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Washington, DC 20548

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January 17, 2014

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: Certification of Compliance With Meal Requirements for the National School Lunch Program Under 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 "Certification of Compliance With Meal Requirements for the National School Lunch Program Under the Healthy, Hunger-Free Kids Act of 2010" (RIN: 0584-AE15). The rule was published in the *Federal Register* as a final rule on January 3, 2014. 79 Fed. Reg. 325. We received the rule on January 6, 2014. On January 16, 2014, a correction to the final rule was published. 79 Fed. Reg. 2761.

The final rule adopts, with some revisions, changes to the National School Lunch Program (NSLP) regulations, as set forth in the interim final rule published in the *Federal Register* on April 27, 2012. The changes conform to requirements contained in the Healthy, Hunger-Free Kids Act of 2010 (HHFKA) regarding performance-based cash assistance for school food authorities (SFAs) certified compliant with meal pattern and nutrition standards. The changes finalized in this rule include requiring state agencies to certify participating SFAs that are in compliance with meal pattern and nutrition standard requirements as eligible to receive performance-based cash assistance for each reimbursable lunch. This rule also finalizes the requirement in the interim final rule that state agencies disburse performance-based cash assistance to certified SFAs, and withhold the performance-based cash assistance from SFAs determined to be out of compliance with meal pattern or nutrition standards during a subsequent administrative review. Additionally, this final rule adopted minor changes based on comments on the interim final rule that will help to streamline the certification process. These changes include making permanent the flexibility that state agencies should consider any SFA compliant with the daily and weekly ranges for grain and meat/meat alternates if documentation is compliant with the daily and weekly minimums.

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. Thomas  
Chief, Planning & Regulatory Affairs Office, FNS  
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  
"CERTIFICATION OF COMPLIANCE WITH MEAL REQUIREMENTS  
FOR THE NATIONAL SCHOOL LUNCH PROGRAM UNDER THE  
HEALTHY, HUNGER-FREE KIDS ACT OF 2010"  
(RIN: 0584-AE15)

(i) Cost-benefit analysis

FNS states, that as required for all rules that have been designated significant by the Office of Management and Budget (OMB), a Regulatory Impact Analysis (RIA) was developed for this final rule. FNS explained that the impact analysis for the interim rule (as updated by the corrected final rule) estimated that full compliance with the new meal patterns would increase SFA revenues by more than \$300 million per year in the aggregate, as a result of increased transfers from the federal government because of the performance-based reimbursement. FNS further explains that, although this transfer from the federal government to SFAs may be viewed as a transfer between members of society and not a direct benefit to society, the increased SFA revenues are expected to speed full SFA compliance with the new meal patterns, which likely offer a wide range of health benefits, as described in the final meal patterns rule.

The changes contained in the final rule are expected to facilitate compliance with the meal patterns, allowing SFAs to take full advantage of the additional revenue. Granting some flexibility on meat, grains, and frozen fruit is an effort by USDA to work with schools that are making serious efforts to comply with the rule's standards but are having some difficulty finding products that have been resized or reformulated specifically to meet the requirements of the rule. To the extent that a little flexibility at the margins encourages schools to plan menus that meet the new standards, students benefit from receiving meals that comply with the new standards rather than receiving meals that do not comply with the new standards.

The benefits to children who consume school meals that follow the Dietary Guidelines for Americans (DGA) recommendations are detailed in the impact analysis prepared for the final meal patterns rule. As discussed in that document, the 2010 Dietary Guidelines Advisory Committee emphasized the importance of a diet consistent with DGA recommendations as a contributing factor to overall health and a reduced risk of chronic disease and obesity. The new meal patterns are intended not only to improve the quality of meals consumed at school, but to encourage healthy eating habits generally. Those goals of the meal patterns rule are furthered to the extent that this rule contributes to full compliance with the meal patterns by all SFAs. FNS explains that because the rule does not modify the final school meal rule's maximum calorie requirements, the new flexibility is limited and does not weaken the school meal standards' focus on childhood obesity.

FNS further explains the changes adopted in the final rule are intended to facilitate SFA compliance with the meal pattern requirements and reduce state agency reporting and recordkeeping burden. By making permanent the flexibility on weekly maximum servings of grains and meat/meat alternates, and by allowing frozen fruit with added sugar to credit toward

the meal pattern requirement for fruit, the final rule will make it easier for some SFAs to plan menus that comply with the meal pattern requirements. The effect of these provisions is to reduce the costs of compliance for the small minority of SFAs that would otherwise not have been certified compliant with the new meal standards by the end of School Year 2013-2014. These provisions are essentially administrative efficiency measures that will reduce meal pattern compliance costs at the margin for some SFAs; the provisions are not expected to have a significant effect on food costs. Since these provisions are options (not requirements) and because FNS has no data on how many schools might avail themselves of either of these options, FNS did not estimate those costs savings in its analysis.

