

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Parts 210 and 220

RIN 0584-AD58

#### Fluid Milk Substitutions in the School Nutrition Programs

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule reflects amendments made by section 102 of the Child Nutrition and WIC Reauthorization Act of 2004 to the Richard B. Russell National School Lunch Act regarding substitutes for fluid milk in the National School Lunch Program. This rule would implement a legislative provision on milk substitutes that follows current regulations on menu exceptions for students with disabilities and would add new requirements for substitutions for fluid milk for children with medical or other special dietary needs.

Specifically, this proposed rule would establish nutritional standards for nondairy beverage alternatives to fluid milk, as well as requirements for substitutions for fluid milk for non-disabled students with medical or special dietary needs. It would allow the parent or legal guardian of a child with medical or special dietary needs to request a fluid milk substitute. In addition, it would allow schools to select acceptable fluid milk substitutes that meet the nutritional standards established in this proposed rule, and would continue to make school food authorities responsible for substitution expenses that exceed the Federal reimbursement.

This rule, as proposed, would ensure consistency among milk substitutes offered in the school lunch and breakfast programs, and would make certain that students who consume nondairy beverage alternates receive important nutrients found in fluid milk.

**DATES:** To be assured of consideration, written comments must be postmarked on or before January 8, 2007.

**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](mailto:CNDPROPOSAL@FNS.USDA.GOV). The subject line must include the words "Fluid Milk Substitutions".
- *Fax:* Submit comments by facsimile transmission to: (703) 305-2879, attention Robert Eadie.

- *Mail:* Comments should be addressed to Mr. Robert Eadie, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, Department of Agriculture, 3101 Park Center Drive, Room 634, Alexandria, Virginia 22302-1594. All written submissions will be available for public inspection at this location Monday through Friday, 8:30 a.m.-5 p.m.

- *Hand Delivery or Courier:* Deliver comments to 3101 Park Center Drive, Room 634, 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>. Follow the online instructions for submitting comments.

#### FOR FURTHER INFORMATION CONTACT:

William Wagoner or Marisol Benesch, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service at (703) 305-2590.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

National School Lunch Program (NSLP) regulations under 7 CFR 210.10(g)(1) require schools to make food substitutions for children whose disabilities restrict their diet, and give schools discretion to make substitutions for students with medical or other special dietary needs. The need for substitutions must be supported by a statement signed by a physician in the case of a student with a disability, or by a recognized medical authority in the case of a student who is not disabled. The substitution rules in the NSLP also apply to the School Breakfast Program (SBP), pursuant to regulations at 7 CFR 220.8(g).

Section 102 of the Child Nutrition and WIC Reauthorization Act of 2004 (Pub.

L. 108-265; June 30, 2004) amended section 9(a)(2) of the Richard B. Russell National School Lunch Act (NSLA), 42 U.S.C. 1758(a)(2), to include the above regulatory provisions and added the following requirements for substitutions for milk:

- Allows schools to make substitutions for students who have medical or dietary needs, other than a disability, and accept a statement from a parent or guardian in lieu of the statement from a recognized medical authority;

- Adds the requirement, except in the case of a student with a disability, that nondairy beverages offered for substitution must be "nutritionally equivalent to fluid milk" and meet the nutritional standards set by the Secretary of Agriculture;

- Grants schools discretion to select acceptable substitutes that meet the nutritional standards established by the Secretary;

- Requires schools to inform the State agency if they choose to offer substitutes for fluid milk other than for students with a disability; and

- Requires school food authorities (SFAs) to pay for substitution expenses that exceed Federal reimbursements.

The Food and Nutrition Service (FNS) has issued separate guidance for accommodating children with special dietary needs in the school meal programs. The publication "Accommodating Children with Special Dietary Needs in the School Nutrition Programs" is available at the FNS Web site ([http://www.fns.usda.gov/cnd/Guidance/special\\_dietary\\_needs.pdf](http://www.fns.usda.gov/cnd/Guidance/special_dietary_needs.pdf)).

This proposed rule also makes a non-substantive change to the heading of 7 CFR 210.10 and 7 CFR 220.8 by converting each from a question to a statement. This change is intended to conform the headings to the same style as all other section headings in 7 CFR Parts 210 and 220. These non-substantive changes will not change the basic meaning of the headings, nor affect the meaning of any of the subsections.

