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MEMORANDUM

January 30, 2012

BY ELECTRONIC MAIL

FROM: Olsson Frank Weeda Terman Matz PC

RE: USDA Final Rule regarding Nutrition Standards in the National School Lunch and School Breakfast Programs

The United States Department of Agriculture's (USDA's) Food and Nutrition Service (FNS) on January 26, 2012 published in the Federal Register its final rule revising the meal patterns and nutrition requirements for the National School Lunch Program (NSLP) and the School Breakfast Program (SBP) to align them with the 2005 "Dietary Guidelines for Americans," as required by the Richard B. Russell National School Lunch Act. The summary of the Final Rule notice indicates that the rule requires most schools to increase the availability of fruits, vegetables, whole grains, and fat-free and low-fat fluid milk in school meals; reduce the levels of sodium, saturated fat and trans fat in meals; and meet the nutrition needs of school children within their calorie requirements. There were 133,268 comments submitted during the 90-day public comment period January 13 – April 13, 2011. While portions of the rule become effective on March 26, 2012, the rule includes several effective dates for various components, provided below.

This memorandum provides a detailed review of the final rule, amending 7 CFR Parts 210 (School Lunch) and 220 (School Breakfast). The final rule can be found at <http://www.gpo.gov/fdsys/pkg/FR-2012-01-26/pdf/2012-1010.pdf>.

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Background:

On January 13, 2011, FNS published in the Federal Register its proposed rule revising the meal patterns and nutrition requirements.¹ Public comments regarding the proposed rule were accepted from January 13, 2011 through April 13, 2011.

The revision to the meal patterns to reflect the latest “Dietary Guidelines for Americans” (Dietary Guidelines) is required by Section 9(a)(4), 42 USC 1758(a)(4), of the Richard B. Russell National School Lunch Act (NSLA). Additionally, Section 201 of the Healthy, Hunger-Free Kids Act of 2010 (Pub. L. 111-296, HRFKA) amended Section 4(b) of the NSLA, 42 USC 1753(b), to require the Department of Agriculture (USDA) to issue regulations to update the meal patterns and nutrition standards for school lunches and breakfasts based on the recommendations issued by the Food and Nutrition Board of the National Research Council of the National Academies of Science, which is part of the Institute of Medicine (IOM).² The 2010 Dietary Guidelines³ were released on January 31, 2011, after USDA published the proposed rule. The 2010 Dietary Guidelines recommended consumption of red-orange vegetables and protein subgroups: (1) seafood; (2) meat, poultry and eggs, and (3) nuts, seeds, and soy products. On March 21, 2011 USDA issued a Notice in the Federal Register (76 CFR 15225) seeking public comment as to how these recommendations should be applied to the revised school meal patterns. The public comments received in response were added to the proposed rule docket, and were considered in preparing this final rule.

¹ The proposed rule can be found at <http://edocket.access.gpo.gov/2011/pdf/2011-485.pdf>. The public comments submitted on the proposed rule can be found at www.regulations.gov and search for public submissions under docket number FNS-2007-0038. A Summary of Public Comments is available as supporting material under the docket folder summary.

² See the IOM recommendations set forth in the report “School Meals: Building Blocks for Healthy Children” (October 2009). The report can be found at <http://www.iom.edu/Reports/2009/School-Meals-Building-Blocks-for-Healthy-Children.aspx>.

³ The 2010 Dietary Guidelines for Americans can be found at <http://www.cnpp.usda.gov/DGAs2010-PolicyDocument.htm>.

Overview:

Several modifications are made to the proposed rule in response to the comments, and in line with the requirements of the Consolidated and Further Continuing Appropriations Act, 2012, P.L. 112-55.

The final rule is estimated to add \$3.2 billion to school meal costs over five years, considerably less than the estimated \$6.8 billion cost of the proposed rule over the same time period. The per meal breakfast cost increase is projected at \$0.28 under the final rule, compared with \$0.51 under the proposed rule. The per meal lunch cost increase is projected at \$0.11 under the final rule, compared with \$0.14 under the proposed rule.

The final rule phases in the implementation of the SBP requirements over three years, and modifies those requirements to reduce the estimated costs of breakfast changes. The only immediate change to the SBP is limiting flavor to fat-free milk, and requiring the service of only fat-free and low-fat milk, as required by HHFKA. Other SBP changes are required beginning in SY 2013-2014. No meat or meat alternate will be required with SBP. Those SFAs that are able to implement the new meal requirements concurrently in the SBP and NSLP are encouraged to do so with SA approval.

The final rule provides an additional year to meet the implementation of the second sodium target, and commits to an evaluation before the change is required.

While a full cup of fruits and vegetables must be offered, students are required to take only ½ cup of fruits and vegetables under the Offer versus Serve (OVS) arrangement in order for the meal to qualify for reimbursement.

State agencies (SAs) will be required to conduct a nutrient analysis of school meals using one week of menus, rather than two weeks as proposed.

SAs must continue to use technical assistance and corrective action as the primary strategies to help schools comply with the meal requirements. However, SAs have discretion to take fiscal action for repeated violations of the food quantity and whole grain requirements, and for repeated violations of the dietary specifications (calories, saturated fat, sodium and trans fats).

In the coming months, FNS will be offering additional guidance and training on several items included in the final rule. This guidance and training is intended to help with the implementation of the rule, and can be found along with other pertinent documents at <http://www.fns.usda.gov/cnd/Governance/Legislation/nutritionstandards.htm>.

Comments and USDA Responses:

The following information is largely excerpted from the Federal Register notice.

Generally –

USDA described the comments received as 7,107 unique letters, 122,715 form letters from 159 mass mail campaigns, 3,353 non-germane letters, and 93 duplicates.

