STATE OF MINNESOTA
DEPARTMENT OF HEALTH

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDMENTS TO MINNESOTA RULES, CHAPTER 4617, GOVERNING ADMINISTRATION OF THE SPECIAL SUPPLEMENTAL FOOD PROGRAM FOR WOMEN, INFANTS, AND CHILDREN.

STATEMENT OF NEED AND REASONABLENESS.

INTRODUCTION

The Special Supplemental Food Program for Women, Infants and Children (WIC program) is a program of comprehensive nutrition care for pregnant, postpartum and breastfeeding women; infants under one year of age and children under five years of age who have a low income and nutritional deficiency.

The WIC program informs potentially eligible persons of the availability of WIC program benefits; determines the nutritional deficiencies of applicants; educates participants on nutrition; provides the kinds and amounts of food that will restore proper nutrition for participants; and provides health services directly or through referrals to health care providers.

Local WIC agencies determine an individual's eligibility for the WIC program. If an individual is eligible the local agency prescribes supplemental food for the participant and gives the participant a voucher for the food. The participant must exchange the voucher for the prescribed food at a vendor operation (grocery or pharmacy approved by the WIC program to accept vouchers).

The WIC program is a national program governed primarily by the Code of Federal Regulations, title 7, part 246 (7 CFR, part 246). The United States Department of Agriculture (USDA) administers the program at the federal level.

The USDA provides the Minnesota Department of Health (MDH) with most of the funds needed to operate the program at the state level. The funds are distributed by MDH to local agencies that operate the program in their communities.

Currently, Minnesota Rules, chapter 4617 consists of WIC program rules that apply to WIC program food vendors.

The proposed amendments consist of some changes to the portion of Minnesota Rules, chapter 4617 affecting vendors, and the addition

of rules governing local agencies and approved foods.

The amendments do not pertain to policies or programs that are different from the ones for which opinion was sought with the publication of the notice to solicit outside opinion in the State Register on Monday, March 30, 1987.

The proposed WIC program amendments are consistent with Minnesota Statutes 1986, sections 14.05, subdivision 1, 14.06, 144.12, 144.05 (f), and 145.893 to 145.897, which permit the department to implement the WIC program. Under 7 CFR, section 246.12 (a) the "state agency" (in Minnesota the Minnesota Department of Health) must be the agency that is responsible for the overall management of the WIC program food delivery system in that state. A food delivery system is the system by which supplemental foods are distributed to WIC program participants.

To prepare the proposed amendments MDH followed the procedures mandated by the Minnesota Administrative Procedures Act and the rules of the Office of Administrative Hearings. A notice to solicit outside opinion concerning the proposed rules was published in the State Register on Monday, March 30, 1987. The department also met with a sample of affected parties to discuss the rules. Drafts of the proposed rules were circulated to affected parties and to each person requesting a copy of the draft rule after publication of the notice of intent to solicit outside opinion. Comments received were reviewed and considered by MDH when it completed the proposed rules.

REMOVAL OF DATES IN CITES TO FEDERAL REGULATIONS

Throughout the amendments to chapter 4617 the dates in cites to the Code of Federal Regulations have been deleted or omitted. Omitting or deleting the dates in cites to the Code of Federal Regulations is needed to avoid the costly and time-consuming task of replacing old dates with new ones when new versions of the Code of Federal Regulations are promulgated.

Omitting or deleting the dates in the cites to the Code of Federal Regulations is reasonable because the federal regulations do not give the state discretion to deviate from federal regulations and statutes. If dates were included in cites to federal regulations governing the WIC program, the automatic inclusion of subsequent amendments to federal regulations and statutes would not be possible. If automatic inclusion of subsequent amendments to federal regulations and statutes was not possible, Minnesota's WIC program would be out of compliance with the federal requirements the minute the federal laws changed, thereby requiring amendments to the

state WIC program rules. Until the state WIC program rules were changed, the state would be subject to federal sanctions. If the state implemented the federal changes without changing its rule, it would be vulnerable to litigation alleging failure to comply with its own rules and alleging lack of power to change its policies without going through the rulemaking process. Such a dilemma can only be avoided by not specifying the enactment dates of the federal statutes and regulations incorporated into the state WIC program rules. (This rationale is based on the legal argument presented by Patricia A. Sonnenberg, Special Assistant Attorney General in a State of Minnesota, Office Memorandum, dated 2/7/1989 with the subject: IDENTIFICATION OF ENACTMENT OR PROMULGATION DATES OF FEDERAL STATUTES AND REGULATIONS INCORPORATED IN STATE RULES. That Office Memorandum is attached as Exhibit A.)

4617.0002 DEFINITIONS

The definitions under this part are needed to clarify which parts of Minnesota Rules the definitions apply to; to provide consistent terminology for use by persons and organizations affected by the WIC program; to provide a basis for evaluating compliance with Minnesota Statutes, other rules promulgated by the state of Minnesota, and federal laws and regulations; and to identify and clarify terms used in Minnesota Rules, chapter 4617. Words and phrases used in a manner consistent with common usage are not defined.

Subpart 1. Scope. The amendments to this subpart are necessary and reasonable because they are for clarification purposes only.

Subp. 3. Breastfeeding woman. This definition is reasonable because it is consistent with the definition of breastfeeding woman given under 7 CFR, section 246.2 and because it provides an abbreviation to refer to a group of persons whose members could be eligible for participation in the WIC program.

Subp. 4. Categorical status. This definition is needed because some requirements in chapter 4617 vary according to whether the participant is a pregnant woman, breastfeeding woman, postpartum woman, infant or child. The definition is reasonable because it is consistent with the definition of "categorical eligibility" under 7 CFR, section 246.2 and because it provides an abbreviation used to refer to the entire group of people for whom supplemental foods can be prescribed and purchased under the WIC program.

Subp. 5. Certification. This definition is reasonable because it is consistent with the definition of certification given under 7

CFR section 246.2.

Subp. 6. Certifier. According to 7 CFR, section 246.2 a competent professional authority can be someone who is a "state or local medically trained health official". According to part 4617.0035, a certifier must be trained and the training requirements are medical in nature. Therefore the definition is reasonable because it is consistent with the requirements of the definition of competent professional authority under 7 CFR, section 246.2.

Subp. 7. Child. The amendment to this definition is necessary and reasonable because it is for clarification purposes only.

Subp. 10. Community health board. This subpart is needed because the term "community health board" is used in the definition of "community health service agency" under subpart 10. The definition is reasonable because the cites to Minnesota Statutes used in the definition of "community health board" are consistent with the cites used in the definition of "community health service agency".

Subp. 11. Community health service agency. According to 7 CFR, section 246.5 (d) a state agency must establish standards for the selection of new local agencies. Under 7 CFR section 246.5 (d) (1) the state agency must consider a priority system for the selection of local agencies that is based on the "relative availability of health and human services". Under proposed part 4617.0020, subpart 5 the commissioner gives first priority to a community health service agency. Since a community health service agency as defined must coordinate health care services (see Minnesota Statutes, section 145A.02, subdivision 6, and 145A.09, subdivision 1) the definition is reasonable.

Subp. 12. Competent professional authority. This term is used in proposed parts 4617.0003 to 4617.0155 in a manner that is consistent with the definition of competent professional authority under 7 CFR section 246.2. The definition is reasonable because it is consistent with the federal requirements.

Subp. 13. Dietetic technician. According to proposed part 4617.0035, subpart 1 a dietetic technician can be a competent professional authority. The definition of competent professional authority under 7 CFR section 246.2 permits a competent professional authority to be a state or local medically trained health official. The definition of dietetic technician is reasonable because, by providing training that is related to the health and nutritional needs of participants in conjunction with the training requirements

for dietetic technicians, it is consistent with the federal regulations. Also, dietetic technicians are specially trained to work as paraprofessionals under supervision of professionals in providing nutrition services.

Subp. 14. Dietitian. According to proposed part 4617.0035, subpart 1, a competent professional authority must be a dietitian or one of several other medical professionals. The definition of competent professional authority under 7 CFR, section 246.2 requires that a dietitian be certified by the "state medical certifying authority". The definition of dietitian is reasonable because the state of Minnesota uses the American Dietetic Association as its state medical certifying authority.

Subp. 15. Health service agency. To select a local agency the commissioner gives a health service agency priority over a human service agency. This definition is necessary, therefore, to clarify the difference between a health service agency and a human service agency. Priority assignments for selecting a local agency are based on the relative availability of health services. The agency that can make health services the most available is given the highest priority. Some human service agencies, however, include health services in their programs. Since the proportion of health services to other services offered by a human services agency or other agency could be small it is reasonable to define health service agency as an agency whose primary purpose is to provide health services. (Also see the statement of need and reasonableness for the definition of "human service agency".)

Subp. 16. Home economist. This definition is reasonable because it is consistent with the educational requirements given for a nutritionist under the definition of "competent professional authority" under 7 CFR, section 246.2.

Subp. 17. Human service agency. To select a local agency the commissioner must give a health service agency priority over a human service agency. This definition is needed, therefore, to clarify what a human service agency is. Under 7 CFR section 246.5 (d) (1) a local agency must be selected according to the availability of health services at the agency. The definition is reasonable because it clarifies the primary functions of a human service agency, which enables a reader of the rules to easily distinguish the difference between a health service agency and a human service agency. If the difference between a human service agency and health service agency is clear in the rules the commissioner can make objective decisions

about how to assign priorities to human service agencies and health service agencies that apply to become local agencies. (See also the statement of need and reasonableness for the definition of "health service agency".)

Subp. 18. Individual care plan. This definition is reasonable because it provides an abbreviation for referring to the requirements of proposed part 4617.0063, subpart 3.