##### II. Fluid Milk Requirement

Schools participating in the school meals programs are required to offer fluid milk as part of a reimbursable meal pursuant to section 9(a)(2) of the NSLA, 42 U.S.C. 1758(a)(2) and 7 CFR 210.10(m)(1)(ii) and 7 CFR 220.8(i)(1). This requirement is in place because

research shows that milk consumption is especially important to bone health during childhood and adolescence. Section 102 of Public Law 108–265 expands section 9(a)(2) and continues the current milk requirement, and gives schools the option to offer an acceptable nondairy substitute to non-disabled children who cannot drink fluid milk for medical or other special dietary reasons.

### III. Substitutions for Disability Reasons

Current regulations governing the NSLP and SBP require schools to make substitutions for children who cannot consume the regular lunch, afterschool snack or breakfast due to their disability, when that need is certified by a physician and the substitution needed for any food item (including fluid milk) is specified with a diet order or diet prescription. The regulations at 7 CFR 210.10(g)(1) already contain these requirements. This proposed rule retains the requirements as currently stated, but reorganizes them for clarity to distinguish between the requirements for substitutions for disabled and non-disabled students.

### IV. Substitutions for Non-Disability Reasons

Over the years, Federal, State, and local program officials have received requests from parents and caregivers for alternatives to fluid milk for children who have milk intolerances or allergies that restrict their diet but do not meet the definition of disability. Under the current regulations, schools may offer non-disabled students substitutes for fluid milk when supported by a statement from a recognized medical authority. This proposed regulation would require that milk substitutions for non-disabled students meet the nutritional standards established in this rule and would allow schools the discretion to offer acceptable substitutes. This proposed rule would also permit schools to accept a written request from a parent or legal guardian in lieu of a statement from a medical authority. These and other statutory provisions are discussed in more detail in the following sections.

#### *Nutritional Standards for Milk Substitutes*

The NSLA now allows schools the option to offer a nondairy beverage that

is nutritionally equivalent to fluid milk for non-disabled children with medical or special dietary needs. To ensure that children receive adequate substitutes, section 9(a)(2)(B) of the NSLA, 42 U.S.C. 1758(a)(2)(B), requires the Secretary to establish nutritional standards for nondairy beverages to assure that they are nutritionally equivalent to milk. That section also requires that milk substitutes be fortified with calcium, protein, vitamin A, and vitamin D to levels found in fluid milk.

The NSLA also authorizes the Secretary to specify other nutrients in addition to the ones required by the statute. Existing research indicates that fluid milk is a major source of a number of other nutrients. According to the Food and Drug Administration (FDA), an “excellent source” (as found in 21 CFR 101.54(b)(1)) is a food item that contributes at least 20 percent of the daily need of a specified nutrient per serving. One serving (1 cup) of milk fulfills the FDA’s nutrient content claim of “excellent source” for calcium, riboflavin and phosphorus. In addition, data from the Continuing Survey of Food Intakes by Individuals (*see* table below) shows that milk is the primary food source for children for the following vitamins and minerals: Vitamin A, riboflavin, vitamin B–12, calcium, magnesium, phosphorus, and potassium. Given the special role of milk in providing these nutrients to children, the Department is proposing to extend the requirements for nondairy milk substitutes to also include minimum nutrient levels for riboflavin, vitamin B–12, magnesium, phosphorus, potassium.

#### SUMMARY OF MILK CONTRIBUTIONS TO TOTAL NUTRIENT INTAKES AMONG U.S. CHILDREN, 2–18 YEARS OF AGE, 1994–96, 1998

Nutrient	Rank	Percent of total
Energy .....	1	9.0
Carbohydrate ..	5	6.0
Protein .....	1	16.4
Total fat .....	1	10.4
Saturated fat ...	1	17.8
Polyunsaturated fat .....	10	2.2
Monosaturated fat .....	4	7.8
Cholesterol .....	3	13.5

#### SUMMARY OF MILK CONTRIBUTIONS TO TOTAL NUTRIENT INTAKES AMONG U.S. CHILDREN, 2–18 YEARS OF AGE, 1994–96, 1998—Continued