USDA said: “...*the comments provided were generally more supportive of the proposed rule than opposed. Comments from nutrition, health and child advocates; community organizations; academia; and parents favor the proposed rule, citing concern about the national childhood obesity problem and the increased likelihood of preventable diseases such as cardiovascular disease, high blood pressure, high cholesterol, stroke, and type 2 diabetes... enthusiastically supported the increase in fruits, vegetables, whole grains, fat-free milk/low-fat milk in the school menus, and most other proposed changes designed to improve the nutritional quality of school meals.*”⁴

USDA also said: “*Comments from SAs and school food authorities (SFAs), food industry, industry representatives, food service management companies, and others in the public and private sectors associated with the operation of the school meals programs also supported improving school meals but voiced strong concerns about some aspects of the proposed rule. The proposed food quantities, meat/meat alternate component at breakfast, weekly vegetable subgroup requirement at lunch, starchy vegetables limit, sodium reductions, whole grains requirement, and frequency of administrative review were the parts of the proposal that prompted most of their concerns. Program operators also raised concerns about the rule cost and implementation timeline, the impact of the proposed changes on student participation in the meal programs, and the potential for increased plate waste if meals are not acceptable to students.*”⁵ USDA suggested that these concerns are more prevalent in the School Breakfast Program (SBP) than the National School Lunch Program (NSLP).

Specific Responses –

⁴ 77 Fed. Reg. 4089 (January 26, 2012).

⁵ 77 Fed. Reg. 4089 (January 26, 2012).

Menu Planning Approach:

The final rule establishes Food Based Menu Planning (FBMP) as the single menu a planning approach for the NSLP (including Pre-K meals) in SY 2012-2013. The final rule gives SBP operators not currently using FBMP additional time to convert, allowing them to continue their current menu approach through SY 2012-2013. However, all SBP operators must use the FBMP approach beginning in SY 2013-2014. Those wishing to do adopt FBMP prior to the required implementation date may do so with the approval of the SA.

The FBMP approach is at §210.10(a)(1)(i) of the regulatory text for the NSLP and §220.8(a)(1) for the SBP. Menu planning approaches applicable to the SBP in SY 2012-2013 are under §220.23(a)(5).

Age/Grade Groups:

The final rule requires schools to use the age/grade groups K-5, 6-8, and 9-12 to plan menus in the NSLP upon implementation of this rule in SY 2012-2013. The new age group requirements take effect in SY 2013-2014 for the SBP.

The age/grade groups can be found at §210.10(c)(1) of the regulatory text for the NSLP and §220.8(c)(1) for the SBP. Age/grade groups applicable to the SBP in SY 2012-2013 are under §220.23(b) for nutrient standards menu planning, and under §220.23(g) for food based menu planning.

Fruits:

The final rule establishes fruits and vegetables as separate food components in the NSLP and adds a fruits requirement at lunch beginning SY 2012-2013.

Schools are required to offer 1 cup of fruit to all age/grade groups at breakfast beginning in SY 2014-2015, giving SFAs more time to prepare for this change to SBP menus. Schools will also have the option to offer vegetables in place of all or part of the required fruit component, provided the first two cups per week of any such substitution must be from the dark green, red/orange, beans and peas (legumes), or other vegetable subgroups.

Starchy vegetables may be offered in substitution of fruits, once the first two cups offering of non-starchy vegetables have been met.

All students are allowed to select ½ cup of fruit for a reimbursable meal under Offer versus Serve (OVS), instead of requiring them to take the full fruit component.

The fruit component at lunch and breakfast may be fresh; canned in fruit juice, water, or light syrup; frozen without added sugar, or dried.

All fruits are credited based on their volume as served, except that 1/4 cup of dried fruit counts as 1/2 cup of fruit.

Only pasteurized, full-strength fruit juice may be used, and may be credited to meet no more than one-half of the fruit component.

The fruit requirements can be found at §210.10(c) for the NSLP and under §220.8(c) for the SBP. Fruit requirements for the SBP in SY 2012-2013 are under §220.23(g).

Vegetables:

The final rule establishes vegetables as a separate food component in the NSLP, and requires schools to offer all the vegetable subgroups identified by the 2010 Dietary Guidelines (dark green, red/orange, beans and peas (legumes), starchy, and other) over the course of the week at minimum required quantities as part of the lunch menus in SY 2012-2013.

The final rule does not limit starchy vegetables, but requires schools to offer at least minimum quantities of all vegetable subgroups in the NSLP over the course of the week.

The final rule expands the proposed orange vegetable subgroup to include red/orange vegetables to be consistent with the 2010 Dietary Guidelines.

Schools will have the option to offer vegetables in place of all or part of the fruits requirement at breakfast beginning July 1, 2014.

SFAs may not offer one serving of beans and peas (legumes) to meet the requirements for both vegetables and meat/meat alternate components.

Schools may use fresh, frozen, and canned products to meet the vegetable requirement.

All vegetables are credited based on their volume as served, except that 1 cup of leafy greens counts as 1/2 cup of vegetables and tomato paste and puree are credited based on calculated volume of the whole food equivalency.

The vegetable requirements can be found at §210.10(c) for the NSLP and under §220.8(c) for the SBP. Vegetable requirements applicable to the SBP in SY 2012-2013 are under §220.23(g).

Grains:

The final rule establishes a minimum whole grain-rich requirement in the NSLP and SBP. For the NSLP, the whole grain requirement takes effect upon implementation of the rule. In SY 2012-2013 and SY 2013-2014 whole grain-rich products must make up half of all grain products offered to students. During this time only, refined-grain foods that are enriched may be included in the lunch menu. In SY 2014-2015 and beyond, schools must offer only whole grain-rich products.

In the SBP, schools must offer the weekly grain ranges and half of the grains as whole grain-rich beginning July 1, 2013. All grains offered in the SBP must be whole grain-rich in SY 2014-2015 and beyond. Once schools meet the daily minimum grain quantity required (1 oz. eq. for all age-grade groups) for breakfast, they are allowed to offer a meat/meat alternate in place of grains. The meat/meat alternate can count toward the weekly grains requirement (credited as 1 oz. eq. of meat/meat alternate is equivalent to 1 oz. eq. of grain).

