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MEMORANDUM

February 7, 2023

BY ELECTRONIC MAIL

To: OFW Clients

Re: Proposed Revision of Child Nutrition Programs: Revisions to Meal Patterns Consistent with the 2020 Dietary Guidelines for Americans

The United States Department of Agriculture's (USDA's) Food and Nutrition Service (FNS) on February 7, 2023 published in the Federal Register its proposed rule ([here](#)) revising the meal patterns and nutrition requirements for the National School Lunch Program and the School Breakfast Program to align them with the 2020 "Dietary Guidelines for Americans," as required by the Richard B. Russell National School Lunch Act. In addition, FNS is merging "Buy American Provision in the National School Lunch and School Breakfast Programs" (0584-AE91), which was listed as a long-term rule on the Fall 2021 Regulatory Agenda. USDA's announcement of the proposed rule and additional resources regarding the current and proposed rule can be found [here](#). Comments are due April 10.

Overview

This proposed rule, according to comments made by Secretary of Agriculture Tom Vilsack, builds on the transition back to regular school meal standards. Last year, USDA issued [transitional nutrition standards for School Years 2022-2023 and 2023-2024](#) to give schools clear guidance after requirements were temporarily loosened during the height of the pandemic. FNS is proposing updated, [science-based standards](#) developed from the latest edition of the [dietary guidelines](#) and informed by public comments on the transitional standards.

Prior to drafting this proposed rule, USDA received input from various stakeholders through listening sessions and public comments. For example, USDA held listening sessions with

stakeholder groups that represent national, State, and local interests, including the Academy of Nutrition and Dietetics, American Beverage Association, American Commodity Distribution Association, American Heart Association, Center for Science in the Public Interest, Education Trust, FoodCorps, Friends of the Earth, International Dairy Foods Association, National Congress of American Indians, National Indian Education Association, School Nutrition Association, State agencies, Urban School Food Alliance, Whole Grains Council members, and local school districts, including tribally-run schools, and others. USDA also received over 8,000 public comments on the transitional standards final rule. These comments, from State agencies, advocacy organizations, local school districts, and other stakeholders, helped to inform this proposed rule.

The proposed rule would be phased in beginning with School Year (SY) 2024-2025. The goal is for all provisions to be implemented by SY 2029-2030. The proposed rule phases in certain requirements so that State agencies, schools, and the food industry have time to prepare for the changes. It will also allow USDA to provide guidance and support to State agencies and schools, so that they are well equipped to meet the updated standards upon implementation. Key proposed changes include: limiting added sugars in certain high-sugar products and, later, across the weekly menu; allowing flavored milk in certain circumstances and with reasonable limits on added sugars; incrementally reducing weekly sodium limits over many school years; and emphasizing products that are primarily whole grain, with the option for occasional non-whole grain products. USDA asks for input on the proposed implementation dates, including if delayed implementation is warranted for any provisions where it is not already specified.

The proposed rule states that USDA intends to work with the food industry and other partners to ensure schools have adequate products to meet the standards, particularly for sodium and added sugars, and welcomes public input on other steps the Department can take to ensure schools successfully meet the proposed standards.

The proposed rule points out that USDA is required to develop school nutrition standards that are consistent with the goals of the most recent *Dietary Guidelines* (National School Lunch Act, 42 U.S.C. 1758(f)). The *Dietary Guidelines, 2020-2025* provide four overarching recommendations: follow a healthy dietary pattern at every life stage; customize and enjoy nutrient-dense food and beverage choices to reflect personal preferences, cultural traditions, and budgetary considerations; focus on meeting food group needs with nutrient-dense foods and beverages and stay within calorie limits; and limit foods and beverages higher in added sugars, saturated fat, and sodium, and limit alcoholic beverages.

The proposed rule would also address Buy American requirements by maintaining the current limited exemptions and adding a limit to the resources that can be used for non-domestic purchases.



Comments regarding this proposed rule ([FNS-2022-0043] RIN 0584-AE88) may be sent to:

School Meals Policy Division
Food and Nutrition Service
P.O. Box 9233
Reston, Virginia, 20195

Comments will also be accepted through the Federal eRulemaking Portal. Go to <https://www.regulations.gov/>, and follow the online instructions for submitting comments electronically.

This memorandum provides a detailed review of the proposed rule, amending 7 CFR Parts 210 (School Lunch), 215 (Special Milk), 220 (School Breakfast), 225 (Summer Food Service Program), and 226 (Child and Adult Care Food Program). The information offered below is taken from the proposed rule and is intended to be illustrative of the proposal. We respectfully encourage all readers to review the proposed rule document itself for further detail. Comments regarding the proposed rule may be submitted on or before Monday, April 10, 2023.

Added Sugars –

The preamble to the proposed rule points out that currently, there is no added sugars limit in the school meal programs. and that USDA has determined that the calorie limits alone are not enough to meet recommendations for limiting children’s intake of added sugars. The *Dietary Guidelines for Americans, 2020-2025* recommends limiting intake of added sugars to less than 10 percent of calories per day, and that about 70 to 80 percent of school-aged children exceed the recommended limit for added sugars. Many of those responding to the Transitional Standards Rule recommended that USDA implement an added sugars limit to better align school meal standards with the *Dietary Guidelines*, with some respondents calling specific attention to added sugars in school breakfasts.

