



Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
T +1 202 637 5600
F +1 202 637 5910
www.hoganlovells.com

MEMORANDUM

From: Elizabeth Barr Fawell
Veronica Colas
Leigh G. Barcham

Date: May 8, 2020

Re: Court Decision Strikes Down USDA Final Rule Easing Sodium and Whole Grains Standards in School Meals

A recent court decision struck down a 2018 final rule by the U.S. Department of Agriculture's (USDA's) Food and Nutrition Service (FNS), which had relaxed sodium and whole grains requirements for the National School Lunch Program and National School Breakfast Program ("school meals programs"). ^{1/} The Center for Science in the Public Interest (CSPI) and Healthy School Food Maryland had filed suit challenging the 2018 final rule as violating the Administrative Procedure Act (APA). The court held that the 2018 final rule was not a logical outgrowth of the agency's earlier 2017 interim final rule (IFR) because it included changes not contemplated in the IFR. The court therefore struck down the rule and returned it to FNS for further proceedings consistent with the court's decision. As a result of this decision, FNS's 2012 standards for sodium and whole grains in school meals are now reinstated.

Background

In January 2012, FNS issued a final rule to align the school lunch and breakfast programs' nutrition standards with the 2010 Dietary Guidelines for Americans, as required by the Healthy, Hunger-Free Kids Act of 2010. ^{2/} The 2012 rule established a three-phase schedule for reducing sodium levels over the course of 10 years based on age group and meal, as follows:

- Sodium Target 1: By school year (SY) 2014-2015, schools were required to reduce sodium levels to between 540 mg and 640 mg for breakfast and between 1230 mg and 1460 mg for lunch.
- Sodium Target 2: By SY 2017-2018, schools were to reduce sodium levels to between 485 mg and 570 mg for breakfast and 935 mg and 1080 mg for lunch.
- Final Target: By SY 2022-2023, schools were to reduce sodium to between 430 mg and 500 mg for breakfast and 640 mg and 740 mg for lunch.

^{1/} *CSPI v. Perdue*, No. GJH-19-1004 (D. Md. Apr. 13, 2020).

^{2/} Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088 (Jan. 26, 2012).

With respect to whole grains, the 2012 rule required 50% of all grain products offered in school meals to be whole-grain rich during SY 2013-2014. ^{3/} Thereafter, it required that all grain products served in school meals be whole grain-rich.

Following the 2012 rule, Congress passed a series of appropriations bills with language directing FNS to retain the Sodium Target 1 levels through SY 2017-2018 and allowing states to grant exemptions to the requirement that all grains served must be whole grain-rich, provided the school food authority (SFA) could demonstrate hardship in meeting the all whole grains requirement and continued to meet the 50% requirement.

In November 2017, USDA published an IFR extending the sodium and whole grain flexibilities provided by Congress through SY 2018-2019. ^{4/} FNS issued the IFR to address “significant challenges faced by local operators regarding milk, whole grains and sodium requirements and their impact of food development and reformulation, menu planning, and school food service procurement and contract decisions.” The 2017 IFR retained the Sodium Target 1 levels through SY 2018-2019 and anticipated that Sodium Target 1 would remain in effect “through at least the end of SY 2020-2021 to provide SFAs more time to procure and introduce lower sodium food products, allow food industry more time for product development reformulation, and give students more time to adjust to school meals with lower sodium content.”

It also retained the requirement that all grains served must be whole grain-rich foods, but continued to allow state agencies to seek exemptions. Though not at issue in the lawsuit discussed in this memorandum, the IFR also permitted schools to offer flavored, low-fat milk as part of a reimbursable meal, whereas previously flavored milk was required to be non-fat. FNS stated in the preamble that “No changes made under this interim final rule will extend beyond SY 2018-2019.”

In December 2018, FNS issued a final rule. ^{5/} The 2018 rule retained Sodium Target 1 through SY 2023-2024, after which schools would be required to comply with Sodium Target 2, and it eliminated the Final Target. It also eliminated the 100% whole grain-rich requirement, and required instead that 50% of grains served be whole-grain rich. In addition, it allowed local operators to permanently offer flavored, low-fat milk as part of school meal programs.

Court Decision

The plaintiffs filed a lawsuit alleging the 2018 final rule was unlawful under the APA and seeking declaratory and injunctive relief. They argued the rule violated the APA because: it is inconsistent with the federal statutes governing the school meal programs; it reflects unexplained and arbitrary decision making; it represents an unacknowledged and unexplained change in position; and it is not a logical outgrowth of the 2017 interim final rule. The court disagreed with the plaintiff's first three allegations, but held that the 2018 final rule is not a logical outgrowth of the 2017 IFR and therefore violates the APA.

^{3/} Whole grain-rich products must contain at least 51 percent whole grains and the remaining grains must be enriched. Whole grain-rich products also must satisfy criteria included in FNS guidance. 7 C.F.R. § 210.10(c)(2)(iv)(A).

^{4/} Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirements, 82 Fed. Reg. 56703 (Nov. 30, 2017).

^{5/} Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirements, 83 Fed. Reg. 63775 (Dec. 12, 2018).

With respect to the sodium targets, the court reasoned that the 2017 IFR suggested the Final Target would remain in effect, but would simply be delayed. The 2017 IFR specifically sought comment on only the effect of extending the Sodium Target 1 compliance dates on Sodium Target 2, and did not discuss eliminating the Final Target. The court reasoned that the specificity concerning Sodium Targets 1 and 2 and silence concerning any suggestion of eliminating the Final Target strongly indicated that the Final Target was not at issue in the IFR. Although agencies are permitted to change a rule in response to comments, the court concluded FNS's changes in the 2018 final rule were not in character with the original scheme of the 2017 IFR because "there is a fundamental difference between delaying compliance standards—which indicates that school meals will eventually meet those standards—and eliminating those standards altogether...."

The court similarly concluded the 2018 final rule's elimination of the 100% whole grain-rich requirement was not a logical outgrowth of the 2017 IFR, which retained the 100% whole-grain rich requirement while also extending the availability of exemptions. According to the opinion, Congress' regular appropriations riders offering the exemptions, the 2017 IFR's detailed discussion of the exemptions, and its total silence on eliminating or even changing the 100% requirement would have led only to the conclusion that a change in the 100% requirement would not be considered.

Accordingly, the court struck down the 2018 final rule and sent the rulemaking back to FNS for further proceedings. This means the 2018 final rule eliminating the Final Target for sodium and the 100% whole grain-rich requirements and allowing flavored, nonfat milk no longer is in effect. Because the flexibilities granted under the 2017 IFR expressly did not extend beyond SY 2018-2019, those flexibilities also have lapsed. As a result, the Obama-era nutrition standards for sodium, whole grains, and fluid milk established under the 2012 final rule are reinstated.

We anticipate the next step will be for FNS to issue a proposed rule or new final rule that more closely adheres to the provisions in the 2017 IFR. We expect FNS will take action within the coming months to provide schools some of the 2017 IFR's flexibilities in advance of SY 2020-2021.

* * *

We will continue to monitor FNS's response to the lawsuit and implementation of the school meal standards. Please contact us if you have any questions regarding this or other matters.