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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 210

RIN 0584-AD57

Marketing and Sale of Fluid Milk in Schools

AGENCY: Food and Nutrition Service, USDA.

ACTION: Interim rule.

SUMMARY: This interim rule implements legislative provisions to prohibit direct or indirect restrictions on the sale or marketing of fluid milk on school premises or at school-sponsored events, at any time or in any place, in schools participating in the National School Lunch Program. This rule is intended to ensure that there are no policies or procedures in place that have the effect of restricting the sale or marketing of fluid milk. In addition, we are making a nonsubstantive change by converting a section heading from a question to a statement. This is intended to conform the heading to the same style as all other section headings in the part.

DATES: *Effective Date:* This rule is effective December 21, 2005.

Comment Date: Comments on this rule must be postmarked on or before May 22, 2006 to be assured of consideration. Comments will also be accepted via E-mail submission, at the address listed below. E-mail submissions must be received no later than 11:59 p.m. on May 22, 2006 to be assured of consideration.

ADDRESSES: The Food and Nutrition Service invites interested persons to submit comments on this interim rule. Comments may be submitted by any of the following methods:

- *E-mail:* Send comments to CNDPROPOSAL@FNS.USDA.GOV. The subject line must contain the phrase

“Marketing and Sale of Fluid Milk in Schools”.

- *Fax:* Submit comments by facsimile transmission to: (703) 305-2879, attention Mr. Robert Eadie. Since comments are being accepted simultaneously on several separate rulemakings, please label your comments on this interim rule as, “Marketing and Sale of Fluid Milk in Schools”.

- *Mail:* Comments should be addressed to Mr. Robert Eadie, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302-1594.

- *Hand Delivery or Courier:* Deliver comments to 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302-1594, during normal business hours of 8:30 a.m.–5 p.m.

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.

All submissions will be available for public inspection at 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302-1594, Monday through Friday, 8:30 a.m.–5 p.m.

FOR FURTHER INFORMATION CONTACT: Mr. Christopher Davenport, School Programs Section, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service at 703-305-2590.

SUPPLEMENTARY INFORMATION:

Background

Section 102 of the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108-265) amended section 9(a)(2) of the Richard B. Russell National School Lunch Act by adding a provision that prohibits schools participating in the National School Lunch Program (NSLP), or any person approved by a school participating in the NSLP, from directly or indirectly restricting the sale or marketing of fluid milk products at any time or in any place on school premises or at school-sponsored events.

This rulemaking uses the term “fluid milk”, as described in 7 CFR 210.10(m)(1)(ii), instead of the term “fluid milk products” as used in Public Law 108-265. Although the Agricultural Marketing Service (AMS) of USDA has established a Federal definition for

“fluid milk products” found at 7 CFR 1000.15; the Department prefers instead to continue to rely upon the each individual State’s definition of fluid milk. Use of the AMS definition would have required identifying a list of allowable and unallowable milk-derived items that would be extensive, frequently changing and perhaps impossible to define.

This provision may affect vending contracts, in that the intent of Public Law 108-265 is to ensure that exclusive vending contracts do not have the effect of preventing the sale or marketing of milk on school premises. The statute has the effect of prohibiting local educational agencies (LEAs) from entering into contracts that restrict the sale or marketing of fluid milk. The requirements for offering fluid milk as a part of a reimbursable lunch in the NSLP are described in 7 CFR 210.10(m) and are not changed by this interim rule.

A 2000 study sponsored by the Centers for Disease Control and Prevention, the School Health Policies and Programs Study, indicates that 54.6 percent of the school districts reported having a contract with a beverage company. In some instances, such vending contracts may limit a school’s ability to offer other types of food choices outside of the school meal programs, including fluid milk. However, based on discussions with State agencies, we understand that very few if any current vending contracts actually limit the sale or marketing of fluid milk.

Per Public Law 108-265, the effective date of this provision was July 1, 2005. Therefore, there may be LEAs with existing contracts in place that contain provisions which conflict with the statutory provision and this rulemaking. To come into compliance with these requirements, these LEAs may either conduct a new procurement or amend these existing contracts to conform with the statute. LEAs should consult with their legal counsel to determine the appropriate course of action. In either case, the action should be taken at the earliest possible date, but no later than the renewal of the current procurement contract, or the beginning of School Year 2006-2007, whichever comes first. All subsequent contracts must reflect the statutory and regulatory requirements.

This provision does not require that participating schools sell or market fluid milk outside of the NSLP, or make fluid milk available at school sponsored events. For example, schools that have a policy of no a la carte sales are not required to change such policies. Instead, this provision is intended to ensure that there are no policies or procedures in place that have the effect of specifically restricting the sale or marketing of fluid milk.

Finally, we are converting the form of the Section heading of 7 CFR 210.10 from a question to a statement. This nonsubstantive change to the heading will not change the basic meaning of the heading, nor affect the meaning of any of the subsections. The only effect will be to conform this heading to the form used for all of the other headings in part 210.

Why Is This Rule Being Issued as an Interim Rule and Not a Proposed Rule?

Section 502(b)(4) of Public Law 108–265 makes the provisions of section 102 of the law addressed in this rulemaking effective July 1, 2005. Section 501(b) of Public Law 108–265 states that the Secretary may promulgate interim regulations to implement those provisions. The Secretary has deemed the requirements of this provision sufficient to warrant just such an interim regulation, without regard to the Administrative Procedure Act's notice and prior comment provisions at 5 U.S.C 553; the Statement of Policy of the Secretary of Agriculture effective July 24, 1971 (36 FR 13804) relating to notices of proposed rulemaking and public participation in rulemaking; and the Paperwork Reduction Act at 44 U.S.C. chapter 35. For these reasons, we are not taking public comment prior to promulgation of this interim rule.