Following are the added sugars limits proposed for the school lunch and breakfast programs:

- *Product-based limits:* Beginning in SY 2025-2026, this rulemaking proposes to implement quantitative limits for leading sources of added sugars in school meals, including grain-based desserts, breakfast cereals, yogurts, and flavored milks.
- *Weekly dietary limit:* Beginning in SY 2027-2028, this rulemaking proposes to implement a dietary specification limiting added sugars to less than 10 percent of calories per week in the school lunch and breakfast programs; this weekly limit would be in addition to the product-based limits described above.

The proposed product-based limits are as follows:

- *Grain-based desserts:* would be limited to no more than 2 ounce equivalents per week in school breakfast, consistent with the current limit for school lunch. Grain-based desserts include cereal bars, doughnuts, sweet rolls, toaster pastries, coffee cakes, and fruit turnovers.

- *Breakfast cereals*: would be limited to no more than 6 grams of added sugars per dry ounce.
- *Yogurt*: would be limited to no more than 12 grams of added sugars per 6 ounces.
- *Flavored milk*: would be limited to no more than 10 grams of added sugars per 8 fluid ounces or, for flavored milk sold as a competitive food for middle and high schools, 15 grams of added sugars per 12 fluid ounces.

USDA expects that the proposed product-based limits would incentivize the food industry to develop products with less added sugars.

USDA also proposes to apply the product-based added sugars limits for breakfast cereals and yogurts to the CACFP; the added sugars limits would replace the current total sugar limits for breakfast cereal and yogurt in CACFP. Proposing to change the CACFP total sugar limits for breakfast cereals and yogurt to added sugar limits, consistent with the proposed requirements for school lunch and breakfast, aligns program requirements, reflects current dietary recommendations, and is expected to simplify operations for schools that participate both in school meals and CACFP.

USDA has already implemented in NSLP regulations limits on how often grain-based desserts may be served in reimbursable meals to encourage more nutrient-dense choices. This proposed rule would apply the same limit to the SBP.

The WIC rule, *Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Revisions in the WIC Food Packages*, proposes to revise limits on total sugars for yogurt and soy beverage, consistent with recommendations in the NASEM report. The Department is seeking comments on the provisions related to sugar in the WIC proposed rule with specific interest in comments on an added versus total sugars limit for foods that currently have total sugar limits: yogurt, soy beverage, and breakfast cereal.

USDA requests specific input on the following questions:

- USDA is proposing product-specific limits on the following foods to improve the nutritional quality of meals served to children: grain-based desserts, breakfast cereals, yogurt, and flavored milk. Do stakeholders have input on the products and specific limits included in this proposal?
- Do the proposed implementation timeframes provide appropriate lead time for food manufacturers and schools to successfully implement the new added sugars standards? Why or why not?
- What impact will the proposed added sugars standards have on school meal menu planning and the foods schools serve at breakfast and lunch, including the overall nutrition of meals served to children?

Milk –

This rulemaking proposes two alternatives for the milk standard:

- Alternative A: Proposes to allow flavored milk (fat-free and low-fat) at school lunch and breakfast for high school children only, effective SY 2025-2026. Under this alternative, USDA is proposing that children in grades K-8 would be limited to a variety of unflavored milk. The proposed regulatory text for Alternative A would allow flavored milk for high school children only (grades 9-12). USDA also requests public input on whether to allow flavored milk for children in grades 6-8 as well as high school children (grades 9-12). Children in grades K-5 would again be limited to a variety of unflavored milk. Under both Alternative A scenarios, flavored milk would be subject to the new proposed added sugars limit.
- Alternative B: Proposes to maintain the current standard allowing all schools to offer fat-free and low-fat milk, flavored and unflavored, with the new proposed added sugars limit for flavored milk.

Several additional proposals would apply under either alternative. As discussed in

This rulemaking will limit the amount of added sugars in flavored milk to no more than 10 grams per 8 fluid ounces, effective SY 2025-2026. This proposed added sugars standard would apply to milk served in reimbursable school lunches and breakfasts, and for sale as a competitive beverage. Consistent with current requirements, this rulemaking would require that unflavored milk be offered at each school meal service. This rulemaking also proposes to continue to allow fat-free and low-fat milk, flavored and unflavored, to be offered to participants ages 6 and older in the SMP and CACFP.

USDA requests public input on allowing unflavored milks only for children in grades K-8 or K-5, as applicable, in SMP and CACFP, if Alternative A is finalized with restrictions on flavored milk for grades K-8 or K-5 in NSLP and SBP.

While USDA appreciates comments on whole milk, allowing whole milk in the school meal programs would make it harder for children to meet nutrient needs while staying within calorie and saturated fat limits. Additionally, the *Dietary Guidelines, 2020-2025 recommends unsweetened fat-free or low-fat milk for school-aged children*. Therefore, USDA does not propose allowing whole milk in the school meal programs.

USDA requests specific input on the following questions:

- The *Dietary Guidelines* state that “consuming beverages with no added sugars is particularly important for young children.” As discussed above, one of the two proposals USDA is considering would limit milk choices in elementary and middle schools (grades K-8) to unflavored milk varieties only at school lunch and breakfast. To reduce young children’s exposure to added sugars and promote the more nutrient-dense choice of unflavored milk, should USDA finalize this proposal? Why or why not?
 - Respondents that support Alternative A are encouraged to provide specific input on whether USDA should limit flavored milk to high schools only (grades 9-12) or to middle schools and high schools only (grades 6-12).