Nutrient	Rank	Percent of total
Fiber .....	.....	<1
Vitamin C .....	7	3.5
Vitamin E .....	11	3.7
Vitamin A (RE) .....	1	20.2
Carotene .....	6	2.3
Folate .....	4	6.4
Thiamin .....	3	8.1
Riboflavin .....	1	27.2
Niacin .....	.....	<1
Vitamin B–6 .....	2	8.5
Vitamin B–12 .....	1	31.5
Calcium .....	1	45.7
Phosphorus .....	1	27.3
Sodium .....	4	5.4
Potassium .....	1	22.4
Iron .....	.....	<1
Zinc .....	3	12.4
Magnesium .....	1	18.9
Copper .....	12	3.1
Selenium .....	3	8.7
Caffeine .....	.....	<1
Theobromine .....	.....	<1

Derived from: 1994–96, 1998 Continuing Survey of Food Intakes by Individuals. Dietary Source Nutrient Database for USDA Survey Food Codes.

In setting minimum nutritional standards for milk substitutes, we examined the nutrient levels found in various types of milk using USDA’s *Nutrient Database for Dietary Studies 1.0*.<sup>1</sup> Among the varieties of fluid milk, whole milk typically provides the lowest levels of several important nutrients; therefore, we used whole milk (3.25% milkfat, the lowest fat level allowable for whole milk) as a benchmark for all nutrients except vitamins A and D. The chosen levels of vitamins A and D were based upon FDA’s definition of “excellent source” and the milk fortification levels required by the FDA.

Based on the above, this rule proposes that allowable fluid milk substitutes provide, at a minimum, the nutrients listed on the following table. The following table also shows the Recommended Daily Intake (RDI) for each of these nutrients and the percentage of the RDI provided by a cup of whole milk (values are RDI unless specified as Daily Reference Value (DRV)).

Nutrient	Per cup	RDI	Percentage
Calcium .....	276 mg .....	1000 mg ..	27.6

<sup>1</sup> USDA Food and Nutrient Database for Dietary Studies 1.0. 2004. Beltsville, MD: Agricultural Research Service, Food Surveys Research Group.

Nutrient	Per cup	RDI	Percentage
Protein .....	8 g .....	50 g (DRV).	16.0
Vitamin A .....	500 IU .....	5000 IU ....	10.0
Vitamin D .....	100 IU .....	400 IU .....	25.0
Magnesium .....	24 mg .....	400 mg ....	6.00
Phosphorus .....	222 mg ....	1000 mg ..	22.2
Potassium .....	349 mg ....	3500 mg (DRV).	10.0
Riboflavin .....	0.44 mg ...	1.7 mg .....	25.9
Vitamin B 12 .....	1.1 mcg ....	6.0 mcg ....	18.3

Sources: USDA National Nutrient Database for Standard Reference, Release 17 (2004). FDA Consumer Special Issue: Focus on Food Labeling, "Daily Values Encourage Healthy Diet", May 1993.

Fortification of nondairy milk substitutes used in the school nutrition programs must follow FDA guidelines, particularly those outlined in 21 CFR 101.9. In addition, Appendix O of the publication entitled "Grade 'A' Pasteurized Milk Ordinance", issued by the FDA's Center for Food Safety and Applied Nutrition, provides guidance on upper bounds of vitamin A and vitamin D fortification.

In light of the recommendations of the "2005 Dietary Guidelines for Americans" on fats and added sugars, and current trends in childhood

overweight, the Department considered establishing maximum levels for nondairy milk substitutes for additional energy-bearing nutrients available on the Nutrition Facts Panel—either total calories (energy) or total fat, saturated fat, trans fat and total sugars—to limit their contribution toward the total calories. We refrained from doing so for the following reasons.

First, we examined the levels of energy, total fats, saturated fats, and sugars generally available in regular and chocolate-flavored fluid whole milk. Chocolate-flavored whole milk typically

has the highest levels of calories and total sugar among all fluid milk varieties. When we compared the nutrient levels in chocolate-flavored whole milk and in a typical chocolate-flavored soy-based beverage alternative (see following table), we concluded that the commercial marketplace already provides a level of energy, total fat, saturated fat, and total sugars in milk substitutes that is below the levels contained in milks currently allowable in the NSLP and SBP, and further special regulatory restriction for milk substitutes does not seem warranted.

