

# NOTE

## FOR THE HEALTH OF IT: HOW THE QUANTIFIED HEALTH BENEFITS OF THE USDA NUTRITION STANDARDS JUSTIFY REAUTHORIZATION AND INCREASED FUNDING FOR SCHOOL MEAL REIMBURSEMENT

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*In 2010, Congress passed landmark legislation requiring the U.S. Department of Agriculture (“USDA”) to promulgate nutrition standards for school meals. The USDA issued proposed standards early in 2011, which closely adhered to the latest scientific guidelines. However, these standards came under immediate attack, largely based on the increased cost the new nutrition standards would impose on schools. As a result, the USDA’s final rule sought to reduce the overall cost of the standards.*

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*In both the proposed and final rules, the USDA failed to adequately quantify the benefits of the new nutrition standards. This failing would leave the nutrition standards vulnerable to cost-based attacks both in the promulgation process itself and in the ensuing appropriations and reauthorization debates. In light of these attacks, this Note seeks to remedy the lack of benefit quantification, providing evidence that the nutrition standards—in both proposed and final form—were cost-justified. As a result, Congress should not seek to reduce the requirements of the standards, but instead maintain them and consider increasing federal funding to assist schools in complying with them.*

## I. INTRODUCTION

The National School Lunch Program (“NSLP”) and School Breakfast Program (“SBP”) are important federal initiatives to help fight child hunger and improve child nutrition in the United States.<sup>1</sup> Through these programs, the federal government reimburses part or all of school meals provided to students, so long as the meals comply with federal standards.<sup>2</sup> In 2010, Congress required the U.S. Department of Agriculture (“USDA”) to issue nutrition standards for NSLP and SBP meals to improve their nutritional quality by bringing them in line with the Dietary Guidelines for Americans<sup>3</sup> (“Dietary Guidelines”) and recent scientific recommendations.<sup>4</sup> The USDA promulgated final standards in 2012 requiring numerous nutritional improvements in school meals, such as increased amounts of fresh fruits and vegetables in school lunches and afterschool snack programs.<sup>5</sup> The USDA claims that “[t]he new standards align school meals with the latest nutrition science and the real world circumstances of America’s schools” and that “[t]hese responsible reforms do what’s right for children’s health in a way that’s achievable in schools across the Nation.”<sup>6</sup>

In the context of the 2015 reauthorization of the NSLP and SBP, a key question is whether the USDA’s nutrition standards are in fact “achievable” in American schools. Critics assert that, despite the health benefits of improved school meals, the increased expense imposed on participating

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<sup>1</sup> See *School Meals: Child Nutrition Programs*, U.S. DEP’T OF AGRIC., <http://www.fns.usda.gov/school-meals/child-nutrition-programs> [https://perma.cc/ND95-8YNU] (last updated Oct. 28, 2015).

<sup>2</sup> See *id.*

<sup>3</sup> The Dietary Guidelines are published jointly by the USDA and Department of Health and Human Services (“DHHS”). At the time this Note was printed, the most recent version of the Dietary Guidelines was issued in 2010. See U.S. DEP’T OF AGRIC. & U.S. DEP’T OF HEALTH & HUMAN SERVS., *DIETARY GUIDELINES FOR AMERICANS* (Dec. 2010), <http://health.gov/dietaryguidelines/dga2010/DietaryGuidelines2010.pdf> [http://perma.cc/LK2L-VMP4]. A new version is expected to be issued in December 2015.

<sup>4</sup> Healthy, Hunger-Free Kids Act of 2010, 42 U.S.C. § 1779 (2012). The USDA has delegated this task to its Food and Nutrition Service division, but this Note refers to all decisions as pertaining to the USDA.

<sup>5</sup> National School Lunch Program, 7 C.F.R. §§ 210.1, 220.1 (2013); see also *School Meals: Nutrition Standards for School Meals*, U.S. DEP’T OF AGRIC., <http://www.fns.usda.gov/school-meals/nutrition-standards-school-meals> [http://perma.cc/8VTC-5F34] (last updated Aug. 11, 2015).

<sup>6</sup> *School Meals: Nutrition Standards for School Meals*, *supra* note 5.

schools is too great. They argue that the USDA could have and should have altered its nutrition standards to accommodate increased school expenses, and that Congress should rectify the mistake by lowering the nutritional requirements of the standards.<sup>7</sup>

Yet, as this Note demonstrates, the burden placed on schools is cost-justified. In promulgating the nutrition standards, the USDA quantified the increased costs of healthier food products served, labor for on-site preparation, and numerous administrative cost burdens that schools, localities, and states would have to bear.<sup>8</sup> However, the USDA's estimates failed to adequately quantify the benefits to schoolchildren and public health more broadly. Because these benefits were never expressly accounted for, the final nutrition standards have been left open to unjustified attacks and legislative rework based on concerns for the overall cost of the improved nutritional requirements.

By rectifying the lack of express benefit-analysis in the nutrition standards, this Note demonstrates that the benefits of the current nutrition standards far outweigh the costs, and that the USDA and Congress should resist efforts to roll them back. Indeed, to serve its goal of improving the health of schoolchildren—while also providing a market for American farmers—this Note argues that Congress should go further in allaying the cost of school meals by increasing federal funding.

The following section provides relevant background information on the nutrition standards, noting the transformation of the policy justifications for NSLP and SBP, from supporting American farmers to improving the health of American children. Part III then assesses whether the USDA's cost-benefit analysis was properly conducted in light of the overall goal of improving children's health. Part III also identifies shortcomings both in the analysis of the nutrition standards' benefits and in the considerations of the USDA's obligations under statutory and administrative standards. Part IV addresses these shortcomings in the context of congressional reauthorization of the NSLP and SBP, arguing for increased federal funding to support the more expensive school meals. Part V concludes.

## II. CHILD NUTRITION PROGRAMS IN CONTEXT

In 1946, Congress created the NSLP to promote two important policy goals: to “encourage the domestic consumption of nutritious agricultural commodities and other food” and to “safeguard the health and well-being of

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<sup>7</sup> See, e.g., *SNA Urges Congress to Ease Financial Pressure on Schools*, SCH. NUTRITION ASS'N (Sept. 30, 2014), <http://www.schoolnutrition.org/PressReleases/SNAUrgesCongress-toEaseFinancialPressureonSchools/> [<http://perma.cc/RLH2-6CHB>]; N.L., *Food Fight*, THE ECONOMIST (July 5, 2014, 8:08 PM), <http://www.economist.com/blogs/democracyinamerica/2014/06/school-meals> [<http://perma.cc/HQ4P-CMFU>].

<sup>8</sup> See generally National School Lunch Program, 7 C.F.R. pt. 210 (2015) and School Breakfast Program, 7 C.F.R. §§ 220.1–220.23 (2015).

the Nation's children."<sup>9</sup> By redirecting surplus crops to American schools, the NSLP was an innovation—it creatively served both the interests of American farmers in securing a ready market for their crops and American families by ensuring children had enough food during the school day. This model has since been expanded beyond the NSLP to school breakfasts (SBP), afterschool snacks (Fresh Fruit and Vegetable Program), summer meals (Summer Food Service Program), and food in childcare facilities (Child and Adult Care Food Program).<sup>10</sup> These programs make up the Child Nutrition Programs.<sup>11</sup>

As the Child Nutrition Programs expanded and more children across the country received food subsidized or directly provided by the federal government, the healthfulness of this food began to be more closely scrutinized. Today, the USDA regulates food components of the Child Nutrition Programs, especially for the NSLP and SBP. Yet the USDA also promotes American agriculture through a variety of programs, including the Child Nutrition Programs themselves. To the extent these two interests are incompatible, the “innovation” of the NSLP no longer serves the interest of both farmers and families. This section discusses the history behind the core interests at stake.

#### A. *Historical Need: Redistributing Farmer Surplus*

The modern NSLP has its roots in the Great Depression era. In the nineteenth century, a small number of individual schools had developed school meal programs, and some state and local governments had contributed to the administration and funding of school meals.<sup>12</sup> However, these school meal programs were primarily state and local efforts made by “private societies and associations interested in child welfare and education.”<sup>13</sup> When the Great Depression stripped many students of the capacity to bring their own food to school, the need for school meal programs greatly intensified.<sup>14</sup> Many students could not afford to purchase meals at school, and some would not see food on the table at home.<sup>15</sup> State and local school meal programs tried to fill the demand for free or low-cost meals through taxing or

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<sup>9</sup> National School Lunch Act, 42 U.S.C. § 1751 (2012).

<sup>10</sup> See *School Meals: Child Nutrition Programs*, *supra* note 1.

<sup>11</sup> See *id.*

<sup>12</sup> See, e.g., GORDON GUNDERSON, U.S. DEP'T OF AGRIC., THE NATIONAL SCHOOL LUNCH PROGRAM: BACKGROUND & DEVELOPMENT 10 (1971), <http://www.fns.usda.gov/sites/default/files/NSLP-Program%20History.pdf> [<http://perma.cc/T6BV-3LFG>] (noting a New York program as early as 1853, which failed to gain widespread momentum until the early 1900s).

<sup>13</sup> See *id.* at 7.

<sup>14</sup> See, e.g., JANET POPPENDIECK, FREE FOR ALL: FIXING SCHOOL FOOD IN AMERICA 47–50 (2010).

<sup>15</sup> See, e.g., *id.*

charitable support, but the funding fell far short of the massive hunger and malnutrition facing American schoolchildren.<sup>16</sup>

The federal government stepped in, but only after being prompted by a different symptom of the Great Depression. A combination of widespread unemployment and diminished purchasing power led to a dramatic decrease in crop prices, which in turn created vast agricultural surpluses.<sup>17</sup> To reorient the agriculture market, the federal government began purchasing the surplus crops in the mid-1930s.<sup>18</sup> These crops were either destroyed or distributed through unemployment relief programs.<sup>19</sup> When unemployment relief ended, the federal government looked for a politically feasible alternative for crop distribution.<sup>20</sup> School meals provided the ideal outlet.<sup>21</sup>

With the addition of federal funding, state school meal programs expanded throughout the Great Depression era, and by the 1940s every state had some kind of school lunch program.<sup>22</sup> The federal government's primary interest was to support farmers by using schools as a guaranteed market for surplus crops, as well as to employ workers to prepare foods for school meals.<sup>23</sup> The improvement to children's nutrition and health was a convenient added benefit.

Certain conditions during World War II led Congress to tie child nutrition and American agriculture together permanently. First, the military needs of the War highlighted the federal government's interest in a healthy citizenry, as up to one-third of the men who had entered the draft had been disqualified for malnutrition.<sup>24</sup> Second, memories from World War I highlighted the federal government's interest in American agriculture, as the nation feared another downturn resulting from decreased demand for American farm exports. In response, Congress passed the Steagall Act, committing the federal government to purchase crops following the end of the War.<sup>25</sup> Congress later committed much of this surplus to go to schools throughout the

<sup>16</sup> See, e.g., *id.*; GUNDERSON, *supra* note 12.

