA’s approach will have unintended consequences. USDA must ensure that they are maintaining the tools to ensure consistent and appropriate monitoring of prices both in-store and online. Routine shelf price collections are an important tool that is used to verify that vendors are not charging different prices to WIC participants compared to the public. If USDA is using EBT data to collect shelf prices, it would be helpful to understand how the Department intends to continue to monitor that vendors are using appropriate WIC pricing throughout their stores. Further, NGA questions how USDA will maintain appropriate price monitoring for “internet vendors” overall.

NGA members are largely in favor of the concept of utilizing virtual tools for vendor monitoring and compliance investigations. However, our members want to understand what technology would be used to conduct this monitoring and how it will be used. In some cases, the use of virtual tools can be more time-consuming and burdensome if not utilized efficiently. For example, during the COVID-19 pandemic, independent grocers who conducted virtual audits found it more time intensive to take virtual calls than to host an in-person visit. It would therefore be helpful to have more guidance on how the Department intends to conduct these virtual investigations. NGA members would be happy to meet with USDA and offer perspectives on the types of virtual technology systems that will be most efficient for our operations.

Finally, NGA strongly supports the Department’s proposal to increase the maximum length of vendor agreements and increase the minimum frequency that State agencies must accept and process applications from three to five years. However, USDA must ensure that in lengthening the time for vendor agreements, it does not allow states to limit enrollment periods for new vendors. USDA should also update requirements to permit new vendors to be authorized for the WIC program on an ongoing basis. The current enrollment process to apply as a new vendor can be time intensive and burdensome, especially in situations when an owner is buying a new store or that store changes ownership. Allowing for a continuous open enrollment period would allow for more stores to offer WIC benefits to participants and increase the speed at which new vendors could become authorized.

**NGA Believes USDA Should Address Minimum Stocking Requirements Holistically for All Vendors Before Addressing Exemptions for Specialty Stores**

NGA appreciates USDA’s general approach in considering if specialty stores, like bakeries or fruit markets, could be WIC-authorized without meeting minimum stocking requirements. However, NGA believes that USDA should consider updates to minimum stocking requirements holistically before providing specific exemptions for specialty vendors.

As NGA noted in comments on revisions to the WIC food package in February, NGA members have struggled and have been penalized for not meeting state-level stocking requirements. With a lack of federal guidance, states are responsible for establishing more comprehensive stocking requirements for WIC-authorized stores. Requirements vary drastically from state to state, adding complexity for retailers and resulting in significant differences in the food and beverage products available to WIC recipients.<sup>7</sup> In some cases, retailers are forced to carry uncommon WIC-only products that do not sell. This often leads to food waste and economic losses for stores if they are uncommonly purchased items. To address this, NGA suggested that USDA should provide more guidance to states and retailers on what essential products reasonably should have minimum stocking requirements. NGA believes that USDA must address this issue prior to considering if specialty stores can be WIC authorized without maintaining minimum stocking requirements for other WIC essential items.

We believe that such exemptions put “brick-and-mortar” stores at a competitive disadvantage by holding them to a higher standard. While we are supportive of USDA’s efforts to reduce and streamline stocking requirements overall, our members ask that the Department propose reasonable minimum state stocking requirements before allowing stocking exemptions for specialty vendors.

**NGA Requests USDA Ensure There Is an Appropriate Expectation for Compliance Time of the Proposed Rule**

Requirements for WIC online must facilitate and foster retailer participation of small and independent grocers and must consider the challenges they may face when implementing WIC online. The implementation of online shopping will introduce new technological processes and data elements into the current EBT processing system that will take retailers time to implement. USDA should ensure that before moving forward with the implementation of the proposal, the above issues are addressed.

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<sup>7</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5463221/>

Retailers face a variety of challenges when determining whether to participate in the WIC program and maintain WIC authorization. Despite these challenges, independent grocers are committed to serving the WIC population for their communities' benefit and fostering a pleasant and easy shopping experience. USDA should work to mitigate these challenges and consider new ways of incentivizing or making it easier for retailers to participate in the program.

NGA looks forward to working with USDA on an approach to increasing retailer participation in the program overall.

### Conclusion

Independent and community-focused grocers are committed to supporting families living in their communities that are on WIC. We urge you to keep this important program strong by improving the functioning and processes for retailer participation. NGA members look forward to working with USDA on the implementation of WIC online services.

Sincerely,



Stephanie Johnson, RDN  
Vice President, Government Relations  
National Grocers Association