Milk type (1 cup)	Energy (kcal)	Total fat (g)	Saturated fat (g)	Sugars (total)
Milk, chocolate, commercial, whole .....	208 kcals per cup .....	8.48 g per cup .....	5.260 g per cup .....	23.85 g per cup.
Milk, soy, ready-to-drink, not-baby's, chocolate.	118 kcals per cup .....	4.58 g per cup .....	0.514 g per cup .....	10.8 g per cup.

Source: USDA Food and Nutrient Database for Dietary Studies, 2.0. 2006. Beltsville, MD: Agricultural Research Service, Food Surveys Research Group.

Second, FNS believes that it is important to be consistent in our definition of allowable milk substitutes across our Federal nutrition programs. Currently, the Supplemental Program for Women Infants and Children (WIC) has proposed a definition for allowable soy-based beverages (71 FR 44801) that reflects the minimum nutrient and energy levels proposed by this rule. Establishing maximum nutrition standards for energy or total fat, saturated fat, trans fat and sugar levels for milk substitutes in the school meals program would, therefore, generate inconsistency in our nutrition programs.

Third, in regard to sugar levels and total diet quality, the "Report of the Dietary Guidelines Advisory Committee on the Dietary Guidelines for Americans, 2005," notes that sugars can improve the palatability of foods and beverages that otherwise might not be consumed. Additionally, not all foods that contain added sugars are poor sources of nutrients. The Report also notes that, on average, the quality of children's and adolescents' total diet is

positively affected by the consumption of sweetened dairy foods and beverages. The Department recognizes that the "2005 Dietary Guidelines for Americans" recommends choosing foods and beverages with little added sugars or caloric sweeteners, and is interested in encouraging reasonably low levels of added sugars in milk substitutes. However, we do not believe that it is necessary to establish a regulatory maximum level for sugars in milk substitutes when one is not established for fluid milk.

Fourth, the Department also considered the potential impact of limiting total and saturated fats in milk substitutes. While fats are a significant contributor of calories, the Department recognizes that they are part of a healthful diet and facilitate the absorption of important nutrients found in fluid milk such as vitamins A and D. Current commercially available milk substitutes do not exceed the fat or saturated fat levels of flavored whole milk, as seen in the table above.

For the reasons stated above, the Department decided not to propose maximum standards for calories or total fat, saturated fat, trans fat and sugars for milk substitutes. However, since the intent is to provide products that are reasonable substitutes for fluid milk, the Department will recommend that when made available, schools use the profile of unflavored milk with respect to calories, fats, and sugars as the guide for evaluating fluid nondairy milk substitutes. We further recommend that schools do not offer fluid nondairy milk substitutes that exceed maximum levels for these nutrients based on the nutrient profile of chocolate-flavored whole milk. Guidance and technical assistance from the Department would emphasize the importance of offering nondairy milk substitutes that meet the proposed minimum requirements but do not exceed the levels of calories, total fat, saturated fat, and sugars commonly found in the milks offered locally in school meals. Milk substitutes offered for non-medical reasons will be

included in the nutrient analyses required under existing regulations.

#### *Selection of Nondairy Beverages by Schools*

While the NSLA requires the Secretary to identify the nutritional requirements for an equivalent beverage, a school wishing to offer fluid milk substitutes for non-disabled children would be responsible for choosing nondairy beverages that would meet the nutritional standards identified in this proposed rule. This would require that a school review documentation of the nutrients in nondairy beverages to determine if the beverages comply with the regulatory nutritional standards for milk substitutes. This proposed rule would allow a school to offer the nondairy beverage(s) that it has identified and selected as acceptable fluid milk substitute(s) based on the nutritional standards established by the Secretary. To the extent practicable, unless otherwise specified by a physician, the alternate nondairy beverages for disabled students should meet the same nutritional standards that apply to milk substitutes for non-disabled students.

