

# New USDA Final Rule Requires Meals Served at School to Meet More Stringent Nutrition Quality Standards

January 31, 2012

## Introduction

On January 25, 2012, the Food Nutrition Service of the U.S. Department of Agriculture ("USDA") issued a final rule that substantially modifies the menu planning and nutrition requirements for the National School Lunch Program ("NSLP") and the School Breakfast Program ("SBP").<sup>1</sup> The rule, which is intended to improve the dietary habits of school children in grades K-12 and address health concerns related to child obesity, closely aligns the NSLP and SBP with the most recent "Dietary Guidelines for Americans," as required by the Richard B. Russell National School Lunch Act ("NSLA").<sup>2</sup> The rule applies only to foods included in lunch and breakfast meals that are served in the school cafeteria and does not impact foods contained in vending machines or other sources of food at school.

## Final Rule History

On January 13, 2011, USDA issued a proposed rule that was based on recommendations developed, at the request of USDA, by the Institute of Medicine ("IOM"). The IOM recommendations, which were set forth in an October 2009 report "School Meals: Building Blocks for Healthy Children," were designed to align school meal patterns with the 2005 Dietary Guidelines.<sup>3</sup> A basic premise of the 2005 Dietary Guidelines is that nutrient needs should be met primarily by consuming a variety of nutrient-dense foods from the basic food groups. These foods, along with low-fat fluid milk, supply many of the key nutrients of concern for children, such as calcium, fiber, potassium, and vitamin E.

In accordance with the IOM recommendations, the USDA proposed the adoption of "nutrition targets" based on Dietary Reference Intake ("DRI") nutrient levels to promote the nutritional quality of school menus offered under the NSLP and SBP, and to require schools to adhere to food-based menu planning ("FBMP") to ensure that the number of servings of foods from key food groups offered as part of school meals would meet minimum standards (*i.e.*, food servings per day and week) and school menus would support nutrient intakes that are consistent with the DRI-based nutrition targets. For example, under the new rule, the menu plan for breakfast requires schools to offer meals that meet minimum standards for servings of fruit, grain, meat/meat alternatives and fluid milk. Similarly, the menu plan for lunch requires schools to offer meals that meet minimum standards for servings of fruit, vegetable, grain, meat/meat alternates, and fluid milk.

On January 31, 2011, the USDA and HHS jointly published the 2010 Dietary Guidelines that reinforced the importance of nutrient-dense foods and beverages in achieving an overall healthy diet, and encouraging Americans to reduce the amounts of sodium, solid fats, added sugars, and refined grains they consume. On March 21, 2011, USDA issued a notice requesting public comment

on whether the proposed rule should be modified to reflect recommendations within the 2010 Dietary Guidelines that call for an increase in consumption of red-orange vegetables and foods high in protein, including seafood, meat, poultry and eggs, nuts and seeds, and soy products. In developing the final rule, USDA considered more than 130,000 public comments that were filed in response to the proposed rule.

## Key Changes to the Proposed Rule

The provisions and nutrition quality standards within the final rule are generally consistent with the USDA's proposed requirements. The rule, for example establishes FBMP as the single menu planning approach for the NSLP beginning in school year 2012-2013. The rule also adopts the USDA proposal to require school breakfast and lunch menus to meet age/grade-appropriate food and nutrition quality standards, which would be defined with reference to the following age/grade groups:

- Grades K-5 (ages 5-10 years)
- Grades 6-8 (ages 11-13 years)
- Grades 9-12 (ages 14-18 years)

The USDA proposed these groupings with the understanding that they are consistent with the current age-gender categories used in the DRIs and with widely-adopted school grade configurations.

The final rule differs from the proposed rule in a number of key respects. Most notably, the rule provides operators with an additional year before they must implement a majority of the school breakfast requirements, including the provisions that increase the minimum amount of fruit and whole grains offered for breakfast, and the requirement that breakfast meals contain zero grams of trans fat per serving. School breakfast program operators will now have until the start of the 2013-2014 school year to implement these requirements. In addition, the rule responds to comments from school breakfast operators about the cost of implementing the new standards by eliminating the proposed provision that required a meat or meat alternate to be served daily at breakfast.

The rule also removes the proposed limit on servings of starchy vegetables, such as white potatoes and corn, in response to the Consolidated and Further Continuing Appropriations Act,<sup>4</sup> which specifically prevented USDA from adopting the IOM recommendation for setting maximum limits on starchy vegetables. In the alternative, the rule requires schools to offer at least the minimum quantities of all five of the vegetable subgroups in the NSLP over the course of each week. In addition, the rule expands the proposed orange vegetable subgroup to include red and orange vegetables, which is consistent with the vegetable subgroup classifications in the 2010 Dietary Guidelines.