Definition of Whole Grains:

Until the whole grain content of food products is required on a product label by the Food and Drug Administration (FDA), schools must evaluate a grain product according to forthcoming FNS guidance as follows:

Element #1. A serving of the food item must meet portion size requirements for the Grains/Breads component as defined in FNS guidance. AND

Element #2. The food must meet AT LEAST ONE of the following:

a. The whole grains per serving (based on minimum serving sizes specified for grains/breads in FNS guidance) must be ≥ 8 grams. This may be determined from information provided on the product packaging or by the manufacturer, if available. Also, manufacturers currently may apply for a Child Nutrition Label for qualifying products to indicate the number of grains/breads servings that are whole grain-rich.

b. The product includes the following Food and Drug Administration (FDA) - approved whole grain health claim on its packaging. "Diets rich

in whole grain foods and other plant foods and low in total fat, saturated fat and cholesterol may reduce the risk of heart disease and some cancers.”

c. Product ingredient listing lists whole grain first, specifically:

I. Non-mixed dishes (e.g., breads, cereals): Whole grains must be the primary ingredient by weight (a whole grain is the first ingredient in the list)

II. Mixed dishes (e.g., pizza, corn dogs): Whole grains must be the primary grain ingredient by weight (a whole grain is the first grain ingredient in the list)

With respect to industry concerns regarding the standard of identity for whole grain products being 14.75 grams, while the IOM recommendations for school meals were based on 16 grams per serving, FNS is committing to provide SAs and schools guidance on this subject.

With respect to the cost and availability of whole grain-rich products, FNS is urging the usage of USDA Foods, including: brown rice; parboiled brown rice; rolled oats; whole-wheat flour; whole-grain kernel corn; and whole-grain rotini, spaghetti, and macaroni.

The final rule reduces the number of allowable grain-based desserts from five to two per school week.

The grains requirements can be found at § 210.10(c) for the NSLP and under § 220.8(c) for the SBP. Grains requirements applicable to the SBP in SY 2012–2013 are under § 220.23(g).

Meats/Meat Alternates:

The final rule implements the meat/meat alternate requirements for the NSLP as proposed. Schools must offer at least a minimum amount of meat/meat alternate daily (2 oz eq. for students in grades 9-12, and 1 oz eq. for younger students), and provide a weekly required amount for each age/grade group. The final rule does not require a daily meat/meat alternate in the SBP. Menu planners may offer a meat/meat alternate in place of grains after the minimum daily grains requirement is met.

Schools will have the option to offer commercially prepared tofu as a meat alternate in the NSLP and SBP. Given that tofu does not have an FDA standard of identity, USDA will continue to provide SAs and schools guidance on this issue.

Schools also have discretion to offer ready-to-eat foods such as cold cuts, cheese, and yogurt to meet the meat/meat alternate component. However, schools must plan all meals with the goal to meet the dietary specifications for sodium, saturated fat, trans fat, and calories.

The final rule does not require the three protein food subgroups recommended by the 2010 Dietary Guidelines. USDA is developing technical assistance to assist schools in offering students a variety of protein foods consistent with the Dietary Guidelines.

The meat/meat alternate requirements can be found at §210.10(c) for the NSLP and under §220.8(c) for the SBP. Meat/meat alternate requirements applicable to the SBP in SY 2012-2013 are under §220.23(g).

Fluid Milk:

The final rule allows flavor in fat-free milk only, and fat-free and low-fat choices only, consistent with Dietary Guidelines recommendations and Section 202 (Nutrition Requirements for Fluid Milk) of the HHFKA, requiring fat-free and low-fat milk for all school lunches. The final rule does not change the nutrition standards for the optional non-dairy drinks offered to students with special dietary needs (not disabilities) in place of milk at the request from parents. Students may decline milk under OVS. Water may not be offered in place of fluid milk as part of the reimbursable meal, but must be available in the food service area for students who wish to drink it in accordance with the NSLA as amended by the HHFKA

The milk requirements can be found at §210.10(d) for the NSLP and under §220.8(d) for the SBP.

Calories:

The rule implements the proposed minimum and maximum calorie levels for each grade group. In the NSLP, the calorie limits for each age/grade group take effect upon implementation of this final rule. In the SBP, however, calorie limits are not implemented until the SY 2013-2014 (the second year of implementation). This modification from the proposed rule is intended to give program operators additional time to implement the new meal requirements in the SBP.

The rule does not add a standard for added sugars, as has been recommended by some commenters. USDA, consistent with the Institute of Medicine recommendations, does not believe a standard is necessary and would unnecessarily restrict menu planning flexibility.

The final rule includes other provisions that limit the sources of discretionary calories.

USDA includes a clarification that the calorie standards established for each age/grade group are to be met on average over the course of the week. On any given school day, the calorie level for the meal may fall outside of the minimum and maximum levels as long as the average number of calories for the week is within the required range.

The calorie requirements can be found at §210.10(f) for the NSLP and under §220.8(f) for the SBP. Calorie requirements applicable to the SBP in SY 2012-2013 are under §220.23(b) and §220.23(c).

Saturated Fat:

The final rule implements the proposed saturated fat standard, which is the same as the restriction currently in place in the NSLP and SBP. This final rule implements two new requirements set forth in the proposed rule and are anticipated to encourage schools to reduce the saturated fat in meals: allowing only fat-free and low-fat milk, and establishing maximum calorie limits. USDA's technical assistance will continue to emphasize the need to purchase and prepare foods in ways that help reduce the saturated fat level in school meals (e.g., procuring skinless chicken or using meat from which fat has been trimmed, and using vegetable oils that are rich in monounsaturated and polyunsaturated fatty acids such as canola and corn oils).

The saturated fat requirements can be found at §210.10(f) for the NSLP and under §220.8(f) for the SBP.

Sodium:

Schools will be required to meet the first intermediate sodium target for each age/grade group (target 1 in the chart) in the NSLP and SBP no later than July 1, 2014 (SY 2014-2015), two years post implementation of this final rule. To meet target 1, schools are expected to modify menus and recipes promptly to reduce the sodium content of school lunches by approximately 5-10 percent from their baseline.

