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MEMORANDUM

April 27, 2012

BY ELECTRONIC MAIL

FROM: Olsson Frank Weeda Terman Matz PC

RE: Interim Final Rule Establishing Certification of Compliance With Meal Requirements for the National School Lunch Program Under the Healthy, Hunger-Free Kids Act of 2010

Section 201 of the Healthy, Hunger-Free Kids Act of 2010 (HHFKA) (P.L. 111-296)¹, provides, beginning October 1, 2012, an additional six cent performance-based meal reimbursement for each lunch served by School Food Authorities (SFAs) certified by State agencies to be in compliance with the updated meal patterns. The United States Department of Agriculture today published an interim final rule (the rule), amending 7 CFR 210, to establish how SFAs will demonstrate their compliance with the new school meal pattern, enabling them to receive the additional six-cent performance-based reimbursement. The rule can be found at <http://www.gpo.gov/fdsys/pkg/FR-2012-04-27/pdf/2012-10229.pdf>. The information collection requirements can be found at <http://www.gpo.gov/fdsys/pkg/FR-2012-04-27/pdf/2012-10253.pdf>. The Department has issued this rule, effective July 1, 2012, as an interim final rule rather than a proposed rule because of the need to have procedures in place prior to the 2012-2013 School Year. The Department, as detailed below, is providing a 90-day comment period

¹ <http://www.gpo.gov/fdsys/pkg/PLAW-111publ296/pdf/PLAW-111publ296.pdf>

regarding this rule, and a 60-day comment period regarding the information collection requirements associated with the rule.

This memorandum provides a brief overview of the rule as published, and a discussion of certain portions of the rule. The material below is excerpted in large part from today's Federal Register notice.

Overview

The rule establishes requirements and procedures for SFAs to receive the additional six cents per meal provided by Section 201 of HHFKA. The key elements excerpted from the discussion of this interim rule include:

- State agencies should begin preparing for certification activities upon publication of this rule, so that the certification process for SFAs may begin as soon as possible following the beginning of SY 2012-2013.
- State agencies are required to establish procedures to certify SFAs for performance-based cash reimbursement in accordance with guidance established by the Food and Nutrition Service (FNS).
- Compliance with the higher nutritional standards in effect for both the National School Lunch Program (NSLP) and the School Breakfast Program (SBP) if the SFA participates in SBP at the time the SFAs are certified is necessary to be certified for performance-based cash reimbursements for lunch. In years subsequent to the year certified, through School Year 2014-2015, SFA's will be required to submit an annual attestation of compliance with meal pattern requirements as new requirements are phased in. FNS will provide SFAs with a prototype attestation which includes a statement attesting compliance with each of the phased in meal pattern requirements.
- SFAs may demonstrate compliance via menus and nutrient analysis, a simplified nutrient assessment related to foods offered on school menus, or during the course of a regular State agency-conducted administrative review, if the State offers this option.
- State agencies must review certification materials and make a certification determination within 60 days of receipt from the SFA or as otherwise authorized by FNS.
- During SY 2012-2013, State agencies must conduct on-site validation reviews for a sample of certified SFAs to ensure that submitted certification documentation accurately reflects the meal service.
- During a State agency's administrative review:
 - If an SFA is found to be in violation of a review area of the updated meal patterns for the SBP established in program regulations, the SFA is not in jeopardy of losing the performance-based reimbursement for eligible lunches served under the NSLP;

- If an SFA is found to be out of compliance with the updated meal patterns for the NSLP, the SFA is at risk of losing the performance-based reimbursement; and
- If an SFA is out of compliance with the updated meal patterns for either SBP or the NSLP, the State agency is required to follow the standard operating procedures for administrative reviews, including holding an SFA subject to fiscal sanctions if the State agency determines that the SFA has not completed timely the corrective action as required by the regulations.
- FNS and the National Food Service Management Institute are developing technical assistance resources and training to help school foodservice staff improve menus, order appropriate foods to meet the new meal requirements, and control costs while maintaining quality.

Opportunity for Comments:

Comments regarding the rule can be submitted until July 26, 2012. Comments regarding information collection requirements and the revisions to Report of School Programs (FNS-10) can be submitted until June 26, 2012.

Comments may be submitted via:

- Federal eRulemaking Portal at <http://www.regulations.gov>.
- Mail to Julie Brewer, Chief, Policy and Program Development Branch, Child Nutrition Division, FNS, Department of Agriculture, 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302-1594.
- Hand Delivery or Courier to 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302-1594, during normal business hours of 8:30 a.m.-5:00 p.m.