- If Alternative A is finalized with restrictions on flavored milk for grades K-8 or K-5 in NSLP and SBP, should USDA also pursue a similar change in SMP and CACFP? Are there any special considerations USDA should keep in mind for SMP and CACFP operators, given the differences in these programs compared to school meal program operators?
- What feedback do stakeholders have about the current fluid milk substitute process? USDA is especially interested in feedback from parents and guardians and program operators with firsthand experience requesting and processing a fluid milk substitute request.

Whole Grains –

USDA is considering two different options and invites comments on both. This rulemaking:

- Proposes to maintain the current whole grains requirement that at least 80 percent of the weekly grains offered are whole grain-rich, based on ounce equivalents of grains offered.
- Requests public input on an alternative whole grains option, which would require that all grains offered must meet the whole grain-rich requirement, except that one day each school week, schools may offer enriched grains.

USDA also proposes to add a regulatory definition of “whole grain-rich” for clarity. The definition would read as follows: *Whole grain-rich is the term designated by FNS to indicate that the grain content of a product is between 50 and 100 percent whole grain with any remaining grains being enriched.* This proposed definition would not change the meaning of whole grain-rich, which has previously been communicated in USDA guidance; USDA is instead proposing to define the term in regulation for clarity. This definition would be included in NSLP, SBP, and CACFP regulations.

USDA is considering a days-per-week model. This alternative would require that all grains offered in the school lunch and breakfast programs must meet the whole grain-rich requirement, except that one day each school week, schools may offer enriched grains. For most school weeks, this would result in four days of whole grain-rich grains, with enriched grains allowed on one day. On the day enriched grains are permitted, schools may choose to offer enriched grains, whole grain-rich grains, 100 percent whole grains, or a combination of these. This alternative proposal would prevent enriched grains from being offered in competition with whole grain-rich grains on a daily basis, since it would limit enriched grains to one day per week in each program. As such, under this alternative, all students that participate in NSLP or SBP would be offered only whole grain-rich grains on most school days. Based on public input, USDA may choose to finalize this alternative in the final rule.

USDA proposes a change to the definition of “entrée” in the competitive food, or “Smart Snack” regulations. The competitive food regulations allow entrée items to be sold à la carte on the day they are served and the day after, even if the entrée does not comply with the competitive food standards. The current definition of “entrée” in the competitive food regulations specifies that grain entrées must be whole grain-rich; however, under the proposed standard, enriched grains

may be served as part of a reimbursable meal entrée. USDA proposes to remove the whole grain-rich criteria from the definition of “entrée,” which would allow any reimbursable meal entrée that includes enriched grains to also be sold as a Smart Snack on the day it is served in the school lunch or breakfast program, and the day after. This proposal would not impact the general standards for competitive foods, which would continue to require all other grain items sold as Smart Snacks to meet USDA’s whole grain-rich criteria.

Many corn-based products commonly served in schools (including certain breakfast cereals, tortillas, and grits) are whole grain-rich and count towards the whole grain-rich requirements in the school meal programs. Additionally, all fortified, ready-to-eat breakfast cereal, including corn-based cereal, can contribute to school meal requirements if the ingredient statement of a corn-based, ready-to-eat breakfast cereal has a sub-listing of *Vitamins and Minerals*. This breakfast cereal is considered to be fortified and therefore would be creditable towards the total grains component, in the amount of up to 20 percent of the weekly grains requirement in this proposed rule. All ready-to-eat breakfast cereals with at least 50 percent whole grain ingredients (whole grain as the primary grain ingredient) contribute to the whole grain-rich requirements.

For the final rule, USDA is considering two different options and invites comments on both:

- Maintaining the current requirement that at least 80 percent of the weekly grains offered are whole grain-rich, based on ounce equivalents of grains offered; or
- Requiring that all grains offered must meet the whole grain-rich requirement, except that one day each school week, schools may offer enriched grains.

USDA will consider the following questions when developing the final rule and may incorporate changes to the whole grains proposal based on public input. USDA invites public input on both these options in general, and requests specific input on the following questions:

- Which option would be simplest for menu planners to implement, and why?
- Which option would be simplest to monitor, and why?

Sodium –

USDA proposes to establish weekly sodium limits, informed by FDA’s voluntary sodium reduction goals, with further reductions to support closer alignment with the goals of the *Dietary Guidelines*. For school lunch, this proposed rule would set forth three reductions, to be phased in as follows and as shown in the chart below:

- SY 2025-2026: Schools will implement a 10 percent reduction from SY 2024-2025 school lunch sodium limits.
- SY 2027-2028: Schools will implement a 10 percent reduction from SY 2026-2027 school lunch sodium limits.
- SY 2029-2030: Schools will implement a 10 percent reduction from SY 2028-2029 school lunch sodium limits.



Proposed National School Lunch Program Sodium Limits:

Age/Grade Group	Sodium Limit: Effective July 1, 2025	Sodium Limit: Effective July 1, 2027	Sodium Limit: Effective July 1, 2029
Grades K-5	≤ 1000 mg	≤ 900 mg	≤ 810 mg
Grades 6-8	≤ 1105 mg	≤ 990 mg	≤ 895 mg
Grades 9-12	≤ 1150 mg	≤ 1035 mg	≤ 935 mg

Because school breakfasts are closer to meeting dietary recommendations for sodium than school lunches, this proposed rule would set forth two reductions for school breakfasts, to be phased in as follows and as shown in the chart below:

- SY 2025-2026: Schools will implement a 10 percent reduction from SY 2024-2025 school breakfast sodium limits.
- SY 2027-2028: Schools will implement a 10 percent reduction from SY 2026-2027 school breakfast sodium limits.

