

# USDA Proposal Would Require Meals Served at School to Meet More Stringent Nutrition Quality Standards

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## Introduction

Last month, the Food and Nutrition Service of the U.S. Department of Agriculture ("USDA") issued a proposed rule that would revise the meal patterns and nutrition requirements for the National School Lunch Program ("NSLP") and the School Breakfast Program ("SBP").<sup>1</sup> The proposed rule, which is intended to improve the dietary habits of school children, would align the NSLP and SBP with the 2005 "Dietary Guidelines for Americans," as required by the Richard B. Russell National School Lunch Act ("NSLA").<sup>2</sup>

### The Dietary Guidelines for Americans

A 2004 amendment to the NSLA requires school meals to conform with the most recent Dietary Guidelines, which are published jointly by the USDA and the Department of Health and Human Services ("HHS") and updated every five years. The proposed rule includes recommendations that will 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 contrast, current school menus are not required to offer the recommended quantities of fruits, vegetables, and whole grains.

The nutritional recommendations included in the 2010 Dietary Guidelines, issued by USDA and HHS on January 31, 2011, are generally consistent with the 2005 Dietary Guidelines, once again reinforcing 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 and to increase their servings of fruits, vegetables, whole grains, low-fat milk products, seafood and lean meats and poultry, eggs, beans/peas, nuts and seeds. The 2010 Dietary Guidelines emphasize the need to maintain "calorie balance" (*i.e.*, balancing calories consumed with those expended) over time, and make calorie intake recommendations for school-age children based on age, gender, and physical activity levels.<sup>4</sup>

### 2009 Institute of Medicine Report & Recommendations

The Institute of Medicine ("IOM") was requested by the USDA to develop recommendations that would align the NSLP and SBP meal requirements with the 2005 Dietary Guidelines. In October 2009, an IOM committee comprised of nutritional scientists and school foodservice professionals issued the report, *School Meals: Building Blocks for Healthy Children*, which provides the scientific basis for the proposed rule.

In accordance with the IOM report recommendations, the USDA proposed rule would adopt "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 would require schools to adhere to food-based meal patterns 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, the proposed meal pattern for breakfast would require schools to offer meals that meet minimum standards for servings of fruit, grain, meat/meat alternatives and fluid milk. Similarly, the proposed meal pattern for lunch would require schools to offer meals that meet minimum standards for servings of fruit, vegetable, grain, meat/meat alternates, and fluid milk.

## Age/Grade Appropriate Food and Nutrition Quality Standards

The proposed rule, which would apply to school children in grades K-12, would revise the age/grade groups used for lunch and breakfast menu planning in a manner that USDA believes is consistent with the current age-gender categories used in the DRIs and with widely-adopted school grade configurations. As a result, under the proposal, school breakfast and lunch menus would be required 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)

## Proposed Food and Nutrition Quality Standards

The USDA proposal would establish age-appropriate DRI-based nutrition targets and food-based patterns to support the nutritional quality of breakfast and lunch menus and meals that are offered in schools under the SBP and NSLP. In key respects, the proposed changes in the food and nutrition standards governing school meals are designed to support U.S. public health goals for children and adolescents, including obesity prevention and ensuring adequate nutrient intakes. The following summary highlights key changes that would be made under the USDA proposal:

- **Offer more fruit servings at breakfast and lunch:** The USDA proposal would require schools to increase the number of fruit servings they offer as part of school breakfast and lunch meals. The proposal would double the amount of fruit that must be offered for breakfast compared to current requirements, from one-half cup per day to one cup per day. The proposal would double 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 current NSLP requirements, the USDA proposal would establish 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); orange vegetables (*e.g.* carrots, sweet potato); 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 proposal would require schools to offer more servings of whole grain foods for breakfast and lunch. The whole grain standards would be phased-in over a two-year period. Only whole grain rich foods could be offered in school breakfast or lunch programs within two years after the rule becomes effective.
- **Offer exclusively fat-free (unflavored or flavored) and unflavored low-fat (one percent or less) fluid milk options:** The proposed rule would discontinue 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.
- **Offer meals that satisfy age/grade appropriate calorie limits:** The proposed 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 proposed rule also establishes a maximum calorie level for each age/grade group. For example, the current lunch calorie requirement is a minimum of 825 calories per day for school children ages 12 and older. Under the proposed 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 proposed rule remain consistent with the current 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 proposed rule, schools could 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 proposed rule is to reduce the sodium content of school meals. As such, the proposed 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 would be 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 would be no more than 640 milligrams of sodium per lunch meal within 10 years after the rule becomes effective. In contrast, the current average sodium content of a school lunch is more than 1400 milligrams.

## State & Local Oversight

Under the proposed rule, state and local agencies operating the NSLP and SBP can establish more rigorous 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 would be permitted to establish more restrictive saturated fats and sodium limits, or could accelerate implementation of the final sodium targets stated in the proposal.

The proposed rule also increases the frequency of administrative reviews by State agencies from the current five-year cycle to a three-year cycle, and expands the review period at each school from one to two weeks. The reviews would include both breakfast and lunch meals. During each review, state agency personnel would analyze menu and production records to assess compliance with the revised

nutritional standards.

## Conclusion

The proposed rule represents a substantial shift in the nutritional composition and quantity of a number of food items that make up current school breakfast and lunch meals and is likely to have far-reaching implications for companies that make or market food products for use in school breakfast or lunch programs. Affected companies are advised to evaluate the legal and business implications of the USDA proposal now, and bring issues and concerns to the attention of the appropriate policymakers, including by submitting written comments to USDA on or before the April 13, 2011 deadline. Please contact any of the Kelley Drye attorneys listed below if you have questions concerning the USDA proposal or other matters.

### Kelley Drye & Warren LLP

Kelley Drye's team of [Food and Drug](#) lawyers strives to integrate our clients' business strategies with FDA compliance and to help resolve regulatory enforcement matters when they arise. Working side-by-side with business development and marketing professionals, we provide comprehensive regulatory counseling and assist in developing products, labels, and promotional materials that achieve our clients' goals without running afoul of regulatory requirements. With close knowledge of FDA's enforcement priorities and deep experience with the FTC's regulation of advertising, our team can provide comprehensive legal advice with an eye towards giving clients a competitive edge.

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<sup>1</sup> 76 Fed. Reg. 2494 (proposed Jan. 13, 2011) (to be codified at 7 C.F.R. pts. 210 and 220).

<sup>2</sup> 42 U.S.C. §1758(a)(1) ("Lunches served by schools participating in the school lunch program under this chapter shall meet minimum nutritional requirements prescribed by the Secretary on the basis of tested nutritional research, except that the minimum nutritional requirements (i) shall not be construed to prohibit the substitution of foods to accommodate the medical or other special dietary needs of individual students; and (ii) shall, at a minimum, be based on the weekly average of the nutrient content of school lunches.")

<sup>3</sup> The 2010 Dietary Guidelines were not available to be considered for the recommended revisions within the proposed rule.

<sup>4</sup> Information about the 2010 Dietary Guidelines for Americans is available in a [February 2, 2011](#) post on Kelley Drye & Warren's Ad Law Access blog.