



Reply to
Attn. of:

SF-221

MAR 12 1996

Subject: WIC Final Policy Memorandum 96-6
WIC Infant Formula Rebate Reviews

To: Regional Directors
Supplemental Food Programs
All Regions

Regional Directors
Financial Management
All Regions

The purpose of this policy memorandum is to provide guidance concerning a State's responsibility to properly conduct rebate billing and collection activities and provisions which should be included in a State agency's request for proposals (RFPs) or Invitation for Bids (IFBs) and contracts for infant formula rebates to avoid rebate billing discrepancies. Guidance is also provided concerning **procedures being allowed on a one-time basis to address a current problem**. That is, how WIC State agencies are to account for and report rebates and Federal food outlays when rebates billed are withheld or disputed as a result of infant formula manufacturers' recent reviews of rebate billings made under existing contracts. For purposes of this memorandum, all Requests for Proposals and Invitation for Bids are hereafter referred to as IFBs.

INFANT FORMULA REBATE BILLING AND COLLECTION

The billing process for infant formula rebates is a key component of a successful cost-containment initiative. The need for tight control over billing procedures is imperative. When a State agency fails to collect all earned rebates, the Federal cost of operating the WIC Program increases dollar-for-dollar by the amount of rebates uncollected. Likewise, when a State makes an error(s) that causes it to bill and collect more rebates than it earned, this can lead to disputes which are very difficult to resolve. The following are situations which are not acceptable cost-containment practices.

(1) Failure to properly bill and collect infant formula rebates due to a State agency.

FCS believes that a State agency's failure to collect rebates earned is clearly contrary to congressional intent. State agencies are required to have infant formula rebate contracts in place and are expected to collect all earned rebates due to the State agency. The State agency must abide by billing procedures stipulated in its infant formula rebate contract and bill the infant formula manufacturer for the entire amount to which it is entitled.

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Any deviation will be handled on a case-by-case basis. For example, FCS will consider mitigating or unusual circumstances beyond the State agency's control.

(2) Billing Discrepancies.

The accuracy of a State agency's billing process is an important aspect of infant formula rebates. There have been occasions when a manufacturer has withheld current year earned rebates when overbilling errors from previous years were discovered.

Correct rebate amounts must be credited to the fiscal year account initially charged with the infant formula cost. Therefore, the IFB and contract must provide specific procedures for handling billing discrepancies for both the State and manufacturer. The IFB and contract should state a reasonable time period in which each party must alert the other to any billing discrepancies. Because a State agency's unspent funds are recovered and reallocated to other States, there is no guarantee that prior year(s) funds will be available to pay understated prior year(s) food costs resulting from rebate overbilling(s) that occurred in the prior year(s). Therefore, all discrepancies must be settled by closeout of the fiscal year related to the rebate savings. This provides a reasonable time for both parties to review records and resolve disputes.

AVOID BILLING DISCREPANCIES THROUGH IFB/CONTRACT PROVISIONS

The requirement to recover and reallocate unspent funds effectively forestalls the accumulation of prior year funds to pay prior year costs. Therefore, States must have the following specific procedures in their IFBs and contracts for infant formula rebates to minimize the risk of billing discrepancies, and to handle those discrepancies that do occur:

- (1) Contractor must pay invoice within timeframe stipulated in contract (usually 30 days).
- (2) Contractor must notify State agency of any dispute or error in rebate invoice within a time period stipulated in contract. If contractor misses deadline, any requirement to return funds to the contractor as a result of a dispute or overbilling error is waived.
- (3) All disputes must be settled by closeout of the fiscal year in which dispute occurred.

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- (4) Contractor must not be allowed to withhold any rebate payments due States under any circumstances.
- (5) If an overbilling error occurs, State agency must make every effort to validate. Independent reviews of the records stipulated in the contract are encouraged, if necessary.
- (6) Upon resolution of dispute, State agency will promptly disburse any funds due to appropriate party.
- (7) State agency and contractor must meet as often as necessary, e.g., quarterly, to review progress and performance of contract. During these meetings any concerns regarding billing procedures must be addressed.
- (8) The IFB and contract should identify the records to which the contractor has access. The only records which the contractor should have access to are those directly related to monthly billings. This must be made clear in the contract.
- (9) The IFB and contract should clearly identify the billing procedures, i.e., which data will be used and how these data will be gathered and used to prepare infant formula rebate billings.

Please note that States will have no recourse against FCS for understated prior year food costs associated with prior year rebate overbillings which occur under new contracts, those entered into on or after October 1, 1995, as this problem should be eliminated through the issuance of new contracts containing the foregoing provisions. States implementing new infant formula contracts on or after October 1, 1995 have been advised through FCS's IFB and contract review process to include the foregoing provisions, thereby eliminating the current rebate billing problems. The rebate reporting procedures outlined in this memorandum are provided on a one-time basis to assist States with rebate billing discrepancies that have or could occur under contracts implemented prior to October 1, 1995.

We recognize that many States have contracts in place which will not expire for several years (latest expiration date for existing contracts is December 1998), and are therefore unable to immediately incorporate these provisions into a new contract. However, States must also take action under existing contracts to avoid billing errors and disputes. This may be accomplished by strengthening internal controls over the rebate billing process, e.g., reforming the method(s), to the extent possible without requiring a contract amendment, for implementing contract provisions such as how data are gathered and used to bill for infant formula rebates. If a contract provision

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concerning the billing process is found to contribute to billing errors, the State should seek a contract amendment.

