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Docket No. FNS-2022-0015

*Sent via electronic submissions on the Federal eRulemaking Portal: [www.regulations.gov](http://www.regulations.gov)*

**Re: Comments on the Proposed WIC Rule Regarding Online Ordering and Transactions and  
Food Delivery Revisions to Meet the Needs of a Modern, Data-Driven Program**

To Whom It May Concern,

These comments are submitted on behalf of the Harvard Law School Food Law and Policy Clinic (FLPC) in response to the Food and Nutrition Service, U.S. Department of Agriculture's (USDA) Federal Register notice of a proposed rule regarding the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC): Online Ordering and Transactions and Food Delivery Revisions to Meet the Needs of a Modern, Data-Driven Program.

FLPC is an educational program at Harvard Law School that serves partner organizations and communities by providing guidance on food system issues and advocating for food systems change, while engaging law students in the practice of food law and policy. FLPC focuses on increasing access to healthy foods, supporting sustainable and equitable production, promoting community-led food system change, and reducing waste of healthy, wholesome food.

FLPC commends the USDA on its work updating and harmonizing WIC program regulations with the contemporary needs of participating mothers and children. By progressively transitioning the WIC program to enable online shopping, the USDA is taking a crucial step towards promoting equity and ensuring improved access to food, especially for communities with limited food resources or other challenges accessing physical retailers. This move is also a necessary step towards aligning the WIC program with the Supplemental Nutrition Assistance Program (SNAP), administered by the USDA, which introduced online shopping four years ago and is currently available in almost every state and the

District of Columbia.<sup>1</sup>

WIC is a vital program that provides nutrition-rich foods, nutrition education (including breastfeeding support), and referrals for healthcare and social services to millions of low-income women, infants, and children.<sup>2</sup> Since its establishment in 1974, WIC has successfully reduced fetal deaths, improved diet and diet-related outcomes for its participants, decreased healthcare costs, and facilitated the growth and cognitive development of infants and children.<sup>3</sup> However, despite its numerous benefits, nearly 50 percent of eligible participants have remained unenrolled in recent years.<sup>4</sup> The program's outdated regulations, designed when WIC benefits were distributed via paper vouchers, hinder its effectiveness.<sup>5</sup> Updating the program to meet the evolving needs of its participants by aligning with current food retail practices and updates to the SNAP program will position WIC to increase the program's reach and better serve nutritionally at-risk women, infants, and children.<sup>6</sup>

### **Overview of Proposed Rule**

Currently, WIC require families participating in the WIC program to pick up and use their WIC benefits in person.<sup>7</sup> WIC participants or their proxies are required to pick up their voucher, electronic benefits card, or other instrument that will be used to purchase WIC-eligible foods when scheduled for nutrition education or recertification appointments.<sup>8</sup> The requirement to be physically present when picking up food instruments is a barrier for participants with limited time, money, or transportation options. The COVID-19 pandemic highlighted the separate challenge of in-person shopping during times of emergency and resulted in a significant increase in the number of Americans purchasing food online.<sup>9</sup> Stakeholders and participants have since advocated for remote services and access to online shopping, curbside pickup, and delivery options for WIC participants, and USDA responded by piloting WIC online shopping projects in select states.<sup>10</sup> Recognizing the importance of remote services and access to online shopping options for all Americans, including participants in the WIC program, USDA

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<sup>1</sup> *Stores Accepting SNAP Online*, FOOD & NUTRITION SERV. (last updated Aug. 4, 2022)

<https://www.fns.usda.gov/snap/online-purchasing-pilot#:~:text=Based%20on%20selections%20made%20by,York%2C%20Oregon%20and%20Washington>.

<sup>2</sup> CONG. RES. SERV., R44115, A PRIMER ON WIC: THE SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS, AND CHILDREN 1 (2017) <https://crsreports.congress.gov/product/pdf/R/R44115> [hereinafter A PRIMER ON WIC].

<sup>3</sup> *About WIC: How WIC Helps*, FOOD & NUTRITION SERV., <https://www.fns.usda.gov/wic/about-wic-how-wic-helps> (last visited May 17, 2023).

