

MEMORANDUM

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Re: USDA Finalizes Standards for Competitive Foods Sold in Schools and Restrictions on Food and Beverage Marketing in Schools

The U.S. Department of Agriculture's (USDA's) Food and Nutrition Service (FNS) has finalized two rules implementing requirements under the Healthy, Hunger-Free Kids Act of 2010 (HHFKA) that may affect companies that sell or market foods or beverages in schools. The final rule on "Smart Snacks in School" adopts as final, with some modifications, the nutrition standards that have been in effect for the past two years under the 2013 interim final rule (IFR). The rule codifies nutrition standards for foods and beverages sold to children on school campuses throughout the school day that are not "reimbursable foods" sold under the National School Lunch Program (NSLP) or School Breakfast Program (SBP), often referred to as "competitive foods." ^{1/} Examples include foods sold on the à la carte line, in the school store, or in vending machines. USDA also is seeking public comments on potential revisions to the total fat standard under the rule, which are due September 27, 2016. The final rule on "Local School Wellness Policy" requires that any foods or beverages marketed on school campuses during the school day must meet the competitive foods standards established in the Smart Snacks in School final rule. ^{2/} This memorandum provides a top-line summary of each rule.

Smart Snacks in School Final Rule

To implement the HHFKA requirement that set nutrition standards for competitive foods, USDA issued a proposed rule in February 2013, followed by an IFR in June 2013. ^{3/} The IFR has binding effect and has been implemented since July 1, 2014. Meanwhile, USDA has continued to accept comments on the IFR. The recently released final rule largely codifies the provisions of the IFR, with some minor changes made in response to comments received and implementation experience. The final rule maintains the total fat standard as interim pending USDA's request for further comment on this single standard. Below we discuss the key modifications to the IFR, changes USDA declined to make, and potential future changes.

^{1/} 81 Fed. Reg. 50131 (July 29, 2016).

^{2/} 81 Fed. Reg. 50151 (July 29, 2016).

^{3/} See HL Memo – FNS Sets Nutrition Standards for Competitive Foods Sold in Schools (July 1, 2013).

Modifications to the IFR include the following:

- Whole grain breakfast entrees. Whole grain rich, grain-only breakfast entrées are now allowable entrée items on the day of and the day after service in the SBP. This change codifies policy guidance issued by USDA during implementation.
- Paired exempt foods. The final rule clarifies that foods that are exempt from the nutrition standards can continue to be exempt when they are simply paired and packaged with other products (without added ingredients) that also are exempt from one or more of the standards. For example, a pairing of peanut butter and celery continues to qualify for peanut butter's exemption from the total fat and saturated fat requirements and may be served as long as the calorie and sodium limits are met. This change codifies policy guidance issued by USDA.
- Exemptions for eggs and canned vegetables. The final rule adds a new exemption from all nutrient standards for no added salt/low sodium canned vegetables with no added fat. There also is a new specific exemption from the total fat and saturated fat standards for whole eggs with no added fat.

USDA declined to make a number of changes that the food industry had requested in response to the IFR, including the following.

- General criterion for foods with 10% of the DV of nutrients of public health concern. USDA will not make permanent the criterion that allowed foods containing 10 percent of the daily value (DV) for nutrients of public health concern (i.e., calcium, potassium, vitamin D, or dietary fiber) to qualify as an allowable food. Instead, the ability for a food to qualify as "allowable" based on that criterion expired on July 1, 2016. USDA found that many products had been reformulated and did not need to rely on that provision to be in compliance with the standards.
- Allowable grain products. The final rule maintains the requirement that allowable grain products contain 50 percent or more whole grains by weight or have whole grains as the first ingredient. USDA declined to adopt an alternative criterion that would allow foods with at least 8 grams of whole grains to qualify.
- Sodium standard. Under the IFR, snack items and side dishes sold à la carte could contain no more than 230 mg of sodium per portion as served until July 1, 2016, with the standard tightening to no more than 200 mg per portion served as of July 1, 2016. USDA declined to revise the stricter sodium limit, so the 200 mg standard for snacks and side dishes will remain in effect.
- Exemption for NSLP/SBP entrée items sold à la carte. The IFR exempts entrée items that are served in the à la carte line from the competitive foods standards the day of or the day after they are served in the NSLP or SBP. The food industry had commented that entrée items sold through the NSLP or SBP should be exempt when sold à la carte regardless of the day on which they are served as part of the reimbursable meal. USDA declined to extend the exemption in this way, explaining that the standards are different because NSLP and SBP programs are based on weekly meal planning, such that less nutritious items may be balanced out with healthier items over the course of the school week. USDA also declined to exempt NSLP/SPB side items when sold à la carte.

