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## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Part 210

RIN 0584-AD55

#### National School Lunch Program: Requirement for Variety of Fluid Milk in Reimbursable Meals

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule makes changes to the regulations governing the National School Lunch Program. Currently, reimbursable school lunches must offer types of fluid milk consistent with prior year preferences, unless the prior year preference for a particular type of milk was less than one percent of the total milk consumed.

In response to the requirements of the Child Nutrition and WIC Reauthorization Act of 2004, which amended the Richard B. Russell National School Lunch Act, the National School Lunch Program regulations are revised to require that schools offer, with meals, fluid milk in a variety of fat contents. The requirement for consistency with prior year preferences is removed. As a result of the legislation, schools are provided with more flexibility to expand choices based upon what school food service professionals believe are the most appropriate offerings to meet the needs and tastes of children, as well as what will best encourage the increased consumption of milk and its associated nutrients by schoolchildren.

**DATES:** Effective July 1, 2005.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary O'Connell, (Rosemary.O'Connell@fns.usda.gov) Section Chief, School Programs Section, Program Policy and Development Branch, Child Nutrition Division, Food

and Nutrition Service, 3101 Park Center Drive, Room 634, Alexandria, VA 22302, (703) 305-2590.

#### SUPPLEMENTARY INFORMATION:

##### Background

The requirements for offering fluid milk as a part of a reimbursable lunch in the National School Lunch Program (NSLP) are described in 7 CFR 210.10 (m). Specifically, 7 CFR 210.10 (m)(1)(i) states that the types of milk offered by the school must be consistent with the types of milk consumed during the prior year, but stipulates that if a particular type of milk accounted for less than one percent (1%) of the total amount of milk consumed in the prior year, the school is not required to offer that type of milk. Section 102 of The Child Nutrition and WIC Reauthorization Act of 2004 (Public Law 108-265), amended section 9(a) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1758(a)) by removing the requirement that types of milk offered be consistent with the types consumed in the previous year. This rule makes corresponding changes to the regulations for the NSLP (7 CFR Part 210).

##### Does This Provision Apply to the School Breakfast and Special Milk Programs?

No, this provision only applies to the NSLP. Under the terms of section 4(e) of the Child Nutrition Act of 1966 (42 U.S.C. 1773(e)), USDA sets minimum nutritional standards for the School Breakfast Program (SBP) and, under this authority, requires that fluid milk be offered for breakfasts. Section 3 of the Child Nutrition Act of 1966 (42 U.S.C. 1772) establishes the criteria for the Special Milk Program (SMP). Thus the SBP and the SMP already have the flexibility to offer any type(s) of milk.

##### Does This Provision Apply to the Afterschool Snack Service of the NSLP?

Yes, the provision applies to afterschool snack program. Section 17A(d) of the Richard B. Russell National School Lunch Act, (42 U.S.C. 1766a(d)), requires that meal supplements served to children participating in the afterschool snack service meet the same requirements as reimbursable school lunches. Thus, this provision does affect the requirements for fluid milk served in the afterschool snack service.

#### What Specific Changes Does This Rule Make?

- Removes the requirement in 7 CFR 210.10 (m)(1)(i) that types of fluid milk offered be consistent with the types consumed in the previous year, and adds the requirement that milk in a variety of fat contents be offered.
- Codifies the authority for schools to offer flavored or unflavored fluid milk and lactose-free fluid milk. Schools had already been authorized to offer these varieties, but this rule makes the schools' authority a part of the regulatory language.

##### Executive Order 12866

This final rule has been determined to be non-significant and is not subject to review by the Office of Management and Budget under Executive Order 12866.

##### Public Law 104-4

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes a requirement for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, FNS generally prepares a written statement, including a cost-benefit analysis. This is done for proposed and final rules that have "Federal mandates" which may result in expenditures of \$100 million or more in any one year by State, local, or tribal governments, in the aggregate, or by the private sector. When this statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives. It must then adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.

This final rule contains no Federal mandates of \$100 million or more in any one year (under regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector. Thus, this final rule is not subject to the requirements of sections 202 and 205 of the UMRA.

##### Regulatory Flexibility Act

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601-612). Roberto Salazar, Administrator of the Food and Nutrition

Service, has certified that, because this rule is technical in nature, it will not have a significant economic impact on a substantial number of small entities.