<sup>4</sup> FOOD & NUTRITION SERV., NATIONAL- AND STATE-LEVEL ESTIMATES OF THE SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS, AND CHILDREN (WIC) ELIGIBILITY AND WIC PROGRAM REACH IN 2020 (SUMMARY) 1 (Jan. 2023) <https://www.fns.usda.gov/sites/default/files/resource-files/2020-wic-eligibility-report-summary.pdf>.

<sup>5</sup> FOOD & NUTRITION SERV., TASK FORCE ON SUPPLEMENTAL FOOD DELIVERY IN THE WIC PROGRAM—RECOMMENDATIONS REPORT 4 (2021) <https://www.fns.usda.gov/wic/food-delivery-task-force-recommendations-report> [hereinafter TASK FORCE REPORT].

<sup>6</sup> A PRIMER ON WIC, *supra*, note 2.

<sup>7</sup> 7 C.F.R. § 246.12(r)(4) and 246.12(h)(3)(vi).

<sup>8</sup> 7 C.F.R. § 246.12(r)(4).

<sup>9</sup> Zoe Han, *Low-income Families May Finally be Able to Purchase Food Online With Their WIC Benefits*, MARKET WATCH, (Feb. 23, 2023) <https://www.marketwatch.com/story/low-income-families-may-finally-be-able-to-buy-food-online-with-their-government-wic-benefits-b29f9691> (citing a 2022 study by Coresight Research finding that 54% of Americans purchased groceries online in the prior year).

<sup>10</sup> *WIC Online Shopping Grant*, GRETCHEN SWANSON CTR FOR NUTRITION, [https://www.centerfornutrition.org/wic-online-ordering#:~:text=Minnesota%20\(lead\)%2C%20Iowa%2C.at%20Hy%2DVee%20grocery%20stores](https://www.centerfornutrition.org/wic-online-ordering#:~:text=Minnesota%20(lead)%2C%20Iowa%2C.at%20Hy%2DVee%20grocery%20stores) (last visited May 17, 2023).

is taking steps to remove existing regulatory barriers. Notably, the proposed rule changes would encourage states to issue WIC food instruments remotely and would remove the requirement that WIC participants complete their shopping transactions in the presence of a cashier. FLPC supports these changes that have the potential to advance nutrition security for WIC participants by increasing access to healthy foods and improving program participation as well as benefit redemption rates.

The USDA has requested comments on whether State agencies should be able to cover delivery and other fees related to online shopping, as well as on the possibility of authorizing vendors that sell some WIC-approved foods but do not meet the minimum stocking requirements. FLPC's comments focus on these two areas of inquiry and further recommend that the USDA support vendors and states by:

- creating a centralized and inclusive online purchasing portal that could be integrated into retailers' payment systems to make it easier for smaller businesses to participate as WIC online vendors; and
- advancing a national authorization and monitoring framework to streamline State agency administration.

In combination, these changes would improve the accessibility and convenience of the WIC program, particularly for historically underserved communities, promote equity in the food retail landscape, and enhance program administration.

### **Providing States with Flexibility to Cover Online Shopping Fees Enhances Equity**

Under the proposed regulations, WIC participants who use online shopping to purchase food would be required to pay any related delivery or service fees using non-WIC funds. WIC regulations provide that vendors may not charge State agencies any costs and fees incurred to process electronic benefit transactions<sup>11</sup> and further restrict State agencies from paying or reimbursing vendors for fees related to WIC electronic benefit transactions.<sup>12</sup> USDA proposes to add a new provision clarifying that vendors are further prohibited from charging State agencies any fees associated with online ordering, including delivery, service, or convenience fees. This creates a barrier for WIC participants and smaller retailers who wish to participate but need help absorbing these costs. States should have the discretion to use non-Federal or Federal funding to promote equity and remove barriers to participation, including covering limited costs for online shopping, such as delivery, transaction, membership, or other fees (e.g., \$10/month per participant).

Although some WIC participants are willing and may be able to pay reasonable delivery or service fees (e.g., \$2-\$5),<sup>13</sup> others cannot afford these fees even when their unique needs require delivery or curbside pickup. WIC households with infants or large families,<sup>14</sup> and those without adequate access to transportation, mobility limitations, or health conditions that limit their ability to shop in-store, are among those most likely to need delivery or curbside pickup options. Additionally, some WIC participants report feeling stigmatized or embarrassed and having difficulty identifying WIC-eligible

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<sup>11</sup> 7 C.F.R. § 246.12 (h)(3)(xxviii).