Proposed School Breakfast Program Sodium Limits:

Age/Grade Group	Sodium Limit: Effective July 1, 2025	Sodium Limit: Effective July 1, 2027
Grades K-5	≤ 485 mg	≤ 435 mg
Grades 6-8	≤ 540 mg	≤ 485 mg
Grades 9-12	≤ 575 mg	≤ 520 mg

As a best practice, USDA will also recommend sodium limits for certain products, such as condiments and sandwiches, which are top contributors of sodium in school lunch. USDA expects that FDA’s voluntary sodium reduction targets will be helpful in developing these best practice limits. USDA also invites input from the public on which products it should develop best practice sodium limits for, including what specific limits would be achievable for schools and industry while still making a difference for children. Meeting these best practice limits would be recommended, but not required.

In developing this proposal, USDA considered several important factors, including:

- *Impact of Sodium on Children’s Health* - The *Dietary Guidelines* recommend limiting foods and beverages high in sodium, noting that “there is very little room for food choices that are high in sodium” at most ages. However, average intakes of sodium are currently high compared to recommendations.
- *Food and Drug Administration Voluntary Sodium Reduction Goals* - The sodium limits in this proposed rule are informed by FDA’s voluntary sodium reduction goals. FDA’s goals are not intended to focus on foods (e.g., milk) that contain only naturally occurring sodium, and were developed to reflect reformulation in targeted foods, where an actionable reduction could occur, while still allowing for naturally occurring sodium in items such as milk, fresh fruit, and fresh vegetables. To develop the proposed school meal sodium limits, USDA used the average short-term FDA targets for foods commonly served in school lunch and breakfast to calculate a baseline menu goal for weekly sodium

limits for each meal; this calculation resulted in an initial 10 percent reduction from the transitional sodium limits. However, USDA recognized that further incremental sodium reductions are needed to support children’s long-term health, particularly at lunch. USDA also recognized that FDA expects to issue revised subsequent targets in the next few years to facilitate a gradual, iterative process to reduce sodium intake. Therefore, in addition to the initial 10 percent reduction to the weekly sodium limits in SY 2025-2026, this rulemaking proposes a second 10 percent reduction in SY 2027-2028 for both programs. For school lunch only, this rulemaking proposes another 10 percent reduction for SY 2029-2030.

USDA will consider the following questions when developing the final rule and may incorporate changes to the sodium proposal based on public input. USDA invites public input on this proposal in general, and requests specific input on the following questions:

- USDA plans to recommend (but not require) sodium limits for certain products, such as condiments and sandwiches, to further support schools’ efforts to procure lower sodium products and meet the weekly limits.
 - For which products should USDA develop best practice sodium limits?
 - What limits would be achievable for schools and industry, while still supporting lower-sodium meals for children?
- Does the proposed implementation timeframe provide appropriate lead time for manufacturers and schools to successfully implement the new sodium limits?
- Do commenters agree with USDA’s proposed schedule for incremental sodium reductions, including both the number and level of sodium reductions and the timeline, or suggest an alternative? Why?

Traditional Foods –

USDA proposes to explicitly state in regulation that traditional foods may be served in reimbursable school meals. The intent of this change is to emphasize USDA’s support for integrating traditional foods into the school meal programs. While many traditional foods may already be served in the programs under existing USDA regulations and guidance, USDA expects that this regulatory change to explicitly mention traditional foods will help to address the perception that traditional foods are not creditable, draw attention to the option to serve traditional foods, and support local efforts to incorporate traditional foods into school meals. Within its authority, USDA will work with State agencies and schools to overcome any food safety, crediting, or other barriers to serving traditional foods in school meals to fully realize the intent of the change.

USDA does not define the term “traditional food.” By “traditional food,” USDA means the definition included in the Agriculture Improvement Act of 2014, as amended (25 U.S.C. 1685(b)(5)), which defines traditional food as “food that has traditionally been prepared and consumed by an [American] Indian tribe,” including wild game meat; fish; seafood; marine mammals; plants; and berries. USDA intends for this term to be used broadly, to cover the diversity of food traditions among American Indian and Alaska Native communities.

USDA invites public input on this proposal in general, and requests specific input on the following questions:

- USDA has provided guidance on crediting certain traditional foods. Are there any other traditional foods that schools would like to serve, but are having difficulty serving? If so, what specific challenges are preventing schools from serving these foods?
- Which traditional foods should USDA provide yield information for and incorporate into the *Food Buying Guide*?
- Is “traditional foods,” as described in the Agriculture Improvement Act of 2014, as amended (25 U.S.C. 1685(b)(5)), an appropriate term to use, or do stakeholders recommend a different term?

Afterschool Snacks -

USDA proposes to align NSLP snack standards for school-aged children at 7 CFR 210.10(o) with the CACFP snack requirements, as required by statute. The existing requirements for NSLP snacks served to preschool-aged children and infants will remain in effect.

Under the proposed NSLP snack requirements for school-aged children, reimbursable snacks would include two of the following five components, as is currently required for CACFP snacks:

- Milk
- Vegetables
- Fruits
- Grains
- Meats/meat alternates (or “protein sources,” as proposed; see *Section 15: Miscellaneous Changes*)

USDA also proposes applying the following CACFP snack requirements to NSLP snacks served to school-aged children:

- Only one of the two components served at snack may be a beverage.
- Milk must be unflavored or flavored fat-free (skim) or low-fat (1 percent fat or less) milk for children 6 years old and older.
- At least one serving of grains per day, across all eating occasions, must be whole grain-rich.
- Grain-based desserts do not count towards meeting the grains requirement.
- As proposed in *Section 2: Added Sugars*, breakfast cereals must contain no more than 6 grams of added sugars per dry ounce.
- As proposed in *Section 2: Added Sugars*, yogurt must contain no more than 12 grams of added sugars per 6 ounces.