Subp. 20. Licensed practical nurse. The reasonableness for this definition is the same as for the definition of certifier except that under the statement of need and reasonableness for that definition the term licensed practical nurse must be substituted for the term certifier.

Subp. 22. Medical consultant. This definition is reasonable because it provides an abbreviation used to refer to the physician hired by the commissioner to provide medical direction to the WIC program. It is reasonable that the consultant be a physician because a physician has the high level of qualifications that is needed to provide medical direction. The definition is also consistent with 7 CFR section 246.3 (d) which says that the state agency "shall ensure that sufficient staff is available to administer an efficient and effective [WIC] program . . . ".

Subp. 23. Migrant farmworker. This definition is reasonable because it is consistent with the definition of migrant farmworker under 7 CFR, section 246.2.

Subp. 24. Migrant service agency. This definition is reasonable because local agencies that operate year around can not administer the WIC program for migrant farmworkers as efficiently and effectively as an agency that serves only migrant farmworkers. Local agencies that operate year around schedule their workloads according to the 6-month certification period of non-migrant participants and are therefore less able to provide flexible services to transient migrant service workers. Migrant service agencies are also more efficient and effective because they coordinate the WIC program with other health and social services typically needed by migrant service workers. This definition is also reasonable because it helps govern how the state WIC program will comply with the part of the state plan required by 7 CFR, section 246.4 (a) (9), which says that the plan must describe how the special nutrition education needs of migrant farmworkers will be met.

Subp. 25. Nutrition education coordinator. This definition is

reasonable because it is consistent with the definition of competent professional authority under 7 CFR, section 246.2. Also, 7 CFR, section 246.11 (c) (1) requires that nutrition education staff be adequately trained. Thus, the definition is consistent with federal regulations regarding staffing for nutrition education.

Subp. 26. Nutritionist. This definition is reasonable because it is consistent with the educational requirements given for a nutritionist in the definition of "competent professional authority" under 7 CFR, section 246.2.

Subp. 27. Ongoing, routine obstetric care **and**

Subp. 28. Ongoing, routine pediatric care. To select a local agency to administer the WIC program at the local level, the state must, according to 7 CFR, section 246.5 (d) establish standards for the selection of new local agencies. To establish the standards the state agency must consider using the priority system under 246.5 (d) (1), which is based on the "relative availability of health and administrative services". Under 7 CFR, section 246.5 (d) (1) (i) to (v) "health services" means ongoing, routine pediatric and obstetric care. Title 7 CFR, section 246.2 does not, however, define "ongoing, routine pediatric care and obstetric care". To clarify the use of "ongoing, routine pediatric and obstetric care" in proposed parts 4617.0003 to 4617.0180 the phrase was divided into one part pertaining to pediatric care and one pertaining to obstetric care.

The definitions are reasonable because they refer to standards in authoritative medical publications. The publications have been reviewed and approved by the WIC program medical consultant. Also, the American Academy of Pediatrics and the American College of Obstetricians and Gynecologists are well accepted in the medical community as authoritative sources.

Subp. 29. Participation level. This definition is necessary and reasonable because it is for clarification purposes only.

Subp. 32. Physician. According 7 CFR, section 246.2 under the definition of "competent professional authority" a competent professional authority can be a physician. Section 246.2 does not, however, define "physician". Therefore this definition is needed to clarify the meaning of the term "physician". Minnesota Statutes, Chapter 147 specifies the licensure requirements for and the scope of practice of a physician. This definition is consistent with statute.

Subp. 33. Physician's assistant. Under 7 CFR, section 246.2,

in the definition of competent medical professional, it is stated that a physician's assistant must be "certified by the National Committee on Certification of Physician's assistants or certified by the State medical certifying authority". The Minnesota Board of Medical Examiners is Minnesota's medical certifying authority for physician's assistants. This definition is, therefore, consistent with the federal regulation. The definition is also consistent with Minnesota Rules, parts 5600.2600 to 5600.2665, which include the requirement for a physician's assistant to register with the Minnesota Board of Medical Examiners.

Subp. 34. Postpartum woman. This definition is reasonable because it is consistent with the definition of postpartum woman under 7 CFR, section 246.2.

Subp. 35. Pregnant woman. This definition is reasonable because it is consistent with the definition of pregnant woman under 7 CFR, section 246.2.

Subp. 36. Private physician. This definition is reasonable because it is an abbreviation used to identify the physicians described in the definition. The definition decreases excessive language in the rules.

Subp. 37. Proxy. This definition is reasonable because it is an abbreviation that is used to avoid excessive language in the rules. The definition is consistent with 7 CFR, section 246.12 (p) which requires each state agency to establish "uniform procedures which allow proxies designated by participants to act on their [the participants'] behalf".

Subp. 38. Registered nurse. This definition is needed because under 7 CFR, section 246.2 registered nurses can be a competent professional authority, but that section does not define registered nurse. The definition is reasonable because Minnesota Statutes, sections 148.171 to 148.285 specify the licensure requirements for and scope of practice of a registered nurse. This definition is consistent with the statute.

Subp. 41. Transfer agency. This definition is reasonable because it is for identification and clarification purposes only.

SMALL BUSINESS CONSIDERATIONS.

Under 7 CFR, section 246.12 (e) (3) "the state agency is encouraged to consider the impact of authorization decisions on small businesses" and under Minnesota Statutes, section 14.115 a state agency is required to consider ways to reduce the impact of rules on small businesses.

The proposed rules regarding local agencies will not impact small businesses.

The proposed rules regarding approved foods (parts 4617.0170 to 4617.0180) could impact small businesses. The commissioner considered the methods for reducing the impact of the rules on small businesses that are required to be considered by Minnesota Statutes, section 14.115, subdivision 2, paragraphs (a) to (e) as follows:

A. Establishment of less stringent compliance or reporting requirements for small businesses.

The rules do not, in every case, require a food provided by a manufacturer or producer to be distributed statewide. This allows small business egg and milk suppliers, for example, to distribute eggs and milk to retailers in their geographic area for possible purchase by WIC program participants.

Except for the application for a food to be approved for use by the WIC program there are no reporting requirements in the rules for businesses that produce food for use under the WIC program.

B. The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses.

The only schedules or deadlines required under the rules regarding approved foods is the deadline for submission of food product approval application to the commissioner. The number of applications that must submitted is minimal because the approval period for a food two years.

C. The consolidation or simplification of compliance or reporting requirements for small businesses.

As stated under item B the only reporting required under the approved foods rules is the application for approval of a food for use under the WIC program. This application is unique and could not be consolidated with other applications. The application form is not complicated, it requires only the information needed to determine whether a food meets the approval criteria under part 4617.0180.

D. The establishment of performance standards for small businesses to replace design or operational standards required in the rule.

This method for reducing the impact of the rules on small businesses is not applicable under the approved foods rules. Performance standards are already implied in the rules. As long as a food meets the approval criteria under 4617.0180 it does not matter how it was produced as long as the production is consistent with other laws and rules that apply to the manufacture of that food.

E. The exemption of small businesses from any or all requirements of the rule.

It is not possible to exempt small businesses from the requirements of the approved foods rules because the approval criteria are required by WIC program federal regulations. The state does not have the option of exempting small businesses from federal regulations that relate to the nutritional qualities of foods.

Small businesses were given the opportunity to participate in the rulemaking process through the Minnesota Grocers Association. The Minnesota Grocers Association represents many grocers that meet the definition of "small business" under Minnesota Statutes, section 14.115. As representative of small business grocers, the Minnesota Grocers Association is well qualified to evaluate the effect of government rules and regulations, including the WIC rules, on grocers who are small businesses. To develop the "approved foods" rules, therefore, the MDH distributed copies of the draft rules to the Minnesota Grocers Association for their review and comment and considered those comments when drafting the proposed rule.

The association's main concern with the draft of the rules was with the clarity or part 4617.0065, subpart 4, vendor prices. That rule part has been clarified.

The WIC program has been in operation for 15 years. The length of operation of the program has given WIC program vendors, including small business grocers, many opportunities to provide input into the operation of the WIC program. Minnesota state WIC program administrators have used that input to change WIC program activities in a way that would allow small businesses, primarily the grocer vendor, to benefit from participation in the WIC program.

Participation in the WIC program by grocers is extensive. The Minnesota WIC program has approximately 2000 grocers from all parts of the state participating in the WIC program.

LOCAL AGENCIES

4617.0005 NOTICE OF AVAILABILITY OF WIC PROGRAM FUNDS.

According to 7 CFR section 246.5 (b) a state agency must require organizations that want to be a local agency to submit a written application. To ensure that all potential applicants are given an equal opportunity to apply and to inform them that an application must be in writing, 7 CFR, section 246.5 (d) (2) requires the state, when seeking new local agencies, to "publish a notice in the media of the area next in line according to the

Affirmative Action Plan . . ." The notice must include a request that potential local agencies notify the state of their interest in becoming a local agency. Although the state of Minnesota does not have any unserved areas and therefore does not need to "publish a notice in the media of the area next in line according to the affirmative action plan", the reason for the notice requirement - that potential applicants must be informed of the status of the program to apply for it - also applies in already served areas because it is possible that the agency currently serving the area could become ineligible or the agency might choose not to apply.

The only other alternative would be for the commissioner to "blanket" an area by sending applications to all the agencies the commissioner thinks would be interested in applying. But "blanketing" an area would be unreasonable because decisions about who might be interested in applying would be subjective and arbitrary.

It is necessary and reasonable to publish the notice in the State Register because by doing so the commissioner increases the chances that affected parties will be informed of the opportunity to apply. The State Register is a legal newspaper and it has statewide circulation. It is reasonable to require that the notice be published at least 30 days before the application deadline in the notice because a local agency needs at least that amount of time to decide to apply.