#### *Executive Order 12372*

The National School Lunch Program is listed in the Catalog of Federal Domestic Assistance under No. 10.555. This program is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials (7 CFR part 3015, subpart V, and final rule related notice at 48 FR 29115, June 24, 1983).

#### *Federalism Summary Impact Statement*

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132. FNS has considered the impact of this rule on State and local governments and has determined that this rule does not have federalism implications. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section 6(b) of the Executive Order, a federalism summary impact statement is not required.

#### *Executive Order 12988*

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would impede its full implementation. This rule is not intended to have retroactive effect unless that is specified in the Effective Date section of the preamble of the final rule. Before any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

#### *Civil Rights Impact Analysis*

Under USDA Regulation 4300-4, Civil Rights Impact Analysis, FNS has reviewed this final rule to identify and address any major civil rights impacts the final rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, FNS has determined that this final rule will not in any way limit or reduce participants ability to

participate in the Child Nutrition Programs on the basis of an individual's or group's race, color, national origin, sex, age, or disability. FNS found no factors that would negatively and disproportionately affect any group of individuals.

#### *Paperwork Reduction Act*

This final rule contains no paperwork burdens or information collection requirements that are subject to review by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507).

#### *Government Paperwork Elimination Act*

FNS is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. This final rule contains no paperwork burdens or information collection requirements, and is thus in compliance with the GPEA.

#### *Public Participation*

This action is being finalized without prior notice or public comment under authority of 5 U.S.C. 553(b)(3)(A) and (B). The amendments contained in this final rule are nondiscretionary in nature, and therefore do not necessitate the opportunity for the public to offer comment. Thus, the Department has determined in accordance with 5 U.S.C. 553(b) that Notice of Proposed Rulemaking and Opportunity for Public Comment is unnecessary and contrary to the public interest and, in accordance with 5 U.S.C. 553(d), finds that good cause exists for making this action effective without prior public comment.

#### **List of Subjects in 7 CFR Part 210**

Children, Commodity School Program, Food assistance programs, Grants programs—social programs, National School Lunch Program, Nutrition, Reporting and recordkeeping requirements, Surplus agricultural commodities.

■ Accordingly, 7 CFR part 210 is amended as follows:

#### **PART 210—NATIONAL SCHOOL LUNCH PROGRAM**

■ 1. The authority citation for 7 CFR part 210 continues to read as follows:

**Authority:** 42 U.S.C. 1751-1760, 1779.

■ 2. In § 210.10, paragraph (m)(1)(i) is revised to read as follows:

#### **§ 210.10 What are the nutrition standards and menu planning approaches for lunches and the requirements for afterschool snacks?**

\* \* \* \* \*

(m) \* \* \*

(1) \* \* \*

(i) Under all menu planning approaches for students, schools must offer students fluid milk in a variety of fat contents. Schools may offer flavored or unflavored milk and lactose-free fluid milk.

\* \* \* \* \*

Dated: November 24, 2004.

**Roberto Salazar,**

*Administrator, Food and Nutrition Service.*

[FR Doc. 04-26934 Filed 12-7-04; 8:45 am]

**BILLING CODE 3410-30-P**

## **DEPARTMENT OF AGRICULTURE**

### **Food and Nutrition Service**

#### **7 CFR Parts 210 and 220**

**RIN 0584-AD63**

#### **Waiver of the Requirement To Use Weighted Averages in the National School Lunch and School Breakfast Programs**

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule makes a technical change to the regulations governing the nutrient analysis of meals served under the National School Lunch Program and School Breakfast Program. Program regulations require school food authorities to use "weighted averages" for nutrient analysis of their school meals. Under this method, the nutrient content of school meals is measured (weighted) according to the quantity of food items chosen by students. This final rule extends, until September 30, 2009, the waiver for conducting a weighted nutrient analysis. This rule responds to changes made under the Child Nutrition and WIC Reauthorization Act of 2004 and is intended to provide school food authorities with additional time to gain operational experience with nutrient analysis.

**DATES:** Effective January 7, 2005.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rosemary O'Connell, Section Chief, School Programs Section, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service at 703-305-2635.

**SUPPLEMENTARY INFORMATION:** Section 110 of the Child Nutrition and WIC