Substituting Vegetables for Fruits at Breakfast –

USDA proposes to continue to allow schools to substitute vegetables for fruits at breakfast, but changes the vegetable variety requirement. Under this proposal, schools that substitute vegetables for fruits at breakfast more than one day per school week would be required to offer a

variety of vegetable subgroups. In other words, schools that substitute vegetables more than one day per school week would be required to offer vegetables from at least two subgroups.

Under this proposal, schools choosing to offer vegetables at breakfast one day per school week would have the option to offer any vegetable, including a starchy vegetable. The requirement to offer a second vegetable subgroup would apply in cases where schools choose to substitute vegetables for fruits at breakfast more than one day per school week.

Nuts and Seeds –

USDA proposes to allow nuts and seeds to credit for the full meat/meat alternate (or protein source) component in all child nutrition programs and meals. This proposal would remove the 50 percent crediting limit for nuts and seeds at breakfast, lunch, and supper. This change is intended to reduce complexity in the requirements by making the requirements consistent across programs and by removing the discrepancy between nut and seed crediting and nut and seed butter crediting. It also provides more menu planning flexibility for program operators. As noted in *Section 15: Miscellaneous Changes*, in this rulemaking, USDA is also proposing to change the name of the meat/meat alternate meal component in the NSLP, SBP, and CACFP regulations to “protein sources.” However, current guidance for all programs still uses the term “meat/meat alternate.” USDA is using both the current and proposed component name in this section.

There are several considerations program operators should keep in mind when choosing to serve nuts and seeds. Nuts and seeds are generally not recommended to be served to children ages 1-3 since they present a choking hazard. If served to very young children, nuts and seeds should be finely minced. As always, program operators should also be aware of food allergies among their participants and take the necessary steps to prevent exposure. Finally, USDA encourages program operators to serve nuts in their most nutrient-dense form, without added sugars and salt. Program operators are also encouraged to choose nutrient-dense nut and seed butters, and schools must consider the contribution of these foods to the weekly limits for calories, saturated fat, and sodium.

Competitive Foods - Hummus Exemption –

USDA proposes to add hummus to the list of foods exempt from the total fat standard in the competitive food, or Smart Snack, regulations. Hummus would continue to be subject to the saturated fat standard for Smart Snacks. This change would allow hummus, which is already permitted as part of a reimbursable school meal, to also be sold as a Smart Snack. It also aligns with other proposals in this rulemaking by expanding schools’ ability to provide vegetarian and culturally appropriate foods to children.

Currently, there is no standard of identity for hummus. Therefore, as part of this change, USDA will add the following definition for hummus to the Smart Snack regulations: *Hummus means, for the purpose of competitive food standards implementation, a spread made from ground pulses (beans, peas, and lentils), and ground nut/seed butter (such as tahini [ground sesame], peanut butter, etc.) mixed with a vegetable oil (such as olive oil, canola oil, soybean oil, etc.),*

seasoning (such as salt, citric acid, etc.), vegetables and juice for flavor (such as olives, roasted pepper, garlic, lemon juice, etc.). Manufactured hummus may also contain certain ingredients necessary as preservatives and/or to maintain freshness.

This change would apply to hummus as a standalone product; it would not apply to combination products that include hummus, such as hummus packaged for sale with pretzels, pita, or other snack-type foods.

Professional Standards –

This rulemaking is focused on the hiring standards for school nutrition program directors in medium (2,500 to 9,999 students) and large (10,000 or more students) local educational agencies. USDA proposes to allow State agency discretion to approve the hiring of an individual to serve as a school nutrition program director in a medium or large local educational agency, for individuals who have 10 years or more of school nutrition program experience but who do not hold a bachelor's or associate's degree. Directors would still need to have a high school diploma or GED. USDA expects this change would ease hiring challenges which USDA understands have been experienced by some medium and large local educational agencies. In addition, this proposal would allow highly experienced individuals to advance their careers in school food service. Directors hired under this provision would be encouraged, but not required, to work towards a degree in food and nutrition, food service management, dietetics, family and consumer sciences, nutrition education, culinary arts, business, or a related field.

USDA will consider the following questions when developing the final rule and may incorporate changes to the professional standards proposals based on public input. USDA invites public input on these proposals in general, and requests specific input on the following questions:

- Is it reasonable to allow medium and large local educational agencies to substitute 10 years of school nutrition program experience for a bachelor's or associate's degree when hiring a school nutrition program director? USDA requests that commenters explain their response. Based on public input, USDA may adjust the number of years of school nutrition program experience required to substitute for a degree.
- Should USDA also consider allowing medium and large local educational agencies to substitute other types of experience, such as experience in other food service sectors, for a bachelor's or associate's degree when hiring a school nutrition program director? USDA requests that commenters explain their response. Based on public input, USDA may adjust the type of experience allowed to substitute for a degree.
- How often do State agencies and schools anticipate using the hiring flexibility proposed in this rulemaking?
- What strategies do local educational agencies currently use to recruit qualified school nutrition program directors? USDA requests input on successes and challenges local educational agencies of any size have experienced in their recruitment efforts.