The information under items A to E is needed to give all potential applicants the same amount and type of information with which to make decisions on whether to apply to become a local agency. The information under items A to E is reasonable because it includes all the information a potential applicant needs to apply to become a local agency and because the information is consistent with the requirements of 7 CFR, part 246 and with proposed Minnesota Rules, chapter 4617.

4617.0010 APPLICATION FOR WIC PROGRAM FUNDS.

Code of Federal Regulations, Title 7, section 246.5 (b) says the state must ". . . require each agency, including subdivisions of the state agency [MDH], which desires approval as a local agency, to submit a written local agency application.". Part 4617.0010 is needed to satisfy the requirement for local agencies to make written applications. Code of Federal Regulations, title 7, section 246.5 (b) does not state the details of the application process. Therefore this part is also needed to clarify the procedures for completing

and submitting a written application.

Item A. This item is needed for the commissioner to know who must be sent a local agency application. The item is reasonable because under part 4617.0005 interested agencies are notified of the opportunity to apply. Having interested agencies notify the commissioner of their intent to apply is also reasonable because this helps the commissioner establish a record of interested agencies to whom the commissioner must send the application materials to as required under item B. By knowing who intends to apply to become a local agency the commissioner can also begin planning for the processing of those applications.

Item B. This item is needed to efficiently provide applications to agencies that are interested in becoming a local agency. It would be unreasonable, for example, to require that an interested person come to MDH to obtain an application because many persons would have to drive long distances to do so. Providing written instructions on how to complete the form is needed to avoid unnecessary or excessive communications between the commissioner and applicants about how to complete the application. Providing written instructions is reasonable, therefore, because such instructions enhance the effective and efficient operation of the WIC program.

Item C. Under 7 CFR, section 246.5 (c) (3) the state agency is authorized to fund "more than one local agency to serve the same [geographic] area or special population as long as more than one local agency is necessary to serve the full extent of need in that [geographic] area or special population . . .". This item is needed, therefore, to clarify that multiple agencies are not needed to serve single geographic areas or special populations in Minnesota. The commissioner's past experience with the WIC program shows that each of the WIC local agencies in the state has always been able to serve the number of participants in the area that the agency was authorized to serve. The requirements under this item are reasonable because they are consistent with 7 CFR, section 246.5 (c) (3). This item is also needed for effective and efficient administration of the WIC program as is required by 7 CFR, section 246.3 (b). Restricting the service of local agencies to persons living in a geographic area or to persons in a special population ensures continuity of care for participants and avoids unnecessary overlap and duplication of records and services.

Item D. An agency must submit an application no later than the date specified under part 4617.0005, item C because the WIC

program operates on a two-year fiscal cycle. For administrative efficiency, WIC program application procedures must be completed sequentially and within short periods during the fiscal cycle.

An application must document that the applicant can meet the eligibility criteria under part 4617.0015 because documentation helps to assure that the commissioner will not waste time reviewing applications from applicants who are later determined to be ineligible. The documentation provides an efficient way for the commissioner to verify eligibility.

Item E. This item is needed because under a program that is as complex as the WIC program and that processes many local agency applications it is likely that some mistakes will be made on the applications. The procedure given under this item for correcting incomplete applications is reasonable because it is consistent with 7 CFR, section 246.5 (b) which says that "Within 15 days after receipt of an incomplete application, the state [shall] provide written notification to the applicant agency of the additional information needed.".

4617.0015 AGENCY ELIGIBILITY CRITERIA.

This part is needed to clarify the qualifications an agency must have to be considered for approval as a local agency.

Item A. This item is necessary to ensure that basic health care is provided for all participants and to ensure that health problems identified by a local agency are properly diagnosed and treated. Ongoing, routine pediatric and obstetric care may also be needed to identify and treat some nutritional deficiencies. The requirement is reasonable because it is consistent with 7 CFR, sections 246.6 (b) (3) and (4) and 246.5 (d).

Item B. This item is needed to ensure that a local agency operates the WIC program with enough qualified staff. It is reasonable to require a local agency to have a competent professional authority on its staff because 7 CFR, section 246.6 (b) (2) says that the signed written agreement between the local agency and the state agency must require the local agency to have "a competent professional authority on the staff of the local agency".

A complex nutrition education program requires detailed planning and coordination by qualified staff. The nutrition education component of the WIC program under 7 CFR section 246.11 is complex. Under section 246.11 the state and local agencies must, through education and training, help women, infants and children change their eating habits to eliminate or lessen their nutritional

risk. Further, improved eating habits are to be "taught in the context of the ethnic, cultural and geographic preferences of the participants". Under 7 CFR, section 246.11 (e) (1) some education may be given to groups and some must be given to individual participants on a face-to-face basis. Therefore it is reasonable to require a local agency to have a nutrition education coordinator to coordinate WIC program education for its participants.

A local agency WIC program coordinator is needed for the state WIC agency to efficiently communicate with the WIC program at the local agency and so that various parts of the local agency WIC activities can be coordinated. The requirement is reasonable because it allows the coordinator to have other responsibilities in the agency and there are no special experience and training requirements for a person to be the coordinator.

It is reasonable to require a local agency to have a person to legally obligate the local agency and have a fiscal manager because under 7 CFR, section 246.6 (b) (1) an agency applicant must demonstrate its ability to provide accounting and record-keeping systems that meet federal financial management standards.

It is reasonable to require a local agency to have staff to perform tasks for which a competent professional authority is not required because it would be an inefficient use of WIC program resources to have a competent professional authority perform those tasks.

Item C. This item is necessary and reasonable because it is consistent with 7 CFR, section 246.3 (b), which requires the state to comply with 7 CFR, part 3015 and because under 7 CFR section 246.6 (b) (1) the state WIC program agreement with local agencies must ensure that the local agency complies with "all the fiscal and operational requirements prescribed by the State agency pursuant to . . . 7 CFR, part 3015 . . .".

Item D. This item is necessary to help ensure that WIC program services are convenient for a majority of WIC program participants in a geographic area or special population and to operate the program as efficiently and effectively as possible, and is reasonable because it is consistent with 7 CFR, sections 246.4 (a) (1) and 246.6 (b) (9).

Item E. This item is necessary to clarify for and communicate to potential applicants the details of what a local agency is and must do. The cited regulation defines local agency. Therefore this item is reasonable because it is consistent with the

federal regulations.

4617.0020 AGENCY APPLICATION REVIEW AND APPROVAL.

Subpart 1. General procedure. This subpart is needed to establish the commissioner's authority to authorize an applicant to become a local agency and to establish the procedures the commissioner must follow to authorize an applicant to become a local agency. Requiring the commissioner to review an application in the same order as subparts 2 to 6 is reasonable because each of subparts 2 to 6 is dependent on its previous subpart. The affirmative action plan and priority system under subparts 4 and 5 respectively, for example, do not need to be applied to a local agency application if the application is disapproved under subpart 3, item B.

Subp. 2. Agency application; review and

Subp. 3. Agency application; approval and disapproval.

Subparts 2 and 3 are needed to establish a basis for the commissioner's approval or disapproval of an application to become a local agency.

It is reasonable to give the commissioner the review authority given under these subparts because this is consistent with the authority under 7 CFR, sections 246.5 (a) and (b).

The statements of need and reasonableness for the items under subpart 3 are as follows:

A. This item is reasonable because it is consistent with 7 CFR section 246.5 (c) (3), which says that the commissioner may approve more than one local agency to serve a geographic area or special population only if needed to "serve the full extent of need in that area or special population". The commissioner has determined that only one local agency per geographic area and special population in Minnesota is needed to serve the "full extent of need" of those special populations and geographic areas. Through past experience the commissioner has not experienced a case when a local agency could not serve all of the participants it was authorized to serve.

B. According to 7 CFR, section 246.6 (a) the state must have a signed written agreement with local agencies and according to section 246.6 (b) (1) a written agreement with a local agency must ensure that the local agency "complies with all the fiscal and operational requirements prescribed by the state agency pursuant to [7 CFR, part 246]". Thus, this item is reasonable because the commissioner could not have a written agreement with a local agency

that did not follow the application procedures under part 4617.0010 or that does not meet the eligibility criteria under part 4617.0015.

C. This item is reasonable because if an applicant has submitted an application according to part 4617.0010 and is eligible according to part 4617.0015 that applicant has shown the commissioner that the applicant has or can comply with the terms of the written agreement required by 7 CFR, section 246.6 (b).

Subp. 4. Performance record determination. This subpart is needed because the commissioner has determined that only one local agency per geographic area or special population is needed (see subpart 3, item B). When two or more eligible agencies apply to serve the same geographic area or special population, therefore, the commissioner must have a means of determining which agency should be authorized to become a local agency for that geographic area or special population.

The commissioner is given authority to establish standards for the selection of new local agencies under 7 CFR, section 246.5 (d), which also says that such standards shall include consideration of the priority system under section 246.5 (d) (1). After considering that priority system the commissioner decided that by itself the priority system did not sufficiently address the problem of agencies that were not satisfactorily achieving WIC program goals. When the contract of a local agency expired the commissioner decided that the WIC program needed a way to eliminate from the competition those agency applicants that had a record of unsatisfactorily achieving WIC program goals. By tying a performance record to the approval of a local agency application local agencies might also have the incentive to maintain satisfactory performance after they are approved.

If none of the agency applicants had an unsatisfactory record of achieving program goals the system for selecting a local agency would have to be based on the applicants' potential to achieve program goals, as is the case with the priority system under 7 CFR, section 246.5 (d) (1). The most reasonable set of standards for approving agency applications therefore would be one that includes measures of achieving WIC program goals (performance record) and the idea of the relative availability of health and administrative services under 7 CFR section 246.5 (d) (1) (the local agency priority and subpriority systems).

