Related Topics of Concern

Competitive Foods

Approximately 640 commenters addressed the sale of foods in competition with school meals. Nearly 400 commenters recommended that all foods sold in the cafeteria, including a la carte items, be included in the analysis to determine whether or not the food service meets the Dietary Guidelines. More than 500 commenters recommended that the Department go even further and regulate the food items that may be sold in vending machines throughout the school or ban vending machines altogether.

The Department appreciates and shares many of these concerns. Currently, the program regulations (§ 210.11(a) and § 220.12(a)) prohibit the sale of certain foods of minimal nutritional value in the food service area between the start of school and the last lunch period of the day. Other foods may be sold in competition with reimbursable meals provided that the proceeds inure to the benefit of the schools or of student organizations. These items would include foods sold a la carte.

The Department has no authority to regulate the sale of foods *outside* the food service area. The current regulations governing the sale of competitive foods result from a Federal court's ruling in a lawsuit filed against the Department by a soft drink manufacturers' association. In that ruling, the court found that the Department had no authority to regulate the sale of competitive foods beyond the food service area. The court also limited the Department's jurisdiction over the food service area after the meal service has ended. Therefore, the Department cannot address the issue of vending machines elsewhere in the school in this rulemaking. The Department notes, however, that State agencies and local school food authorities have complete authority to impose more stringent limitations on the sale of competitive foods. This authority is underscored in Pub. L. 103-448, which directs the Department to provide States with a copy of the current regulations dealing with competitive foods and to provide States with model language prohibiting the sale of foods of minimal nutritional value anywhere on elementary school grounds between the start of the school day and the last lunch period. The Department intends to provide these materials to States for distribution to school food authorities in the near future.

The Department shares commenters' concerns about a la carte items. The

Department notes that these items are generally not intended to be part of a complete, balanced meal. A la carte sales can range from a second helping of a food item prepared as part of a reimbursable meal to items from a separate salad bar. Consequently, an analysis which includes a la carte items would shift the focus to individual foods, something which the Dietary Guidelines do not intend. Moreover, in the case of prepackaged items, the school would need to establish a separate system of records to track their selection and would need to identify their nutrient content. The Department believes, therefore, that requiring schools to apply the principles of the Dietary Guidelines to these items would greatly increase the complexity and burden of nutrient analysis.

Fortification

The preamble to the June 10, 1994, proposal solicited comments regarding the use of fortified foods in school meal programs. The Department was particularly interested in whether there are practical ways to control excessive use of fortification, the degree to which this should be a concern, and the potential impact on the character of school meals.

No regulatory proposals were made on this subject because the Department was unaware of any practical method for controlling the use of highly fortified foods. It was our understanding at the time of the proposal that it was virtually impossible to distinguish those nutrients that have been added to a product from those that are naturally occurring, especially for food items with numerous ingredients. Nevertheless, the Department was committed to the principle that meals be comprised of a variety of conventional foods, as recommended in the Dietary Guidelines, rather than ones containing formulated fortified foods.

More than 2,300 commenters responded to our request for comments, some of whom recommended adoption of the fortification policy developed by USDA and employed in the USDA nutrient standard pilots in the mid-1980's. This method, which is also a part of pilot projects currently operating in California, permits nutrients which are added to foods to be counted toward the nutrient standards only if they were added in accord with one of the following criteria: (1) a standard of identity or standard for enrichment issued by the Food and Drug Administration (FDA), (2) a USDA purchase specification for a donated commodity, (3) a standard for an Alternative Food for Meals under

Appendix A of Parts 210 and 220, excluding formulated grain/fruit products, and (4) in a breakfast cereal available on the commercial market.

The Department had seriously considered adopting this policy as a part of the June 10, 1994, proposal. However, following discussions with the FDA, the food industry, the nutrient data laboratory of the USDA's Agriculture Research Service and local school food service personnel, the Department concluded that it could not be implemented at the local level for several reasons.

First, there is no simple way to distinguish between the amount of synthetic nutrients added to a food and the level which occurs naturally because FDA does not require such distinctions to be made on food labels. Moreover, the Department has found that FDA standards of identity are not a particularly helpful source of information because they are only available for a limited number of products (under 40). Standards do not exist, for example, for many fruit juices commonly fortified and sold on the market. It would be difficult and costly to require the food industry to identify the primary source of nutrients on the label because such a requirement would exceed the requirements of the Nutrition Labeling and Education Act. It should be noted that further inquiries to the California State agency concerning this policy confirmed that it had not been successfully implemented in the pilot sites.

Some commenters also suggested that USDA use the fortification standards established by FDA. These standards (21 CFR 101.14) only apply to those instances in which a health claim is being made in connection with the use of a particular food product. Therefore, such standards would have little applicability to the school meal programs. Since commenters did not provide new information that could be used to fashion a practical method for regulating the use of fortified products in the school meal programs, this final regulation contains no new regulatory proscriptions. The Department does wish to stress its continued commitment to the principle that school meals should be comprised of a variety of foods which provide naturally occurring nutrients rather than formulated foods which have been artificially fortified. The training and technical assistance the Department plans to provide on implementing the Dietary Guidelines will stress the importance of serving a variety of foods as well as the potential dangers of serving highly fortified foods.