To benefit from the experiences of program operators, the Food and Nutrition Service (FNS) decided to issue this rule as an interim, rather than a final rule, in order to facilitate public comment. FNS intends to issue a final rule after consideration of the comments received on this rule.

What Specific Changes Does This Rule Make?

This interim rule adds a paragraph to 7 CFR 210.10(m) and 7 CFR 210.21(e), stating that schools and LEA's are prohibited from directly or indirectly restricting the sale or marketing of fluid milk, as defined in 7 CFR 210.10(m)(1)(ii), on school premises or at school-sponsored events at any time or in any place. This interim rule also makes a nonsubstantive change to the heading of 7 CFR Part 210.10,

conforming it to other section headings in the Part by converting it from a question to a statement.

Executive Order 12866

This interim rule has been determined to be non-significant and is not subject to review by the Office of Management and Budget under Executive Order 12866.

Public Law 104–4

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes a requirement for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, FNS generally prepares a written statement, including a cost-benefit analysis. This is done for proposed and interim rules that have "Federal mandates" which may result in expenditures of \$100 million or more in any one year by State, local, or tribal governments, in the aggregate, or by the private sector. When this statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives. It must then adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.

This interim rule contains no Federal mandates of \$100 million or more in any one year (under regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector. Thus, this interim rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Regulatory Flexibility Act

This interim rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). Roberto Salazar, Administrator of the Food and Nutrition Service, has certified that this rule will not have a significant economic impact on a substantial number of small entities. The number of LEAs that will be impacted by policy or contract changes as a result of this rule is expected to be minor.

Executive Order 12372

The National School Lunch Program is listed in the Catalog of Federal Domestic Assistance under No. 10.555. This program is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials (7 CFR part 3015, subpart V, and final rule related notice at 48 FR 29115, June 24, 1983).

Shortly after the passage of Public Law 108–265, FNS held discussions with State education agencies that administer child nutrition programs and with organizations representing State and local public health agencies. These discussions provided FNS an opportunity to inform State and local officials about the new requirements regarding the marketing and sale of fluid milk and to hear their concerns. However, the pre-emptive status of the law and the requirement to implement the provision by July 1, 2005, has precluded any need of, or opportunity for, formal consultation. The interim nature of this rule will, however, allow for the final rule to reflect changes based on local experience, provided they are consistent with the law.

Federalism Summary Impact Statement

Executive Order 13132 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 13132. FNS 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.

Executive Order 12988

This interim rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would impede its full implementation. This rule is not intended to have retroactive effect unless that is specified in the Effective Date section of the preamble of the interim rule. Before any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis

Under USDA Regulation 4300–4, Civil Rights Impact Analysis, FNS has reviewed this interim rule to identify and address any major civil rights impacts the rule might have on minorities, women, and persons with

disabilities. After a careful review of the rule's intent and provisions, FNS has determined that this rule will not in any way limit or reduce participants' ability to participate in the Child Nutrition Programs on the basis of an individual's or group's race, color, national origin, sex, age, or disability (The Child Nutrition Programs' nondiscrimination policy can be found at 7 CFR 210.23(b)). FNS found no factors that would negatively and disproportionately affect any group of individuals.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. This rule does not contain any information collection requirements subject to approval by OMB under the Paperwork Reduction Act of 1995.

Government Paperwork Elimination Act

FNS is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Public Participation

FNS has determined, in accordance with 5 U.S.C. 553(b), that Notice of Proposed Rulemaking and opportunity for public comments is unnecessary and contrary to the public interest and, in accordance with 5 U.S.C. 553(d), finds that good cause exists for making this action effective without prior public comment. In section 501(b) of Public Law 108-265, Congress specifically afforded the Secretary the option of implementing this rulemaking without prior notice and comment. In addition, the provisions of this interim rule reflect mandatory statutory requirements which are non-discretionary. The Department, however, wishes to receive comments that might improve the administration of these mandatory requirements.

List of Subjects in 7 CFR Part 210

Grant programs-education, Grant programs-health, Infants and children, Nutrition, Penalties, Reporting and recordkeeping requirements, School breakfast and lunch programs, Surplus agricultural commodities.

■ Accordingly, 7 CFR Part 210 is amended as follows:

PART 210—NATIONAL SCHOOL LUNCH PROGRAM

■ 1. The authority citation for 7 CFR part 210 continues to read as follows:

Authority: 42 U.S.C. 1751-1760, 1779.

■ 2. In § 210.10 the section heading is revised and a new paragraph (m)(3) is added to read as follows:

§ 210.10 Nutrition standards and menu planning approaches for lunches and requirements for afterschool snacks.

* * * * *

(m) * * *

(3) *Restrictions on the sale of milk.* A school participating in the Program, or a person approved by a school participating in the Program, must not directly or indirectly restrict the sale or marketing of fluid milk (as described in paragraph(m)(1)(ii) of this section) at any time or in any place on school premises or at any school-sponsored event.

* * * * *

■ 3. In § 210.21, add a new paragraph (e) to read as follows:

§ 210.21 Procurement.

* * * * *

(e) *Restrictions on the sale of milk.* A school food authority participating in the Program, or a person approved by a school participating in the Program, must not directly or indirectly restrict the sale or marketing of fluid milk (as described in paragraph(m)(1)(ii) of this section) at any time or in any place on school premises or at any school-sponsored event.

Dated: November 10, 2005.

Roberto Salazar,

Administrator, Food and Nutrition Service.

[FR Doc. 05-22952 Filed 11-18-05; 8:45 am]

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