Subp. 5. Affirmative action plan. Although it is not the case in Minnesota, it is possible for a state to not have enough

resources to serve the entire state. Under 7 CFR, section 246.4 (a) (5), therefore, a state agency is required to have an affirmative action plan to serve geographic areas or special populations in order of relative need.

Under 7 CFR sections 246.7 (b), (c) and (d) eligibility for participation in the WIC program is established when an individual's income meets low income guidelines and when the individual is at nutritional risk. Geographic areas and special populations with a high percentage of individuals who have low incomes and who are at acute nutritional risk have a higher need for WIC program foods relative to those areas or special populations who have a lower percentage of those types of individuals.

It is reasonable to use the conditions described under items A to C as indicators of acute nutritional risk because they have a high impact on nutritional risk. Low birth weight is listed under 7 CFR, section 246.7 (d) (2) (i) as an example of nutritional risk criteria. The weight of 2,500 grams is, in the practice of medicine, the generally accepted value for low birthweight [Suiter and Hunter, 1980, p. 396; and Cataldo and Whitney, 1986, p. 197].

It is reasonable to use the percentage of infants conceived under the age of 18 as a reasonable criteria because mothers of infants conceived under the age of 18 and the infants so conceived are at greater medical and nutritional risk. Medically, pregnant teens are at greater risk for having a low birthweight or premature baby, infant and neonatal death, and cesarean section. Nutritionally, a young pregnant teenager is at risk because she and her baby are growing (maturing physically) at the same time. Depending on the teenager's stage of growth, a teenager's nutrient needs may be much higher during pregnancy than a pregnant adult. For example, the pregnant teen may need up to 1600 mg of calcium per day versus the 1200 required by pregnant adult women. Some pregnant teens resist gaining the amount of weight appropriate to their pregnancy. [See: Working With the Pregnant Teenager: A Guide for Nutrition Educators. United States Department of Agriculture, Program Aid 1303. October, 1981].

Item D, poverty, is a reasonable criterion of relative need because individuals must have low incomes to be eligible for the WIC program. It is reasonable to use the Office of Management and Budget definition of poverty because poverty statistics are readily available from that office and because use of that definition enables the commissioner to be consistent and objective when using

poverty as a measure of relative need for the WIC program.

Subp. 6. Priority System. The need and reasonableness of the requirement that the priority system under this subpart be used only when required by subpart 3, item D is discussed in the SNR for subpart 3, item D.

The priority system for selecting a local agency to serve a geographic area or special population is needed to ensure that the agency that is authorized to act as a WIC local agency can best fulfill the purposes of the WIC program and so that the process of selecting a local agency is applied consistently statewide.

The priority system for selecting local agencies is reasonable because it is consistent with 7 CFR, section 246.5 (d) where it is stated that the "state agency shall establish the standard for the selection of new local agencies.".

To establish the standards 7 CFR, section 246.5 (d) (1) requires the state agency to consider the priority system under 7 CFR, section 246.5 (d) (1) (i) to (v). The commissioner used that priority system to develop the priority and subpriority systems under subparts 5 and 6. After considering the priority system under 7 CFR, section 246.5 (d) (1) (i) to (v) the commissioner decided that the federal priority system did not apply to the majority of the local agency applicants in Minnesota. The majority of local agencies in Minnesota are public health service agencies that do not provide comprehensive routine health care directly. Most public health service agencies enter into written agreements with private physicians to provide ongoing, routine pediatric or obstetric care for participants. Another priority system was needed, therefore, that could be used to choose one agency over another to be a local agency. Therefore the commissioner developed the priority system under subpart 5. The priority system under 7 CFR, section 246.5 (d) (1) is essentially the same as the subpriority system under subpart 6.

The priority system under subpart 5 gives community health service agencies the highest priority because community health service agencies can best coordinate the WIC program with other health care services. In some cases, for example, the same health service agency staff person coordinates the WIC program with the Maternal and Child Health program, immunization program, and Early, Periodic Screening program. Second priority is given to a public or private nonprofit health service agency because those agencies can coordinate the WIC program with other health care services better

than a human service agency. A public human service agency is given third priority because a public human service agency operates major human service programs that the WIC program is supposed to coordinate with, such as Food Stamps, Aid to Families with Dependent Children, and Early and Periodic Screening, Diagnosis and Treatment. A private human service agency is given fourth priority because it is the least likely to operate a program that the WIC program needs to coordinate with. Coordination is required by 7 CFR, section 246.4 (a) (8) to be a part to the WIC program state plan. The priority system is also reasonable because it will be used in conjunction with the subpriority system under subpart 6.

An agency must be classified as a health service agency or human service agency so that the priority system can be applied to that agency.

It is reasonable to require more than 50% of an agency's budget be allocated to non WIC program health services and non WIC program employee work hours for that agency to be classified as a health service agency because that would mean the majority of the agency's activities are health service activities. A percentage also provides an objective measure that can be applied consistently by the commissioner.

The statements indicating that this subpart applies to an agency applying the first time, has applied before or that has administered the WIC program is needed and reasonable for clarification purposes only.

The requirement under item D is needed to govern what the commissioner must do if two or more agencies have the same priority and to provide a logical flow of the rule from subpart 6 to subpart 7. It is reasonable to use subpriorities to choose among applicants with the same priorities because, as has been discussed earlier in this SNR (under subpart 3, item A), only one agency can be authorized to serve a geographic area or special population.

Subp. 7. Subpriority system. The subpriority system is needed to choose among two or more local agency applications that have the same priority, such as two private nonprofit human service agencies. The subpriority system (items A to E) is reasonable because under it priorities are assigned according to how directly the agency applicant is able to provide ongoing, routine pediatric or obstetric care, which is consistent with the "relative availability of health and administrative services" rationale used to develop the priority system under 7 CFR, section 246.5 (d). The subpriority system is

basically the same as the priority system under 7 CFR, section 246.5 (d) (1).

Subp. 8; Performance record **and**

Subp. 9; table of performance points. Subparts 7 and 8 are needed to provide the commissioner with an objective measure of poor performance that can be applied consistently among agency applicants competing to serve the same geographic area or special population. The criteria that were chosen as measures of poor performance (submission of nutrition education plan, participation, responses to financial and management reviews, and corrective action) are reasonable because they are measurable. Participation level is a reasonable measure of performance because the financial accountability of the Minnesota WIC program depends on the actual number of participants equaling the authorized participation level. Therefore, a desirable characteristic of a local agency is one that will serve only the number of participants that is authorized by the commissioner. Under 7 CFR, section 246.16 (b) (2) (i) in any federal fiscal year a state agency must not overspend on the WIC program more than one percent of money the federal government allocated the Minnesota WIC program for that year and under Minnesota Statutes, section 145.894 the state must spend at least 99% of federal dollars available to the state. Therefore it is reasonable to assign the most performance points to the agency that has a participation level of at least 98% percent but not more than 102% of its authorized participation level.

Participation by pregnant women is a reasonable measure of performance because such a measure is consistent with the Minnesota Statutes, section 145.894 (h), which requires the commissioner to increase the number of pregnant women participating in the WIC program.

The measures of performance that relate to management evaluations, financial reviews and nutrition education plans are reasonable measures of performance because 7 CFR section, 246.3 (b) holds the state agency responsible for the efficient and effective administration of the WIC program. The evaluations and reviews are the methods the commissioner uses most to monitor and change local agency operations so that the operations remain in compliance or better comply with federal and state guidelines and regulations. Local agencies are required to have nutrition education plans under 7 CFR, section 246.11 (d) (2). Section 246.11 (d) (2) also requires a nutrition education plan to be submitted to the state agency "by a

date specified by the state agency."

Subp. 10. Notice of approval or disapproval. This part is necessary and reasonable because it is consistent with 7 CFR, section 246.5 (b).

Subp. 11. Cessation of local agency operations. This subpart is needed to minimize the interruption of services to WIC program participants when an agency quits the WIC program before the expiration of its WIC program contract. The subpart is reasonable because it mandates the commissioner use the same procedures for selecting a new local agency (part 4617.0005) that were used to select the agency that stopped operating.

4617.0025 DISQUALIFICATION.

The authority for the commissioner to disqualify a local agency is needed to enforce local agency compliance with chapter 4617. Disqualification is a reasonable means of enforcing local agency compliance with chapter 4617 because disqualification under this part is consistent with 7 CFR, section 246.5 (e) (1) (i) and and (2).

The commissioner must require a local agency to reimburse the commissioner for funds that were not distributed according to chapter 4617 because the commissioner may be required to reimburse such funds to the federal government. Under 7 CFR, section 246.23 (a) (1) to (4) the Food and Nutrition Service of the federal government is authorized to collect WIC program resources that were misused or diverted from WIC program purposes by the state or a local agency.

4617.0030 LOCAL AGENCY CONTRACTS AND AGREEMENTS.

Subpart 1. State contracts. It is necessary and reasonable to require a local agency to have a WIC program contract with the commissioner because the requirement for such contracts is consistent with 7 CFR, section 246.6 (a). Items A to E are reasonable and necessary because they are consistent with 7 CFR section 246.6 (b).

A. This item is necessary to clarify who the contracting parties are and to clarify that the parties have read and understand the contract. The item is reasonable because the use of signatures for such purposes is common legal practice.

B. This item is necessary and reasonable because it is consistent with 7 CFR section 246.6 (b).

C. This item is needed to clarify to the parties of the contract that all contract terms must be consistent with chapter

4617.

D. This item is necessary to clarify for the commissioner and local agencies that nondiscrimination shall be enforced under the WIC program. This item is reasonable because it is consistent with 7 CFR, section 246.6 (b) (9).

E. This item is necessary to ensure that changes to a application are clarified for both parties and to ensure that a changed application is consistent with this subpart. This item is reasonable because submitting a second application would be an unnecessary duplication of the tasks that were completed to complete the initial application. For example, this item allows a local agency to hire staff with different qualifications without submitting a new application that contains most of the same information contained in the existing application.