<sup>17</sup> See, e.g., GUNDERSON, *supra* note 12.

<sup>18</sup> See, e.g., *id.*

<sup>19</sup> See, e.g., POPPENDIECK, *supra* note 14.

<sup>20</sup> See, e.g., *id.*

<sup>21</sup> See Erika M. D'Addabbo, *Regulating Childhood Obesity: A Comparison of Federal School Meal Programs in England and the United States*, 12 QUINNIAC HEALTH L.J. 171, 178–79 (2008) (discussing both the federal provision of surplus crop commodities as well as food preparation labor under the Works Progress Administration).

<sup>22</sup> See, e.g., J. Amy Dillard, *Sloppy Joe, Slop, Sloppy Joe: How Commodities Dumping Ruined the National School Lunch Program*, 87 OR. L. REV. 221, 226–28 (2008).

<sup>23</sup> See, e.g., *id.*

<sup>24</sup> See, e.g., *id.*; POPPENDIECK, *supra* note 14, at 50–53 (discussing the “defense nutrition” rationale that led to support for federal funding of school meals, as well as requirements that these meals provide one-third or one-half of the Recommended Daily Allowances for schoolchildren).

<sup>25</sup> See, e.g., POPPENDIECK, *supra* note 14, at 50 (discussing concerns that the end of the War and ensuing decreased demand for American farm exports could injure the American agriculture economy).

country through the National School Lunch Act of 1946.<sup>26</sup> And to ensure these surplus crops would also be used to promote nutrition for American children, Congress required participating schools to provide meals meeting minimal nutritional requirements, as set by the USDA.<sup>27</sup>

*B. Modern Purposes: Promoting Childhood Nutrition  
and Reducing Hunger*

In its early years, the NSLP proved successful at simultaneously promoting the interests of farmers in continuing federal government subsidies and families in ensuring children received adequate nutrition at school. However, revelations from the 1960s about national poverty—and specifically national hunger in American children—prompted additional reforms.<sup>28</sup> Congress improved the reimbursement rate for school lunches to ensure equity in funding and improved participation.<sup>29</sup> Congress also set up additional programs focusing on reducing hunger on and off school grounds, including the School Breakfast Program and what would eventually become the Summer Meals Program and Child and Adult Care Food Program.<sup>30</sup> These changes set the foundation for the modern Child Nutrition Programs, and they were applauded as ways to provide children with more nutrients and reduce childhood hunger across the country.

As early as the 1980s, however, the programs came under criticism for providing children with the wrong kinds of nutrients.<sup>31</sup> The Dietary Guidelines, first published in 1980, recommended diets with lower amounts of saturated fats, sodium, and cholesterol, yet school meals of beef and cheese went directly against this advice.<sup>32</sup> The provision of beef and cheese to schools came from USDA commodity purchases; these elements could not be eliminated for the benefit of children while simultaneously serving the interests of American farmers. Although the USDA resisted initial criticism, public outcry over the nutritional quality of school meals resurged as a 1990 update to the Dietary Guidelines specifically called for limits on fat, and studies revealed that school lunches were dramatically worse than recommended by the Dietary Guidelines.<sup>33</sup>

The USDA began working with schools to improve the health of school meals, but the agency faced opposition from the farmers and food processors

<sup>26</sup> National School Lunch Act, Pub. L. No. 79-396, 60 Stat. 230 (1946) (codified as amended at 42 U.S.C. §§ 1751–1769(h) (2012)).

<sup>27</sup> See, e.g., GUNDERSON, *supra* note 12 (discussing specific requirements for various types of acceptable lunches under the federal program).

<sup>28</sup> See POPPENDIECK, *supra* note 14, at 58–64.

<sup>29</sup> See GUNDERSON, *supra* note 12 (detailing the substance of reimbursement reforms).

<sup>30</sup> See, e.g., *id.*

<sup>31</sup> See POPPENDIECK, *supra* note 14, at 76–77.

<sup>32</sup> *Id.* (describing the federal government's intervention in the 1980s that resulted in rerouting dairy and beef products to school children through the meal programs).

<sup>33</sup> *Id.* at 78.

benefitting from the easy supply route to school food, as well as congressional concerns over maintaining schools as an outlet for agricultural surplus purchases.<sup>34</sup> Additionally, many schools objected to the increased costs of running programs with the improved nutrition requirements and menu-planning requirements.<sup>35</sup> The USDA still promulgated regulations for school meal nutrition standards in 1995 aiming to bring school meals into compliance with the latest Dietary Guidelines.<sup>36</sup>

Yet in spite of this increased focus on nutrition, the obesity crisis in America worsened. Childhood obesity rates climbed steadily throughout the 1990s and 2000s, culminating in a national “epidemic” in which one-third of American children are overweight or obese.<sup>37</sup> Children increasingly experience obesity-related diseases; most dramatically, thousands of children develop type 2 diabetes—formally known only as “adult diabetes”—as a direct consequence of poor nutrition and low exercise.<sup>38</sup> Concern over the childhood obesity epidemic has prompted calls for reform in the Child Nutrition Programs.<sup>39</sup> As the next section discusses, these calls have been partially answered.

### III. USDA NUTRITION STANDARDS: CHANGES FOR THE HEALTH OF IT?

As part of its broader mission to promote childhood nutrition and reduce hunger, Congress’ most recent reauthorizations of the Child Nutrition Programs have included provisions focusing on the quality of food served in school meals. In 2004, Congress required schools to issue school wellness policies and provide meals for students that reflect the latest Dietary Guidelines.<sup>40</sup> In 2010, Congress strengthened these requirements by authorizing the USDA to promulgate nutrition standards that schools would have to meet

<sup>34</sup> *Id.* at 79–82.

<sup>35</sup> *Id.*

<sup>36</sup> National School Lunch Program and School Breakfast Program: School Meals Initiative for Healthy Children, 60 Fed. Reg. 31188-01 (June 13, 1995) (codified at 7 C.F.R. pts. 210 & 220).

<sup>37</sup> *Childhood Obesity Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/obesity/data/childhood.html> [<http://perma.cc/KY6S-Q3KH>] (last updated June 19, 2015).

<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., Jess Alderman et al., *Application of Law to the Childhood Obesity Epidemic*, 35 J.L. MED. & ETHICS 90, 93 (2007) (noting that “[h]eightedened awareness of the childhood obesity epidemic . . . has renewed the call for regulatory and legislative action . . .”); D’Addabbo, *supra* note 21, at 182–84 (summarizing regulatory reform efforts to strengthen nutritional requirements of the early 2000s).

<sup>40</sup> Richard B. Russell National School Lunch Act, 42 U.S.C. § 1758(a)(4) (2012). It should be noted that the nutritional quality of the most recent Dietary Guidelines is not undisputed. See, e.g., *New U.S. Dietary Guidelines: Progress, Not Perfection*, HARV. T.H. CHAN SCH. OF PUB. HEALTH, <http://www.hsph.harvard.edu/nutritionsource/dietary-guidelines-2010/> [<http://perma.cc/T6E3-T72Q>]; Jeff Herman, *Saving U.S. Dietary Advice from Conflicts of Interest*, 65 FOOD & DRUG L. J. 285, 289–93 (2010). However, an analysis of the Dietary Guidelines is beyond the scope of this Note. For the purposes of the Regulatory Impact Analyses (“RIAs”) discussed, this Note presumes both the Dietary Guidelines and the Institute of Medicine (“IOM”) recommendations reflect highly beneficial standards for school meals.

in order to receive federal reimbursement funding.<sup>41</sup> This mandate for improved nutrition standards was accompanied by a small increase in federal reimbursements.<sup>42</sup>

The Healthy, Hunger-Free Kids Act of 2010 (“HHFKA”) authorized the USDA to update its school meal nutrition standards for the first time in fifteen years.<sup>43</sup> Following the HHFKA, the USDA first issued nutrition standards under a Notice of Proposed Rulemaking (“NPRM”) in January 2011.<sup>44</sup> The proposed nutrition standards closely mirrored recommendations from a panel of experts convened by the Institute of Medicine (“IOM”),<sup>45</sup> and were generally thought to comply with the statutory mandate to establish standards consistent with the Dietary Guidelines and authoritative scientific recommendations.<sup>46</sup> However, objections that were raised in the subsequent comment period<sup>47</sup> and congressional riders in the 2012 budget appropriation<sup>48</sup> led the USDA to revise the nutrition standards proposed in the NPRM. The USDA issued the final rule implementing the nutrition standards in January 2012.<sup>49</sup>

Despite some significant changes from the standards originally proposed in 2011, the final USDA nutrition standards promise many benefits to the thirty million schoolchildren participating in school meal programs.<sup>50</sup> The final standards increase the number of fruits and vegetables offered to students, increase the amount of whole grains schools must provide, and set limits on sodium and calories in school meals.<sup>51</sup> These changes are generally

<sup>41</sup> Healthy, Hunger-Free Kids Act of 2010 § 208(C), 42 U.S.C. § 1779 (2012).

<sup>42</sup> Healthy, Hunger-Free Kids Act of 2010 § 201, 42 U.S.C. § 1753 (2012) (providing a six cent increase for school lunches meeting the new nutrition standards).

<sup>43</sup> See Healthy Meals for Healthy Americans Act of 1994, Pub. L. 103-448, 108 Stat. 4699. See generally Lindsay F. Wiley, *The U.S. Department of Agriculture as a Public Health Agency? A “Health in All Policies” Case Study*, 9 J. FOOD L. & POL’Y 61 (2013) (describing the development and revision of the Dietary Guidelines for Americans and the changes in USDA regulation of school meals).

<sup>44</sup> Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. 2494 (Jan. 13, 2011) (to be codified at 7 C.F.R. pts. 210 & 220) [hereinafter “Nutrition Standards”].

<sup>45</sup> *USDA Unveils Historic Improvements to Meals Served in America’s Schools*, U.S. DEP’T OF AGRIC. (Jan. 25, 2015), <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2012/01/0023.xml> [<http://perma.cc/NH8T-NGUQ>].

<sup>46</sup> See Healthy, Hunger-Free Kids Act of 2010 § 208(C).

<sup>47</sup> See U.S. Dep’t of Agriculture, Final Summary of Public Comments on Proposed Rule on Meal Pattern Requirements and Nutrition Standards in the National School Lunch Program and School Breakfast Program, Docket FNS-2007-0038 (Aug. 4, 2011), <http://www.regulations.gov/#!documentDetail;D=FNS-2007-0038-64675> [<https://perma.cc/9YDT-PG63>].