Buy American –

Limited Exceptions to the Buy American Requirement –

USDA has not established a dollar amount or a percentage threshold to permit a school food authority to use the “significantly higher” exception to the Buy American provision during procurement. Under current requirements, a school food authority is responsible for determining the dollar amount or percentage which constitutes a significantly higher cost for a domestic product, thus permitting the use of an exception.

This proposed rule seeks to strengthen the Buy American requirement while recognizing that purchasing domestic food products is not always practicable for schools. This rulemaking proposes to strengthen the Buy American requirements, by maintaining the current limited exemptions and adding a limit to the resources that can be used for non-domestic purchases. This new limit is lower than the reported expenditures that are currently used for non-domestic products; therefore, this cap will encourage schools that utilize an exemption to reduce the amount of non-domestic purchases currently made by substituting domestic product in situations where the school may be purchasing non-domestic items. To do this, USDA proposes to codify the circumstances described by guidance which are excepted from the Buy American provision as well as create a new threshold limit for school food authorities that use these exceptions. The two exceptions USDA proposes to codify will continue to apply when:

- The product is not produced or manufactured in the U.S. in sufficient and reasonably available quantities of a satisfactory quality; or
- Competitive bids reveal the costs of a U.S. product are significantly higher than the non-domestic product.

In order to strengthen the Buy American provision and in line with priorities outlined in *Executive Order 14005, Ensuring the Future Is Made in All of America by All of America’s Workers*, USDA also proposes to institute a 5 percent ceiling on the non-domestic commercial foods a school food authority may purchase per school year. This cap is based on a USDA study which found that on average, among school food authorities that used one of the limited exceptions to the Buy American provision in SY 2017-2018, products purchased under exceptions made up 8.5 percent of their total food purchase expenditures. In this study only 26 percent of school food authorities used an exception which means a majority of school food authorities are able to fully make domestic purchases and therefore do not need to utilize either of the limited exception. Since the purchase of domestic products are practicable for the majority of school food authorities and to support the intent of *Executive Order 14005*, USDA intends to limit the use of exceptions to this 5 percent threshold. By instituting a 5 percent cap, USDA is balancing the intent of the Buy American provision to support American farmers and ranchers while also recognizing that there are times when purchasing domestic foods is not practicable for schools. Finally, consistent with current USDA guidance, this proposed rule would clarify in regulation that it is the responsibility of the school food authority to determine whether an exception applies.

USDA invites public input on this proposal in general, and requests specific input on the following questions:

- Is the proposed 5 percent ceiling on the non-domestic commercial foods a school food authority may purchase per school year a reasonable ceiling, or should a different percentage be used? Would the 5 percent cap encourage those school food authorities using exceptions to reduce the amount of non-domestic products they purchase? USDA requests that respondents include justification and reasons behind their response.
- How feasible would tracking and documenting the total amount of non-domestic food purchases be? Would purchasing and record keeping processes need to be altered? Does the documentation of total non-domestic purchases alleviate burden associated with documenting each limited exception that is used? And any additional information about how school food authorities would document the total amount of non-domestic food purchases versus total annual food purchases.

Exception Documentation and Reporting Requirements -

USDA proposes to require school food authorities to maintain documentation supporting utilization of one of the two limited exceptions and that no more than 5 percent of their total annual commercial food costs were for non-domestic foods. To supplement this documentation, USDA would continue to collect information and data on the Buy American provision and school food authority procurement through the annual CN-OPS study.

Since school food authorities will only maintain documentation showing that no more than 5 percent of their total annual commercial food costs were for non-domestic food purchases using one of the two limited exceptions, rather than documenting each use of an exception and given that school food authorities will have flexibility in how they maintain documentation, USDA invites public input on this proposal in general, and requests specific input on the following question. USDA will consider this question when developing the final rule and may incorporate changes to the proposals based on public input:

- Is the proposal to require school food authorities to maintain documentation showing that no more than 5 percent of their total annual commercial food costs were for non-domestic foods feasible and is the regulatory language clear enough for school food authorities and State agencies to implement and follow?
- For oversight purposes, USDA is considering requiring school food authorities maintain an attestation statement to attest that any nondomestic food item purchased under the 5 percent cap met one of the two limited exceptions. Would this approach assist school food authorities with the burden associated with documentation requirements? Does it help ensure that any non-domestic food purchase under the 5 percent cap was only a result of utilizing one of the current limited exceptions that USDA proposes to codify through this rulemaking?

Procurement Procedures -

This proposed rule would require school food authorities to include the Buy American provision in documented procurement procedures, solicitations, and contracts for foods and food products procured using informal and formal procurement methods, and in awarded contracts. State agencies would verify the inclusion of this language when conducting reviews. USDA expects that this proposal would ensure vendors are aware of expectations at all stages of the procurement process, in addition to providing contractual protection for school food authorities if vendors fail to meet Buy American obligations.

Definition of “Substantially” -

This proposed rule would codify a definition of the statutory phrase “substantially using agriculture commodities.” The definition, which USDA proposes to codify at 7 CFR 210.21(d)(1)(ii) and 220.16(d)(1)(ii), would read as follows: *is: Substantially using agriculture commodities that are produced in the United States means over 51 percent of a food product must consist of agricultural commodities that were grown domestically.* This proposed definition reflects the Congressional report language accompanying the original legislation which noted that “substantially means over 51% from American products.” and existing USDA guidance.