<sup>12</sup> 7 C.F.R. § 246.12 (h)(3)(xxix).

<sup>13</sup> Meghan Zimmer et al., *Feasibility and Acceptability of a "Click & Collect" WIC Online Ordering Pilot*, 121 J. OF THE ACADEMY OF NUTRITION & DIETETICS 12: 2464-2474.e1 (2021) <https://www.clinicalkey.com/#!/content/journal/1-s2.0-S2212267221003397?scrollTo=%23h10000625>.

<sup>14</sup> Qi Zhang et al., *Evaluation of WIC Online Ordering during the COVID-19 Pandemic: Evidence from an Oklahoma Grocery Store Chain*, 15 NUTRIENTS 3:478 (2023) <https://doi.org/10.3390/nu15030478>.

items while shopping in brick-and-mortar stores.<sup>15</sup> Other participants are uncomfortable shopping in crowded stores, which is particularly problematic for those with health issues.<sup>16</sup> Online shopping and internet-based transactions have the potential to significantly increase WIC benefit redemption by addressing the barriers that make it challenging for participants to redeem their benefits in-store. WIC participants are interested in using online ordering and home delivery options<sup>17</sup> and believe these options would provide a more focused and less stressful shopping experience, save time, and eliminate transportation or childcare challenges.<sup>18</sup>

Regulations allow State agencies to cover transportation costs to ensure equitable access to the WIC program, and delivery and service fees should similarly be permitted. Under current regulations, transportation costs are considered "allowable nutrition services and administration."<sup>19</sup> State agencies must approve these costs in advance and document their importance in ensuring program access.<sup>20</sup> State agencies should similarly have the authority to cover online shopping fees as necessary to ensure that participants will be able to access WIC benefits through online shopping. The USDA can issue guidance and policies, as it has done in the past, to help State agencies consider competing demands for nutrition services and administration funds while also promoting fairness and civil rights.<sup>21</sup>

State agencies should further have the flexibility to subsidize fees paid to certain retailers that might otherwise be excluded from the program due to an inability to compete with the economies of scale that benefit large retailers. Some retailers, like Amazon, waive delivery fees for purchases that exceed a certain minimum threshold.<sup>22</sup> Larger retailers can afford to forgo those costs. During the rollout of SNAP online, Walmart and Amazon dominated the SNAP online market.<sup>23</sup> Despite widespread interest, smaller retailers with fewer resources and more constrained finances struggled with the investments required to serve their SNAP customers' online shopping needs.<sup>24</sup> To address the technological and financial barriers that limited the ability of smaller and independent grocers, local growers, farmers markets, and other specialty retailers to participate in online SNAP purchasing, the American Rescue

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<sup>15</sup> Christina Chauvenet et al., *WIC Recipients in the Retail Environment: A Qualitative Study Assessing Customer Experience and Satisfaction*, 119 J. OF THE ACADEMY OF NUTRITION & DIETETICS, 3:416-424.e2 (2019) <https://doi.org/10.1016/j.jand.2018.09.003>.

<sup>16</sup> Collin R. Payne et al., *Can a Better Understanding of WIC Customer Experiences Increase Benefit Redemption and Help Control Program Food Costs?*, J. OF HUNGER & ENVTL. NUTRITION, 13:2, 143-153 (2018) <https://doi.org/10.1080/19320248.2017.1364191>.

<sup>17</sup> Meghan Zimmer et al., *Feasibility and Acceptability of a "Click & Collect" WIC Online Ordering Pilot*, 121 J. OF THE ACADEMY OF NUTRITION AND DIETETICS 12: 2464-2474.e1 (2021) <https://www.clinicalkey.com#!/content/journal/1-s2.0-S2212267221003397?scrollTo=%23hl0000625>.

<sup>18</sup> *Id.*

<sup>19</sup> 7 C.F.R. § 246.14(c)(7).

<sup>20</sup> *Id.*

<sup>21</sup> See e.g., FOOD & NUTRITION SERV., WIC POLICY MEMORANDUM: #95-2, CLARIFICATION OF ALLOWABILITY OF TRANSPORTATION COSTS FOR WIC PARTICIPANTS (Oct. 17, 1994) <https://www.fns.usda.gov/sites/default/files/resource-files/95-2-ClarificationOfTransportationCost.pdf>.