Prior to the implementation of the second (target 2) and final sodium targets contained in this rule, USDA will evaluate relevant studies on sodium intake and human health, as required by Section 743 of the FY 2012 Agriculture Appropriations Act. The scheduled compliance date for target 2 is no later than July 1, 2017 (SY 2017-2018), five years post implementation of the final rule for both meal programs. In response to stakeholders' concerns, and the provisions of Section 743 of the FY 2012 Agriculture Appropriations Act, this final rule lengthens the time to reach the second intermediate targets from 4 to 5 years. This modification to the sodium proposal is intended to allow food manufacturers additional time to reformulate products and schools

more time to build student acceptance of lower sodium meals. To meet target 2, schools have to reduce sodium in school lunches by approximately 15-30 percent from their baseline.

The scheduled compliance date for the final sodium targets is no later than July 1, 2022 (SY 2022-2023), ten years post implementation of the final rule. To meet the final sodium target, schools will have to reduce the sodium content of the meals by approximately 25-50 percent from the school baseline. This will require innovation on the part of product manufacturers in the form of new technology and/or food products. As required by Section 743 of the FY 2012 Agriculture Appropriations Act, USDA will certify that it has evaluated relevant data on sodium intake and human health prior to requiring compliance with the second and final sodium targets.

Age/grade group	Baseline: Current Average Sodium Levels As Offered ¹ (mg)	Sodium Reduction: Timeline & Amount ⁶				% Change (Current Levels vs. Final Targets)
		Target 1: Meet by July 1, 2014 (SY 2014-2015) (mg)	Target 2: Meet by July 1, 2017 (SY 2017-2018) (mg)	Final Target: 2 Meet by July 1, 2022 (SY 2022-2023) (mg)		
School Breakfast Program						
K-5	573 (elementary)	< 540 (28.4% of UL)	< 485 (25.5% of UL)	< 430 (22.6% of UL)		-25%
6-8	629 middle	< 600 (27.3% of UL)	< 535 (24.3% of UL)	< 470 (21.4% of UL)		-25%
9-12	686 (high)	< 640 (27.8% of UL)	< 570 (24.8% of UL)	< 500 (21.7% of UL)		-27%
National School Lunch Program						
K-5	1,377 (elementary)	< 1,230 (64.8% of UL)	< 935 (49.2% of UL)	< 640 (33.7% of UL)		-54%
6-8	1,520 (middle)	< 1,360 (61.8% of UL)	< 1,035 (47.0% of UL)	< 710 (32.3% of UL)		-53%
9-12	1,588 (high)	< 1,420 (61.7% of UL)	< 1,080 (47.0% of UL)	< 740 (32.2% of UL)		-53%

¹Current Average Sodium Levels as Offered are from the School Nutrition and Dietary Assessment Study-III. Data were collected in the 2004-05 school year.

²The IOM final targets are based on the Tolerable Upper Intake Limits (ULs) for sodium, established in the Dietary Reference Intakes (DRI) (IOM, 2004). The sodium ULs for school-aged children are 2,300 mg (ages 14-18), 2,200 mg (ages 9-13), and 1,900 mg (ages 4-8). The final sodium targets represent the UL for each age/grade group multiplied by the percentage of nutrients supplied by each meal (approximately 21.5% for breakfast, 32% for lunch), as recommended by IOM. IOM's recommended final sodium targets for the K-5 age/grade group breakfasts and lunches are slightly higher than 21.5% and 32% 32%, respectively, of the UL because this proposed elementary school group spans part of two DRI age groups (ages 4-8 and 9-13 years).

The sodium limits can be found at §210.10(f) for the NSLP and under §220.8(f) for the SBP.

Tracking Calories, Saturated Fat, and Sodium:

The HHFKA amended the NSLA to require improvements to school meals and more frequent monitoring of school meals to facilitate transition to the new meal requirements. This rule requires SAs to begin the 3-year Coordinated Review Effort (CRE) cycle on July 1, 2013

⁶ 77 Fed. Reg. 4098 (January 26, 2012).

(SY 2013-2014) for the NSLP and SBP. To help SAs meet this requirement, USDA will develop technical assistance tools to facilitate monitoring of school meals.

This rule requires SAs to conduct the nutrient analysis of school lunches and breakfasts as part of the administrative review, but does not limit SFA discretion to conduct a nutrient analysis of the school meals to determine if they are in line with the dietary specifications.

The final rule reduces the time period to conduct a nutrient analysis of school meals using menus for a one-week period, which is the current requirement.

The requirements for tracking calories, saturated fat and sodium can be found at §210.18(c), §210.18(g)(2), §210.18(i)(3), §210.18(m), and §210.19(c) for the NSLP and under §220.8(h), §220.8(i), and §220.8(j) for the SBP.

Tracking Trans Fat:

The final rule requires that food products and ingredients used to prepare school meals contain zero grams of added trans fat per serving (less than 0.5 grams per serving as defined by FDA) according to the nutrition labeling or manufacturer's specifications. This requirement takes effect in the NSLP on July 1, 2012 (SY 2012-2013). In the SBP, the requirement is effective on July 1 2013 (SY 2013-2014, the second year of implementation). See USDA Foods guidance on trans fat at <http://www.fns.usda.gov/fdd/facts/nutrition/TransFatFactSheet.pdf>.

The requirements for tracking trans fat can be found at §210.10(g) §210.10(h) and §210.10(j), for the NSLP and under §220.8(g), §220.8(h), and §220.8(j) for the SBP.

Standards for Meals Selected by the Student (Offer versus Serve (OVS)):

Consistent with the Dietary Guidelines and the IOM recommendations, this final rule requires that the reimbursable lunch selected by the student includes a fruit or a vegetable beginning SY 2012-2013. In the SBP, this requirement is effective in SY 2014-2015 (the third year of implementation), when the fruit quantities for breakfast are required to increase.