Discussion:

Reasons for the Rule –

Section 201 of HFFKA provides that beginning October 1, 2012, an additional six cent performance-based meal reimbursement for each lunch served by SFAs certified by State agencies to be in compliance with the updated NSLP and SBP meal patterns. Modifications to the meal pattern regulations were published on January 26, 2012², and will be implemented in stages beginning with School Year 2012-2013.

² See 77 Fed. Reg. 4088-4167 (January 26, 2012) (to be codified at 7 CFR Parts 210 and 220) at <http://www.gpo.gov/fdsys/pkg/FR-2012-01-26/pdf/2012-1010.pdf>.

Section 201 also provides \$50 million for each of FY 2012 and FY 2013 to assist in the implementation of the revised meal pattern. \$47 million of the additional amount is being made available each year to states for training, technical assistance, certification, and oversight activities. The remaining \$3 million is reserved for Federal implementation of the new requirements. These amounts are in addition to the regular State Administrative Expense funds provided for these programs.

Performance-Based Reimbursement –

Section 201 requires that the additional six-cents be provided only for those meals that meet the updated meal patterns. In this rule, USDA suggested that the legislative language is unclear as to whether the requirement applied to meeting both the updated lunch and breakfast standards, even though the additional reimbursement is provided only for the NSLP. Based upon the goals of the HHFKA as expressed by Congress and the purpose of performance-based reimbursement, the Department has decided that there are two requirements. First, at the time an SFA is certified by the State agency to receive the six-cents per lunch performance-based reimbursement, the State agency must determine that the SFA is in compliance with the updated meal patterns and nutrition requirements in effect at the time of certification for the NSLP (and for the SBP if the SFA participates in that program). Secondly, for the purposes of the rule, the use of the phrase “the meal patterns or nutrition standards” in subparagraph (E) of the HHFKA means the meal patterns or nutrition standards of the NSLP but not the SBP. If the SFA is certified to receive the performance-based reimbursement and, during a State agency’s administrative review, is found to be in violation of a review area of the updated meal patterns for the SBP, the SFA is not in jeopardy of losing the performance-based reimbursement for eligible lunches served under the NSLP. If the SFA is found to be out of compliance with the updated meal patterns for the NSLP, the SFA is at risk of losing the performance-based reimbursement. If the State agency finds an SFA out of compliance with the updated meal patterns for either SBP or the NSLP, the State agency is required to follow the standard operating procedures for administrative reviews. An SFA could be subject to fiscal sanctions if the State agency determines that the SFA has not completed timely the corrective action as required by the regulations.

State Agency Certification Responsibilities –

State agencies are required to establish procedures for performance-based cash reimbursement following guidance to be established by FNS. In turn, states are to provide guidance to SFAs, including making SFAs aware of certification protocol and the documentation required to show compliance with the updated meal patterns in place at the time of certification. The Federal Register notice emphasizes that compliance with both NSLP and SBP updated meal patterns is necessary to be certified for the six-cent performance-based cash reimbursement for lunch.

For school years after the school year of certification, through School Year 2014-2015, State agencies must require SFAs to submit annual attestations of compliance with new meal requirement as they are phased in. FNS will provide prototype attestations. Compliance with the new requirements will be confirmed during State administrative reviews.

State agencies must establish a protocol for the timely review of certification documents and disbursement of funds to eligible SFAs. State agencies must review certification materials and make a certification determination within 60 days of receipt from the SFA or as otherwise authorized by FNS. Performance-based reimbursement payments for lunches served in certified SFAs must begin in the calendar month for which the SFA is certified, noting that procedures must ensure that no performance-based reimbursement payments are made for meals served prior to October 1, 2012.

In School Year 2012-2013, State agencies must conduct on-site validation reviews of a random sample of 25 percent of certified SFAs. The sample must include all large certified SFAs.³ State agencies should select SFAs for validation reviews throughout the year. State agencies must observe a meal service for each type of certified menu, review production records for the meal, and review the documentation submitted for certification. During this year, State agencies may conduct performance-based reimbursement certification and validation reviews in lieu of administrative reviews, unless an SFA is determined by the State agency to be at-risk for improper payments.

State agencies are strongly encouraged to include SFAs not certified in School Year 2012-2013 in the first year of the administrative review cycle – School Year 2013-2014.