F. This item is needed for the state WIC program to comply with 7 CFR, section 246.12 (r). The item is reasonable because it enables the commissioner to use a written document to verify that the parties to a local agency contract or agreement were aware that no conflict of interest can exist and it holds the parties accountable for a conflict of interest if one arises during the contract period.

G. This item is needed to clarify when the responsibilities of the commissioner and local agency begin and end under the contract.

Subp. 2. Health care provider agreements. The requirement for a local agency to have a health care provider agreement with another agency is necessary and reasonable because that requirement is consistent with 7 CFR, section 246.6 (d).

The requirement for a local agency to have a health care provider agreement with a private physician is necessary and reasonable because that is consistent with 7 CFR, section 246.6 (e).

Item A is reasonable because a health care provider agreement that began before the beginning date or ended after the ending date of a local agency contract with the state would be invalid. An agency can not act as local agency outside of the beginning and ending dates of its contract with the state under subpart 1, state contracts.

Item B is reasonable because a local agency contract with the state has a similar clause regarding nondiscrimination. Also nondiscrimination is a general requirement of the WIC program under 7 CFR section 246.8.

Item C is necessary and reasonable because it helps

potential applicants realize that they must have the agreement to apply. If agencies without the agreements don't apply, the commissioner will not have to waste resources on processing applications from ineligible agencies. Also, having the agreement submitted with the application ensures that the agency had the agreement at the time of application as is required by part 4617.0015, item A.

Item D is necessary and reasonable because it clarifies that an agreement must contain the requirements from the federal regulations that pertain to the type of agreement obtained by the local agency.

Subp. 3. Health service referral agreements and plans. This subpart is needed for the commissioner to ensure that that a fifth subpriority agency (one that is providing ongoing, routine obstetric and pediatric care through referral at the time the agency is approved as a fifth subpriority agency) can document that it is now providing health services through referral and that it can document a plan for providing the services directly or through a written agreement with a health care provider. This subpart is reasonable because it is consistent with 7 CFR, section 246.6 (b) (4).

The requirement for the plan to state that the agency will operate according to the plan within 90 days is reasonable because it has been the commissioner's experience that it is possible for agencies in Minnesota to comply with the 90-day requirement. Minnesota has 61 local agencies and none of them who chose to do so has been unable to provide ongoing, routine pediatric or obstetric care through written agreement with another agency or private agency.

4617.0035 STAFF QUALIFICATIONS.

Subp. 1. Competent professional authority. This subpart is needed to clarify who is authorized to function as a competent professional authority according to the definition of competent professional authority under 7 CFR, section 246.2. This subpart is reasonable because the occupations listed in the subpart have training requirements and titles that are consistent with the training requirements of the occupations listed in the definition of competent professional authority under 7 CFR section 246.2.

Subpart 2. Commissioner's review. This subpart is needed to enforce the requirements of a competent professional authority given according to the definition of competent professional authority under 7 CFR, section 246.2. The subpart is reasonable because it is

consistent with the authority given under 7 CFR, section 246.5 (f) and with the requirements of agreements between local agencies and the state agency given under 7 CFR, section 246.6 (b) (7).

Subparts 3 to 7. Subparts 3 to 7 are needed to clarify the qualifications of the persons who under subpart 1 can be a competent professional authority. Under 7 CFR, section 246.2 a competent professional authority is defined as "an individual on the staff of a local agency authorized to determine nutritional risk and prescribe supplemental foods.".

According to the definition of "competent professional authority" under 7 CFR, section 246.2 the state agency may authorize physicians, nutritionists, dietitians, registered nurses, and physician's assistants or state or local medically trained health officials as competent professional authorities. The commissioner, however, is not required to authorize individuals in a particular medical profession to be competent professional authorities. A state WIC agency, therefore, is authorized to designate as competent professional authorities the number and types of health professionals whose qualifications are consistent with the needs of the WIC program in that state.

To decide who to authorize as competent professional authorities in the Minnesota the commissioner analyzed the training and education requirements of health professions in Minnesota and found that certifiers, dietetic technicians, home economists, licensed practical nurses and physician's assistants lack some important training in nutrition. Therefore subparts 3 to 7 are needed to clarify and specify the training requirements of occupations that qualify as CPA's under the provision of "state or local medically trained health officials".

To develop the training requirements under subparts 3 to 7 the commissioner analyzed the job responsibilities and the job requirements (skills and knowledge needed to complete the job responsibilities) of competent professional authorities.

Competent professional authority job requirements were then compared to the experience and training of the occupations of individuals currently performing the responsibilities of a competent professional authority. It was concluded that the occupations lacked some competent professional authority job requirements and that the deficiencies would have to be eliminated by having the individuals in those occupations who wanted to act as a competent professional authority, satisfactorily complete education and

training through which they could acquire the job requirements.

The education and training that is required under subparts 3 to 7 is reasonable, therefore, because it gives the individuals taking the training and education courses the skills and knowledge lacking in their occupation but which are needed to complete the job responsibilities of a competent professional authority.

Supervision, including chart reviews, of the "state or local medically trained health official" is needed to increase the involvement of professional staff in day-to-day clinic operations. Supervision is also needed to compensate for the varying types and amounts of formal training received by the competent professional authorities. In addition, some supervisory requirements, such as for LPN's who are currently working in the WIC program, consist of less supervision than for newly hired LPN's. The less stringent supervisory requirements for some individuals are reasonable because those individuals have more experience in the WIC program.

For other competent professional authorities, such as certifiers, continuous supervision is required because most certifiers have little or no background in health or nutrition other than that acquired through the WIC program.

Individuals already acting as certifiers will be allowed to continue working as competent professional authorities in consideration of their accumulated experience working as certifiers. Considering the scope of knowledge and skills needed to act as a competent professional authority it is reasonable to not allow additional certifiers to be hired into this class of competent professional authorities.

Observation of certifications is needed to focus attention of supervisors on the assessment and counseling skills of the paraprofessional (state or local medically trained health official) and to identify strengths and weaknesses in counseling skills. An evaluation of counseling skills is then conducted to improve counseling skills. It is reasonable to require observations of three certifications because that number gives a supervisor a chance to observe interactions with several different personalities and different education and referral needs.

Chart reviews are needed to quickly identify the types of client problems encountered by the paraprofessional and their ability to appropriately address the problem; general impressions of the completeness of the assessment, identification of high-risk participants, education, referral and documentation; training needs

of the paraprofessional in these areas, and needs for additional education or referral for the participant.

Chart audits are needed and reasonable because audits provide a more comprehensive review than chart reviews. An audit includes components such as review of graphing and diet assessment. Because components of the certification process do not vary as much between participants as the health and nutrition needs of those participants, fewer chart audits are required. The requirement for ten chart audits was selected to provide sufficient charts to determine areas which are done well and areas where improvement is needed.

4617.0037 AUTHORIZED PARTICIPATION LEVELS.

Subpart 1. Migrant service agencies. This subpart is needed to address the special needs of migrant farmworkers. It is reasonable to determine authorized participation levels with information from an annual participation plan developed by the migrant service agency because the needs of migrant farmworkers change annually. It is difficult to determine participation levels from past service levels or waiting lists because the numbers of farmworkers change and they may live in a different place each year. Basing the authorized participation level on an annual participation plan for migrant farmworkers is also reasonable because it is consistent with 7 CFR section 246.16 (d) (2).

Subp. 2. All other local agencies. This subpart is needed to determine how many participants a local agency will be authorized to serve in a federal fiscal quarter. By authorizing a local agency to serve a limited number of participants the commissioner limits the amount of WIC program funds the state will have to spend for participants certified by the local agency. It is reasonable to determine how many participants can be served statewide and base the determination on an estimate of funds available for the federal fiscal quarter because most of the funding for the WIC program comes from the federal government. Also, if funding is limited the commissioner can under subpart 3, limit the WIC program to highest priority and subpriority risk groups if the commissioner knows the highest number of participants that can be served with the funds that are available for a particular quarter.

The determination must be based on an estimate of funding to allow for the state and local agencies to develop WIC program goals and plans for the upcoming fiscal quarter. It is reasonable to do an estimate of funding because the commissioner can make accurate

estimates based on past experience and on current data maintained by the department and because under 7 CFR, section 246.16 (b) WIC program funds are distributed to state agencies based on food, administrative and program costs. Also, under 7 CFR, section 246.16 (d) (1) and (2) the commissioner is required to distribute funds based on expected food, administrative, and program services costs.

Subp. 3. Applicants who cannot be served. This subpart is needed to ensure that participants in the highest priority or subpriority nutritional risk groups are served first and to ensure that all persons in a risk group receive equal treatment under the WIC program. It is reasonable to not certify an applicant for WIC program services who is a member of a priority or subpriority risk group that cannot be served statewide because certification of those applicants would prevent certification of applicants in a higher priority.

4617.0040 ADMINISTRATIVE FUNDING.

This part is needed to implement the distribution of WIC program funds to local agencies according to 7 CFR, sections 246.14 and 246.16. The procedures under this part have been in use by the commissioner for the past five years. During that time the commissioner has not experienced problems that would necessitate a change in the funding procedures. Therefore this part is reasonable because it is consistent with the federal regulations and past department practice. This part is also reasonable because it ensures that all local agencies will be considered for funding using the same funding standard.

Subparts 1 through 3 are reasonable because they are consistent with 7 CFR, section 246.16 (c).

Subpart 1. Administrative funding for transfer and migrant service agencies. This subpart is needed because transfer and migrant service agencies have administrative costs that are different than the ongoing administrative costs of other local agencies.

Transfer agencies will have costs associated with learning the WIC program and developing the administrative systems needed to operate the WIC program. Transfer agencies will not, however, have the same operating or close out costs of a migrant service agency because the transfer agency will operate on a long-term basis.