<sup>48</sup> Consolidated and Further Continuing Appropriations Act, 42 U.S.C. § 1758 (2012).

<sup>49</sup> 7 C.F.R. pts. 210 & 220 (2015).

<sup>50</sup> See, e.g., *Healthier School Meals: A Summary of the New USDA Standards for School Breakfast and Lunch*, FOOD RES. & ACTION CTR. (Jan. 2012), [http://frac.org/pdf/school\\_meal\\_nutrition\\_rule\\_summary.pdf](http://frac.org/pdf/school_meal_nutrition_rule_summary.pdf) [<http://perma.cc/FD8G-2B5Q>] (“The new standards are extraordinarily important to the health and learning of America’s school children. Nearly 32 million children eat lunch at school every day; more than 20 million of them are low-income children whose families are struggling to make ends meet and who receive free or reduced-price meals.”).

<sup>51</sup> See generally 7 C.F.R. pts. 210 & 220.



in line with the latest scientific nutritional recommendations, and the potential impact on student health could be substantial. Still, critics have attacked the standards from both sides. Some assert that the standards (in their final form) circumvent key nutritional recommendations and fall short on their overall public health goal.<sup>52</sup> Others claim the nutrition standards go too far and impose higher costs on schools to provide food that is both more expensive and less liked by students.<sup>53</sup>

In light of these criticisms, this section assesses whether the USDA properly quantified the costs and benefits of its proposed standards according to its legislative and administrative mandates. It concludes that, although the nutrition standards are in fact cost-justified, this justification was not made apparent in the promulgation of the standards themselves. Rather, the cost-benefit analysis of the rule glosses over significant benefits, leaving a direct comparison between costs and benefits unachievable.<sup>54</sup> By delineating the benefits of the nutrition standards here, this section demonstrates that the nutrition standards are cost-justified.

#### A. *Changes and Cost-Savings from Proposed Rule to Final Rule*

With some exceptions, the changes made from the proposed rule in 2011 to the final rule in 2012 were generally intended to reduce the costs—rather than increase or maintain the benefits—of the proposed nutrition standards. The final rule made significant strides toward reducing costs, as the proposed rule would have increased the cost of the NSLP and SBP by \$6.8 billion over five years (a twelve percent increase),<sup>55</sup> whereas the final rule is estimated to cost only an additional \$3.2 billion over five years (an eight percent increase).<sup>56</sup> Yet, in reducing the rule's projected costs by \$3.6 billion, the final rule did not adequately assess the corresponding loss in health benefits, which were largely unstated or only generally alluded to as a “critical strategy to prevent obesity, and related health risks, among children.”<sup>57</sup>

Between the proposed and final rules, the USDA reduced the rule's costs in three ways. The first category is empirical, and the second two are policy-oriented.

- i. *Changes in Cost Estimates*: the final rule is based on improved estimates of food price inflation, which reduced the rule's baseline

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<sup>52</sup> See *infra* Part III.B.

<sup>53</sup> See *infra* Part IV.

<sup>54</sup> Cf. Cass R. Sunstein, *The Real World of Cost Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, 114 COLUM. L. REV. 167 (2014) (illustrating multiple ways cost-benefit analysis can overcome situations where benefits are hard to quantify or non-quantifiable).

<sup>55</sup> See Nutrition Standards, 76 Fed. Reg. at 2507.

<sup>56</sup> Compare Nutrition Standards, 76 Fed. Reg. at 2507, with Nutrition Standards, 77 Fed. Reg. at 4142.

<sup>57</sup> Nutrition Standards, 77 Fed. Reg. at 4133.

- cost of food and thus the rule's projected cost by \$730 million (twenty percent of the \$3.6 billion reduction).<sup>58</sup>
- ii. *Changes to School Breakfasts*: the final rule achieves significant cost savings by phasing-in implementation of school breakfast requirements for fruits and grains, as well as eliminating the separate requirement for meat and meat alternates at breakfast.<sup>59</sup> These changes are projected to reduce the rule's cost by \$2.7 billion over five years (seventy-five percent of the \$3.6 billion reduction).<sup>60</sup>
  - iii. *Changes to School Lunches*: the final rule achieves modest cost savings by altering grain and vegetable requirements, such as removing the limit on starchy vegetables.<sup>61</sup> These changes are projected to reduce the rule's cost by \$150 million over five years (four percent of the \$3.6 billion reduction).<sup>62</sup>

Thus, the most significant cost reductions were achieved by altering the requirements originally proposed for school breakfasts. Yet some of the most significant changes altered requirements for both school lunch and school breakfast. The nine most significant policy changes from the proposed rule to the final rule are listed below.

- i. *Changes to Starchy Vegetable Meal Components*: the proposed rule limited starchy vegetables—including potatoes used in french fries—to one cup per week; the final rule eliminated limits on starchy vegetables but required all five vegetable subgroups be provided throughout the week.<sup>63</sup> This change was required by a congressional appropriations rider and reverts the crediting standard—the measurement by which schools may count meal components in order to obtain federal reimbursements—for starchy vegetables to what it was prior to the proposed rule.<sup>64</sup> No additional limitations on specific processed foods (such as french fries) were adopted.
- ii. *Changes to Crediting Tomato Paste*: the proposed rule required all fruits and vegetables to be credited based on volume, but provided an exception for dried fruits and leafy salad greens; the final rule makes a third exception for tomato paste and puree.<sup>65</sup> This change

<sup>58</sup> See Nutrition Standards, 77 Fed. Reg. at 4130.

<sup>59</sup> See *id.*

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

<sup>63</sup> Nutrition Standards, 77 Fed. Reg. at 4091–93.

<sup>64</sup> See Nicholas Confessore, *How School Lunch Became the Latest Political Battleground*, N.Y. TIMES MAG. (Oct. 7, 2014), [http://www.nytimes.com/2014/10/12/magazine/how-school-lunch-became-the-latest-political-battleground.html?\\_r=0](http://www.nytimes.com/2014/10/12/magazine/how-school-lunch-became-the-latest-political-battleground.html?_r=0) [http://perma.cc/7KGA-F54L].

<sup>65</sup> Nutrition Standards, 77 Fed. Reg. at 4101–02 (noting that “[a]lthough this specific proposal was intended to promote consistency and improved nutrition by crediting all fruits and vegetables (and their concentrates, purees, and pastes) based on volume as served, this final rule must comply with the [Section 743 of the FY 2012 Agriculture Appropriations

was required by a congressional appropriations rider and reverts the crediting standards for tomato paste to what it was prior to the proposed rule.<sup>66</sup> No additional limitations on specific processed foods (such as pizza) were adopted.

- iii. *Changes to Sodium Target*: the proposed rule would have required schools to meet initial sodium targets by July 2013; over objections to lack of data and requests for longer timelines, the final rule provided an additional year to implement sodium targets.<sup>67</sup> The final rule also asserts the scientific foundation for sodium reductions, as required by Congress.<sup>68</sup>
- iv. *Changes to Student Selection of Fruits and Vegetables*: the proposed rule required students to select a fruit or a vegetable at lunch and breakfast; in response to comments regarding potential food waste and cost increases, the final rule allows students to take a half cup of a fruit or a vegetable rather than the full component.<sup>69</sup>
- v. *Changes to Grain Requirement*: the proposed rule would have required all grains offered to be whole grain-rich within two years; in response to comments regarding student preferences and cost concerns, the final rule delayed the requirement for school breakfast and allowed partial substitution by a meat/meat alternate.<sup>70</sup> Additionally, the proposed rule would have allowed schools to serve a grain-based dessert daily to meet their weekly grains requirement; the final rule reduced this allowance to two times per week.<sup>71</sup> This change responds to the 2010 Dietary Guidelines, which cite grain-based desserts as a significant source of solid fats and added sugars in Americans' diets.<sup>72</sup>

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Act]”). This change allows crediting of tomato paste based on whole food equivalency rather than the actual volume of tomato paste (i.e., two tablespoons of tomato paste can count as eight tablespoons of tomatoes rather than two tablespoons of tomato paste). See Consolidated and Further Continuing Appropriations Act, Pub. L. No. 112-55 §§ 743, 746, 125 Stat. 552 (2012); Confessore, *supra* note 64.

<sup>66</sup> See Consolidated and Further Continuing Appropriations Act § 743; Confessore, *supra* note 64.

<sup>67</sup> Nutrition Standards, 77 Fed. Reg. at 4097–98.

<sup>68</sup> See Consolidated and Further Continuing Appropriations Act § 743.

<sup>69</sup> Nutrition Standards, 77 Fed. Reg. at 4099–100. This option is permitted under Offer Versus Serve, a concept that allows students to decline some food components offered in a school meal while still permitting schools to receive federal reimbursements. See generally U.S. DEP'T OF AGRIC., OFFER VERSUS SERVE: GUIDANCE FOR THE NATIONAL SCHOOL LUNCH PROGRAM AND SCHOOL BREAKFAST PROGRAM (2014), <http://www.fns.usda.gov/sites/default/files/SP57-2014a.pdf> [<http://perma.cc/6U77-SVQD>].

<sup>70</sup> Nutrition Standards, 77 Fed. Reg. at 4093–94 (“[C]ommenters asserted that prohibiting all refined grains would restrict many grains that children and adolescents enjoy such as white rice and white bread. Other program operators that objected to the final whole grains requirement expressed concern with the timeline and the higher food costs associated with using only whole grain-rich products[.]”).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

- vi. *Changes to School Breakfast Meat Requirement*: the proposed rule required schools to serve a separate meat and meat alternate daily; responding to comments raising cost and operational concerns, the final rule does not require a daily meat/meat alternate in school breakfasts, and a meat/meat alternate may count toward meeting the weekly grains requirement.<sup>73</sup>
- vii. *Changes to School Breakfast Fruit and Vegetable Requirement*: the proposed rule allowed schools to serve a non-starchy vegetable in place of fruit at breakfast; the final rule allows starchy vegetables to also be served at breakfast in place of fruit, with some limitations.<sup>74</sup> This change was required by a congressional appropriations rider and partially reverts the crediting standard for starchy vegetables to what it was prior to the proposed rule.<sup>75</sup>
- viii. *Changes to School Breakfast Program Implementation*: the proposed rule required increases in the amounts of fruits and whole grains offered for breakfast and zero grams of trans fat per serving; in response to comments raising cost concerns, the final rule phases in these school breakfast requirements over three years.<sup>76</sup>
- ix. *Changes to Monitoring Procedures*: the proposed rule required state agencies to review programs every three years for compliance with USDA nutrition standards and to conduct two-week reviews of school menu and production records; following comments regarding the cost of these review procedures, the final rule extended the administrative review cycle to every five years and reduced the menu and production record review to one week.<sup>77</sup>

As noted, the USDA adopted these policy changes based on concerns raised in the public comments<sup>78</sup> and updates to the Dietary Guidelines,<sup>79</sup> as well as requirements passed by Congress in the 2012 Agricultural Appropriations Bill.<sup>80</sup> These discretionary and required changes had a significant impact on both the overall costs and benefits of the final rule.