<sup>22</sup> *SNAP Online Purchasing Program FAQ*, MASS.GOV, <https://www.mass.gov/info-details/snap-online-purchasing-program-faq#walmart> (last visited May 17, 2023).

<sup>23</sup> Catherine Douglas Moran, *SNAP Online Availability is About to Explode. But Grocers Say They Still Face Too Many Hurdles*, GROCERY DIVE (Feb. 16, 2021) <https://www.grocerydive.com/news/snap-online-availability-is-about-to-explode-but-grocers-say-they-still-fa/594664/>.

<sup>24</sup> *Id.*

Plan allocated funding to the USDA to provide technology and technical assistance to vendors.<sup>25</sup> Subsidizing delivery fees on purchases made from smaller, independent grocers, farmers, or other specialty retailers is an additional lever that can remove barriers to online WIC redemption, support sales from these businesses, and bring a more diverse and broader range of vendors online.

To promote equity and access to the WIC program for participants, State agencies must have the flexibility to pay delivery or convenience fees consistent with current regulations allowing transportation costs. WIC regulations should further provide State agencies broad flexibility to cover limited fees to facilitate participation by a diverse and wide range of vendors. This will enable State agencies to offer WIC participants more choices and better serve the needs of their communities.

### **Establish Flexible Stocking Requirements, Particularly for Internet-Based Transactions.**

During the COVID-19 pandemic, the USDA granted 26 requests from State agencies and Tribal nations to waive WIC vendor minimum stocking requirements due to significant supply chain and market disruptions.<sup>26</sup> More recently, nationwide infant formula supply chain issues left parents struggling to feed their babies after recalls resulted in severe shortages.<sup>27</sup> Again, the USDA deployed waivers to enable WIC participants to purchase infant formula when retailers could not stock WIC-eligible formulas.<sup>28</sup> These two events emphasized the vulnerability of our nation's food system and the importance of flexibility and diversification of supply chains to ensure equity and resilience. This includes enabling smaller or specialized vendors to participate in the marketplace and serve participants in federal nutrition programs.

Currently, WIC vendors must meet specific criteria to qualify as an eligible retailer, including a minimum stocking requirement.<sup>29</sup> State agencies must establish “minimum requirements for the variety and quantity of supplemental foods that a vendor must stock in order to be authorized. These requirements include a mandate that the vendor stock at least two different fruits, two different vegetables, and at least one whole grain cereal authorized by the State agency.”<sup>30</sup> While these requirements may make sense for physical stores, where they ensure a variety of supplemental foods for WIC benefit redemption and increase access to fresh, nutritious produce for entire communities,<sup>31</sup> they need to be revisited as the program shifts to allow virtual platforms.

Some vendors may have limited product lines, such as infant formula, while producers may only sell their fruits and vegetables or dairy products. Currently, some states, like Colorado, already exempt

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<sup>25</sup> *USDA Expands SNAP Online Shopping, Adds New Retailers*, FOOD & NUTRITION SERV. (Sept. 9, 2022)

<https://www.fns.usda.gov/news-item/fns-0009.22#:~:text=As%20part%20of%20that%20commitment.to%20retailers%20offering%20online%20shopping.>

<sup>26</sup> *WIC- Minimum Stocking Waivers*, FOOD & NUTRITION SERV. (last updated Jan. 19, 2022)

<https://www.fns.usda.gov/wic/covid-19/wic-minimum-stock-waiver> (last visited May 9, 2023).

<sup>27</sup> Arohi Pathak et al., *The National Baby Formula Shortage and the Inequitable U.S. Food System*, CTR. FOR AM. PROGRESS (June 17, 2022) <https://www.americanprogress.org/article/the-national-baby-formula-shortage-and-the-inequitable-u-s-food-system/>.

<sup>28</sup> *Imported Infant Formula and Flexibilities in the WIC Program*, FOOD & NUTRITION SERV. (updated Feb. 2, 2023)

<https://www.fns.usda.gov/wic/imported-infant-formula> (last visited May 9, 2023).

<sup>29</sup> 7 C.F.R. § 246.12(g)(3)(i).