A migrant service agency operates the WIC program only for several months out of the year and therefore must close out the WIC program yearly.

This subpart is reasonable, therefore, because it tailors administrative funding to the needs of individual agencies, which is consistent with 7 CFR, section 246.16 (c) (2).

Subpart 2. Administrative funding for operating costs. This subpart is needed to distribute the administrative funds that are left after the distribution of administrative funds under subpart 1 in a consistent manner statewide.

Subpart 3. Allocation of remaining administrative funds. This subpart is needed to distribute administrative funds left after administrative funds are distributed according to subpart 2. It is reasonable for the commissioner to consider the costs under item A because the primary source of WIC funding is distributed according to the number of participants served by a local agency, yet many of the costs incurred by a local agency are the same or more regardless of the number of participants. For example, staff from the local agency in Grand Portage, Minnesota, which serves the least number of participants, must travel further to attend WIC meetings in St. Paul than staff from most WIC local agencies.

It is reasonable for the commissioner to consider costs related to the geographic area of a local agency because the geographic areas of local agencies range from 6 to two thousand square miles. The average number of miles traveled per month to clinic sites ranges from 0 to two thousand.

It is reasonable for the commissioner to consider the costs under item C because not all agencies can always be financially prepared for the costs of special program activities that are not ongoing activities.

It is reasonable to use the value of 900 participants per quarter because the commissioner analyzed expenditures according to local agency size. Local agencies with 900 or fewer participants have higher costs.

4617.0042 REPORTING REQUIREMENTS.

The reports required under this part are needed for the commissioner to efficiently and effectively manage the WIC program. It is reasonable for the commissioner to require local agencies to submit the reports in items A to C because that requirement is consistent with 7 CFR, section 246.6 (b) (1) and (7). Items A to C are also consistent with the federal guidelines for distributing funds to local agencies under 7 CFR, section 246.16 (c).

Under 7 CFR, section 246.25 the commissioner must submit financial and participation reports to the federal government which

contain information that is most efficiently and effectively obtained by having local agencies submit it to the state. Therefore the reporting requirements under this part are also reasonable because they parallel the types of reports the commissioner must in-turn provide the federal government.

4617.0043 EVALUATIONS AND MONITORING.

This part is needed to govern the procedures used by the commissioner to determine whether a local agency has done or is doing what it agreed to do under the federal and state WIC program rules. The part is reasonable because the evaluation is limited to WIC program objectives and responsibilities.

The part is also reasonable because it is consistent with the generally accepted principles of evaluation and monitoring: setting and clarifying objectives and goals; determining whether objectives have been met; and correcting deficiencies.

As the supervisor of the WIC program for the state of Minnesota, it is appropriate for the commissioner to approve plans for correcting deficiencies in local agency activities.

To ensure that the state agency (the commissioner) can effectively monitor and supervise the WIC program statewide, 7 CFR, section 246.3 (d) requires the state agency to have a minimum number of employees who are qualified to administer each aspect of the WIC program. The state of Minnesota has complied with those staffing requirements.

Also, this part is consistent with 7 CFR, section, 246.19 (b).

4617.0044 NUTRITION EDUCATION PLAN; REQUIREMENT.

This part is needed for clarification purposes only. It is reasonable because it consistent with 7 CFR, section 246.11 (d) (2).

The two-year duration of the plan is reasonable because a two-year period is consistent with the two-year grant cycle of the state WIC program. To be consistent with the requirement of 7 CFR, section 246.11 (d) (2) that the plan be an annual plan, each local agency is required under subparts 5 and 6 to evaluate and revise the plan if necessary on an annual basis. This type of planning schedule increases administrative efficiency by changing only those parts of the plan that need to be changed to meet program objectives.

4617.0045 NUTRITION EDUCATION PLAN SUBMISSION DEADLINES.

Subp. 1. General deadline. Under 7 CFR, section 246.11 (d) (2) the local agency is required to "submit its nutrition education plan to the State agency by a date specified by the State agency."

Therefore this subpart is needed and reasonable because it clarifies and specifies the deadline for submission of plans according to the federal regulations. It is reasonable to require agencies to submit their plans by the October 1st that is the starting date of the plan because that deadline will give the commissioner sufficient time during the beginning months of the plan to review and approve the plan.

Subp. 2. Transfer agency. After 180 days of operation is a reasonable time for a transfer agency to submit a nutrition education plan because the agency needs time to get to know the WIC program, to assess available resources, to survey participant needs, and to develop plans to address identified problems.

Subp. 3. Migrant service agency. Two months before beginning operations each year is a reasonable deadline for a migrant service agency to submit a nutrition education plan because the state needs that two months to use the migrant service agency plans to develop the state plan for state coordination with migrant service agencies, and to correct the plan before the migrant farmworking season begins if needed.

4617.0046 CONTENTS OF A NUTRITION EDUCATION PLAN.

Generally, items A to H are needed to help the commissioner and the local agencies meet the "two broad goals" of nutrition education established under 7 CFR, section 246.11 (b). Also, listing the components that nutrition education plan must have helps ensure that the commissioner has enough information from each local agency to determine whether each local agency plan is consistent with federal and state educational requirements. Under 7 CFR, section 246.11 (c) (1) the commissioner must develop and coordinate nutrition education "with consideration of local agency plans".

Item A is needed to ensure that a local agency nutrition education plan is consistent with 7 CFR, section 246.11 (b).

Item B is reasonable because it is consistent with 7 CFR, section 246.11 (c) (5) and (6).

Item C is reasonable because the commissioner needs to know whether the local agency intends to comply with 7 CFR, section 246.11 (e).

Item D is reasonable because it is consistent with 7 CFR, section 246.4 (a) (8) and with the commissioner's responsibility under 7 CFR, section 246.11 (c) (1) to coordinate WIC program nutrition education with "available nutrition education resources".

Item E is needed to hold a local agency accountable for

providing nutrition education and to provide information needed to evaluate nutrition education. The item is reasonable because it is consistent with 7 CFR, section 246.11 (e) (4).

Item F is needed for the commissioner to determine whether the criteria used are consistent with the requirements of 7 CFR section 246.11 (a) (1) and for the local agency to select participants for high risk education contacts consistently and objectively. The item is reasonable because it gives the commissioner and the local agency the information needed to later evaluate whether the appropriate persons were chosen to receive high risk nutrition education contacts. Without the criteria, it would be more likely that a local agency would give high-risk nutrition contacts to participants who didn't need them and would miss giving high-risk nutrition contacts to participants who did need them.

Item G is needed to effectively serve individuals from specific cultural and ethnic backgrounds. The item is reasonable because it is consistent with 7 CFR, sections 246.11 (a) (1) and (c) (3).

Item H is needed for the commissioner to effectively and efficiently monitor how information regarding the evaluations of previous nutrition education plans is used to improve current nutrition education plans. The requirement is reasonable because the evaluation is required to be completed by the same date that the next nutrition education plan is required to be completed.

I. This item is needed to identify the persons who provide the nutrition education so that the commissioner can verify that the people providing the education are qualified according to chapter 4617.

J. This item is needed for the identification and accountability of the person approving the nutrition education plan.

4617.0047 EVALUATION AND REVISION OF NUTRITION EDUCATION PLAN

Subp. 1. Evaluation. This subpart is needed to comply with the requirement of 7 CFR section 246.11 (c) (5) that the state "annually perform and document evaluations of nutrition education activities". Since development of the plan is a nutrition education activity the commissioner must evaluate that activity for the commissioner's administration of the WIC program to be consistent with the regulations. The evaluation is reasonable because it will yield information that will enable the local agency to improve WIC program effectiveness, incorporate new knowledge about nutrition, or to comply with changes in federal regulations. Also, 7 CFR, section

246.11 (d) (2) requires the local agency to develop a "nutrition education plan consistent with the State's nutrition education component of Program operations and in accordance with this part [246.11] and FNS guidelines". The commissioner must evaluate the plan and request clarification of plan components or submission of missing components to ensure that the nutrition plan is consistent with 7 CFR, section 246.11 (d) (2).

Subp. 2. Revision. This subpart is needed to require that a nutrition education plan be revised when an evaluation under subpart 5 indicates the revisions are needed to make the plan consistent with WIC program goals. The requirement is reasonable because it is consistent with the idea that a nutrition education plan be a yearly plan and because it helps the program regularly assess the status and effectiveness of nutrition education services. The requirement for revisions also enables the WIC program to make changes indicated by evaluations, needs assessments and new program policies.

Subp. 3. Written report. The report required under this subpart is needed to clarify the revisions of the plan for the commissioner and to clarify that a report must be submitted for each previous year's nutrition education plan. The reports are also needed for the commissioner to identify ways to improve coordination of the WIC program at the state level. Under 7 CFR, section 246.11 (c) (1) the state must "develop and coordinate the nutrition education component of program operations with consideration of local agency plans, and available nutrition education resources."

4617.0049 APPROVAL OF NUTRITION EDUCATION PLAN AND WRITTEN REPORT.

This part is necessary and reasonable because it is consistent with 7 CFR, section 246.11 (d) (2) where it is required that a local agency develop a nutrition education plan that is consistent with the State's nutrition education component of WIC program operations. Approving local agency nutrition education plans and written reports of plan evaluations is a reasonable way to ensure compliance of local agency nutrition education plans with the State WIC program because the state is responsible for the overall supervision of the WIC program.

4617.0050 ROLE OF NUTRITION EDUCATION COORDINATOR.

This part is needed because nutrition education under the WIC program must be given by individuals who have nutrition education experience and training. It is reasonable to have a nutrition education coordinator perform the responsibilities under this part

because a nutrition coordinator, as defined by part 4617.0002, subpart 25, receives training that specifically prepares them to help the local agency and WIC program achieve the goals specified by 7 CFR, section 246.11 (b).