<sup>73</sup> Nutrition Standards, 77 Fed. Reg. at 4094–95.

<sup>74</sup> Nutrition Standards, 77 Fed. Reg. at 4091. Although schools may replace the required fruit servings with all vegetable subgroups, the final rule requires that the “first two cups per week of any such substitution must be from the dark green, red/orange, beans and peas (legumes) or other vegetable subgroups.” *Id.*

<sup>75</sup> See Consolidated and Further Continuing Appropriations Act § 746; Confessore, *supra* note 64.

<sup>76</sup> Nutrition Standards, 77 Fed. Reg. at 4102.

<sup>77</sup> Nutrition Standards, 77 Fed. Reg. at 4100–01.

<sup>78</sup> The public comment period lasted from January 13, 2011 to April 13, 2011, and generated 133,268 comments. Nutrition Standards, 77 Fed. Reg. at 4089. These comments addressed both the substantive requirements of the rules as well as projected impacts on school budgets, student participation, and plate waste.

<sup>79</sup> The 2010 update to the Dietary Guidelines came out days after the proposed rule. These guidelines provided the USDA slightly different standards for consumption of red-orange vegetables (which were incorporated) and protein subgroups (which were not). See DIETARY GUIDELINES FOR AMERICANS, *supra* note 3.

<sup>80</sup> Consolidated and Further Continuing Appropriations Act §§ 743, 746.

### 1. Changes Required by Congress

Perhaps the most controversial revisions from the proposed to final rule were mandated by Congress in a rider to its 2012 Agricultural Appropriations Bill. The USDA's proposed rule, released in January 2011, was met with both praise from health proponents and backlash from industry and school lunch groups.<sup>81</sup> The starchy vegetable lobby vehemently objected to the proposed limitation on starchy vegetable servings at lunch to just one cup per week.<sup>82</sup> The lobby sent letters to the Secretary of Agriculture denouncing the proposed limit and asserting the virtues of potatoes as low cost components of school meals.<sup>83</sup> At a budget hearing for Fiscal Year 2012, Senator Susan Collins of Maine (one of the country's largest producers of potatoes), forcefully questioned the Secretary of Agriculture: "My question, Mr. Secretary," Collins asked, "is: What does the department have against potatoes?"<sup>84</sup>

Objections, too, were raised about the proposed crediting of tomato paste based on volume as served rather than their whole-food equivalency (a calculation that uses the percent of natural whole food soluble solids in paste and puree in order to credit the use of paste or puree as a vegetable or fruit served).<sup>85</sup> Some commented that the proposed crediting effectively limited the ability of schools to provide popular food products made with tomato paste, such as pizza.<sup>86</sup> At a subsequent Agriculture Committee hearing, Representative Collin Peterson of Minnesota (the home state of Schwan, one of the country's most prominent food manufacturers) demanded that the USDA explain the scientific authority behind the limit on tomato paste, asserting that "[the] proposed rule would significantly change the way tomato sauce and tomato paste is counted, which would substantially increase the cost of serving school lunches and generally make pizza uneconomical for

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<sup>81</sup> See Nutrition Standards, 77 Fed. Reg. at 4092 ("Nutrition and health advocates favored allowing non-starchy vegetables in place of fruit in the [School Breakfast Program]. However, numerous commenters opposed disallowing starchy vegetables at breakfast. These commenters, including SFAs, food industry, and some parents, stated that starchy vegetables such as potatoes are affordable and popular, and complement many breakfast dishes.").

<sup>82</sup> See Confessore, *supra* note 64. Confessore provides an excellent account of the political backlash of certain food group interests following the promulgation of the proposed rule in 2011.

<sup>83</sup> See *id.*

<sup>84</sup> See *id.*

<sup>85</sup> See Nutrition Standards, 77 Fed. Reg. at 4101 (noting that commentators including school districts, school advocacy organizations, trade associations, food manufacturers, a food service management company, a state department of education and others, "expressed concern over the potential cost increase due to product reformulation and reduced product acceptability. Many commenters recommended that USDA keep the current practice to credit tomato paste and puree based on their whole-food equivalency using the percent natural tomato soluble solids in paste and puree").

<sup>86</sup> See Confessore, *supra* note 64.

schools.”<sup>87</sup> These concerns were echoed by comments on the potential impact of the nutrition standard’s sodium limits on school meal costs and participation.<sup>88</sup>

Congress responded by including several riders in the 2012 Agriculture Appropriations Bill that would prohibit the use of federal funds to “implement an interim final or final rule regarding [federal] nutrition programs” where such rules limited starchy vegetables, required tomato paste crediting based on volume, or did not state scientific findings for sodium levels.<sup>89</sup> The USDA complied with the riders by eliminating its limits for starchy vegetables, changing the crediting of tomato paste, and providing more data on sodium levels in the final rule.<sup>90</sup> Several commenters raised concerns that this action would revert some of the standards back to pre-2011 norms and allow large amounts of pizza and french fries—two large contributors to poor school meal nutrition—back into school meals. Commenters made suggestions as to how the USDA might prevent this effect, such as by explicitly limiting schools from preparing the starchy vegetables through deep-fried methods, like those used to prepare french fries, or by only crediting starchy vegetables in mixed dishes, such as soups.<sup>91</sup> These suggestions were not adopted in the final rule.

## 2. *Changes Adopted Pursuant to USDA’s Discretion*

While some of the key final rule changes were mandated by congressional requirements, other decisions resulted from the USDA’s exercise of its rulemaking discretion. In promulgating the final rule, the USDA was obligated to follow procedures set forth in the Administrative Procedure Act (“APA”).<sup>92</sup> For agency rulemaking, the APA requires agencies to issue a proposed rule, open the rule to public comments, and then consider these comments and adopt those that would substantively improve the final rule.<sup>93</sup> Following the promulgation of the proposed rule, some comments on the nutrition standards noted ways in which the USDA could comply with the updated 2010 Dietary Guidelines or accommodate the congressional rider requirements in a manner that still promoted childhood health.<sup>94</sup> Many other comments lodged cost-based critiques of the proposed nutritional standards and proposed ways in which the USDA could lower the overall cost of the

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<sup>87</sup> See Brett Neely, *Washington Pizza Sauce Fight has Deep Minnesota Ties*, MPR NEWS (Nov. 18, 2011), <http://www.mprnews.org/story/2011/11/18/schwan-foods-pizza-as-vegetable-minnesota-delegation> [<http://perma.cc/76YU-7RHZ>]; see also Confessore, *supra* note 64.

<sup>88</sup> See Confessore, *supra* note 64.

<sup>89</sup> Consolidated and Further Continuing Appropriations Act of 2012, Pub. L. No. 112-55, §§ 743, 746, 125 Stat. 552, 589–90 (2012).

<sup>90</sup> See Confessore, *supra* note 64.

<sup>91</sup> Nutrition Standards, 77 Fed. Reg. at 4088, 4092.

<sup>92</sup> Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06 (2012).

<sup>93</sup> See 5 U.S.C. § 553(c).

<sup>94</sup> See generally Nutrition Standards, 77 Fed. Reg. at 4088–108.

final rule.<sup>95</sup> These comments were captured by the final rule's Regulatory Impact Analysis ("RIA").<sup>96</sup>

As noted, the final rule had a projected cost of \$3.2 billion over five years, reducing the initial projected cost of the nutrition standards by \$3.6 billion.<sup>97</sup> While this reduction appears significant, the USDA was not under an obligation to reduce the overall cost of the nutrition standards to their absolute minimum. Rather, the USDA had an obligation to promulgate a rule that promoted compliance with the Dietary Guidelines and scientific recommendations advancing childhood nutrition, while still accounting for cost impacts of the rule.<sup>98</sup> When choosing among multiple alternatives, the USDA is generally obligated to maximize net benefits and take into account unquantifiable benefits, rather than focusing exclusively on reducing costs.<sup>99</sup>

The USDA's stated cost reductions must be evaluated in the context of these goals. Although a \$3.6 billion reduction is laudable, this cost reduction is misleading. Twenty percent of it comes not from cost savings, but from a change in empirical methods.<sup>100</sup> Improved estimates of food price inflation and student participation reduced the rule's overall cost by \$730 million, but this amount is less of a "cost savings" than an empirical correction.<sup>101</sup> Similarly, seventy-five percent of the purported cost-savings came from delayed implementation and substantive changes in the school breakfast program.<sup>102</sup> These changes purported to reduce the overall cost of the rule by \$2.7 billion over five years, accounting for some cost-savings from the improved ability of schools to plan for and adjust to the new school breakfast requirements.<sup>103</sup> However, because the USDA quantified benefits for only five years, this cost reduction appears—at least in part—to have been achieved not by overall cost-savings, but from pushing costs out from year five to year six or seven, outside the bounds of the RIA's quantification. Finally, four percent of cost savings comes from a wide variety of changes to the substantive and administrative requirements of the school lunch program.

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<sup>95</sup> See generally *id.*

<sup>96</sup> See *id.* at 4108.

<sup>97</sup> Compare Nutrition Standards, 76 Fed. Reg. at 2507 (Jan. 13, 2011), with Nutrition Standards, 77 Fed. Reg. at 4142 (Jan. 26, 2012).

<sup>98</sup> Healthy, Hunger-Free Kids Act of 2010, 42 U.S.C. § 1779 (2012) (requiring the USDA to establish standards that are consistent with the most recent Dietary Guidelines while considering authoritative scientific recommendations for nutrition standards and the practical application of the standards).

<sup>99</sup> See Exec. Order No. 12,866, 3 C.F.R. 638 (1993–1994); see also Exec. Order No. 13,563, 3 C.F.R. 215 (2011).

<sup>100</sup> See *supra* Part III.A.

<sup>101</sup> Nutrition Standards, 77 Fed. Reg. at 4088, 4125. As the USDA noted, this correction "provides a more direct measure of the reduction in cost due to changes in the content of the proposed and final rules. Using that difference as our basis of comparison, the final rule reduces costs over the first 5 years by almost \$3 billion, or 44 percent, as compared to the proposed rule." *Id.*

<sup>102</sup> See *supra* Part III.A.

<sup>103</sup> Nutrition Standards, 77 Fed. Reg. at 4108.

