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Dated: July 30, 2009.

**Mary Ellen Callahan,**  
Chief Privacy Officer, Department of  
Homeland Security.

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## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Part 210

[FNS-2005-0009]

RIN 0584-AD83

#### Marketing and Sale of Fluid Milk in Schools

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

**ACTION:** Final Rule.

**SUMMARY:** This rule finalizes the interim rule that implemented the statutory provision to prohibit direct or indirect restrictions on the sale or marketing of fluid milk on school premises or at school-sponsored events, at any time or in any place, in schools participating in the National School Lunch Program. This rule ensures that there are no policies or procedures in place that have the effect of restricting the sale or marketing of fluid milk.

**DATES:** *Effective Date:* This action is effective September 4, 2009.

**FOR FURTHER INFORMATION CONTACT:** Melissa Rothstein, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302-1594; or (703) 305-2590; or [CNDINTERNET@fns.usda.gov](mailto:CNDINTERNET@fns.usda.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Section 102 of the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108-265) amended section 9(a)(2) of the Richard B. Russell National School Lunch Act, 42 U.S.C. 1758, by adding a provision that prohibits schools participating in the National School Lunch Program (NSLP), or any person approved by a school participating in the NSLP, from directly or indirectly restricting the sale or marketing of fluid milk products at any time or in any

place on school premises or at school-sponsored events. The Food and Nutrition Service (FNS) published an interim rule on November 21, 2005 (70 FR 70031) to prohibit school food authorities (SFAs) from entering into contracts that restrict the sale or marketing of fluid milk.

Contracts between SFAs and vendors can be structured to restrict the variety or types of food choices a school may offer outside of the school meal programs. Prior to implementation of the interim rule, some exclusive vending contracts were found to have the potential to limit a school's ability to sell or market fluid milk on school premises outside of the school meal programs; however, very few if any were found to actually limit the sale or marketing of fluid milk.

The intent of this rule is to ensure no vending contract restricts a school's ability or discretion to provide children access to fluid milk outside of the school meal programs. This rule does not require that participating schools sell or market fluid milk outside of the NSLP, or make fluid milk available at school-sponsored events. Furthermore, this rule does not affect the requirements for offering fluid milk as part of a reimbursable lunch in the NSLP as described in 7 CFR 210.10(m). For additional background information, please refer to the interim rule.

##### II. Discussion of Public Comments and FNS Response

FNS received a total of eight comments during the 180-day comment period that ended on May 22, 2006. The commenters included representatives from dairy industry trade associations (3), a school food authority (1), a State agency (1), and individuals (3).

Of the eight comments received, six of the commenters, including one individual and the representatives from a school food authority, a State agency, and the trade associations, were in support of finalizing the requirements as established by the interim rule to prohibit any restriction of the sale or marketing of fluid milk in participating schools.

One commenter in support of the provision also felt that the Department should extend the rulemaking to prohibit or restrict all exclusive beverage contracts in participating schools.

Under existing NSLP regulations at 7 CFR 210.21, SFAs must comply with requirements intended to ensure the integrity of procurement practices for the purchase of goods and services with funds from the nonprofit school

foodservice account. Furthermore, NSLP regulations provide SFAs with the flexibility to enter into vending contracts that best meet their needs for foods and beverages sold outside of the school meal programs. This rulemaking is intended to ensure vending contracts do not directly or indirectly restrict the sale or marketing of fluid milk at any time or in any place on school premises or at school-sponsored events. Other procurement issues regarding vending contracts and agreements are outside the scope of this rulemaking.

Two of the individual commenters expressed opposition to implementing the rule as final because of concern that it favors dairy industry interests and inhibits schools' ability to choose whether to sell or market fluid milk. One commenter also disapproved of conventional dairy production practices.

This rulemaking does not require or promote the sale or marketing of fluid milk outside the school meal programs. SFAs retain the authority to establish procurement contracts in accordance with Program regulations for foods sold outside of the school meal programs that best meet the nutritional and operational needs of their students and schools.

Finally, discussion of conventional dairy production practices is outside the scope of this rulemaking.

FNS considered all comments received and determined that these comments did not warrant any changes to the requirements established by the interim rule, or were outside the scope of the interim rule. FNS is issuing the interim rule as final without revision.

##### III. Procedural Matters

###### *Executive Order 12866*

This 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.

###### *Regulatory Flexibility Act*

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601-612). Implementation of this rule is not expected to impose a significant economic impact on a substantial number of small entities. No later than the beginning of School Year 2006-2007, SFAs were required by section 102 of Public Law 108-265 to ensure that any existing or new vending contracts did not include provisions that restrict the sale or marketing of fluid milk. Therefore, the number of SFAs expected to be impacted by this rule is minimal.

### *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements 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, the Department generally must prepare a written statement, including a cost/benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

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

### *Executive Order 12372*

The National School Lunch Program is listed in the Catalog of Federal Domestic Assistance under No. 10.555. For the reasons set forth in the final rule in 7 CFR part 3015, Subpart V and related Notice [48 FR 29115, June 24, 1983], this program is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Since the NSLP is a State-administered, federally funded program, FNS headquarters and regional office staff have ongoing formal and informal discussions with State and local officials regarding program implementation and policy issues. This arrangement allows State and local agencies to provide feedback that contributes to any discretionary decisions made in establishing requirements for rules that govern the NSLP.

### *Executive Order 13132*

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 rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule 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 otherwise impede its full implementation. This rule is not intended to have retroactive effect. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures under § 210.18(q) or § 235.11(f) 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 rule might have on children on the basis of age, race, color, national origin, sex or disability. After a careful review of the rule's intent and provisions, FNS has determined that this rule does not affect the participation of protected individuals in the Child Nutrition Programs. FNS found no factors that would negatively and disproportionately affect any group of individuals.

### *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. This rule does not contain any information collection requirements subject to approval by OMB under the Paperwork Reduction Act of 1995.

### *E-Government Act Compliance*

The FNS is committed to complying with the E-Government Act of 2002, to promote the use of the Internet and other information technologies to

provide increased opportunities for citizen access to Government information and services, and for other purposes.

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

Grant programs—education, Grant programs—health, Infants and children, Nutrition, Penalties, Reporting and recordkeeping requirements, School breakfast and lunch programs, Surplus agricultural commodities.

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

■ Accordingly, the interim rule amending 7 CFR Part 210 which was published at 70 FR 70031 on November 21, 2005, is adopted as a final rule without change.

Dated: July 29, 2009.

**Julia Paradis,**

*Administrator, Food and Nutrition Service.*

[FR Doc. E9-18690 Filed 8-4-09; 8:45 am]

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### **NUCLEAR REGULATORY COMMISSION**

#### **10 CFR Part 50**

**[NRC-2008-0663]**

**RIN 3150-AI53**

#### **Industry Codes and Standards; Amended Requirements**

**AGENCY:** Nuclear Regulatory Commission (NRC).

**ACTION:** Direct final rule.

**SUMMARY:** The NRC is amending its regulations governing vessel head inspection requirements. This amendment revises the upper range of the percentage of axial flaws permitted in a specimen set used for the qualification of nondestructive examination systems (procedures, personnel and equipment), which are used in the performance of inservice inspection (ISI) of pressurized water reactor (PWR) upper vessel head penetrations. This amendment is being made as a result of the withdrawal of a stakeholder's recommendation necessitated by a typographical error in the original recommendation with respect to the maximum percentage of flaws that should be oriented axially.

**DATES:** *Effective Date:* The final rule will become effective October 19, 2009, unless significant adverse comments are received by September 4, 2009. A significant adverse comment is a comment where the commenter explains why the rule would be