In response to commenters' concerns about potential food waste and cost increases, this final rule allows students to take ½ cup of a fruit or a vegetable as suggested by several commenters, rather than the full component, to have a reimbursable meal under OVS. For example, if a school is offering ½ cup of fruit pieces and ½ cup fruit juice to meet the 1 cup fruit component at lunch, the student must select at least one of those two items to have a reimbursable lunch under OVS.

This rule continues the current OVS practice under FBMP to allow students to decline up to two food components at lunch (preferred OVS option presented in the IOM report).

In the SBP, OVS applies to food items rather than food components because of the flexibility to substitute meats/meat alternates for grains (once the daily grain requirement is met). In SBP, schools must offer fruit, milk, and grains daily. On multiple days per week, schools will need to offer more than the minimum daily grains requirement of 1 oz. eq. per day to meet the weekly grain requirement. To accomplish this, schools will need to offer at least three or four food items on the breakfast menu. When a school offers four food items at breakfast, students may decline one food item. If only three food items are offered, students must take all the food items to preserve the nutritional integrity of the breakfast. More details about OVS will be provided in guidance.

Schools that offer salad bars must follow the OVS requirements. To ensure that students actually take the minimum required portion size from a salad bar, foods may be pre-portioned to allow staff to quickly identify if the student has a reimbursable meal under OVS. If not pre-portioning, then the cashier must be trained to judge accurately the quantities of self-serve items on student trays, to determine if the food item can count toward a reimbursable meal. For more information, see FNS memorandum SP 02-2010 – Revised, dated January 21, 2011.

The requirements for Standards for Meals Selected by the Student (Offer versus Serve (OVS)) can be found at §210.10(e) for the NSLP and under §220.8(e) for the SBP. The OVS requirements applicable to the SBP in SY 2012-2013 are under §220.23(e)(2) and §220.23(g)(4).

Monitoring Procedures:

Section 207 of the HRFKA amended the NSLA to require USDA to establish a unified monitoring system. Accordingly, this final rule eliminates the SMI review and strengthens the administrative review to assess compliance with the new meal requirements. As required by this rule, SAs must monitor compliance with the meal patterns and the dietary specifications (calories, saturated fat, sodium and trans fat) under the administrative review responsibilities established in 7 CFR 210.18.

In addition to observing the serving line and the meals counted at point of service during the administrative review, the SAs must conduct a nutrient analysis to ensure that the average levels of calories, saturated fat, and sodium in the meals offered over the school week are within the values specified in this final rule. However, in response to commenters' concerns, this final rule requires SAs to review menu and production records for one week only within the review period, instead of the two weeks stated in the proposed rule.

This final rule changes the administrative review cycle from 5 to 3 years in accordance with the NSLA, as amended by §207 of the HHFKA. This change takes effect in SY 2013-2014, after the current 5-year review cycle ends. USDA will provide technical assistance, resources, and guidance to SAs to facilitate transition to the 3-year review cycle.

Beginning SY 2013-2014, SAs must monitor breakfasts under the administrative review. However, because the new meal requirements (other than limiting types of milk) are being implemented gradually in the SBP, part of the compliance assessment must be based on prior nutrition standards (which are now in § 220.23) until new requirements in the SBP regulations at § 220.8 take effect. The requirement to conduct a nutrient analysis of breakfast menu records for a one-week period begins July 1, 2013 (SY 2013-2014).

SAs must continue to use technical assistance and corrective action as the primary strategies to help schools comply with the meal requirements. However, this final rule gives SAs the ability to use fiscal action to enforce compliance with specific meal requirements. As currently done, SAs must apply immediate fiscal action if the meals offered are completely missing one of the required food components. SAs must also take fiscal action for repeated violations of the vegetable subgroup and milk type requirements when technical assistance efforts and required corrective action have not resolved these violations. However, SAs have discretion to take fiscal action for repeated violations of the food quantity and whole grain requirements, and for repeated violations of the dietary specifications (calories, saturated fat, sodium and trans fats).

The NSLA, as amended by the HHFKA, requires schools to post review final findings and make findings available to the public. Also, the NSLA requires local education agencies to report on the school nutrition environment to USDA and to the public, including information on food safety inspections, local wellness policies, school meal program participation, and nutritional quality of program meals. These statutory requirements will be implemented through a separate rule.

The monitoring procedure requirements can be found at §210.18(a), §210.18(c), §210.18(g) and §210.18(m) for the NSLP and under §220.8(h) and §220.8(j) for the SBP.

Identification of Reimbursable Meal:

Beginning July 1, 2012 (SY 2012-2013), this final rule requires schools to identify the components of the reimbursable meal at or near the beginning of the serving line(s) as students and parents often are not aware of what is included in the school meal. Schools have discretion to determine the best way to present this information on the serving line. Implementing this requirement must not result in overt identification of any student participating in the NSLP or

SBP through use of a separate serving line for the reimbursable meal or other segregation of certified students.

The identification of reimbursable meal requirements can be found at §210.10(a)(2) for the NSLP, and under §220.8(h) and §220.8(j) for the SBP.

Crediting:

Effective July 1, 2012 (SY 2012-2013), reimbursable meals must not include snack-type fruit products that have been previously credited by calculating the whole-fruit equivalency of the processed fruit in the product using the FDA's standards of identity for canned fruit nectars (21 CFR 146.113).

USDA will credit tomato paste and puree as a calculated volume based on the whole food equivalency.

The crediting requirements can be found at §210.10(c)(2)(iii) of the regulatory text.

Fiber:

The final rule disallows the use of formulated grain-fruit products to meet the grain and fruit components in the SBP beginning July 1, 2012 (SY 2012- 2013). Formulated grain-fruit products, as defined in Appendix A to 7 CFR part 220, are (1) grain-type products that have grain as the primary ingredient, and (2) grain-fruit type products that have fruit as the primary ingredient. Both types of products must have at least 25 percent of their weight derived from grain. This rule does not prohibit the use of fortified cereals or cereals with fruit (e.g., ready-to-eat cereals) which may provide good sources of whole grains, fiber, and other important nutrients. In most instances, however, the use of highly-fortified food products is inconsistent with the Dietary Guidelines.