USDA expects that codifying the existing definition of “substantially using agriculture commodities that are produced in the United States” in regulation would provide clarity and improve awareness of program requirements.

USDA invites public input on this proposal in general, and requests specific input on the following question:

- Does the proposed definition of “substantially using agriculture commodities that are produced in the United States” meet the intent of the Buy American requirements? If not, what other suggestions do stakeholders have for the definition?

Clarification of Requirements for Harvested Farmed and Wild Caught Fish -

Section 4207 of the Agriculture Improvement Act of 2018 (Pub. L. 115-334) clarified the Buy American provision applies to fish harvested “within the Exclusive Economic Zone of the United States, as described in Presidential Proclamation 5030 (48 FR 10605; March 10, 1983), or...by a United States flagged vessel.” USDA published *Buy American and the Agricultural Improvement Act of 2018* and explained how to treat harvested fish under the Buy American requirement. The guidance stated that, “[i]n order to be compliant:

- Farmed fish must be harvested within the United States or any territory or possession of the United States.
- Wild caught fish must be harvested within the Exclusive Economic Zone of the United States or by a United States flagged vessel.”

USDA proposes adding language to the regulations to codify how Buy American applies to fish and fish products in the school lunch and breakfast programs. The proposed change would be consistent with current statutory requirements and existing USDA policy guidance. USDA expects that codifying these existing requirements in regulation will improve awareness of program requirements.

Geographic Preference Expansion –

USDA is proposing a change in this rulemaking to expand geographic preference options by allowing locally grown, raised, or caught as procurement specifications (a written description of the product or service that the vendor must meet to be considered responsive and responsible) for unprocessed or minimally processed food items in the child nutrition programs, in order to increase the procurement of local foods and ease procurement challenges for operators interested in sourcing food from local producers.

USDA invites public input on this proposal in general, and requests specific input on the following questions:

- Do respondents agree that this approach would ease procurement challenges for child nutrition program operators interested in sourcing food from local producers?
- Do respondents agree that this approach would encourage smaller-scale producers to submit bids to sell local foods to child nutrition programs?

Miscellaneous Changes –

Terminology Change: Protein Sources Component -

Current child nutrition program regulations use the term “meat/meat alternate” for the meal component that includes dry beans and peas, whole eggs, tofu, tempeh, meat, poultry, fish, cheese, yogurt, soy yogurt, peanut butter and other nut or seed butters, and nuts and seeds. USDA proposes to change the name of the meat/meat alternate meal component in the NSLP, SBP, and CACFP regulations to “protein sources.” Under this proposal, all references in 7 CFR parts 210, 220, and 226 to “meats/meat alternates” would change to “protein sources”. The foods within this meal component would remain unchanged. This change better reflects the variety of foods that may be credited under this meal component. As a point of clarification, the proposed terminology change would not change current guidelines regarding foods that may be credited under this component. The guidelines regarding creditable food being recognizable or served alongside a recognizable protein source would also remain in place.

USDA is not including SFSP regulations (7 CFR part 225) with this change. USDA recognizes that using a different component name in the SFSP could cause confusion for State and local program operators. For example, schools operating both the school meal programs and the SFSP would need to be familiar with the term “protein sources” for school meals, as well as the term “meat/meat alternate” for the SFSP. However, there are other inconsistencies between the

meal component terms in the SFSP and other child nutrition programs. For example, the SFSP has a “bread and bread alternatives” component instead of a “grains” component, and has a single “vegetable and fruits” component instead of separate “vegetable” and “fruit” components. USDA intends to comprehensively address the SFSP meal pattern in a future rulemaking, which may include updating the terminology used for the SFSP meal components.

USDA invites public input on this terminology change for NSLP, SBP, and CACFP. Commenters are invited to provide feedback on the proposed change in general and to share their ideas for alternative options for USDA to consider.

Terminology Change: Beans, Peas, and Lentils -

The *Dietary Guidelines, 2020-2025*, changed the terminology for the “legumes (beans and peas)” vegetable subgroup to “beans, peas, and lentils.” The foods within this vegetable subgroup did not change. USDA proposes to change the name of the “legumes (beans and peas)” vegetable subgroup in the school meal pattern regulations to align with the *Dietary Guidelines*. Under this proposal, all references in 7 CFR parts 210 and 220 to “legumes (beans and peas)” would change to “beans, peas, and lentils” for consistency with the terminology used in the *Dietary Guidelines*. The foods within this subgroup would remain unchanged. USDA is also proposing to change references to “dry beans and peas (legumes)” in 7 CFR part 226 to “beans, peas, and lentils”).

Meal Pattern Table Revisions -

USDA also proposes several changes to the child nutrition program meal pattern tables:

- Add minimum creditable amounts to all meal components in the school lunch and breakfast meal pattern tables.
- Change references to “food components” to “meal components”.
- Revise table footnotes so that related footnotes are grouped together.
- Change references from “grains” to “grain items” in footnotes to meal pattern tables.
- Update protein sources rows in CACFP meal pattern tables, to use ounce equivalents and refer to protein sources generally, instead of listing specific foods within this category.

These changes are not substantive but are intended to make USDA regulations more user-friendly and easier to understand. Regarding the last point, USDA reminds State agencies and program operators that crediting information for the protein sources component and all other meal components may be found in the Food Buying Guide. Please note that current program guidance uses the term “meats/meat alternates” for the proposed protein sources component.