FNS states that given the assumptions about a phased certification process for some SFAs, the estimated cost of federal performance-based reimbursements (and the value of additional SFA revenue) is \$1.54 billion through FY 2017 (1 percent less than the \$1.55 billion estimated with full implementation). To the extent that additional flexibilities are afforded to SFAs, this rule could result in marginally lower administrative and compliance costs to SFAs relative to the interim final rule baseline, but FNS has not quantified those changes.

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

FNS states that the final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. §§ 601–612). Pursuant to that review, FNS determined that the final rule will not have a significant impact on a substantial number of small entities. FNS notes that while there may be some SFA burden associated with initial certification for the performance-based reimbursement in this rule, the burdens will not be significant and will be outweighed by the benefits of increased federal reimbursement for school lunches.

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

FNS states that the final rule does not contain 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, and, therefore, are not subject to the requirements of sections 202 and 205 of UMRA.

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

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

On April 27, 2012, FNS published an interim final rule in the *Federal Register*. 77 Fed. Reg. 25,024. FNS received 173 comments on the interim final rule. FNS states that 117 commenters were from SFAs, 45 comments were from advocacy organizations, 6 were from individuals, and 5 were from state agencies. FNS analyzed the comments, and in response to the comments, adopted the provisions of the interim final rule, with revisions, in the final rule.

In the FNS correction to the final rule, published on January 16, 2014, FNS stated that the interim final rule generated about 200 comments. FNS noted that most of the comments pertained to either the school meals rule (e.g., commented on the new meal patterns) or to statutory requirements as set forth in HHFKA (e.g., commented on whether 6 additional cents are sufficient to cover the costs of the new meal patterns). FNS concluded that the Regulatory

Impact Analysis does not address the school meals rule and stated that because FNS has no discretion to change the statutory requirements of the rule, the revised Regulatory Impact Analysis did not address those comments.

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

FNS stated that it reduced the data required for the quarterly report associated with this final rule. In the interim final rule, FNS required state agencies to submit a quarterly report detailing the disbursement of performance-based reimbursement, including the total number of SFAs in the state, the names and locations of certified SFAs, and the total number of lunches earning the performance-based reimbursement for each month. The burden estimate for this quarterly report was 1 hour. FNS explained that it received comments from state agencies that some of this information would be particularly difficult and/or burdensome to report by SFAs.

In an effort to reduce burden, this rule finalized a reporting change at 7 CFR 210.5(d)(2)(ii) to require that state agencies only include in this quarterly report the total number of SFAs in the state and the names of certified SFAs. According to FNS, this reduces the estimated burden for state agencies from 1 hour per quarterly report to 15 minutes per quarterly report.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0584-0567, Certification of Compliance with Meal Requirements for the National School Lunch Program Under the Healthy, Hunger-Free Kids Act of 2010.

Statutory authorization for the rule

FNS states that the authority for the final rule is based on the Richard B. Russell National School Lunch Act, 42 U.S.C. §§ 1751-1760, 1779, as amended by the Healthy, Hunger-Free Kids Act of 2010 (Pub. L. 111-296) (Dec. 13, 2010).

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

FNS states that the final rule has been designated an “economically significant regulatory action” and, accordingly, has been reviewed by OMB.

Executive Order No. 13,132 (Federalism)

Executive Order 13,132 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 13,132. FNS stated that it has considered the impact of this final rule on state and local program operators and has attempted to develop a rule that would implement the performance-based reimbursement in the most effective and least burdensome manner. FNS stated that it recognizes that implementing the new performance-based reimbursement certification process will require a significant effort on the part of state and local program operators. FNS asserted that this final rule simplifies the certification process by allowing state agencies to consider any SFA compliant with the component requirements for grains and meat/meat alternates if the menu is compliant with the daily and weekly minimums for these components. Additionally, FNS explains that it has provided several trainings and

guidance to ensure state agencies understand performance-based funding requirements and provide SFAs with the training and technical assistance needed to implement the improved school meal patterns. Finally, per the requirements of the HHFKA, FNS stated that it provided \$47 million to state agencies in fiscal years 2012 and 2013 to assist with meal pattern implementation, training, technical assistance, and performance-based certification activities. FNS noted that these funds are available for obligation by state agencies through September 2015.