In addition to being empirically misleading due to the change in estimation of food prices, the \$3.6 billion overall cost reduction is misleading from a cost-benefit perspective. An implicit cost of the final rule is that many of the changes of the substantive meal requirements came with a reduction in benefits to childhood health. Yet the quantified cost-savings achieved by these changes do not account for lost benefits, only saved costs.<sup>104</sup> For example, the final rule delayed the new nutritional requirements for breakfast and permitted meat substitutes,<sup>105</sup> which achieved cost-savings but took on an implicit “cost” to childhood health by deviating from Dietary Guideline recommendations. Similarly, the final rule reduced the requirement for fruits and vegetables at lunch,<sup>106</sup> addressing concerns regarding cost and waste but not accounting for the potential lost benefit to student nutrition. Additionally, the final rule’s accommodation of congressional riders for tomato paste and potatoes did not include any additional restrictions on processing these ingredients,<sup>107</sup> thus accounting for the cost-savings of cheaper food items but not the negative health impact of increased pizza and french fry consumption.

While the final rule does in fact promote improved nutrition in school meals, changes from the proposed rule were primarily driven by cost-based concerns. It is unclear, however, just how much the final rule sacrificed health benefits to achieve these cost reductions. Were the sacrificed health benefits justified by cost-savings? If not, wasn’t the USDA obligated to use its discretion—where available—in a way that promoted health benefits rather than cost reduction? Whether the USDA properly used its discretion to both promote student health and respond appropriately to comments, updated Dietary Guidelines, and congressional riders depends in significant part on the benefits lost from the proposed to final rule.

### *B. Benefits “Glossed-Over” in Proposed Rule and Final Rule*

The USDA was required to calculate the rule’s benefits and compare them to the rule’s costs under both legislative and executive mandates. First, the HRFKA required the USDA not only to improve nutrition standards based on the Dietary Guidelines and other authoritative scientific research, but to also take into account the “practical application” of nutrition standards in schools.<sup>108</sup> The USDA’s rule promulgation process is thus subject to

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<sup>104</sup> The RIA does claim that “[e]ven with these changes, and with the less significant changes to the proposed lunch standards, the final rule remains consistent with Dietary Guidelines recommendations.” Nutrition Standards, 77 Fed. Reg. at 4088, 4134. This broad statement cannot account for comments initially lauding the proposed rules’ higher requirements, much less the quantified impact the proposed rule provisions could have had on childhood health.

<sup>105</sup> Nutrition Standards, 77 Fed. Reg. at 4093–94.

<sup>106</sup> Nutrition Standards, 77 Fed. Reg. at 4099–100.

<sup>107</sup> Nutrition Standards, 77 Fed. Reg. at 4101–02.

<sup>108</sup> Healthy, Hunger-Free Kids Act of 2010 § 208(C), 42 U.S.C. § 1779 (2012).



a cost-benefit analysis, where the agency must look to both benefits and costs in policymaking decisions. Second, the USDA was required to examine these costs and benefits under standards articulated by Executive Orders that apply to all “economically significant” regulations.<sup>109</sup> Executive Orders 12,866 and 13,563 require the USDA to issue an RIA assessing “all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity).”<sup>110</sup>

As discussed above, the USDA quantified the costs of the proposed and final rules. However, the USDA did not provide a similar assessment of the rule’s benefits. Instead, in both the proposed and final rule RIAs, the USDA treats the health benefits of the rule as unquantifiable. The USDA describes how the nutrition standards are generally designed to “ensure that school meal nutrition requirements reflect current nutrition science, increase the availability of key food groups, better meet the nutritional needs of children, and foster healthy eating habits.”<sup>111</sup> The USDA then provides more detail on the substantive changes of the nutrition standards, rather than an analysis of health benefits:

The rule is expected to result in (1) increased servings of fruits and vegetables, (2) replacement of refined-grain foods with whole-grain rich foods, and (3) replacement of higher-fat dairy products with low-fat varieties. As documented in the IOM recommendations, each of these changes corresponds to an inconsistency between the typical diets of school-aged children in the United States and the Dietary Guidelines/*MyPyramid* recommendations . . . . Recognizing that the Dietary Guidelines apply to a total diet, rather than a specific meal or portion of an individual’s consumption, the intention of the rule is to make changes to school meals nutrition requirements to promote diets more consistent with the *Guidelines* among program participants. Such diets, in turn, are useful behavioral contributors to health and well-being. As the report of the 2010 Dietary Guidelines Advisory Committee notes, “evidence is accumulating that selecting diets that comply with the Guidelines reduces the risk of chronic disease and promotes health.”<sup>112</sup>

While the benefits analysis does allude to the broader health benefits justifying the Dietary Guidelines, the USDA does not analyze these benefits empirically—rather, the USDA asserts that its final rule generally promotes

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<sup>109</sup> See Exec. Order No. 12,866, 3 C.F.R. 638 (1993–1994); see also Exec. Order No. 13,563, 3 C.F.R. 215 (2011).

<sup>110</sup> Nutrition Standards, 77 Fed. Reg. at 4088, 4104.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 4132–33.

the Guidelines, and that the Guidelines promote health.<sup>113</sup> This “glossing over” approach gives short shrift to the USDA’s mandate under the text of the HHFKA to consider consistency with the Dietary Guidelines as well as other scientific recommendations and current school nutrition practices.<sup>114</sup> Moreover, the modern purpose of the Child Nutrition Programs to promote childhood health should have led to even further emphasis of the rule’s potential impact on curbing the rate of childhood obesity.<sup>115</sup> The USDA’s approach also falls short of the requirements of Executive Orders 12,866 and 13,563. These mandates should have informed the USDA’s assessment in the RIA not only of costs and benefits, but also potential public health effects and distributive impacts.<sup>116</sup>

The USDA justifies its “glossing over” approach based on the tenuous nature of the connection between the food children eat at school and the broader childhood obesity epidemic. In the RIA, the USDA briefly mentions obesity-related medical expenses, but concludes that “[b]ecause of the complexity of factors that contribute to overall food consumption and to obesity, we are not able to define a level of disease or cost reduction that is attributable to the changes in meals expected to result from implementation of the rule.”<sup>117</sup> Still, the USDA asserts that “the likelihood is reasonable that the benefits of the rule exceed the costs.”<sup>118</sup>

Thus, while the RIA specifies some benefits to childhood health and nutrition that will come from the rules, it does not attempt to quantify them. This lack of quantified benefits is problematic for two reasons. First, because there were no quantified benefits to the proposed nutrition standards, there is no clear way to evaluate whether the USDA’s discretionary changes effectively balanced the cost-savings with benefit-reductions in the final rule.<sup>119</sup> Second, because there were no monetized benefits, proponents of stronger nutrition standards were limited in their responses to cost-based attacks and legislative rework both in the 2012 Agriculture Appropriations (which altered the french fry and pizza standards in the final rule) and in additional

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<sup>113</sup> See *id.*

<sup>114</sup> See Healthy, Hunger-Free Kids Act of 2010 § 208(C), 42 U.S.C. § 1779 (2012).

<sup>115</sup> See *supra* Part II.

<sup>116</sup> See 77 Fed. Reg. at 4104; Exec. Order No. 12,866, 3 C.F.R. 638 (1993–1994); Exec. Order No. 13,563, 3 C.F.R. 215 (2011).

<sup>117</sup> Nutrition Standards, 77 Fed. Reg. at 4088, 4107.

<sup>118</sup> *Id.*

<sup>119</sup> Cf. Lisa Heinzerling & Frank Ackerman, *Pricing the Priceless: Cost Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1581–84 (2002) (arguing cost-benefit analysis improperly obscures important values, particularly in environmental regulation). While this Note does not question the normative value of using a cost-benefit analysis to promote transparency and improve regulatory (and legislative) decision-making, interested readers may consider alternative approaches such as risk analyses, risk-benefit analyses, and comparative risk analyses. See *id.* at 7; see also Cass R. Sunstein, *The Paralyzing Principle*, REGULATION 32, 32–37 (Winter 2002–03) (discussing strong and weak versions of the precautionary principle and arguing against its use as an approach for regulatory decision-making).

reauthorization and appropriations debates.<sup>120</sup> To rectify this shortcoming, this section accounts for the quantifiable and unquantifiable benefits of the final rule.

### 1. Free-Standing Benefits

The USDA could have gone much further in quantifying the benefits of proposed and final nutrition standards. In both versions, the USDA properly alluded to health benefits associated with school meals adhering to the Dietary Guidelines.<sup>121</sup> However, the USDA did not undertake an in-depth analysis of these benefits, much less of how its final rule, which departed from the Dietary Guidelines, may have reduced the nutrition standards' benefits to student health.<sup>122</sup> The USDA asserted that the causal links are too tenuous—that it is impossible to trace how many students get what amount of calories from school, much less how those calories compare in nutritional value to foods they eat outside of school.<sup>123</sup> Yet these benefits are not “nonquantifiable.”<sup>124</sup> The benefits could be quantified as measures of estimated health improvements that would result from the new standards. This quantification could have been accomplished independently, by relying on several simplifying assumptions for the USDA's analysis of the “complexity of factors.”<sup>125</sup>

The RIA noted that “the rule is projected to make substantial improvements in meals served to more than half of all school-aged children on an average school day.”<sup>126</sup> Expanding upon this, the benefits analysis could have noted that more than thirty million children participate in school meal programs each year.<sup>127</sup> In 2010, participating children consumed a total of 5,278,400,000 school lunches (or approximately 166 lunches each),<sup>128</sup> and 1,968,040,000 school breakfasts (or approximately 169 breakfasts each).<sup>129</sup> Thus, participating children are receiving nearly half of all their annual

<sup>120</sup> Phillip Brasher, *Roberts Determined to Rewrite Child Nutrition Law*, AGRI-PULSE (May 7, 2015), <http://www.agri-pulse.com/Roberts-seeks-new-child-nutrition-law-05072015.asp> [<http://perma.cc/6B3A-TXMC>].

<sup>121</sup> See Nutrition Standards, 76 Fed. Reg. at 2494; Nutrition Standards, 77 Fed. Reg. at 4088, 4087.

<sup>122</sup> See *supra* Part III.B.

<sup>123</sup> See *supra* Part III.B.

<sup>124</sup> By way of contrast, updating buildings to permit wheelchair access, for instance, may come with nonquantifiable benefits from the intangible value added to the lives of those who are wheelchair-bound and may otherwise lack access to the building. See Sunstein, *supra* note 54.

<sup>125</sup> Nutrition Standards, 77 Fed. Reg. at 4133.

<sup>126</sup> Nutrition Standards, 77 Fed. Reg. at 4088, 4133.

<sup>127</sup> This point was made in the background of the RIA, but not as part of the benefits analysis. Nutrition Standards, 77 Fed. Reg. at 4109.

<sup>128</sup> *National School Lunch Program: Participation and Lunches Served*, U.S. DEPT OF AGRIC., <http://www.fns.usda.gov/sites/default/files/pd/slsummar.pdf> [<http://perma.cc/W82T-99HU>] (last updated Oct. 9, 2015) (calculations by author).

