

441 G St. N.W.
Washington, DC 20548

B-328327

August 18, 2016

The Honorable Pat Roberts
Chairman
The Honorable Debbie Stabenow
Ranking Member
Committee on Agriculture, Nutrition, and Forestry
United States Senate

The Honorable K. Michael Conaway
Chairman
The Honorable Collin C. Peterson
Ranking Member
Committee on Agriculture
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, 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 August 2, 2016. It was published in the *Federal Register* as a final rule and interim final rule on July 29, 2016. 81 Fed. Reg. 50,132.

The final rule and interim final rule adopts as final, with some modifications, the National School Lunch Program and School Breakfast Program regulations set forth in an interim final rule published.¹ As that interim final rule was also a major rule, we reported on it pursuant to section 801(a)(2)(A) of title 5, United States Code as well.² This rule also codifies specific policy guidance issued after publication of the interim rule. Finally, this rule retains as interim the provision related to the standard for total fat and requests further comment on this single standard.

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.

¹ 78 Fed. Reg. 39,068 (June 28, 2013).

² GAO, *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*, GAO-13-751R (Washington, D.C.: July 11, 2013).

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 Thomas
PRAO Branch Chief
Food and Nutrition Service
Department of Agriculture

ENCLOSURE

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT 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

The Food and Nutrition Service (FNS) discussed the benefits and costs of this final rule and interim final rule. FNS stated that the primary purpose of the rule is to ensure that nutrition standards for competitive foods are consistent with those used for the National School Lunch Program (NSLP) and the School Breakfast Program (SBP), holding competitive foods to standards similar to the rest of foods available to students during the school day. FNS asserts that these standards, combined with recent improvements in school meals, will help promote diets that contribute to students' long-term health and well-being. In addition, FNS expects these standards to continue to support a healthy school environment and the efforts of parents to promote healthy choices for children at home and at school. Further, FNS identified direct economic costs due to childhood obesity: \$237.6 million (in 2005 dollars) in inpatient costs and annual prescription drug, emergency room, and outpatient costs of \$14.1 billion. Because the factors that contribute both to overall food consumption and to obesity are so complex, it was not possible for FNS to define a level of disease or cost reduction expected to result from implementation of the rule. FNS did cite some evidence that competitive food standards can improve children's dietary quality. FNS also noted that ancillary benefits could derive from the fact that improving the nutritional value of competitive foods may reinforce school-based nutrition education and promotion efforts and contribute significantly to the overall effectiveness of the school nutrition environment in promoting healthful food and physical activity choices.

FNS stated that it is too early to definitively ascertain the overall impact to school revenue. FNS concluded that the changes and technical clarifications in the final rule do not change the methodology of the cost benefit analysis from the methodology used in the interim final regulatory impact analysis, but FNS updated the estimates using the most recent data available to assess the impacts to revenue and to account for the potential variation in implementation and sustainability experiences across schools. The limited information available indicates to FNS that many schools have successfully introduced competitive food reforms with little or no loss of revenue and in a few cases, revenues from competitive foods increased after introducing healthier foods. According to FNS, in some of the schools that showed declines in competitive food revenues, losses from reduced sales were fully offset by increases in reimbursable meal revenue. In other schools, students responded favorably to the healthier options and competitive food revenue declined little or not at all. FNS's analysis examines the possible effects of the rule on school revenues from competitive foods and the administrative costs of complying with the rule's competitive foods provisions. The analysis uses available data to construct model-based scenarios that different schools may experience in implementing the rule. While these vary in their impact on overall school food revenue, each scenario's estimated

impact is relatively small (+0.5 percent to -1.3 percent). FNS cautioned that the data behind the scenarios are insufficient to assess the frequency or probability of schools experiencing the impacts shown in each.

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

FNS noted 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 final rule will apply to school districts, which FNS determined meet the definitions of small governmental jurisdiction and other establishments that FNS determined meet the definition of small entity in the Act. FNS stated that a Regulatory Flexibility Act analysis was published.

(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 it is possible, although not certain, 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.

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

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

On February 8, 2013, FNS published a proposed rule (78 Fed. Reg. 9530). FNS received a total of 247,871 public comments to the proposed rule during the comment period. On June 28, 2013, FNS published an interim final rule. 78 Fed. Reg. 39,068. FNS received a total of 520 public comments on the interim final rule during the comment period. Comments were received from advocacy organizations; health care organizations; industry and trade associations; farm and industry groups; schools, school boards and school nutrition and education associations; state departments of education; consumer groups; and others. FNS responded to comments in this final rule and interim final rule.

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

FNS determined that this final rule does not contain substantive changes to information collection requirements that require additional approval by the Office of Management and Budget (OMB). The paperwork requirements for this final rule were previously approved by OMB for the interim final rule under OMB Control Number 0584–0576 and merged into OMB Control Number 0584–0006.

Statutory authorization for the rule

FNS promulgated this final rule under the authority of sections 1751 to 1760 and 1779 of title 42, United States Code.

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

FNS determined that this final rule and interim final rule is an economically significant regulatory action under the Order and therefore the rule was reviewed by the Office of Management and Budget.

Executive Order No. 13,132 (Federalism)

FNS determined that this final rule does not impose substantial or direct compliance costs on state and local governments.