Requiring a nutrition education coordinator from a local agency to attend the annual nutrition education conference sponsored by the commissioner is reasonable because this is consistent with 7 CFR, section 246.11 (c) (2), which requires the commissioner to "provide in-service training and technical assistance for professional and para-professional staff involved in providing nutrition education to participants at local agencies".

4617.0052 QUALIFICATIONS OF NUTRITION EDUCATION INSTRUCTORS.

It is reasonable to require that nutrition education be provided by a competent professional authority because nutrition education requires the provider or the education to thoroughly understand the principles of nutrition and to make fine judgments about the nutritional needs of participants.

The staffing requirements under this subpart also help implement the commissioner's responsibility to "establish standards for participant contacts that ensure adequate nutrition education in accordance with paragraph (e) of [7 CFR, section 246.11]" and under 7 CFR, section 246.11 (c) (7).

A person who provides nutrition education to groups of participants does not have to be a competent professional authority because the education provided to groups is of a more general nature, is developed and approved by the nutrition education coordinator and does not involve the precise evaluation of nutrition education needs of an individual participant.

4617.0054 SCHEDULE OF NUTRITION EDUCATION SESSIONS.

The different types of nutrition education required by subparts one and two (one-to-one, group and high-risk) are needed to comply with 7 CFR, section 246.11 (a) (1), which requires nutrition education to "bear a practical relationship to participant nutritional needs, household situations, and cultural preferences ". By having several types of nutrition education the local agency can match the types of nutrition education to the needs of individual participants and to the changing needs of participants.

It is reasonable to require under subparts one and two that the first nutrition education session provided at the certification appointment be a one-to-one session. During the one-to-one session the nutrition educator can observe the participant or caretaker for

physical signs of nutrition problems. Also, nutrition problems that are unique to the participant or parent of the participant, such as problems with breastfeeding, can be discussed. It may also be necessary to provide health services to the participant at the time of the one-to-one session.

Subp. 1. Schedule of nutrition education sessions for infants whose certification period ends after their first birthday, women, and children. This subpart is needed to comply with 7 CFR, section 246.11 (e) (2) which requires that at least two nutrition education sessions (contacts) be offered. This subpart is reasonable because it is consistent with the federal regulations.

Subp. 2. Schedule of nutrition education sessions for infants whose certification will end on the infant's first birthday. This rate at which nutrition education must be offered under this subpart is needed and reasonable because it is consistent with 7 CFR, section 246.11 (e) (3).

4617.0056 CONTENTS OF NUTRITION EDUCATION SESSIONS.

Subp. 1. Contents of nutrition education for women, children and infants.

A. Item A is necessary and reasonable because encouragement of breastfeeding is required by 7 CFR, section 246.11 (e) (1). The item is reasonable because it is consistent with the federal regulations.

B. Subitems (1) through (11) are needed to help motivate a participant to do the things that are necessary to improve the participant's health by clarifying for the participant the participant's nutritional and health deficiencies and how the deficiencies can be eliminated. Subitems (1) through (11) are reasonable because, frequently, individuals who understand the consequences of a behavior will change that behavior to correct a problem and because they are consistent with 7 CFR, section 246.11 (b) (2).

Allowing local agencies to choose which explanation to include in a nutrition education session gives the local agency the flexibility needed to tailor a basic nutrition contact to the needs of the participant, which is consistent with 7 CFR, section 246.11 (e) (1).

Subitems (8) through (11) have additional rationale as follows:

Subitem (8) is reasonable because it can help a person understand the reasons a food prescription was given during the certification and to know that some health problems are directly

related to diet.

Subitem (9) is reasonable because it helps the participant understand that WIC prescribed foods are not the only nutritional foods available to the participant and that the participant must continue or begin eating a variety of foods.

Subitem (10) is reasonable because it helps to identify and clarify participant concerns.

Subitem (11) is reasonable because it is consistent with 7 CFR, section 246.11 (e) (6).

Subp. 2. Contents of nutrition education for the parent or caretaker of an infant participant. This subpart is needed to address the special nutrition education needs for infants.

Items A to D are needed to ensure that the parent or caretaker of the infant gives the infant the prescribed supplemental foods in a manner that is consistent with the prescription. The proper development of infants depends on specific nutritional needs at specific times in the infant's physical development, therefore it is important that the infant gets the proper nutrition as early as possible in the infant's life and on a regular schedule for the first few years after the infant is born.

Subp. 3. Contents of high-risk nutrition education. (See the statement of need and reasonableness for part 4617.0058)

4617.0058 INDIVIDUAL CARE PLAN

Part 4617.0056, subpart 3 and this part are needed to clarify who must be given a high-risk nutrition education contact and for whom an individual care plan must be prepared. The requirement for an individual care plan under subpart 14 is reasonable because it is consistent with 7 CFR, section 246.11 (e) (5). It is reasonable to not specify the types of information or forms of education that must be included with a high-risk nutrition education contact because the nutritional status of the individual for whom the contact is needed is likely to be unique to that individual and therefore require specific types of education and intervention, which is also why an individual care plan is needed for that participant.

It is necessary and reasonable to prepare an individual care plan for a participant who requests it because that is consistent with 7 CFR, section 246.11 (e) (5).

VENDORS

REPLACEMENT OF THE TERM "CONTRACT" WITH THE TERM "GUARANTEE" AND DELETION OF "IN A CONTRACT PERIOD".

Throughout chapter 4617, the phrase "vendor contract" is replaced with the phrase "vendor guarantee". Replacing "vendor contract" with "vendor guarantee" is needed for clarification purposes only. The phrase "vendor contract" is a misnomer because the written document that must be submitted under the current rule part titled part **"4617.0075 VENDOR CONTRACTS"** does not technically meet the legal requirements of a contract. The written document required by part 4617.0075 does not have "mutual consideration". Mutual consideration is required for a document to be considered a contract. Therefore it is reasonable that the phrase "vendor contract" be replaced with "vendor guarantee", which more accurately reflects the function of the document required by part 4617.0075. The function of the document is to provide a means to verify that the vendor signing the document understands and agrees to abide by the requirements of chapter 4617 while participating as a vendor in the WIC program. Also, under part 4617.0075, the phrase "in a contract period" is deleted wherever it was used in reference to "vendor contracts" because with the replacement of the phrase "vendor contract" with "vendor guarantee" the phrase "in a contract period" is confusing for the reader.

4617.0060 GENERAL APPLICATION REQUIREMENTS

Subp. 3. Submission deadlines for applications. Deletion of the phrase "Except as provided in subpart 5," is needed for clarification purposes only. The phrase was inadvertently left in the subpart during the drafting process. Deletion of the phrase is reasonable because it does not change the meaning of the subpart.

4617.0065 VENDOR ELIGIBILITY CRITERIA

Subp. 2. Minimum in-stock requirements.

Item B.

Subitem (2). The amendments to this subitem are needed to clarify that "Isomil SF" and "Similac PM 60/40" are required not "Isomil" and "Similac 60/40". The changes are reasonable because they do not change policy. The initials "SF" and "PM" were inadvertently omitted when chapter 4617 was first promulgated.

Including "PediaSure", "Similac Special Care with Iron 24" and "Alimentum" with the group of products that must be available to a participant within three business days is necessary and reasonable because those products are products that became available for retail sale after chapter 4617 was promulgated and because the products are

consistent with the types of supplemental food that may be prescribed under 7 CFR, section 246.10.

The products are required to be available within three business days because they are products that some infants must have within a short time because of medical reasons. It is reasonable to require pharmacies to have them available within three business days because pharmacies usually can get the products in that amount of time because their usual and customary business includes frequent special orders from manufacturers of the special formulas. Grocery stores do not have frequent special orders from those companies on demand from their customers.

4617.0075 VENDOR GUARANTEES.

Item A. It is necessary to delete the phrase "names of contracting parties" because the document required by this part is not a contract (see the above statement of need and reasonableness for the "REPLACEMENT OF THE TERM CONTRACT WITH THE TERM GUARANTEE"). It is reasonable to require instead under item A, "the name and address of the vendor" because the vendor is the entity that must comply with the requirements stated on the "vendor guarantee".

Item E.

(1) Insertion of the phrase "or any local agency" in this item is needed for clarification purposes. The insertion of "or any local agency" is reasonable because 7 CFR, section 246.12 (r) states that the "State agency shall ensure that no conflict of interest exists between any local agency and the food vendor or vendors within the local agency's jurisdiction".

Item G. It is necessary and reasonable to delete the requirement for the commissioner's signature because the "vendor guarantee" discussed above is not a contract.

APPROVED FOODS

STATEMENTS OF NEED AND REASONABLENESS THAT APPLY TO PARTS 4617.0170 TO 4617.0180.

According to 7 CFR, section 246.10 (b) (1) the state agency "shall identify foods which are acceptable for use in the Program in accordance with the requirements of this section [7 CFR, section 246.10] and provide to local agencies a list of acceptable foods and their maximum monthly quantities as specified in paragraph (c) of this section [7 CFR, section 246.10]. . ." . Parts 4617.0170 to 4617.0180 are needed to implement the federal regulations and are

reasonable because they are consistent with the federal regulations.

4617.0170 PREAPPROVED FOODS.

This part is needed to avoid approving foods more often than is necessary. This part is reasonable because the foods that are preapproved under items A to H, such as milk, are consistent in quality regardless of the brand, or because the foods, such as infant formula, do not change once they are approved as WIC authorized food.