This final rule amends Appendix A to 7 CFR part 220 by removing Formulated Grain-Fruit Products in its entirety. It also makes a technical change to Appendix B to 7 CFR part 210 by removing the statement that affirms that Appendix B will be updated to exclude individual foods that have been determined to be exempted from the categories of Foods of Minimal Nutritional Value. A list of these exempted foods is maintained and available to all State agencies participating in the Programs. There have been no changes to the categories of exempted foods and USDA is maintaining the requirement to publish a Federal Register Notice and update the regulations to reflect any changes to the categories.

New Meal Pattern and Dietary Specifications:

The following meal patterns must be implemented in SY 2012-2013 for the NSLP, and phased-in for the SBP as specified in the footnotes and regulatory text.

Table 3 – Summary of Final Rule Meal Requirements⁷

Meal Pattern	Breakfast Meal Pattern			Lunch Meal Pattern		
	Grades K-5 ^a	Grades 6-8 ^a	Grades 9-12 ^a	Grades K-5 ^a	Grades 6-8 ^a	Grades 9-12 ^a
	Amount of food ^b per week (minimum per day)					
Fruits (cups) ^{c,d}	5 (1) ^e	5 (1) ^e	5 (1) ^e	2½ (½)	2½ (½)	5 (1)
Vegetables (cups) ^{c,d}	0	0	0	3¾ (¾)	3¾ (¾)	5 (1)
Dark Green ^f	0	0	0	½	½	½
Red Orange ^f	0	0	0	¾	¾	1¼
Beans/Peas (Legumes) ^f	0	0	0	½	½	½
Starchy ^f	0	0	0	½	½	½
Other ^{f,g}	0	0	0	½	½	¾
Additional Veg to Reach Total ^h	0	0	0	1	1	1½
Grains (oz eq) ⁱ	7-10 (1) ^j	8-10 (1) ^j	9-10 (1) ^j	8-9 (1)	8-10 (1)	10-12 (2)
Meats/Meat Alternates (oz eq)	0 ^k	0 ^k	0 ^k	8-10 (1)	9-10 (1)	10-12 (2)
Fluid Milk (cups) ⁱ	5 (1)	5 (1)	5 (1)	5 (1)	5 (1)	5 (1)
Other Specifications: Daily Amount Based on the Average for a 5-Day Week						
Min-max calories (kcal) ^{m,n,o}	350-500	400-550	450-600	550-650	600-750	750-850
Saturated fat % of total calories ^{n,o}	<10	<10	<10	<10	<10	<10
Sodium (mg) ^{n,p}	≤430	≤470	≤500	≤640	≤710	≤740
<i>Trans</i> fat ^o	Nutrition label of manufacturer specifications must indicate zero grams of <i>trans</i> fat per serving.					

^a In the SBP, the above age-grade groups are required beginning July 1, 2013 (SY 2013–14). In SY 2012–2013 only, schools may continue to use the meal pattern for grades K–12 (see § 220.23).

^b Food items included in each food group and subgroup and amount equivalents. Minimum creditable serving is 1/8 cup.

^c One quarter-cup of dried fruit counts as 1/2 cup of fruit; 1 cup of leafy greens counts as 1/2 cup of vegetables. No more than half of the fruit or vegetable offerings may be in the form of juice. All juice must be 100% full-strength.

^d For breakfast, vegetables may be substituted for fruits, but the first two cups per week of any such substitution must be from the dark green, red/orange, beans and peas (legumes) or “Other vegetables” subgroups as defined in § 210.10(c)(2)(iii).

^e The fruit quantity requirement for the SBP (5 cups/week and a minimum of 1 cup/day) is effective July 1, 2014 (SY 2014–2015).

^f Larger amounts of these vegetables may be served.

^g This category consists of “Other vegetables” as defined in § 210.10(c)(2)(iii)(E). For the purposes of the NSLP, “Other vegetables” requirement may be met with any additional amounts from the dark green, red/orange, and beans/peas (legumes) vegetable subgroups as defined in § 210.10(c)(2)(iii).

^h Any vegetable subgroup may be offered to meet the total weekly vegetable requirement.

⁷ 77 Fed. Reg. 4110 (January 26, 2012).

ⁱ At least half of the grains offered must be whole grain-rich in the NSLP beginning July 1, 2012 (SY 2012–2013), and in the SBP beginning July 1, 2013 (SY 2013–2014). All grains must be whole grain-rich in both the NSLP and the SBP beginning July 1, 2014 (SY 2014–15).

^j In the SBP, the grain ranges must be offered beginning July 1, 2013 (SY 2013–2014).

^k There is no separate meat/meat alternate component in the SBP. Beginning July 1, 2013 (SY 2013–2014), schools may substitute 1 oz. eq. of meat/meat alternate for 1 oz. eq. of grains after the minimum daily grains requirement is met.

^l Fluid milk must be low-fat (1 percent milk fat or less, unflavored) or fat-free (unflavored or flavored).

^m The average daily amount of calories for a 5-day school week must be within the range (at least the minimum and no more than the maximum values).

ⁿ Discretionary sources of calories (solid fats and added sugars) may be added to the meal pattern if within the specifications for calories, saturated fat, trans fat, and sodium. Foods of minimal nutritional value and fluid milk with fat content greater than 1 percent milk fat are not allowed.

^o In the SBP, calories and trans fat specifications take effect beginning July 1, 2013 (SY 2013–2014).

^p Final sodium specifications are to be reached by SY 2022–2023 or July 1, 2022. Intermediate sodium specifications are established for SY 2014–2015 and 2017–2018. See required intermediate specifications in § 210.10(f)(3) for lunches and § 220.8(f)(3) for breakfasts.

Implementation Assistance:

According to the Federal Register notice, USDA and the National Food Service Management Institute are developing technical assistance resources and training to help school foodservice staff improve menus, order appropriate foods to meet the new meal requirements, and control costs while maintaining quality. Resources and training materials being developed include identifying and purchasing whole grain-rich foods, lowering the sodium on menus, and meeting the new meal pattern requirements. Training will be available through a variety of methods including webinars and online learning modules.