<sup>30</sup> *Id.*

<sup>31</sup> See e.g., Tatiana Andreyeva et al., *Changes in Access to Healthy Foods after Implementation of the WIC Food Package Revisions* (2011) <https://ageconsearch.umn.edu/record/292086/>; Amy Hillier et al., *The Impact of WIC Food Package Changes on Access to Healthful Food in 2 Low-Income Urban Neighborhoods*, 44 J. OF NUTRITION EDUC. & BEHAVIOR 3, 210–216 (2012) <https://doi.org/10.1016/j.jneb.2011.08.004>.

certain vendors, such as farmers, from minimum stocking requirements.<sup>32</sup> As virtual platforms are introduced, minimum stocking policies should be revisited to ensure that all businesses can participate as online vendors to advance the underlying goals of the WIC program and USDA’s broader goals of supporting local economies and a diversity of businesses. Such a policy would also better support and integrate disadvantaged, limited resource, veteran or beginning farmers and ranchers, who are more likely to have smaller operations producing limited product lines, such as produce or dairy.<sup>33</sup> This flexibility around minimum stocking requirements should not extend to brick-and-mortar stores where such requirements enhance physical access to nutritious foods for residents in the surrounding community.

### **Looking Ahead: Investing in WIC Online Technology and Frameworks**

To successfully integrate online shopping into the WIC program, USDA must invest in technological solutions and frameworks facilitating vendor and State agency participation. Online purchasing is an opportunity to increase business for small retailers and farmers while also better serving the needs of low-income families. However, limited financial resources and technological hurdles may exclude smaller vendors from participating, as setting up a system to accept electronic benefits payments is time-consuming and expensive.<sup>34</sup>

To address this concern in the SNAP program, the America Rescue Plan Act of 2021 allocated \$25 million to USDA to expand SNAP online shopping options.<sup>35</sup> The funding must be used to develop mobile payment technologies to redeem SNAP benefits and provide technical assistance to retailers wanting to accept SNAP benefits online.<sup>36</sup> The goal is to “support smaller retailers in offering products for online SNAP purchasing” by creating a “secure, easy-to-use online and app-based portal for EBT redemption” while providing technical assistance to alleviate the challenges businesses face when setting up SNAP online payment systems.<sup>37</sup> As USDA invests in these technological solutions for SNAP electronic benefits redemption, it should ensure that the benefits cross over to assist smaller, independent grocers, farmers, and others wishing to participate as vendors in the WIC program.

The current system for authorizing and monitoring vendors also creates an unnecessary administrative burden for State agencies wanting to offer online shopping to their WIC participants. The responsibility for authorizing and monitoring vendors rests with State agencies, who historically have authorized brick-and-mortar stores based on a single fixed location (with limited exceptions).<sup>38</sup> The vendor authorization and monitoring process for virtual platforms (platforms that allow customers to order food

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<sup>32</sup> COL. DEPT. OF PUB. HEALTH AND ENV’T, RETAILER HANDBOOK WOMEN, INFANTS, & CHILDREN (WIC) PROGRAM 5 (2020) <https://www.coloradowic.gov/sites/default/files/media/document/2020%20COWIC%20Retailer%20Handbook%20%282%29.pdf>.

<sup>33</sup> See e.g., BLACK FARMER INDEX, <https://blackfarmersindex.com/> (last visited May 9, 2023).

<sup>34</sup> *Independent Grocers Laud Efforts to Expand SNAP Online Purchasing*, NAT’L GROCER’S ASSOC. (Feb. 11, 2021) <https://www.nationalgrocers.org/news/independent-grocers-laud-efforts-to-expand-snap-online-purchasing/>.

<sup>35</sup> American Rescue Plan Act of 2021, Pub. L. No 117-2 (2021).

<sup>36</sup> *Id.*

<sup>37</sup> *Durbin, Duckworth Introduce Bill to Implement and Expand Online SNAP Purchasing Nationwide*, DICK DURBIN U.S. SENATOR IL. (Feb. 9, 2021) <https://www.durbin.senate.gov/newsroom/press-releases/durbin-duckworth-introduce-bill-to-implement-and-expand-online-snap-purchasing-nationwide>.