4617.0175 BIENIALLY APPROVED FOODS.

Foods within the categories listed under this part, subpart 1, vary in quality according to the brand and they are subject to relatively frequent (compared to the preapproved foods) changes in content, quantity or other characteristics affecting the nutrition of the product and use of that product as supplemental food under the WIC program. This part is needed, therefore, to ensure that the commissioner's knowledge of the foods within the categories listed under this part, subpart 1, is sufficient for the commissioner to determine whether the foods' nutritional qualities are consistent with the requirements of the WIC program.

Subpart 1. Food products. This subpart is needed to clarify which foods must be approved according to this part. It is reasonable to include the juice products listed under this subpart as biennially approved foods because juice food products vary in the level of vitamin C that they contain. Vitamin C is the primary benefit of these foods for WIC program participants. It is reasonable to include cereal as a bienially approved food because the amount of sugar and iron added to cereal varies.

Subp. 2. Previously approved food products. This subpart is needed and reasonable because it ensures that all foods will eventually be compared to the approval criteria under part 4617.0180.

Subp. 3. New food products. This subpart is necessary and reasonable for clarification purposes only.

Subp. 4. Duration of approval. This subpart is needed to clarify the period of approval for food that must be approved under subpart 5 and to establish a limit on the time of approval of foods whose nutritional value can change frequently. Two years is reasonable because it is consistent with administrative functions of the WIC program that occur with the federal fiscal year. A duration of approval that is consistent with the administrative cycles of the WIC program is effective and efficient because the paper work of the

not allowed because it is rarely sold in the container sizes (1/2 gallon or gallon) that are allowed under part 4617.1080, subpart 3. The statement regarding colby longhorn and co-jack cheeses is necessary and reasonable for clarification purposes only. Colby and monterey jack cheeses are allowed under 7 CFR, section 246.10 (c) (4). "Longhorn" refers only to how the cheese is cut and "co-jack" means a mixture of colby and monterey jack cheeses.

Requiring a minimum amount of vitamin C in the 1 to 3 ratio of frozen concentrate juice is needed because many participants do not consume enough vitamin C. It is reasonable to specify 30 milligrams of vitamin C per 100 milliliters of frozen juice when reconstituted at a ratio of one ounce of frozen concentrate to 3 ounces of water because that ratio is the standard reconstitution ratio for most frozen juices. The requirement of 30 milligrams of vitamin C per 100 milliliters of frozen juice is also required by 7 CFR, section 246.10 (c) (2) (iii).

Subp. 3. Packaging. This subpart is necessary and reasonable because the sizes and weights listed under this subpart are the sizes and weights that must be prescribed for the participants according to 7 CFR, section 246.10. These sizes and weights are the amounts that best suit the nutritional needs of applicants. For example, foods are issued in the amounts that can be consumed between participant appointments with the local agency.

Under 7 CFR, section 246.10 food packages are listed for the categories and ages of participants. The food packages list the maximum quantities allowed per month per participant. The packages also indicate, however, that the "quantities and types of supplemental foods prescribed shall be appropriate for the participant taking into consideration the participant's age and dietary needs" (see for example 7 CFR section 246.10 (c) (1) (ii)). The package quantities are reasonable because they are in amounts that can meet the nutritional needs of the participants without taking the chance that food stored in open containers for unnecessary amounts of time would rot or that it would be consumed by someone other than the participant.

In some cases, such as with milk under item C, hot cereals under item K, and ready-to-eat cereal under item L, the price of the food in container sizes other than the sizes listed in the rules makes that food cost prohibitive.

Item K is also reasonable because some hot cereals in individual packets can not be clearly distinguished as a product

that is allowed under the WIC program.

Subp. 4. Cost. This subpart is necessary to maintain the efficiency of the WIC program. It is reasonable because it is consistent with 7 CFR, section 246.12 (f) (2) (ii).

Subp. 5. Availability. There are substantial administrative costs when a food product is approved for purchase with WIC vouchers. Examples of the administrative costs include the costs of printing the name of the food on the backs of vouchers as an available WIC food and the mailing of notices to all 2000 vendors and 61 local agencies that the food has been approved. If the state approved a food when it was available at only one store it would frequently be spending administrative funds for the approval of foods on a store-by-store basis. Such approvals would be an inefficient and ineffective use of WIC administrative funds. This subpart is reasonable, therefore, because it decreases the number of times that the commissioner must approve a food for consumption by relatively few participants. It is also reasonable because it does not restrict the geographic distribution of the three stores in which the food must be available. The stores could be in the same neighborhood or be in separate parts of the state. If, for example, there was a special population in need of a particular food it would not be difficult to get three stores to stock the food.

Subp. 6. Distinction. This subpart is needed to ensure that participants and vendors know which package contains the WIC approved foods and because manufacturers sometimes package different variations of a product in similar looking packages. The requirement for distinction of packaging is reasonable because it is possible for participants to purchase a product that appears to be the WIC prescribed food but which really is a different product in a similar looking package.

EXPERT WITNESSES.

The department will not present expert witnesses to testify concerning the provisions of these proposed rules on behalf of the department.

DATE: 3/20/89

Sister Mary Madonna Ashton
Commissioner of Health

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Suitor, Carol W., and Hunter, Merrily F. Nutriton: Principles and Application in Health Promotion. Philadelphia: J. B. Lippincott Company, 1980.

DEPARTMENT : ATTORNEY GENERAL

STATE OF MINNESOTA Exhibit A

Office Memorandum

DATE : FEBRUARY 7, 1989

TO : DAVE SIEGEL
Central Medical Building
393 N. Dunlap

FROM : PATRICIA A. SONNENBERG
Special Assistant Attorney General

PHONE : 296-7013

SUBJECT : IDENTIFICATION OF ENACTMENT OR PROMULGATION DATES OF FEDERAL STATUTES AND REGULATIONS INCORPORATED IN STATE RULES

This memo is in response to your request for advice on whether state rules must specify the enactment dates of federal statutes and regulations they incorporate. You indicated the Revisor of Statutes believes the enactment dates must be specified.

After looking into this matter, I conclude that specifying the enactment dates of federal laws is not necessary and, indeed, may be unwise in certain situations.

Generally, an administrative agency may not delegate its powers to another entity without statutory authorization. Muehring v. School District No. 31 of Stearns County, 224 Minn. 432, 28 N.W.2d 655, 658 (1947). It is not an improper delegation of authority, however, for an administrative agency to adopt the standards of another entity with expertise in the area. Application of Horner, 275 N.W.2d 790, 796-97 (Minn. 1978), appeal dismissed, 441 U.S. 938, 99 S. Ct. 2154, 60 L. Ed.2d 1040 (1979). Nor is it an improper delegation of authority if a rational basis for adopting another entity's standards or verifications exists. Droganosky v. Minnesota Bd. of Psychology, 367 N.W.2d 521, 525 (Minn. 1985).

The Minnesota Supreme Court has specifically held that adoption or incorporation of federal legislation in the future is permissible if the state rule governs a program which is auxiliary in nature and seeks to achieve uniformity in the implementation of national programs and policies. Wallace v. Commissioner of Taxation, 289 Minn. 220, 184 N.W.2d 588 (1971), Minn. Recipients Alliance v. Noot, 313 N.W.2d 584, 587 (Minn. 1981). Even if the program is not auxiliary to federal statutes, the adoption of federal legislation in state rules will be upheld if "good reasons" exist to coordinate the federal and state eligibility requirements and the state agency will be making the ultimate determination which affects the applicant. Minnesota Energy & Economic Development Authority v. Prunty, 351 N.W.2d 319, 352 (Minn. 1984).

Although in Wallace v. Commissioner of Taxation, 289 Minn. 220, 184 N.W.2d 4588 (1971), the Minnesota Supreme Court held that a state tax law incorporating certain interval revenue code provisions incorporated these provisions as of the date the state law was enacted and did not include any subsequent amendments made by Congress, the court has refused to apply the Wallace rationale in other cases. Minnesota Recipients Alliance v. Noot, 313 N.W.2d 584, 587 (Minn. 1981), Minnesota

Energy & Economic Development Authority v. Prunty, 351 N.W.2d 319, 351-52 (Minn. 1985).

Moreover, since Wallace, the state legislature has specifically approved the automatic inclusion of subsequent federal amendments into state rules. Minnesota law provides:

> When an act adopts the provisions of another law by referral it also adopts by reference any subsequent amendments of such other law, except where there is clear legislative intention to the contrary.

Minn. Stat. § 645.31, subd. 2 (1988). The above statute governs all rules becoming effective after June 20, 1981, unless specifically provided to the contrary by law or rule. Minn. Stat. § 645.001 (1988).

The above statutory and case law, supports the proposition that enactment dates of federal laws need not be specified in state rules. Moreover, there are many instances when including an enactment date for the incorporated federal law would be harmful to the state. The recently adopted Hospice Rule for example, incorporated several federal laws. Under the Social Security Act, the state was mandated to operate its Hospice program in accordance with federal law. There was little or no discretion given to the state to deviate from federal statutes and regulations. In spite of this fact, the enactment date of the federal laws were specified in the rule, thereby precluding the automatic inclusion of subsequent amendments to the federal law. The minute the federal law changes, Minnesota's rule will be out of compliance with federal requirements and will have to be amended. Until the Hospice Rule is amended to conform to federal requirements, the state could be subject to federal fiscal sanctions. If the state implements the federal changes without changing its rule, it is vulnerable to litigation alleging failure to comply with its own rule and lack of power to change its policies without going through the rulemaking process. Such a dilemma could have been avoided by not specifying the enactment dates of the federal laws incorporated into the Hospice rule.

I would strongly encourage the Department to refrain from routinely using the enactment dates of the federal laws it is incorporating into its rules. Whether enactment dates should be used in a given instance is a question which will depend upon whether the state has any discretion to refrain from adopting any future federal changes, the potential sanctions the state will face if its program is out of compliance with federal requirements and the time and manpower needed to amend the rules.

PAS:kso