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July 11, 2013

The Honorable Debbie Stabenow
Chairwoman
The Honorable Thad Cochran
Ranking Member
Committee on Agriculture, Nutrition, and Forestry
United States Senate

The Honorable John Kline
Chairman
The Honorable George Miller
Ranking Member
Committee on Education and the Workforce
House of Representatives

Subject: *Department of Agriculture, Food and Nutrition Service: National School Lunch Program and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Agriculture (USDA), Food and Nutrition Service (FNS), entitled "National School Lunch Program and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010" (RIN: 0584-AE09). We received the rule on June 28, 2013. It was published in the *Federal Register* as an interim final rule on June 28, 2013. 78 Fed. Reg. 39,068.

The interim final rule amends the National School Lunch Program and School Breakfast Program regulations to establish nutrition standards for all foods sold in schools, other than food sold under the lunch and breakfast programs. Amendments made by section 208 of the Healthy, Hunger-Free Kids Act of 2010 (HHFKA) require the Secretary of Agriculture to establish nutrition standards for such foods, consistent with the most recent Dietary Guidelines for Americans, and directs the Secretary to consider authoritative scientific recommendations for nutrition standards; existing school nutrition standards, including voluntary standards for beverages and snack foods; current state and local standards; the practical application of the nutrition standards; and special exemptions for infrequent school-sponsored fundraisers (other than fundraising through vending machines, school stores, snack bars, à la carte sales, and any other exclusions determined by the Secretary). In addition, this interim final rule requires schools participating in the National School Lunch Program and School Breakfast Program to make potable water available to children at no charge in the place where lunches are served during the meal service, consistent with amendments made by section 203 of the HHFKA, and in the cafeteria during breakfast meal service. This interim final rule is expected to improve the health and well-being of the Nation's children, increase consumption of healthful foods during the school day, and create an environment that reinforces the development of healthy eating

habits. The stated effective date for this final rule is August 27, 2013, and state agencies, local educational agencies, and school food authorities must implement the potable water provisions no later than August 27, 2013, and all other provisions of the interim final rule must be implemented beginning on July 1, 2014.

Enclosed is our assessment of FNS's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that FNS complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Lynnette M. Williams
Chief, Planning & Regulatory Affairs Office
Department of Agriculture

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF AGRICULTURE,
FOOD AND NUTRITION SERVICE
ENTITLED
"NATIONAL SCHOOL LUNCH PROGRAM AND
SCHOOL BREAKFAST PROGRAM: NUTRITION STANDARDS
FOR ALL FOODS SOLD IN SCHOOL AS REQUIRED
BY THE HEALTHY, HUNGER-FREE KIDS ACT OF 2010"
(RIN: 0584-AE09)

(i) Cost-benefit analysis

FNS conducted a regulatory impact analysis that included a cost/benefit analysis in this interim final rule. The rule requires schools to improve the nutritional quality of foods offered for sale to students outside of the federal school lunch and school breakfast programs. FNS states that the key benefit sought through this interim final rule is to improve the food choices that children make during the school day. By helping to ensure that all foods sold at school—those provided as part of a school meal or sold in competition with such meals—are aligned with the latest dietary recommendations, the rule should also improve the mix of foods that students purchase and consume at school in order to contribute to students' long-term health and well-being, and reduce their risk for obesity.

FNS states that any rule-induced benefit of healthier eating by school children would be accompanied by costs, at least in the short term. Healthier food may be more expensive than unhealthy food—either in raw materials, preparation, or both—and this greater expense would be distributed among students, schools, and the food industry. The rule would also impose administrative costs on schools and their food authorities. Additional effects of the rule may include transfers of food sales revenue to or from school food authorities. Such effects would be correlated with health outcomes. FNS notes that available data do not allow FNS to develop point estimates of competitive food or reimbursable meal revenue effects with any certainty, but a table was included indicating the total projected nominal costs from fiscal years 2014-2018 of the interim final rule. The data were presented in the accounting statement and were associated with state agency, local educational agency, and school-level administrative costs for recordkeeping. The total projected nominal cost of the interim final rule over this 5-year period between fiscal years 2014 and 2018 is \$125.7 million.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

FNS explained that while state agencies are not considered small entities as state populations exceed the 50,000 threshold for a small government jurisdiction, many of the service-providing institutions that work with them to implement the program do meet definitions of small entities. The requirements established by this interim final rule will apply to school districts, which meet the definitions of "small governmental jurisdiction" and other establishments that meet the definition of "small entity" in the Regulatory Flexibility Act. As such, an Initial Regulatory Flexibility Act analysis was included as an Appendix to this interim final rule.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

FNS determined that because data is not available to meaningfully estimate the quantitative impacts of this rule on school food authority revenues, it was not certain that this rule is subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act. As such, FNS determined that it is possible that the rule's requirements could impose costs on state, local, or tribal governments or to the private sector of \$100 million or more in any one year. FNS therefore conducted a regulatory impact analysis that includes a cost/benefit analysis and describes and explains six alternatives to the interim final rule, substantially meeting the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

FNS, under the provisions of the Administrative Procedure Act at 5 U.S.C. 553(b)(B), found for good cause that it is impracticable to issue a final rule and thus issued an interim final rule, as authorized by section 208 of the HHFKA, Pub. L. No. 111-296, enacted on December 13, 2010. On February 8, 2013, USDA published a proposed rule to implement section 208 of the HHFKA (78 FR 9530). The rule provided for a 60-day comment period, which ended on April 9, 2013. This interim final rule reflects comments received during that period. Section 208 requires that implementation of this statutory provision shall take effect at the beginning of the school year that is not earlier than 1 year and not later than 2 years following the date of the publication of an interim final or final rule. FNS stated that it recognizes that the significant, statutorily established, implementation delay will provide federal and state partners a lengthy period in which to provide technical assistance and administrative support to school food authorities working toward compliance. FNS invited public comment on this interim final rule. FNS will consider amendments to the rule based on comments submitted during the 120-day comment period. The agency will address comments and affirm or amend the interim final rule in a final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

FNS determined that this rule does contain information collection requirements subject to approval by the Office of Management and Budget (OMB) under the PRA. The information collection requirements associated with this interim final rule have been submitted for approval to OMB. FNS will publish a document in the *Federal Register* once these requirements have been approved. FNS is requesting 927,634 burden hours for recordkeeping to document compliance with the new nutrition standards. The estimated average number of respondents for this rule is 122,662 (57 state agencies, 20,858 school food authorities, and 101,747 schools). FNS included the estimated burden associated with the new information collection requirements in a table within the interim final rule.

Statutory authorization for the rule

FNS promulgated this interim final rule under the authority of section 208 of the Healthy, Hunger-Free Kids Act of 2010 (HHFKA), Pub. L. No. 111-296, § 208, 124 Stat. 3183, 3221 (Dec. 13, 2010).

Executive Order No. 12,866 (Regulatory Planning and Review)

FNS determined that this interim final rule is an economically significant rule under the Order because it is likely to have an annual effect on the economy of \$100 million in any one year. OMB reviewed the rule under the Order.

Executive Order No. 13,132 (Federalism)

USDA 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.