REPORTING PROCEDURES FOR BILLING DISCREPANCIES ASSOCIATED WITH EXISTING CONTRACTS

Based on ongoing coordination, we believe the Office of Inspector General (OIG) will agree to the following reporting procedures on a **one-time basis**, i.e., **these procedures are limited to withheld or disputed rebates associated with existing rebate contracts**. Please be reminded that States which fail to add the foregoing provisions to their future rebate contracts will have no recourse against FCS for rebate withholdings or disputes.

These procedures can only be applied for those State agencies for which it can be demonstrated through prior year closeout records that their cumulative Federal WIC funding over the fiscal years in question would have been the same, had they billed their rebates correctly and exercised available spending options to cover the resulting prior year food costs. However, States will not be required to submit amended closeout reports.

States which have undergone infant formula manufacturers' rebate reviews and are cited in the report of the review as having received rebates in excess of that earned during the closeout and/or prior year(s) will likely be in one of the following situations at closeout:

1. Rebates earned by the State during the closeout year have been withheld by the infant formula manufacturer to recover excess rebates previously paid to the State for the closeout year and/or prior year(s).
2. The State is currently negotiating the amount refundable to its infant formula manufacturer as the result of a rebate review, but the manufacturer has not withheld any or has withheld only a portion of the amount it considers refundable from rebates earned by the State during the closeout year.

In either situation, the State will report the amount of rebates **actually received** from rebate billings for the closeout year on Line 5, Rebates Billed, of the FNS-498 and on Line 10a, Rebates, of the FNS-227. Rebates actually received from the infant formula manufacturer for rebates billed for the closeout year will be reported even if the amount received is net of manufacturers' withholdings to recover prior year(s) excess rebates, or if some portion of the amount received is still in dispute and may have to be returned to the infant formula manufacturer after the dispute is resolved.

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States will also identify the amount of rebates withheld from rebate billings for the closeout year to recover prior year(s) excess rebates, and whether negotiations are final or ongoing in the remarks section of the final FNS-498. This information will provide an official record to track the status of rebate billing disputes.

In the latter situation, the amount of rebates received from rebate billings for the closeout year which may have to be refunded to the infant formula manufacturer at the conclusion of review negotiations will be reported as unliquidated food obligations. This will be accomplished by adding the dollar value of rebates in dispute to Line 4, Actual Food Outlays, of the final FNS-498 and to Line 9, Column (A), the Food Cost Category for Gross Outlays and Unliquidated Obligations for Report Year Program Cost, of the FNS-227. The dollar value of the disputed rebates will also be reported as unliquidated food obligations in the remarks section of the final FNS-498 and on Line 21, Column (A), the Food Cost Category for Federal Unliquidated Obligations Against the Formula Grant, of the FNS-227. States must also indicate in the remarks section of the Final FNS-498 whether or not the dollar value of unliquidated food obligations represent disputed rebates. Again, this information will provide an official record to track the status of rebate billing disputes. Reporting disputed rebates as unliquidated food obligations prevents WIC Output Reports generated at closeout from the FNS-498 and FNS-227 from overstating the amount of unspent funds available for recovery and reallocation. It also enables FCS to hold the funds necessary to fund the obligations.

We caution States to be very accurate in reporting unliquidated food obligations. Unliquidated food obligations must be sufficient to cover all rebate amounts which are still in dispute and may have to be returned to the infant formula manufacturer. If they are understated, the understated amount will be recovered and reallocated, and thus become unavailable for restoration to the State agency in the event the infant formula manufacturer prevails. On the other hand, if unliquidated food obligations are overstated, it will result in funds needlessly being made unavailable to fund current Program costs. This is due to the fact that unliquidated food obligations are withheld from the reallocation process, and if subsequently deobligated, end up in the expired appropriations account.

The following are examples of the type of information concerning rebate billing disputes which may need to be reported in the remarks section of the final FNS-498 to provide an official record of the status of rebate billing disputes:

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1) Rebates have been withheld:

\$50,000 (rebates withheld - ongoing), or

\$50,000 (rebates withheld - final)

2) Rebates have not been withheld, but are in dispute and may have to be returned to the infant formula manufacturer:

\$40,000 (disputed rebates)

+ \$ 1,000 (other unliquidated food)

\$41,000 (total unliquidated food), or

\$40,000 (total unliquidated food - disputed rebates)

When a State's negotiations have reached a final determination of the amount refundable to the infant formula manufacturer, the State will request the necessary funds to make this payment from the funds held by FCS for the State for this purpose by submitting Form SF-270, Request for Advance and Reimbursement, with attached letter stating that this is the final settlement. If the letter states that the final settlement is an amount less than that set aside for the State for this purpose, FCS will deobligate the balance of these funds. If it is determined that the infant formula manufacturer is not due a refund, the State must notify FCS by letter stating that this is the final settlement, so that FCS may deobligate the entire amount held for the State for this purpose. And finally, if it is determined that the infant formula manufacturer must pay the State some or all of the rebates withheld, the State will return these funds to FCS by submitting Form SF-270, Request for Advance and Reimbursement, with attached letter stating that this is the final settlement.

If you have any questions concerning this policy, please contact Joan Carroll at (703) 305-2716 or Chris Lipsey at (703) 305-2166.



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