<sup>38</sup> NAT’L. WIC ASS’N., NATIONAL WIC ASSOCIATION ONLINE WIC SHOPPING: FREQUENTLY ASKED QUESTIONS 2 (2022) <https://media.nwica.org/online-shopping-faqs.pdf>; and 7 C.F.R. 246.12.

through a website, mobile app, or using other technology)<sup>39</sup> must be streamlined as the current approach would be highly inefficient and duplicative for virtual platforms where WIC vendors will inevitably operate across state lines.<sup>40</sup> By creating a national vendor management framework that State agencies can opt to use, USDA could increase State agency uptake and ensure more efficient program administration.

The *Task Force on Supplemental Food Delivery in the WIC Program* recommends a national authorization process for virtual vendor platforms, with State opt-ins.<sup>41</sup> Creating a scalable system that benefits both State agencies and vendors is crucial for the success of USDA's modernization efforts. Despite section (c)(2)(A) of the Child Nutrition Authorization Act being cited as a barrier,<sup>42</sup> the Act broadly grants USDA the authority to carry out the WIC program through “grants-in-aid and other means,”<sup>43</sup> requires that USDA “establish standards for [its] proper, efficient, and effective administration”<sup>44</sup> and allows USDA to provide technical assistance, including on improving State agencies’ administrative systems.<sup>45</sup> USDA is also funded specifically to establish, improve, or administer WIC management information systems, “including changes necessary to meet new legislative or regulatory requirements of the program.”<sup>46</sup> Therefore, the Act provides potential paths for USDA to create and manage a nationwide authorization process for State agencies, which would result in program efficiencies and reduced administrative costs and burdens. As the National WIC Association notes, a nationwide authorization process could encourage State agencies to standardize and streamline vendor criteria over time:

USDA-level authorization should not happen autonomously from State policies and systems, but instead create a framework to simplify State-level authorizations through an opt-in that identifies and simplifies additional State imposed criteria to manage authorization across multiple State WIC agencies. Nationwide authorization would not be blanket approval across the country, but, over time, could encourage State WIC Agencies to standardize and streamline vendor criteria. Virtual platforms could still seek authorization at a state-by-state level.<sup>47</sup>

As USDA modernizes the WIC program to offer online shopping, it must ensure that smaller vendors and WIC participants in less well-resourced states are not excluded. USDA can facilitate a more inclusive and equitable WIC program by providing technology and assistance to small and independent grocers, farmers, cooperatives, and other vendors wishing to offer online shopping to WIC participants. USDA also has sufficient statutory authority and flexibility to develop a national authorization process that states could opt to use and a framework for monitoring virtual vendors across multiple WIC State agencies. Both measures would facilitate State agencies' efficient program administration and encourage uptake of online shopping. Since WIC operates as a block grant program, this can save states money and retain more funding for participant benefits.

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> TASK FORCE REPORT, *supra* note 5, at 23, 40.

<sup>42</sup> 42 U.S.C. § 1786(c)(2)(A).

<sup>43</sup> 42 U.S.C. § 1786(c)(1).

<sup>44</sup> 42 U.S.C. § 1786(f)(10).

<sup>45</sup> 42 U.S.C. § 1786(g)(5).

<sup>46</sup> 42 U.S.C. § 1786 (h)(10)(B)(ii).

<sup>47</sup> NAT'L. WIC ASS'N., NATIONAL WIC ASSOCIATION ONLINE WIC SHOPPING: FREQUENTLY ASKED QUESTIONS 3 (2022) <https://media.nwica.org/online-shopping-faqs.pdf>.

## Conclusion

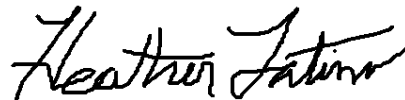
USDA's efforts to modernize the WIC program and provide online shopping options for WIC participants are commendable. A modernized WIC program, and one that is better aligned with and incorporates lessons learned during the development of the SNAP online program, will help provide more equitable access to nutrition for millions of families as well as business opportunities for smaller, independent retailers and farmers that serve as the backbone of our communities. To keep pace with the evolving needs of the WIC program, the USDA must invest in technology, develop new frameworks for state administration, and provide robust technical assistance. These measures are key to preventing less-resourced vendors and states from being left behind.

Thank you for your consideration of FLPC's comments and recommendations.

Sincerely,



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