## Food and Nutrition Quality Standards Under the New Rule

The USDA rule establishes age-appropriate DRI-based nutrient targets and adopts the food-based menu planning approach to support the nutritional quality of breakfast and lunch menus and meals that are offered in schools under the SBP and NSLP. The changes in the food and nutrition standards governing school meals are intended by USDA to support diet-related public health goals for U.S. children and adolescents, including obesity prevention and ensuring the adequate intake of nutrients. The following summary highlights key changes to current nutrition quality standards that will be implemented under USDA's final rule:

- **Offer fruit servings at breakfast and lunch:** The final rule requires schools to increase the number of fruit servings they offer as part of school breakfast and lunch meals. The rule doubles the amount of fruit that must be offered for breakfast compared to previous requirements, from one-half cup per day to one cup per day. The rule doubles the amount of fruit and vegetable servings that must be offered for lunch to certain age/grade groups, such as school children in grades 9-12, from a combined one cup of fruit and vegetables to one cup of fruit and one cup of vegetables per day.
- **Offer more vegetable servings and vegetable variety at lunch:** In contrast to previous NSLP requirements, the USDA final rule establishes minimum standards concerning not only the amount of vegetables that must be served, but also the varieties of vegetables that must be offered as part of lunch menus and meals, which would be defined by the following categories: dark green vegetables (*e.g.* broccoli, spinach); red or orange vegetables (*e.g.* carrots, sweet potato, red bell peppers); legumes (*e.g.* black beans, lima beans); starchy vegetables (*e.g.* corn, white potatoes); and other vegetables (*e.g.* tomatoes, onions).
- **Offer more whole-grain rich foods:** The USDA final rule requires schools to offer more servings of whole grain foods for breakfast and lunch. The whole grain standards will be phased-in over a multi-year period. Only whole grain rich foods can be offered in school lunch programs within two years after the rule becomes effective. The school breakfast program will have three years to implement the same provision. The rule also reduces the number of allowable grain-based desserts from five, under the proposed rule, to two per school week.
- **Limit fluid milk options to fat-free (unflavored or flavored) and unflavored low-fat (one percent or less):** The final rule discontinues the current USDA policy that permits schools to offer fluid milk of various fat content levels (*e.g.*, whole milk, two percent) and places no limit on the fat content of flavored milk products. The final rule allows flavor in fat-free milk only and limits unflavored milk choices to fat-free and low-fat (one percent or less). The USDA adopted this provision in an effort to limit added sugars and fat to the meal that would make it more difficult for schools to offer meals that meet the limits on calories and saturated fat under the new rule.
- **Offer meals that satisfy age/grade appropriate calorie limits:** The rule establishes new minimum calorie levels for lunch and breakfast that align with the revised age/grade groups and significantly lowers the current minimum lunch calorie intake requirement. The rule also establishes a maximum calorie level for each age/grade group. For example, the previous lunch calorie requirement is a minimum of 825 calories per day for school children ages 12 and older. Under the new rule, the lunch calorie requirement is a minimum of 750 calories and a maximum of 850 calories per day for school children ages 14-18.
- **Offer meals that satisfy saturated fat limits:** Saturated fat levels under the new final rule remain consistent with the previous requirement. School breakfasts and lunches offered to all age/grade groups must, on average over the school week, provide less than 10 percent of total calories from saturated fat.
- **Offer meals that minimize consumption of *trans* fat:** Under the new final rule, schools can only use food products and ingredients that contain zero grams of *trans* fat (or less than 0.5 grams) per serving, as indicated on the nutrition label.
- **Offer meals that substantially reduce consumption of sodium over time:** A key objective of the final rule is to reduce the sodium content of school meals. As such, the rule

requires proportional reductions in sodium levels for both breakfast and lunch meals implemented over a ten-year period. For example, the sodium target for school children ages 5 through 10 is no more than 1,230 milligrams of sodium per lunch within two years after the rule becomes effective. The sodium target for the same age/grade group is no more than 640 milligrams of sodium per lunch meal within 10 years after the rule becomes effective. In contrast, the present average sodium content of a school lunch is more than 1400 milligrams. The rule, however, lengthens the proposed time that school lunch and breakfast program operators will have to reach the second intermediate sodium reduction targets – from four to five years – to give food manufacturers more time to reformulate food products.

## State & Local Oversight

The new rule permits state and local agencies operating national school lunch and breakfast programs to establish more restrictive nutrition requirements or additional requirements for school meals that are not inconsistent with the nutritional provisions of the rule. For example, State or local agencies can impose more restrictive saturated fats and sodium limits, or can accelerate implementation of the final sodium targets within the rule.

The rule also increases the frequency of administrative reviews by State agencies from the current five-year cycle to a three-year cycle. The rule maintains the current one week review period at each school. During the reviews, which include both breakfast and lunch meals, State agency personnel will analyze menu and production records to assess compliance with the revised nutritional standards.

## Conclusion

The USDA rule represents a substantial shift in the nutritional composition and quantity of a number of food items that make up school breakfast and lunch meals and will have far-reaching implications for companies that make or market food products for use in school breakfast or lunch programs. Companies are advised to evaluate the legal and business implications of the rule soon, as many of the changes to the nutrition quality standards are effective at the start of the 2012-2013 school year. Please contact any of the Kelley Drye attorneys listed below if you have questions concerning the USDA rule or other matters.

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<sup>1</sup> Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 3919, 4087 (Jan. 26, 2012) (to be codified at 7 C.F.R. Parts 210 and 220).

<sup>2</sup> 42 U.S.C. §1758(a)(1).

<sup>3</sup> A 2004 amendment to the NSLA requires school meals to conform with the most recent Dietary Guidelines, which are published jointly by USDA and the Department of Health and Human Services ("HHS") and updated every five years. The 2010 Dietary Guidelines were not available to be considered for the recommended revisions within the proposed rule.

<sup>4</sup> 2012 P.L. 112-55.