

Issue

The current Women, Infants, and Children (WIC) Program requires that infant formula suppliers hold a valid seller's permit.

Background

At its Legislative Committee meeting on September 11, 2007, an issue was brought before the Board regarding the California Department of Public Health's (CDPH) guidelines related to sellers of infant formula under the Women, Infants, and Children (WIC) Program. The issue related to the requirement in the guidelines that, in order to sell WIC-approved infant formula, retailers may only acquire the infant formula from "authorized suppliers." Under the CDPH guidelines, an "authorized supplier" means a wholesaler, distributor, or retailer within California that has a current, valid seller's permit number that the retailer has verified through the Board. Since suppliers of infant formula that only make nontaxable sales of formula or other food products are not required to hold seller's permits, the CDPH guidelines are in conflict with the seller's permit requirements.

This conflict affected one particular taxpayer that is both a retailer of WIC-approved infant formula, as well as a supplier. The taxpayer owns approximately 70 retail stores in California that sell only WIC-approved foods and infant formula. The taxpayer was also an "authorized supplier" of infant formula, as the taxpayer had held a valid seller's permit. However, in the course of a Board audit, the auditor noted that the taxpayer made no taxable sales. Thus, the auditor recommended that the taxpayer's seller's permit be closed. However, under the CDPH guidelines, without a valid seller's permit, the taxpayer would no longer be regarded as an "authorized supplier" for purposes of the WIC program and would no longer be able to sell WIC-approved infant formula. The taxpayer therefore sought the Board's assistance.

At the Legislative Committee meeting, the Board directed staff to not revoke any WIC infant formula suppliers' seller's permits on the basis that the supplier only sells nontaxable food products, until such time as the issue can be addressed with the CDPH. The Board also directed staff to (1) work with the CDPH to find ways to revise its guidelines to meet its objectives while either eliminating or modifying the seller's permit requirement, and (2) report back to the Committee on the results of that meeting.

This document is a summary of the results of the discussions held with CDPH.

CDPH Discussions

Staff held discussions with various representatives of the CDPH, including the Chief of the WIC Supplemental Nutrition Branch, the Chief of the Food Management and Integrity Section, and the Chief of the Program Integrity Unit. Staff explained the conflict between the CDPH guidelines and the seller's permit requirements, and suggested that the guidelines be modified to either eliminate the seller's permit reference altogether, or, at a minimum, make an exception for those infant formula suppliers whose only sales consist of nontaxable sales of

food. Instead of requiring a seller's permit, staff suggested that those suppliers obtain a letter from the Board that verifies that such suppliers need not hold seller's permits. Staff explained that the possession of a seller's permit does not guarantee the quality of a product sold or the validity of its labels, and may not be the most suitable proxy for purposes of assuring quality infant formula is on the grocery store shelves.

In the discussions, the CDPH representatives recognized that possessing a seller's permit does not guarantee the quality of infant formula. It is the CDPH's belief, however, that the possession of a seller's permit is, at a minimum, indicative that the holder is in fact, a legitimate business. Also, the USDA's General Counsel has approved this methodology for purposes of complying with the federal mandate that required every state by October 1, 2005 to maintain an approved list of infant formula suppliers who provide formula to WIC vendors. Other states are using this methodology as well.

Further, the CDPH was confident that the taxpayer that brought this issue to light is likely the only taxpayer in such a situation. Of the infant formula suppliers that CDPH is aware, that particular taxpayer was the sole infant formula supplier that only sold nontaxable food products. All other suppliers sell taxable goods, such as cleaning supplies, cigarettes, and various sundry items. Staff obtained a sampling of such suppliers, and confirmed that all those in the sampling did in fact sell other taxable items and held seller's permits.

In addition, in its efforts to comply with the 2004 Federal mandate, CDPH considered various alternatives, and the seller's permit requirement was the only viable option. The other options considered included:

- CDPH composing its own written listing of authorized suppliers. This option was not pursued as the CDPH believed it was time and cost prohibitive, and that such a listing would be outdated as soon as it was prepared.
- Using information the Department of Health Care Services maintains by its own Food and Drug Branch, which registers persons that engage in the manufacture, packing, or holding of any processed food in this state. Due to various exceptions from registration, such as retail food establishments with a valid registration from a local health agency, the CDPH determined that the listing of registrants would not be useful. Also, this listing is not accessible to the public due to public security issues.
- Since every WIC authorized vendor is required to hold a health permit, the CDPH considered compiling a list of those health permittees. However, there was no master listing available, and it noted that in cases where a local health agency does not have sufficient funding to oversee such a program, the state steps in to administer one for that local agency. Consequently, the CDPH concluded that it would be a significant burden to require vendors to determine which local agency had enforcement authority in order to verify a permit.

- Using business licenses as a source from which vendors could determine whether their suppliers were legitimate businesses. However, there was no one database listing for vendors to verify, and with over 500 local jurisdictions, the burden would be too great for vendors.

In determining the best option, the CDPH was of the understanding that all infant formula suppliers would be required to hold a valid seller's permit. The CDPH noted that the Board's database of all sellers is accessible to the public either on-line, or by telephonic or written request, and that vendors could easily locate the supplier through the Board's database.

Conclusion

CDPH noted that any exceptions to the current adopted guidelines would require approval by the USDA, and since there is apparently only one taxpayer that is affected by this conflict, it does not see a compelling need to change its current guidelines at this point. However, the CDPH and Board staff agreed that if this issue becomes a growing concern, we will revisit it at that time. In order to address the concern of the specific taxpayer, Board staff has reinstated his seller's permit in accordance with the Board's directive.