State Agency Reports -

State agencies must submit a quarterly report, as specified by FNS, detailing the disbursement of performance-based reimbursement, including the total number of SFAs in the State, the names and locations of certified SFAs, and for each school food authority, the total number of lunches earning the performance-based reimbursement for each month. This is in

³ See 7 CFR 210.18(b)(6) – “(6) *Large school food authority* means, in any State:

“(i) All school food authorities that participate in the Program and have enrollments of 40,000 children or more each; or

“(ii) If there are less than two school food authorities with enrollments of 40,000 or more, the two largest school food authorities that participate in the Program and have enrollments of 2,000 children or more each.”

addition to incorporating meal counts earning the performance based reimbursement on the Report of School Program Operations (FNS-10).

SFA Responsibilities –

SFAs must submit certification materials to the State agency in accordance with State agency certification procedures, and with documentation to support the receipt of performance-based reimbursement. SFAs must attest that the documentation is representative of the on-going meal service. SFAs must maintain the documentation of compliance, including production and menu records, and other records. SFAs must make appropriate records available to State agencies upon request.

Compliance with the updated meal patterns may be done as follows:

- Menu and Nutrient Analysis - Those SFAs using software to plan menus may use the software's nutrient analysis function to document compliance with updated meal patterns. SFAs that select this option must submit to the State agency one week of each type of menu offered in the schools under its jurisdiction, nutrient analyses of the submitted menus, and a detailed menu worksheet which shows food items and quantities (as specified by FNS) which will be used to assess compliance with updated meal patterns.
- Menus and a simplified nutrient assessment - SFAs may perform a simplified nutrient assessment related to foods offered on school menus to demonstrate to the State agency compliance with updated meal patterns. SFAs must submit to the State agency, a simplified nutrient assessment (as specified by FNS), one week of each type of menu offered, and a detailed menu worksheet with food items and quantities (as specified by FNS).
- State agency review findings - When conducting an administrative review, a State agency may, at its option, certify an SFA to receive performance-based reimbursement if the State agency can confirm compliance with all meal pattern and nutrition standards. A detailed menu worksheet with food items and quantities (as specified by FNS) is required as part of the materials used to demonstrate compliance. The State agency may document certification in lieu of asking the SFA to submit documentation.

In years subsequent to the year certified, through School Year 2014-2015, SFA's will be required to submit an annual attestation of compliance with meal pattern requirements as new requirements are phased in.

Ongoing Compliance and Subsequent Administrative Reviews –

The updated meal pattern rule referenced above eliminated School Meals Initiative (SMI) reviews, and revised the Performance Standard 2 portion of the review to reflect new meal

pattern requirements. The review frequency has been increased to once every three years beginning in School Year 2013-2014, requires breakfasts to be reviewed during administrative reviews, and establishes requirements for fiscal action related to specific meal pattern violations.

The two performance standards included in critical areas are:

- Performance Standard 1 - certification, counting, and claiming procedures to ensure that all free, reduced, and paid lunches are served to eligible children and that lunches are counted correctly to yield accurate claims; and
- Performance Standard 2 - whether lunches meet the updated meal patterns in §210.10 and breakfast meets §220.8 or §220.23, as applicable.

If the SFA is certified to receive the performance-based reimbursement and, on an administrative review, is found to be non-compliant with the updated meal patterns for lunch, the State agency must follow the standard operating procedures set forth in §§210.18 and 210.19. As a result of this rule, these procedures include cessation of the performance-based reimbursement for noncompliance with lunch requirements until the SFA demonstrates to the satisfaction of the SA that corrective action has taken place. Absent immediate corrective action, the State agency must turn off the six-cents per lunch reimbursement with the beginning of the month following the administrative review and, at State discretion, may turn off the six-cent per lunch reimbursement for the month under review. The State agency may recover any funds improperly paid back through the beginning of the certification period.

School Year 2012-2013 Monitoring Adjustments –

This rule permits State agencies to conduct administrative Coordinated Review Effort reviews scheduled for School Year 2012-2013 in either School Year 2012-2013 or 2013-2014, with one exception: State agencies must conduct a scheduled School Year 2012-2013 review in that year of any school food authority at risk for improper payments, as determined by the State agency. State agencies are advised that any reviews moved to School Year 2013-2014 count toward, and are not in addition to, the required number of reviews for the first three-year administrative review cycle. State agencies must continue to conduct additional administrative reviews (AARs) of selected local educational agencies that have a demonstrated level of, or are at high risk for, administrative error.

Technical Assistance –

FNS and the National Food Service Management Institute are developing technical assistance resources and training to help school foodservice staff improve menus, order appropriate foods to meet the new meal requirements, and control costs while maintaining quality. Training will be available through webinars and online learning modules.

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FNS is also developing guidance, resources, and necessary forms to assist with the execution of performance-based certifications, and will make these materials available on a centralized website at:

http://www.fns.usda.gov/cnd/Governance/Legislation/CNR_resources.htm.

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