Two key potential future changes to the competitive foods standards include:

- Potential revisions to total fat standard. USDA is retaining the nutrient standard for total fat as “interim,” but is requesting comments on whether this particular standard should be eliminated or whether additional exemptions should be added. USDA recognizes the need for consistency with the *Dietary Guidelines for Americans 2015-2020*, which do not have a key recommendation for total fat, and acknowledges that foods like hummus, guacamole, snack bars, and salad with dressing cannot qualify as competitive foods due to their total fat content. USDA is inviting comments on whether a revised standard would be more appropriate. Comments on the total fat standard are due September 27, 2016.
- Potential added sugars standard. USDA is not setting a limit for added sugars at this time, but notes that the new added sugars labeling requirements under FDA’s final rule revising the Nutrition Facts Panel will be fully implemented by summer 2019. USDA anticipates updating the competitive foods standards to set a standard for added sugars once this information is available. Such a requirement, if adopted by USDA, would likely not become effective until July 2019 at the earliest.

USDA also plans to monitor FDA activity related to caffeine consumed by high school aged children. Neither the IFR nor the final rule prohibit or restrict caffeine for high school students, although USDA notes that local jurisdictions have discretion to further restrict the availability of caffeinated beverages (or to impose stricter standards than the USDA standards in general), if they choose to do so.

Local School Wellness Policy Final Rule

Prior to passage of the HHFKA, local education agencies (LEAs) participating in the NSLP or SBP were required under the Child Nutrition and WIC Reauthorization Act of 2004 to develop local school wellness policies. The HHFKA expanded the requirements for these wellness policies, requiring, among other things, that they include nutrition guides for all foods available on the school campus during the school day, consistent with USDA’s requirements for reimbursable and competitive foods and designed to reduce childhood obesity. USDA issued a proposed rule in February 2014 to implement these requirements. ^{4/} The proposed rule also included restrictions on marketing foods and beverages in schools.

USDA is now finalizing the proposed restrictions on marketing, with some additional clarification regarding the scope of the requirements. As proposed, the final rule will require LEAs to implement policies that would allow marketing on the school campus during the school day of only those foods and beverages that meet the requirements for competitive foods. LEAs will have the discretion to adopt more stringent policies than those established in the rule. In particular, LEAs will retain the ability to prohibit food or beverage marketing on campus.

The following key terms define the scope of the rule:

- Marketing. Marketing is defined as “advertising and other promotions in schools,” including “oral, written, or graphic statements made for the purpose of promoting the sale of a food or beverage product made by the producer, manufacturer, seller, or any other entity with a commercial interest in the product.”

^{4/} HL Memo – USDA Proposes to Restrict Food and Beverage Marketing in Schools (Feb. 27, 2014).

- School Campus. The school campus is defined as all areas of the property under the jurisdiction of the school that are accessible to students during the school day. 5/
- School Day. The school day is defined as the period from the midnight before to 30 minutes after the end of the official school day. 6/

USDA explains that the marketing restrictions of the rule will apply to food and beverage marketing in the following areas and items:

- areas of the school campus that are owned or leased by the school and used at any time for school-related activities, such as the school building or on the school campus, including the outside of the school building and areas adjacent to the school building;
- school buses or other vehicles used to transport students;
- athletic fields and stadiums (e.g., on scoreboards, coolers, cups and water bottles, or parking lots);
- the exterior of vending machines;
- posters; and
- menu boards, coolers, trash cans, cups used for beverage dispensing, and other food service equipment.

In particular, the logos and products marketed in these areas will be required to meet the competitive foods standards.

USDA explains that the rule does not require schools to immediately replace menu boards, coolers, tray liners, beverage cups, and other food service equipment with depictions of noncompliant products or logos to comply with the new standards. Nor is the rule intended to require LEAs to remove or replace durable equipment such as an existing scoreboard. However, USDA states that “as the school nutrition services review/consider new contracts and as scoreboards or other such durable equipment are replaced or updated over time, replacement and purchasing decisions should reflect the applicable marketing guidelines established by the LEA in the wellness policy.”

Importantly, the rule will not apply to marketing that occurs at events outside of school hours such as after school sporting or any other events, including school fundraising events. Thus, unless an LEA’s policy states otherwise, sponsorship of school sporting events would not be covered, provided the events occur outside of school hours. USDA also clarifies that the rule does not establish limits on personal expression, opinions, or products. The following items also are excluded from the scope of the marketing requirement:

- clothing or personal items used by students or staff;
- the packaging of products brought from home for personal consumption; and
- materials used for educational purposes in the class room (e.g., a teacher’s use of soda advertisements as a media education tool or when implementing a health or nutrition education curriculum).

The final rule requires LEAs to begin developing revised local school wellness policies by August 29, 2016. LEAs must fully comply with the requirements of the final rule by June 30, 2017.

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5/ 21 C.F.R. § 210.11(a)(4).
6/ § 210.11(a)(5).

We will continue to monitor the development of policies governing foods and beverages sold or marketed in schools. Please contact us if you have any questions.