<sup>129</sup> *School Breakfast Program Participation and Meals Served*, U.S. DEPT OF AGRIC., <http://www.fns.usda.gov/sites/default/files/pd/sbsummar.pdf> [<http://perma.cc/EA5U-PJ6X>] (last updated Oct. 9, 2015) (calculations by author).

lunches and breakfasts at school. A simplifying assumption provided in the National School Lunch Act is that school lunches should provide one-third of a child's recommended daily nutritional allowances, and school breakfasts one-fourth.<sup>130</sup> The RIA could have quantified the causal impact of its nutrition standards for school lunches as one-sixth a participating child's total annual nutrient intake; for children who also consume school breakfast, this amount rises to seven-twenty-fourths or more than twenty-five percent of all nutrients for the year.<sup>131</sup> A final assumption provided explicitly in the RIA—that compliance with the latest nutritional recommendations for a quarter of all annual nutritional intake would improve a child's health—would give the nutrition standards in either their proposed or final form a quantifiable benefit.<sup>132</sup> The nutrition standards would improve the nutritional value of up to twenty-five percent of the calories that participating students consume each year. This basic calculation does not even include the effect of corollary benefits, such as teaching these students healthy eating habits that could affect their nutritional intake outside of school meals.<sup>133</sup>

The RIA could have refined this calculation by taking into account the distributional effects of the health benefits. In 2010, 65.3% of lunches served under the NSLP went to children who qualify for free or reduced price meals,<sup>134</sup> meaning they generally come from households with incomes between 130% and 185% of the federal poverty level.<sup>135</sup> More dramatically,

<sup>130</sup> Nutrition Standards, 77 Fed. Reg. at 4088, 4107.

<sup>131</sup> Nutrition Standards, 77 Fed. Reg. at 4107 (“School lunches must provide one-third of the [Dietary Guideline’s] Recommended Dietary Allowances (RDA) for protein, calcium, iron, and vitamins A and C, on average over the course of a week; school breakfasts must satisfy one-fourth of the RDAs for the same nutrients.”).

<sup>132</sup> This assumption is not uncontroversial. See, e.g., *New U.S. Dietary Guidelines: Progress, Not Perfection*, *supra* note 40.

<sup>133</sup> There is some evidence that this is a strong possibility. See, e.g., Joanne Guthrie & Constance Newman, *Eating Better at School: Can New Policies Improve Children’s Food Choices*, U.S. DEP’T OF AGRIC. (Sept. 3, 2013), <http://www.ers.usda.gov/amber-waves/2013-september/eating-better-at-school-can-new-policies-improve-children%E2%80%99s-food-choices.aspx#.VHOI7dLF98E> [<http://perma.cc/EF7K-J2R3>]; see also J.C. Taylor & R.K. Johnson, *Farm to School as a Strategy to increase Children’s Fruit and Vegetable Consumption in the United States: Research and Recommendations*, 38 THE NUTRITION BULL. 70, 70–79 (2013), <http://onlinelibrary.wiley.com/doi/10.1111/mbu.12009/epdf> [<https://perma.cc/P2PD-VSLD>]. Cf. LINDSAY HAYNES-MADLOW & JEFFREY K. O’HARA, UNION OF CONCERNED SCIENTISTS, LESSONS FROM THE LUNCHROOM: CHILDHOOD OBESITY, SCHOOL LUNCH, AND THE WAY TO A HEALTHIER FUTURE 1, 2–3 (Feb. 2015), <http://www.ucsus.org/sites/default/files/attach/2015/02/lessons-from-the-lunchroom-report-ucs-2015.pdf> [<http://perma.cc/GU7J-DMT3>] (finding that, although “school food programs have improved the diets of socioeconomically disadvantaged children,” “school food programs are not strong enough to overcome other unhealthy influences on children’s diets and prevent obesity”).

<sup>134</sup> *National School Lunch Program: Participation and Lunches Served*, U.S. DEP’T OF AGRIC., <http://www.fns.usda.gov/sites/default/files/pd/slsummar.pdf> [<http://perma.cc/W82T-99HU>] (last updated Oct. 9, 2015) (calculations by author).

<sup>135</sup> See U.S. DEP’T OF AGRIC., ELIGIBILITY MANUAL FOR SCHOOL MEALS: DETERMINING AND VERIFYING ELIGIBILITY 1, 11, 14 (Aug. 2014), <http://www.fns.usda.gov/sites/default/files/cn/EliMan.pdf> [<http://perma.cc/7XRQ-DUYQ>] (defining eligibility criteria for children in households with income levels at 130% federal poverty level (“FPL”) for free lunch or 185% FPL for reduced price lunch, or who otherwise qualify for federal assistance programs such as

83.5% of school breakfasts served under the SBP went to children who qualify for free or reduced price meals.<sup>136</sup> The children with most limited financial access to healthy meals outside of school are disproportionately benefitting from improved school nutrition standards.<sup>137</sup> Under Executive Order 13,563,<sup>138</sup> this is a relevant quantified value that, while not expressly comparable to analyses of broad costs and benefits, would weigh in favor of justifying the cost of the nutrition standards.

The above calculations contain additional assumptions, and a byproduct of an explicit benefits analysis would be directly addressing them. First, would students still participate in the healthier meal programs? The USDA's cost analysis used the simplifying assumption that the participation rate would in fact remain the same, and even went so far as to estimate the cost impact of minor participation increases and decreases.<sup>139</sup> This approach could have been used in the benefits analysis as well. Second, would children compensate for the healthier food at school by eating more unhealthy foods from competitive food sources or outside of school? This is an important tradeoff that could have been more explicitly addressed. The USDA could have replicated its analysis for the competitive food rules, also authorized in the HHFKA, which became final in August 2013.<sup>140</sup>

Third, and perhaps most importantly, would the final rule still have the same or similar health benefits as the proposed rule? As noted, the final rule departed from the proposed rule in nine key policy areas. While the tomato paste and starchy vegetable changes were required by Congress, others fell to the USDA's discretion. For the reduction of the proposed rule's school lunch fruit and vegetable requirement, the USDA was not explicit in how much of the benefit to student health was lost. For the school breakfast delays that saved billions in implementation costs, the USDA did not assess the health benefits lost in serving nearly two billion less-healthy breakfasts each year—breakfasts that predominantly go to children from low-income households. For the change in monitoring requirements, the USDA did not address the risk this posed to reducing overall health benefits to students.

Without explicitly quantifying (much less monetizing) the health benefits lost from these policy changes, the USDA had no clear baseline for using its discretion to adopt cost-saving changes that diverged from the higher

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the Supplemental Nutrition Assistance Program ("SNAP"), the Food Distribution Program on Indian Reservations ("FDPIR"), or Temporary Assistance for Needy Families ("TANF").

<sup>136</sup> *School Breakfast Program Participation and Meals Served*, U.S. DEPT OF AGRIC., <http://www.fns.usda.gov/sites/default/files/pd/sbsummar.pdf> [http://perma.cc/EA5U-PJ6X] (last updated Oct. 9, 2015) (calculations by author).

<sup>137</sup> See HAYNES-MADLOW & O'HARA, *supra* note 133, at 2–3.

<sup>138</sup> See Exec. Order No. 12,866, 3 C.F.R. 638 (1993–1994); see also Exec. Order No. 13,563, 3 C.F.R. 215 (2011).

<sup>139</sup> Nutritional Standards, 77 Fed. Reg. at 4088, 4128 (forecasting also the effect of small participation increases and decreases on the cost of the nutrition standards).

<sup>140</sup> See National School Lunch Program and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010, 77 Fed. Reg. 39067 (interim final rule June 28, 2013).

standards of the proposed rule. What's more, because the health benefits of the proposed rule were not quantified in the first instance, Congress did not have a relevant baseline for making its decisions in the 2012 appropriation rider that so dramatically altered the nutrition standards for tomato paste and potatoes. While other factors were certainly in play,<sup>141</sup> Congress expressly considered the cost impact of the proposed rule, especially in the context of the starchy vegetable limit as potatoes were considered an inexpensive option.<sup>142</sup> Making the health benefits of the proposed rule explicit perhaps could have helped to protect the standards in the final rule, in addition to improving the cost-benefit analysis itself.

Other free-standing benefits are worth addressing briefly. The RIA noted—but did not attempt to quantify—“corollary benefits” to the rule that included: “increase[d] confidence by parents and families in the nutritional quality of school meals, which may encourage” broader participation; “reinforce[d] school-based nutrition education” that could “promot[e] healthful food and physical activity choices[;]” and “a clearer alignment between Federal program benefits and national nutrition policy, which can help to reinforce overall understanding of the linkages between diet and health.”<sup>143</sup> These broad “corollary benefits” could have been more expressly included as free-standing benefits, or they could contribute to an overall cost-justification of the nutrition standards.<sup>144</sup>

## 2. Breakeven Analysis

In lieu of quantifying free-standing benefits associated with the rule, the USDA could have conducted a breakeven analysis. Breakeven analyses demonstrate the point at which a policy alternative is cost-justified based on hypothesized or estimated benefits.<sup>145</sup> They are useful to aid a policymaker's

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<sup>141</sup> While this Note is not focused on external influences, it is important to note that several interest groups have made significant efforts toward influencing the substance of the school nutrition standards. See, e.g., Duff Wilson & Janet Roberts, *Special Report: How Washington Went Soft on Childhood Obesity*, REUTERS (Apr. 27, 2012), <http://www.reuters.com/article/2012/04/27/us-usa-foodlobby-idUSBRE83Q0ED20120427> [<http://perma.cc/J55U-NWXD>] (discussing food industry lobbying efforts); Allison Aubrey, *From Potatoes To Salty Fries In School: Congress Tweaks Food Rules*, NAT'L PUB. RADIO (Dec. 10, 2014), <http://www.npr.org/sections/thesalt/2014/12/10/369869222/from-potatoes-to-salty-fries-in-school-congress-tweaks-food-rules> [<http://perma.cc/3BTX-7GXN>] (discussing School Nutrition Association lobbying efforts).

<sup>142</sup> See *supra* Part III.A.1.

<sup>143</sup> Nutrition Standards, 77 Fed. Reg. at 4133.