#### **Written Statement From Student's Parent or Legal Guardian**

We intend to allow schools to fulfill the requests for fluid milk substitutes for children with medical and special dietary needs without creating additional paperwork or administrative burdens for parents or schools. Therefore, this proposed rule would allow a student's parent or legal guardian to submit a written request for a nondairy substitute by attaching it to the application form for free and reduced price meals or by submitting the request separately in writing at any time, provided that it identifies the student's medical or other special dietary needs. The request for substitutions would remain in effect until the student's parent or legal guardian revokes such request in writing, or until the school discontinues this option.

#### **State Agency Notification**

Section 9(a)(2)(B)(ii) of the NSLA requires that schools inform the State agency (SA) if they choose to offer substitutes for fluid milk other than for children with a disability. Recognizing the State/local administrative structure, this rule would require each SFA to report to the State agency on behalf of its schools. According to this proposed rule, the SA would be able to specify how SFAs must notify it of this decision. FNS would expect the SA to

have information on file regarding schools that offer this option for review upon request.

#### **Documentation for Substitutions**

Section 9(a)(2)(B)(ii) of the NSLA also requires that a request for milk substitution be in writing and identify the student's medical or special dietary need. This proposed rule would require schools to retain documentation such as the written statement from a medical authority or the student's parent or guardian, and product information certifying the nutritional content of the milk substitute.

#### **Expenses Related to Milk Substitutions**

In accordance with section 9(a)(2)(B)(iii) of the NSLA, schools would cover expenses incurred in providing allowable fluid milk substitutions that are in excess of expenses covered by program reimbursements. Because milk substitutions are granted on a case by case basis and a school selects the acceptable nondairy beverage(s), we anticipate that in most cases the substitution could be accommodated without undue financial hardship. These substitutions would be allowable costs and chargeable to the nonprofit school food service account.

#### **V. Procedural Matters**

##### *Executive Order 12866*

This proposed rule has been determined to be significant and was reviewed by the Office Management and Budget in conformance with Executive Order 12866.

##### *Regulatory Impact Analysis*

##### *Need for Action*

This action is needed to implement the provisions of Public Law 108-265 regarding the substitution of fluid milk in the NSLP and SBP. In accordance with the NSLA, this proposed rule would establish nutritional standards for milk substitutes, set minimum requirements for the substitution of milk for students with medical or special dietary needs, allow schools to identify acceptable substitutes that meet the nutritional standards established by the Secretary, and make school food authorities responsible for substitution expenses that exceed Federal reimbursement.

##### *Cost-Benefit Assessment*

Previous analyses by FNS and the Congressional Budget Office of the provision being implemented in this rule estimated a cost of less than \$500,000 annually. Little cost is

anticipated because it is expected that few students will request a non-dairy alternative to fluid milk; schools are not required to provide a substitution; and the Federal government will not reimburse any additional cost for non-dairy alternatives. This rule is not expected to significantly increase administrative burdens at the national, state, or local level. The benefits of this rule include nutritional consistency among milk substitutes offered in the school meal programs and reduced barriers for students who cannot consume fluid milk.

##### *Regulatory Flexibility Act*

This proposed rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601-612). Nancy Montanez Johner, Under Secretary of Food, Nutrition, and Consumer Services has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities participating in the NSLP and SBP. The requirement to provide substitutes for students with disabilities is not new, and the requirement concerning milk substitutes for non-disability reasons is only triggered if a school chooses to offer milk substitutes for non-disabled students with medical or special dietary needs.

##### *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements 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, the Department generally must prepare a written statement, including a cost/benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. This proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) that impose costs on State, local, or tribal governments or to the private sector of \$100 million or more in any one year. This proposed rule is, therefore, not subject to the requirements of sections 202 and 205 of the UMRA.

*Executive Order 12372*

The NSLP is listed in the Catalog of Federal Domestic Assistance under No. 10.555 and the SBP is listed under No. 10.553. For the reasons set forth in the final rule in 7 CFR part 3015, Subpart V and related Notice (48 FR 29115, June 24, 1983), these Programs are included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Since the NSLP and SBP are State-administered, federally funded programs, our national headquarters staff and regional offices have formal and informal discussions with State and local officials on an ongoing basis regarding program implementation and policy issues. This arrangement allows State and local agencies to provide feedback that forms the basis for any discretionary decisions made in this and other rules.