USDA is updating the Child Nutrition Database and will reevaluate nutrient analysis software systems available from industry to assist SAs with monitoring calories, saturated fat, and sodium in the meals offered to students in grades K through 12 during the administrative review.

The Child Nutrition Labeling Program is being updated to report whole grain-rich contributions to the grains component and to provide standardize claims for the vegetable subgroups consistent with the 2010 Dietary Guidelines.

In addition, the HRFKA provides USDA \$50 million for each of the first two years of the new meal requirements for use in assisting SAs implement the new requirements. These funds, combined with increases in State Administrative Expense funding, should assist States and local operators in improving the quality of school meals provided to children.

Implementation Timetable⁸

The following chart provides a summary of the new requirements and the required implementation dates in the NSLP and SBP. Refer to the regulatory text for details.

New Requirements	Implementation (school year) for NSLP (L) and SBP (B)						
	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2022/23
Fruit Component:							
Offer Daily	L.....	.....	.....	.....	.....	.....
Fruit quantity increases to 5 cups/week (minimum 1 cup/day)	.....	.....	B.....	.....	.....	.....
Vegetable Component:							
Offer vegetables subgroups weekly	L.....	B.....	.....	.....	.....	.....
Grain Component:							
Half of grains must be whole grain-rich	L.....	.....	.....	.....	.....	.....
All grains must be whole grain-rich	.....	.....	L,B.....	.....	.....	.....
Offer weekly grain ranges	L.....	B.....	.....	.....	.....	.....
Meats/Meat Alternates Component:							
Offer weekly meals/meat alternates ranges (daily min.)	L.....	.....	.....	.....	.....	.....
Milk Component							
Offer only fat-free (unflavored or flavored) and lowfat (unflavored) milk	L,B.....	.....	.....	.....	.....	.....
Dietary Specifications (to be met on average over a week):							
Calorie ranges	L.....	B.....	.....	.....	.....	.....
Saturated fat limit (no change)	L,B.....	.....	.....	.....	.....	.....
Sodium Targets ¹	.....	.....	L,B.....	.....	.....	.....	L,B
* Target 1							
* Target 2							
* Final target							
Zero grams of trans fat per portion	L.....	B.....	.....	.....	.....	.....
Menu Planning:							
A single FBMP approach	L.....	B.....	.....	.....	.....	.....
Age-Grade Groups:							
Establish age/grade groups: K-5, 6-8, 9-12	L.....	B.....	.....	.....	.....	.....
Offer vs. Serve:							
Reimbursable meals must contain a fruit or vegetable (1/2 cup minimum)	L.....	.....	B.....	.....	.....	.....
Monitoring							
3-year adm. review cycle	.....	L,B.....	.....	.....	.....	.....
Conduct weighted nutrient analysis on 1 week of menus	L.....	B.....	.....	.....	.....	.....

⁸ 77 Fed. Reg. 4103 (January 26, 2012).

¹ Target 2 and the final target will only be required after USDA evaluates relevant data on sodium intake and human health, as required by Section 743 of the FY 2012 Agriculture Appropriations Act

Comparing Meal Requirements:

Following are a series of tables that illustrate the changes in the SBP and NSLP programs.

Table 4: School Breakfast Program – Current Requirements Compared to Final Rule Requirements for a 5-Day School Week⁹

Grade Levels	Current Requirements	Final Rule		
	K-12	K-5	6-8	9-12
Fruit (cups)	2.5	5	5	5
Vegetable (cups) Grain/Bread (oz eq)	0	0	0	0
Meat/Meat Alternates (oz eq)	0-10 ^{b,c}	7-10	8-10	9-10
	0-10 ^c	0 ^d	0 ^d	0 ^d
Milk (cups)	5	5	5	5

^a Requirements and recommendations are for meals as offered for a 5-day school week. Requirements are minimum portion sizes based on the Traditional Food-Based Menu Planning approach.

^b Must be enriched or whole grain.

^c Requirements call for two grains, two meats, or one of each.

^d Schools retain ability to substitute meat for grains. See Table 3, footnote k for additional detail.

⁹ 77 Fed. Reg. 4113 (January 26, 2012).

Table 5: National School Lunch Program: Current Requirements Compared to Final Rule Requirements for a 5-Day School Week^{a10}

Grade Levels	Current Requirements: Traditional Food-Based Approach			Current Requirements: Enhanced Food Based Approach			Final Rule ^c		
	k-3 ^b	4-12 ^b	7-12 ^{c,d}	k-3 ^{b,d}	4-12 ^b	7-12	k-5	6-8	9-12
Fruit (cups)	2.5 ^f	3.75 ^f	3.75 ^f	3.75 ^f	4.25 ^h	5 ^f	2.5	2.5	5
Vegetable (cups)							3.75	3.75	5
Dark Green	NS	NS	NS	NS	NS	NS	0.5	0.5	0.5
Orange	NS	NS	NS	NS	NS	NS	0.75	0.75	1.25
Legumes	NS	NS	NS	NS	NS	NS	0.5	0.5	0.5
Starchy	NS	NS	NS	NS	NS	NS	0.5	0.5	0.5
Other	NS	NS	NS	NS	NS	NS	0.5	0.5	0.75
Additional Veg to Reach Total	NS	NS	NS	NS	NS	NS	1	1	1.5
Grain/Bread (oz eq)	8 (min 1/day) ^g	8 (min 1/day) ^g	8 (min 1/day) ^g	10 (min 1/day) ^g	12 (min 1/day) ^g	15 (min 1/day) ^g			
Meat/Meat Alternates (oz eq)	7.5	10	15	7.5	10	10	8-9	8-10	10-12
Milk (cups)	5	5	5	5	5	5	5	5	5

^a Requirements and recommendations are for meals as offered for a 5-day school week.

^b Minimum portion sizes.

^c Recommended portion sizes for the Traditional Food-Based Menu Planning approach.

^d Optional grade configuration.