<sup>144</sup> See *id.*

<sup>145</sup> See generally Cass R. Sunstein, *Limits of Quantification*, 102 CALIF. L. REV. 1369, 1392–93 (2014) (setting out a “simple framework” for breakeven analyses: “When quantified benefits justify quantified costs, of course, agencies should proceed (to the extent permitted by law). When quantified benefits do not justify quantified costs, but when nonquantifiable benefits are involved, agencies should identify those benefits and, to the extent possible, identify lower and upper bounds. They might be able to do so because of existing information about the problem at hand or because of relevant information from comparison cases. After lower and upper bounds have been identified, agencies should add that information to the benefits esti-

economic analysis where knowledge is limited or uncertainty is high, where benefits are hard to quantify or monetize, or where policymakers may have a difficult time proving a causal connection between a problem and their proposed solution.<sup>146</sup> Breakeven analyses also can incorporate certain nonquantifiable social values or norms, such as the dignitary rights of wheelchair users gaining access to a building.<sup>147</sup>

Under a breakeven analysis, the RIA for the nutrition standards would have demonstrated that because the final rule will result in a \$3.2 billion increase in school meal costs over the course of five years, the rule would be justified by a gain of \$3.2 billion in benefits.<sup>148</sup> On a student-by-student level, because the school meal program serves approximately thirty million students (assuming no increase or decrease in participation), the rule would be justified by benefits of approximately \$107 per child over the course of five years, or \$21 per year (for a total of approximately \$3.2 billion for thirty million students).<sup>149</sup> For the proposed rule, the breakeven point would have been at the slightly higher value of \$45 per child per year (for a total of approximately \$6.8 billion for thirty million students).<sup>150</sup>

Does the final rule “break-even” in achieving \$21 in benefits per child per year? It could achieve this by either generating new benefits or decreasing costs. An obvious source for cost-reduction would be the annual cost of childhood-obesity-related diseases. Studies have estimated that the cost of these diseases is \$11 billion for children with private health insurance and \$3 billion for children enrolled in Medicaid.<sup>151</sup> These health costs will be incurred both in the near-term and over the long-term, as children with poor nutrition and obesity-related diseases will carry these effects into adulthood. One study estimates that twenty-one percent of all medical spending annually, as much as \$190 billion, will go to adult overweight and obesity related health issues.<sup>152</sup>

The RIA itself notes \$3 billion per year in direct medical costs are associated with childhood obesity, or \$236 on average per obese child in the United States.<sup>153</sup> Assuming children participating in school meal programs have the same seventeen percent obesity rate as the national average,<sup>154</sup> then 5.1 million obese children eat school meals every day. Thus, these children

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mate, and to the extent permitted by law, proceed if the benefits justify the costs.”); *see generally* Sunstein, *supra* note 54.

<sup>146</sup> *See generally* Sunstein, *supra* note 54.

<sup>147</sup> *See generally id.*

<sup>148</sup> *See* Nutrition Standards, 77 Fed. Reg. at 4142.

<sup>149</sup> *See id.*

<sup>150</sup> *See* Nutrition Standards, 76 Fed. Reg. at 2507.

<sup>151</sup> *Consequences of Childhood Obesity*, FOOD RESEARCH & ACTION CENTER, <http://frac.org/initiatives/hunger-and-obesity/what-are-the-consequences-of-childhood-overweight-and-obesity/> [<http://perma.cc/8W2J-66YH>].

<sup>152</sup> John Cawley & Chad D. Meyerhoefer, *The Medical Care Costs of Obesity: An Instrumental Variables Approach*, 31 J. HEALTH ECON. 219, 226 (2012).

<sup>153</sup> Nutrition Standards, 77 Fed. Reg. at 4133.

<sup>154</sup> *Childhood Obesity Facts*, *supra* note 37.

are contributing on average \$236 in direct medical costs. If the healthier school meals contributed to a reduction in obesity-related direct medical costs by just nine percent, they would breakeven.

Because many students consume twenty-five percent of their annual calories at school,<sup>155</sup> it is reasonable to assume such a reduction could be achieved. Indeed, the health benefits of the rule are hardly speculative. A recent study measuring the correlation between childhood obesity and state nutrition requirements found that, “[i]n states that exceeded [previously lower] USDA standards, the difference in obesity prevalence between students who obtained free/reduced-price lunches and students who did not obtain school lunches was 12.3 percentage points . . . compared with states that did not exceed USDA standards.”<sup>156</sup> Reducing childhood obesity would have a dramatic impact on reducing obesity-related diseases.<sup>157</sup> The American Diabetes Association notes that “[c]hildren and teens may be able to prevent diabetes or delay its onset for many years” through interventions such as improved diets and physical activity.<sup>158</sup> Diet improvements would likely have accompanied the more stringent nutrition standards in the proposed rule, which closely tracked IOM recommendations that hope to reduce “in-consistenc[ies] between the typical diets of school-aged children in the United States and the Dietary Guidelines/MyPyramid recommendations.”<sup>159</sup> The looser nutrition standards of the final rule have correspondingly lessened benefits than the proposed rule, but they are still highly likely to lead to some significant reductions in childhood obesity and thus direct medical costs for obesity-related diseases. Because the cost per child per year is so low, and the potential benefits so substantial, it is quite possible that the USDA could have demonstrated the breakeven potential of the rule to a high degree of certainty.

Indeed, this analysis only estimated the breakeven point for direct medical costs associated with childhood obesity. A more comprehensive breakeven analysis could consider the likelihood that children would learn better eating habits that stay with them for life. It could also estimate the breakeven point for the cost of lifelong obesity and the likelihood that the nutrition standards would reduce the number of obese adults in America.

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<sup>155</sup> See *supra* Part III.B.1. See also Nutrition Standards, 77 Fed. Reg. at 4088, 4107.

<sup>156</sup> Daniel R. Taber et al., *Association Between State Laws Governing School Meal Nutrition Content and Student Weight Status*, 167 [J]AMA PEDIATRICS 513, 513 (2013).

<sup>157</sup> See *Preventing Type 2 in Children*, AM. DIABETES ASS'N (Nov. 12, 2014), <http://www.diabetes.org/living-with-diabetes/parents-and-kids/children-and-type-2/preventing-type-2-in-children.html> [<http://perma.cc/8YAP-92N8>].

<sup>158</sup> *Id.*

<sup>159</sup> Nutrition Standards, 77 Fed. Reg. at 4132. *MyPyramid* recommendations have since been replaced with *MyPlate* recommendations, although they contain similar nutrition requirements. See *MyPlate and MyPyramid . . . Can they be used together?*, U.S. DEP'T OF AGRIC. (Oct. 17, 2015), <http://www.choosemyplate.gov/sites/default/files/printablematerials/UsingMyPlateAlongWithMyPyramid.pdf> [<http://perma.cc/5L56-9N6X>]. See generally *ChooseMyPlate.gov*, U.S. DEP'T OF AGRIC., <http://www.choosemyplate.gov/> [<http://perma.cc/F5LW-DEBG>].



Further, such an analysis could discuss the probable economic benefits from children with improved concentration and learning in the classroom.

Thus, had an analysis of free-standing benefits proven too difficult, this breakeven analysis of benefits could have guided the substantive changes to the nutrition standards outlined above. Did the school breakfast changes, which produced seventy-five percent of the cost reduction, preserve health benefits from the proposed rules? Did the school lunch changes—especially where few alternatives were considered following the congressional riders on tomatoes and potatoes—preserve benefits?

Without an attempt at quantification, it is difficult to determine the benefits lost as the USDA moved from the proposed rule to the final rule, much less whether those benefits were cost-justified or whether the USDA maximized net benefits. Quantifying the benefits in the proposed rule itself may have forestalled the congressional reaction and perhaps even helped to prevent the rider that substantially changed proposed restrictions on french fries and pizza. More relevantly, however, quantifying the benefits of the final rule may help alleviate pressure to reduce nutrition standards in future reauthorization debates.

#### IV. CHILD NUTRITION PROGRAM REAUTHORIZATION: HEALTH AT RISK

By the fall of 2013, just a year-and-a-half after the final nutrition standards were promulgated, schools had already made great progress implementing the standards. Dr. Janey Thornton, Deputy Under Secretary for the USDA's Food, Nutrition and Consumer Services, reported that “[s]chools across the country are increasing their efforts to prevent childhood obesity by serving healthier school meals providing more time for physical activity, and helping kids learn about proper nutrition.”<sup>160</sup> Dr. Thornton discussed early USDA survey results showing an eighty percent success rate overall, with some states reporting a one-hundred percent transition rate to the new meal standards.<sup>161</sup> Additionally, the “Kids’ Safe and Healthful Foods Project” found that in 2012 ninety-four percent of U.S. school districts were on track to meet the updated nutrition standards.<sup>162</sup> The survey also showed that only 0.15% of schools cited difficulty in complying with the new standards.<sup>163</sup>

Unfortunately, it is unclear whether this success will be maintained.<sup>164</sup> An appropriations rider in the fiscal year 2015 Consolidated and Further

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<sup>160</sup> Janey Thornton, *When Schools Improve Meals, Positive Results Follow*, U.S. DEP'T OF AGRIC. (Sept. 30, 2013, 9:30 AM), <http://blogs.usda.gov/2013/09/30/when-schools-improve-meals-positive-results-follow/#sthash.ULJhvGA.dpuf> [<http://perma.cc/PY58-A8RR>].

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> For example, the House Appropriations Committee approved a rider in the fiscal year 2015 budget bill to permit schools to obtain waivers if they have been operating at a net loss. See Confessore, *supra* note 64.

Continuing Appropriations Act provided a waiver option for states to allow their schools to opt out of the whole grain-rich requirement, and it also suspended sodium reductions planned in the 2012 nutrition standards.<sup>165</sup> In debates leading up to the Child Nutrition Program reauthorization in 2015, many commentators concerned with the cost of the nutrition standards called on Congress to reduce whole grain and fruit and vegetable requirements.<sup>166</sup> At the time of writing, it is unclear whether Congress will respond to or resist these concerns.<sup>167</sup>

Yet, as demonstrated above, the USDA nutrition standards offer numerous benefits that likely would have justified the higher cost of the proposed rule, and most certainly justify the far lower cost of the final rule. One of the primary advantages of conducting a cost-benefit analysis is that it permits policymakers to assess the pros and cons of a rule across a baseline of monetized values. While this advantage is most evident at the agency level, as most agencies are required to explicitly assess the costs and benefits of any proposed economically significant rules, the advantages can be applied more broadly. Congress may look to the costs and benefits of a given rule in making budget decisions or modifying statutes.<sup>168</sup> And the public may demand congressional or agency action based on explicit cost and benefit comparisons.<sup>169</sup>

This broader application of cost-benefit analyses is highly relevant for the USDA nutrition standards in order to defend them against cost-based attacks. First, critics allege that many students dislike the foods offered under the new menus,<sup>170</sup> creating increased food waste as well as decreased participation, thus leading to decreased funding for schools through fewer

<sup>165</sup> Jay Sjervan, *Congress Eases Whole Grain and Sodium Requirements in School Meals*, FOOD BUS. NEWS (Dec. 16, 2014), [http://www.foodbusinessnews.net/articles/news\\_home/Regulatory\\_News/2014/12/Congress\\_eases\\_whole\\_grain\\_and.aspx?ID=%7B29827895-2A79-4F20-9ED5-CFD960523BE7%7D&cck=1](http://www.foodbusinessnews.net/articles/news_home/Regulatory_News/2014/12/Congress_eases_whole_grain_and.aspx?ID=%7B29827895-2A79-4F20-9ED5-CFD960523BE7%7D&cck=1) [<http://perma.cc/T227-QDJB>].