Severability -

USDA is proposing a severability clause for changes to the meal pattern standards made by this rulemaking. In the event any changes made by this rulemaking to the meal pattern standard regulatory sections were to be held invalid or unenforceable, USDA intends the remainder of the changes to survive. USDA’s proposal further specifics what standard would replace the

invalidated change. USDA proposes adding a new paragraph (r) to 7 CFR 210.10 (NSLP meal pattern standards) providing that if any provision of such section finalized through this rulemaking is held to be invalid or unenforceable by its terms, or as applied to any person or circumstances, it shall be severable from that section and not affect the remainder thereof. In the event of such holding of invalidity or unenforceability of a provision, the meal pattern standard covered by that provision would revert to the version that immediately preceded the changes promulgated through this rulemaking. USDA proposes to add similar paragraphs to 7 CFR 220.8 (SBP meal pattern standards) and 7 CFR 226.20 (CACFP meal pattern standards).

Changes by School Year –

USDA welcomes public input on the proposed implementation dates, including if delayed implementation is warranted for any provisions where it is not already specified. Additionally, in prior rulemakings, USDA has included an effective date, as well as a delayed compliance date, for certain provisions. This approach allows State agencies and local operators to focus on technical assistance, rather than on compliance, during the initial implementation period. USDA welcomes public input on whether a similar approach should be used for this rulemaking.

Following is a timeline for the significant proposed changes.

SY 2024-2025:

Whole Grains

- Proposed option: Maintaining the current requirement that at least 80 percent of the weekly grains offered are whole grain-rich, based on ounce equivalents of grains offered.
- Alternative option: Requiring that all grains offered must meet the whole grain-rich requirement, except that one day each school week, schools may offer enriched grains.

SY 2025-2026:

Added Sugars

- Beginning in SY 2025-2026, this rulemaking proposes to implement quantitative limits for leading sources of added sugars in school meals, including grain-based desserts, breakfast cereals, yogurts, and flavored milks.

Milk

- Alternative A: Proposes to allow flavored milk (fat-free and low-fat) at school lunch and breakfast for high school children only, effective SY 2025-2026. Under this alternative, USDA is proposing that children in grades K-8 would be limited to a variety of unflavored milk. The proposed regulatory text for Alternative A would allow flavored milk for high school children only (grades 9-12). USDA also requests public input on whether to allow flavored milk for children in grades 6-8 as well as high school children (grades 9-12). Children in grades K-5 would again be limited to a variety of unflavored

milk. Under both Alternative A scenarios, flavored milk would be subject to the new proposed added sugars limit.

- Alternative B: Proposes to maintain the current standard allowing all schools to offer fat-free and low-fat milk, flavored and unflavored, with the new proposed added sugars limit for flavored milk.

Sodium

- Schools will implement a 10 percent reduction from SY 2024-2025 school lunch and school breakfast sodium limits

SY 2027-2028

Added Sugars

- Beginning in SY 2027-2028, this rulemaking proposes to implement a dietary specification limiting added sugars to less than 10 percent of calories per week in the school lunch and breakfast programs; this weekly limit would be in addition to the product-based limits described above.

Sodium

- Schools will implement a 10 percent reduction from SY 2026-2027 school lunch and school breakfast sodium limits.

SY 2029-2030

Sodium

- Schools will implement a 10 percent reduction from SY 2028-2029 school lunch sodium limits. School breakfast sodium limits would not be reduced in SY 2029-2030.

Regulatory Impact Analysis

Benefits: This proposed rule builds on the progress schools have already made in improving school meals to support healthy diets for school children. Proposals in this rulemaking include gradual reduction of sodium and added sugars content in school meals over several school years. Added sugars proposed regulations include product-specific limits and an overall added sugars limit of 10 percent of calories per week at school lunch and breakfast. This rulemaking proposes two alternatives for milk. Alternative A would allow flavored milk at school lunch and breakfast for high school children only, effective SY 2025-2026, and Alternative B would maintain the milk standard from the transitional standards rule, allowing all schools to serve flavored or unflavored milks. USDA proposes to maintain required whole grain-rich offerings at 80 percent of total grain offerings. Minor shifts have also been proposed in other provisions, and USDA has also proposed several technical corrections, such as updating definitions and terminology in the regulations. The Regulatory Impact Analysis details potential health benefits for students if this proposed rule is finalized, as well as information regarding the methodology for selecting specific limits for added sugars, sodium, and whole grains.



Costs: USDA estimates this proposed rule would cost schools between \$0.03 and \$0.04 per breakfast and lunch served or between \$220 and \$274 million annually including both the SBP and NSLP starting in SY 2024-2025, accounting for the fact that standards are going to be implemented gradually and adjusting for annual inflation. The costs to schools are mainly due to a shift in purchasing patterns to products with reduced levels of added sugars and sodium, as well as increases in labor costs for continued sodium reduction over time. The two proposed milk alternatives include a no-cost option and an option with expected cost increases due to a shift in purchasing patterns for elementary and middle schools. Updating afterschool snack standards to reflect the proposed added sugars standards would result in some savings due to a reduction of grain-based desserts being served. Simplifying vegetable variety requirements for schools opting to substitute vegetables for fruits at breakfast also results in some savings, because on average, vegetables are less expensive than fruits, per serving. An increase in cost due to the Buy American provision is a result of additional labor and food costs. The changes proposed in this rulemaking are gradual, achievable, and realistic for schools and recognize the need for strong nutrition standards in school meals.

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We hope this information is helpful to you. Should you have any questions, please contact Roger Szemraj at rszemraj@ofwlaw.com or by calling (202) 789-1212.