^e See Table 3 and Table 3 footnotes for additional detail. Final rule standards shown in this table are after full phase-in (SY 2014-2015).

^f Two or more servings of fruit, vegetables, or both a day.

^g Must be enriched or whole grain.

^h Two or more servings of fruit, vegetables, or both a day, plus an extra half-cup over the 5-day school week.

Estimated Cost of Final Rule:

The analysis estimates that total costs may increase by \$3.2 billion from fiscal year (FY) 2012 through fiscal year (FY) 2016, or roughly 8 percent when the rule's food group requirements are fully implemented in FY 2015. The final rule's cost is \$3.6 billion below the estimated cost of the proposed rule. The cost estimate assumes no change in student participation following introduction of the new meal pattern requirements.¹¹

The estimated increases in food and labor costs are equivalent to about 10 cents for each reimbursable school lunch and about 27 cents for each reimbursable breakfast in FY 2015. The following tables detail and compare costs.

¹⁰ 77 Fed. Reg. 4113 (January 26, 2012).

¹¹ 77 Fed. Reg. 4128 (January 26, 2012), Table 13.

Estimated Cost of Final Rule (millions)¹²

	Fiscal Year					
	2012	2013	2014	2015	2016	Total
Food Costs	\$20.8	\$135.4	\$178.7	\$612.8	\$642.8	\$1,590.5
Labor Costs	20.7	141.9	174.4	598.0	627.2	1,562.3
State Agency Administrative Costs	0.1	8.9	9.1	9.4	9.7	37.1
Total	\$41.6	\$286.2	\$362.1	\$1,220.2	\$1,279.7	\$3189.9
Percentage Change Over Baseline	2.0%	2.0%	2.5%	8.0%	801%	5.2%

Table 11: Estimated Food Costs by Food Category (millions)¹³

Food Group	Fiscal Year					
	2012	2013	2014	2015	2016	Total
Milk	-\$4.5	-\$30.0	-\$30.9	-\$31.8	-\$32.7	-\$130.0
Meat or Meat Alternate	-25.4	-169.0	-175.3	-181.6	-188.1	-739.4
Fruit Juice	0.0	0.0	0.0	0.0	0.0	0.0
Fruit (non-juice)	0.5	3.1	46.9	294.9	307.2	652.6
Vegetables	75.8	51.5	533.9	547.0	573.0	2,240.2
Refined Grains	-80.0	-569.6	-888.9	-1,569.2	-1,639.5	-4,747.1
Whole Grains	54.5	390.4	693.0	1,553.5	1,622.8	4,314.3
Total Cost of Rule	\$20.8	\$135.4	\$178.7	\$612.8	\$642.8	\$1,590.5

Table 12 – Reduction in Estimated Cost of Final Rule Relative to Proposed Rule¹⁴

	Fiscal Year					
	2012	2013	2014	2015	2016	Total
Proposed Rule	\$181.5	\$1,246.8	\$1,401.9	\$1,923.8	\$2,041.3	\$6,795.2
Final Rule – preliminary estimate	41.6	286.2	362.1	1,220.2	1,279.7	3,189.9
Difference	-139.8	-960.6	-1,039.7	-703.6	-761.6	-3,605.3
Proposed Rule	\$181.5	\$1,246.8	\$1,401.9	\$1,923.8	\$2,041.3	\$6,795.2
Final Rule – with proposed rule inflation and participation estimates	53.5	376.0	474.8	1,419.0	1,511.1	3,834.5
Difference	-127.9	-870.6	-927.0	-504.8	-530.2	-2,960.7

Table 15 – Changes in Cost of the final Rule Relative to the Proposed Rule¹⁵

	Fiscal Year					
	2012	2013	2014	2015	2016	Total
Proposed Rule	\$181.5	\$1,246.8	\$1,401.9	\$1,923.8	\$2,041.3	\$6,795.2
Updated economic and participation projections	-15.9	-114.8	-141.1	-211.3	-248.2	-731.2
Changes to breakfast meal pattern requirements	-120.5	-822.7	-871.4	-446.4	-465.6	-2,726.7
Changes to breakfast meal pattern requirements	-3.4	-23.0	-27.1	-45.8	-47.8	-147.3
Final Rule	41.6	286.2	362.1	1,220.2	1,279.7	3,189.9

¹² 77 Fed. Reg. 4108 (January 26, 2012).

¹³ 77 Fed. Reg. 4123 (January 26, 2012).

¹⁴ 77 Fed. Reg. 4126 (January 26, 2012).

¹⁵ 77 Fed. Reg. 4131 (January 26, 2012).

Options for Addressing Increased Costs:

While pointing to the reduced cost of the final rule as compared to the estimated cost of the proposed rule, USDA does note that schools and school districts will be required to make a “substantial investment...to improve the nutritional quality of school meals.”¹⁶ USDA suggests the following options are available for dealing with these costs:

- The additional 6 cents reimbursement provided by HRFKA for each lunch served meeting the new meal requirements. The Congressional Budget Office estimates that the additional 6 cents per lunch will raise \$1.5 billion for SFAs in the first 5 years after implementation of the rule.
- HRFKA requires SFAs to gradually raise the per-meal revenue generated from paid lunches to an amount equal to the Federal reimbursement for free lunches. That revenue could come from student payments or State or local sources.
- HRFKA also requires that the revenue generated from non-program foods as a percent of food costs match the revenue to food cost ratio of program meals. USDA estimates that these two provisions will raise a combined \$7.5 billion in the 5 years following their July 1, 2011 effective date.
- Substantial progress toward implementation of the rule can even be achieved with existing resources, as experienced by SFAs already participating in USDA’s HealthierUS Schools Challenge.
- Schools may need to consider changes to their operations to increase efficiency and meet the requirements of the rule.

* * * * *

We hope this information is helpful to you. Should you have any questions, please contact Roger Szemraj at rszemraj@ofwlaw.com or (202) 789-1212.

RRS:lld
Attachment

¹⁶ 77 Fed. Reg. 4142 (January 26, 2012).