<sup>166</sup> Brasher, *supra* note 120.

<sup>167</sup> See, e.g., Louise Walsh, *Vilsack Urges Congress to Reauthorize Healthy, Hunger-Free Kids Act*, NAT'L PRESS CLUB (Sept. 9, 2015), <https://www.press.org/news-multimedia/news/vilsack-urges-congress-reauthorize-healthy-hunger-free-kids-act> [<https://perma.cc/Z4GQ-BRFV>] (citing USDA Secretary Vilsack's call for Congress to resist "critics who complain that these nutritional standards are too difficult, too expensive or unpopular").

<sup>168</sup> As noted, congressional appropriation decisions and substantive debates on the reauthorization have focused on whether the standards are cost-justified. See *supra* Part III.

<sup>169</sup> Much of this public demand may come in the form of comments during the rulemaking process, as with the many cost-focused comments received following the proposed rule for the USDA nutrition standards. See *supra* Part III.

<sup>170</sup> The U.S. Government Accountability Office ("GAO") has reported that there are a significant number of complaints. See Von Diaz, *Whatever Happened to Michelle Obama's School Lunch Program*, COLOR LINES (Sept. 9, 2013), <http://www.colorlines.com/articles/what-ever-happened-michelle-obamas-school-lunch-program> [<http://perma.cc/9SXV-F3VQ>] ("Among other things, [the GAO report] found that schools have had to eliminate popular items; that the meat and grain restrictions have led to smaller lunch entrees; that students don't like the new lunches; and that some schools are losing food funding because fewer students are getting their lunches from school.").

student-purchases and federal reimbursements.<sup>171</sup> Second, critics assert that the increased costs of food, labor, and administration of the programs—as well as decreases in funding because of student participation declines—cause schools to reduce staffing or meal variety in order to meet the new standards, which may harm student participation even further.<sup>172</sup>

While the validity of these cost-based attacks is contested,<sup>173</sup> the central tenor of the debate remains focused on cost. However, this Note has argued for an analogous focus on benefits. As demonstrated above, the quantified benefits of the nutrition standards—both in their proposed and final forms—outweigh the overall costs, even with possible declines in student participation or schools dropping out of the school meal programs.<sup>174</sup> The free-standing benefits to children’s health are incredibly high, and a breakeven analysis—even on just one benefit output—demonstrates that the rule is cost-justified.<sup>175</sup> Subsequent research finding positive correlations between the nutrition standards and student health provide additional evidence of the benefits of the rule.<sup>176</sup> Quantification of these benefits—even years after their promulgation—should inform future action in maintaining the nutrition standards in their most robust form.

Yet if the cost-based attacks on the nutrition standards are valid, an important implication remains. While the benefits of healthier school meals will be felt at the federal, state, and local levels, the burden is most directly borne by individual schools that must struggle to implement the nutrition standards on constrained school budgets. The HHFKA did provide schools with a six-cent per meal increase for lunches (not breakfasts) that met the

<sup>171</sup> See Alexandra C. Sifferlin, *Why Some Schools Are Saying ‘No Thanks’ to the School-Lunch Program*, TIME (Aug. 29, 2013), <http://healthland.time.com/2013/08/29/why-some-schools-are-saying-no-thanks-to-the-school-lunch-program> [<http://perma.cc/B78Z-ZXGQ>].

<sup>172</sup> See Press Release, Sch. Nutrition Ass’n, *Costs of Nutrition Standards Threaten School Meal Programs* (Aug. 25, 2015), <https://schoolnutrition.org/PressReleases/CostsofNutritionStandardsThreatenSchoolMealPrograms> [<https://perma.cc/9B5N-QXQZ>].

<sup>173</sup> The empirical evidence behind cost-based attacks is not the main subject of this section, but many suggest concerns for both student participation and school participation rates may be misleading. See, e.g., Marlene B. Schwartz et al., *New School Meal Regulations Increase Fruit Consumption and Do Not Increase Total Plate Waste*, 11 CHILDHOOD OBESITY 242, 245 (2015), <http://online.liebertpub.com/doi/pdfplus/10.1089/chi.2015.0019> [<http://perma.cc/D5YA-AMGU>] (finding that “the revised NSLP nutrition standards and policies have led to more nutritious meals and less overall plate waste”); Diaz, *supra* note 170 (noting that, of the few schools that have dropped the school meal programs in response to the new standards, most “have predominantly white populations of students and have a very low percentage of students receiving free or reduced-price lunches”); HAYNES-MADLOW & O’HARA, *supra* note 133, at 16–18.

<sup>174</sup> See *supra* Part III.

<sup>175</sup> See *supra* Part III.B.

<sup>176</sup> See Marion Nestle, *Three Studies on School Food: Nutrition Standards Work, and Well*, FOOD POLITICS (Mar. 9, 2015), <http://www.foodpolitics.com/2015/03/three-studies-on-school-food-nutrition-standards-work-and-well/> [<http://perma.cc/2K7P-DSPN>] (citing studies from the Rudd Center, the Harvard School of Public Health, and the Union of Concerned Scientists, which purport to show that the USDA nutrition standards are having positive health impacts without increasing plate waste).

higher nutrition standards.<sup>177</sup> Additionally, the USDA has provided some funding via grants for schools to purchase needed equipment and to invest in training of kitchen personnel.<sup>178</sup> Nevertheless, many object that federal funding is insufficient to cover the cost of new burdens imposed by the nutrition standards.<sup>179</sup>

Because the benefits of the nutrition standards are so large, Congress must play a more significant role in bearing the increased costs. Proponents of the standards have called on Congress to increase its reimbursement rates, as well as provide additional funding for equipment and training.<sup>180</sup> Such an increase could incentivize school compliance with the nutrition standards and ensure their prolonged health impact across the nation. For example, the School Nutrition Association has noted widespread concern over school meal program deficits, and it recently recommended federal reimbursements increase by thirty-five cents per meal (including both lunch and breakfast) to cover the cost of complying with the nutrition standards.<sup>181</sup>

The federal response to funding requests will depend in large part on available sources of funding. However, consideration of these requests should be viewed in light of the clear benefits of the nutrition standards. Availability of healthy school meals is a national issue with long-ranging benefits, which, when even modestly quantified, clearly justify their costs. Still, the costs of these programs cannot be placed on schools via an un-

<sup>177</sup> 42 U.S.C. § 1753 (2012). This is the first increase in federal reimbursement rates aside from inflation adjustments in thirty years. See Jane Black, *Extra Lunch Money Hidden in Child Nutrition Bill*, THE ATLANTIC (Dec. 9, 2010), <http://www.theatlantic.com/life/archive/2010/12/extra-lunch-money-hidden-in-child-nutrition-bill/67444/> [<http://perma.cc/4MPK-EB48>].

<sup>178</sup> Press Release, U.S. Dep't of Agric., USDA Awards Grants to Support Schools Serving Healthier Meals and Snacks (Mar. 6, 2015), <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2015/03/0058.xml> [<http://perma.cc/MJ24-M8Y8>].

<sup>179</sup> See, e.g., 2015 Position Paper: Reauthorization of the Healthy, Hunger-Free Kids Act, SCH. NUTRITION ASS'N (2015), [https://schoolnutrition.org/uploadedFiles/Legislation\\_and\\_Policy/SNA\\_Policy\\_Resources/1-2015PP-35CentOnePager.pdf](https://schoolnutrition.org/uploadedFiles/Legislation_and_Policy/SNA_Policy_Resources/1-2015PP-35CentOnePager.pdf) [<https://perma.cc/K99J-BDXY>] (noting the USDA's forecast of \$1.2 billion in additional costs for schools, and calling for an increased reimbursement rate to offset predicted shortfalls).

<sup>180</sup> HAYNES-MADLOW & O'HARA, *supra* note 133, at 18 (recommending "raising the reimbursement rate for meals in compliance with nutrition standards to allow schools more flexibility to buy the healthiest foods possible," as well as "expand[ing] the availability [sic] of grants and loans to help schools outfit and update their kitchens").

<sup>181</sup> 2015 Position Paper: Reauthorization of the Healthy, Hunger-Free Kids Act, *supra* note 179. It should be noted that the School Nutrition Association has also requested less robust nutrition requirements as well as flexibility in complying with the standards. See SNA 2015 Position Paper: Talking Points, SCH. NUTRITION ASS'N (2015), [https://schoolnutrition.org/uploadedFiles/Meetings\\_and\\_Events/ANC\\_2014\(1\)/Pages/2015PositionPaperTalkingPoints.pdf](https://schoolnutrition.org/uploadedFiles/Meetings_and_Events/ANC_2014(1)/Pages/2015PositionPaperTalkingPoints.pdf) [<https://perma.cc/HYY6-7GLF>]; cf. Dana Woldow, *School Nutrition Assn. Chooses Flexibility over Funding*, BEYOND CHRON (Apr. 18, 2014), <http://www.beyondchron.org/school-nutrition-assn-chooses-flexibility-over-funding/> [<http://perma.cc/U48K-TSVL>] ("Something smells funny when the leader of the SNA doesn't jump at the suggestion of increased federal funding for school meals. The SNA has requested an additional 35 cents per meal in its 2015 position paper, for heaven's sake! Is the SNA worried that publicly asking for more money will somehow backfire? Or is their real agenda simply to gut the school nutrition standards—which could help the SNA's Big Food sponsors get their unhealthy products back into schools on a daily basis?") (quoting "national food policy activist" Nancy Huehnergarrh).

funded mandate. Congress should continue to seek ways to assist schools in complying with the nutrition standards. Increased federal assistance for students in the short-term could lead to dramatic cost-savings in the long-term—a solution Congress should embrace.

## V. CONCLUSION

Although the costs—and especially the benefits—of the USDA’s nutrition standards were not appropriately quantified, further analysis shows the great promise of the final rule in bringing significant health benefits to American school children. While these benefits do come with significant costs, those costs are clearly justified.

For future reauthorizations of and appropriations to the Child Nutrition Programs, Congress should maintain the nutrition standards as finalized by the USDA. Because the costs of these standards are borne by individual schools, Congress should also increase its reimbursement rates for the school meal programs, as well as training and equipment grants. Increased federal assistance will not only offset the cost of improved meals for students, but also incentivize more schools to remain in or join the school nutrition programs. By improving healthy food offerings at school, Congress can satisfy the dual purposes of the child nutrition programs: to provide a steady market for American agriculture, and—more importantly—provide for the health of America’s youngest and most vulnerable.