*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 would 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 rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule 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 otherwise impede its full implementation. This proposed rule is not intended to have retroactive effect. Prior to 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*

FNS has reviewed this proposed rule in accordance with the Department Regulation 4300-4, "Civil Rights Impact Analysis," to identify and address any

major civil rights impacts the rule might have on children on the basis of age, race, color, national origin, sex or disability. After careful review of the rule's intent and provisions, FNS has determined that it would not have a deleterious effect on the participation of protected individuals in the NSLP and SBP. The rule's sole effect is to facilitate nutritionally adequate nondairy beverages for participants that have a disability or medical condition that precludes their consumption of fluid milk.

*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. The recordkeeping and reporting burden contained in this rule is approved under OMB No. 0584-0006. This proposed rule does not contain any new information collection requirements subject to approval by OMB under the Paperwork Reduction Act of 1995.

*E-Government Act Compliance*

The Food and Nutrition Service is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

**List of Subjects***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.

*7 CFR Part 220*

Grant programs—education, Grant programs—health, Infants and children, Nutrition, Reporting and recordkeeping requirements, School breakfast and lunch programs.

Accordingly, 7 CFR parts 210 and 220 are proposed to be 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:
  - a. Revise the section heading;
  - b. Revise paragraph (g)(1);
  - c. Redesignate paragraphs (g)(2) and (g)(3) as paragraphs (g)(3) and (g)(4), respectively, and add a new paragraph (g)(2); and
  - d. Redesignate paragraph (m)(3) as paragraph (m)(4) and add a new paragraph (m)(3).

The revisions and additions read as follows:

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

\* \* \* \* \*

(g) \* \* \*

(1) *Exceptions for disability reasons.* Schools must make substitutions in lunches and afterschool snacks for students who are considered to have a disability under 7 CFR part 15b and whose disability restricts their diet. Substitutions must be made on a case by case basis only when supported by a written statement of the need for substitutions that includes the student's disability, an explanation of why the disability restricts the student's diet, the major life activity affected by the disability, the food(s) to be omitted from the student's diet, and the recommended alternative foods. Such statement must be signed by a licensed physician.

(2) *Exceptions for non-disability reasons.* Schools may make substitutions for students without disabilities who cannot consume the regular lunch or afterschool snack because of medical or other special dietary needs. Substitutions must be made on a case by case basis only when supported by a written statement of the need for substitutions that identifies the medical or special dietary need that restricts the student's diet, the foods to be omitted from the student's diet and, except for fluid milk, recommended alternative foods. Such statement must be signed by a recognized medical authority.

(i) *Milk substitutions for non-disability reasons.* Schools may make substitutions for fluid milk for non-disabled students who cannot consume fluid milk due to medical or special dietary needs. A school that selects this option may offer the nondairy beverage(s) of its choice, provided the beverage(s) meet the nutritional standards established under paragraph (m) of this section. Expenses incurred in providing substitutions for fluid milk that exceed program reimbursements must be paid by the school food authority.

(ii) *Requisites for milk substitutions.*

(A) A school food authority must inform the State agency if any of its schools choose to offer fluid milk substitutes other than for students with disabilities; and

(B) A medical authority or the student's parent or legal guardian must submit a written request for a fluid milk substitute identifying the medical or other special dietary need that restricts the student's diet.

(iii) *Substitution approval.* The approval for fluid milk substitution shall remain in effect until the medical authority or the student's parent or legal guardian revokes such request in writing, or until such time as the school changes its substitution policy for non-disabled students.

\* \* \* \* \*

(m) \* \* \*

(3) *Milk substitutes.* If a school chooses to offer one or more substitutes for fluid milk for non-disabled students with medical or special dietary needs, all substitute beverages offered must be fortified to meet 276 milligrams calcium per cup, 8 grams protein per cup, 500 International Units vitamin A per cup, 100 International Units vitamin D per cup, 24 milligrams magnesium per cup, 222 milligrams phosphorus per cup, 349 milligrams potassium per cup, 0.44 milligrams riboflavin per cup, and 1.1 micrograms vitamin B12 per cup, in accordance with fortification guidelines issued by the Food and Drug Administration. A school need only offer the nondairy beverage(s) that it has identified as allowable milk substitutes according to this paragraph (m)(3).

\* \* \* \* \*

## PART 220—SCHOOL BREAKFAST PROGRAM

1. The authority citation for 7 CFR part 220 continues to read as follows:

**Authority:** 42 U.S.C. 1773, 1779, unless otherwise noted.

2. In § 220.8:

- a. Revise the section heading;
- b. Revise paragraph (d)(1);
- c. Redesignate paragraphs (d)(2) and (d)(3) as paragraphs (d)(3) and (d)(4), respectively, and add a new paragraph (d)(2); and
- d. Add a new paragraph (i)(3).

The revisions and additions read as follows:

### § 220.8 Nutrition standards and menu planning approaches for breakfasts.

\* \* \* \* \*

(d) \* \* \*

(1) *Exceptions for disability reasons.* Schools must make substitutions in breakfasts for students who are considered to have a disability under 7

CFR part 15b of this title and whose disability restricts their diet. Substitutions must be made on a case by case basis only when supported by a written statement of the need for substitutions that includes the student's disability, an explanation of why the disability restricts the student's diet, the major life activity affected by the disability, the food(s) to be omitted from the student's diet, and the recommended alternative foods. Such statement must be signed by a licensed physician.

(2) *Exceptions for non-disability reasons.* Schools may make substitutions for students without disabilities who cannot consume the breakfast because of medical or other special dietary needs. Substitutions must be made on a case by case basis only when supported by a written statement of the need for substitutions that identifies the medical or special dietary need that restricts the student's diet, the foods to be omitted from the student's diet and, except for milk, recommended alternative foods. Such statement must be signed by a recognized medical authority.

(i) *Milk substitutions for non-disability reasons.* Schools may make substitutions for fluid milk for non-disabled students who cannot consume fluid milk due to medical or special dietary needs. A school that selects this option may offer the nondairy beverage(s) of its choice, provided the beverage(s) meet the nutritional standards established in Part 210 of this chapter. Expenses incurred in providing substitutions for fluid milk that exceed program reimbursements must be paid by the school food authority.

(ii) *Requisites for milk substitutions.*

(A) A school food authority must inform the State agency if any of its schools choose to offer fluid milk substitutes other than for students with disabilities; and

(B) A medical authority or the student's parent or legal guardian must submit a written request for a fluid milk substitute identifying the medical or other special dietary need that restricts the student's diet.

(iii) *Substitution approval.* The approval for fluid milk substitution shall remain in effect until the medical authority or the student's parent or legal guardian revokes such request in writing, or until such time as the school changes its substitution policy for non-disabled students.

\* \* \* \* \*

(i) \* \* \*

(3) *Milk substitutes.* If a school chooses to offer one or more substitutes

for fluid milk for non-disabled students with medical or special dietary needs, all substitute beverages offered must be fortified to meet 276 milligrams calcium per cup, 8 grams protein per cup, 500 International Units vitamin A per cup, 100 International Units vitamin D per cup, 24 milligrams magnesium per cup, 222 milligrams phosphorus per cup, 349 milligrams potassium per cup, 0.44 milligrams riboflavin per cup, and 1.1 micrograms vitamin B12 per cup, in accordance with fortification guidelines issued by the Food and Drug Administration. A school need only offer the nondairy beverages that it has selected as allowable milk substitutes according to this paragraph (i)(3).

\* \* \* \* \*

Dated: November 1, 2006.

**Nancy Montanez Johner,**

*Under Secretary, Food, Nutrition, and Consumer Services.*

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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 9 CFR Parts 93, 94, and 95

[Docket No. APHIS–2006–0026]

### Bovine Spongiform Encephalopathy; Minimal-Risk Regions, Identification of Ruminants and Processing and Importation of Commodities

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** We are reopening the comment period for our proposed rule that would remove several restrictions regarding the identification of animals and the processing of ruminant materials from BSE minimal-risk regions, as well as BSE-based restrictions on gelatin derived from bovine hides. This action will allow interested persons additional time to prepare and submit comments.

**DATES:** We will consider all comments that we receive on or before November 24, 2006.

**ADDRESSES:** You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>, select “Animal and Plant Health Inspection Service” from the agency drop-down menu, then click “Submit.” In the Docket ID column, select APHIS–2006–0026 to submit or view public