

§ 210.10 Meal requirements for lunches and requirements for afterschool snacks.

(a) * * *

(1) * * *

(i) * * * Schools must make potable water available and accessible without restriction to children at no charge in the place(s) where lunches are served during the meal service.

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§ 210.11 [Redesignated as § 210.11a]

■ 4. Redesignate § 210.11 as § 210.11a and add new § 210.11 to read as follows:

§ 210.11 Competitive food service and standards.

(a) *Definitions.* For the purpose of this section:

(1) *Combination foods* means products that contain two or more components representing two or more of the recommended food groups: fruit, vegetable, dairy, protein or grains.

(2) *Competitive food* means all food and beverages other than meals reimbursed under programs authorized by the Richard B. Russell National School Lunch Act and the Child Nutrition Act of 1966 available for sale to students on the *School campus* during the *School day*.

(3) *Entrée item* means an item that is either:

(i) A combination food of meat or meat alternate and whole grain rich food; or

(ii) A combination food of vegetable or fruit and meat or meat alternate; or

(iii) A meat or meat alternate alone with the exception of yogurt, low-fat or reduced fat cheese, nuts, seeds and nut or seed butters, and meat snacks (such as dried beef jerky).

(4) *School campus* means, for the purpose of competitive food standards implementation, all areas of the property under the jurisdiction of the school that are accessible to students during the school day.

(5) *School day* means, for the purpose of competitive food standards implementation, the period from the midnight before, to 30 minutes after the end of the official school day.

(b) *General requirements for competitive food.* (1) *State and local educational agency policies.* State agencies and/or local educational agencies must establish such policies and procedures as are necessary to ensure compliance with this section. State agencies and/or local educational agencies may impose additional restrictions on competitive foods, provided that they are not inconsistent with the requirements of this part.

(2) *Recordkeeping.* The local educational agency is responsible for

the maintenance of records that document compliance with the nutrition standards for all competitive food available for sale to students in areas under its jurisdiction that are outside of the control of the school food authority responsible for the service of reimbursable school meals. In addition, the local educational agency is responsible for ensuring that organizations designated as responsible for food service at the various venues in the schools maintain records in order to ensure and document compliance with the nutrition requirements for the foods and beverages sold to students at these venues during the school day as required by this section. The school food authority is responsible for maintaining records documenting compliance with these for foods sold under the auspices of the nonprofit school food service. **At a minimum, records must include receipts, nutrition labels and/or product specifications for the competitive food available for sale to students.**

(3) *Applicability.* The nutrition standards for the sale of competitive food outlined in this section apply to competitive food for all programs authorized by the Richard B. Russell National School Lunch Act and the Child Nutrition Act of 1966 operating on the school campus during the school day.

(4) *Fundraiser restrictions.* Competitive food and beverage items sold during the school day must meet the nutrition standards for competitive food as required in this section. A special exemption is allowed for the sale of food and/or beverages that do not meet the competitive food standards as required in this section for the purpose of conducting an infrequent school-sponsored fundraiser. Such specially exempted fundraisers must not take place more than the frequency specified by the State agency during such periods that schools are in session. No specially exempted fundraiser foods or beverages may be sold in competition with school meals in the food service area during the meal service.

(c) *General nutrition standards for competitive food.* (1) *General requirement.* At a minimum, all competitive food sold to students on the school campus during the school day must meet the nutrition standards specified in this section. These standards apply to items as packaged and served to students.

(2) *General nutrition standards.* To be allowable, a competitive food item must:

(i) Meet all of the competitive food nutrient standards as outlined in this section; and

(ii) Be a grain product that contains 50 percent or more whole grains by weight or have as the first ingredient a whole grain; or

(iii) Have as the first ingredient one of the non-grain major food groups: fruits, vegetables, dairy or protein foods (meat, beans, poultry, seafood, eggs, nuts, seeds, etc.); or

(iv) Be a combination food that contains ¼ cup of fruit and/or vegetable; or

(v) For the period through June 30, 2016, contain 10 percent of the Daily Value of a nutrient of public health concern based on the most recent Dietary Guidelines for Americans (i.e., calcium, potassium, vitamin D or dietary fiber). Effective July 1, 2016, the criterion in this paragraph is obsolete and may not be used to qualify as a competitive food; and

(vi) If water is the first ingredient, the second ingredient must be one of the food items in paragraphs (c)(2)(ii), (iii) or (iv) of this section.

(3) *Exemptions.* (i) *Entrée items offered as part of the lunch or breakfast program.* Any entrée item offered as part of the lunch program or the breakfast program under 7 CFR Part 220 is exempt from all competitive food standards if it is offered as a competitive food on the day of, or the school day after, it is offered in the lunch or breakfast program. Exempt entrée items offered as a competitive food must be offered in the same or smaller portion sizes as in the lunch or breakfast program. Side dishes offered as part of the lunch or breakfast program and served à la carte must meet the nutrition standards in this section.

(ii) *Sugar-free chewing gum.* Sugar-free chewing gum is exempt from all of the competitive food standards in this section and may be sold to students on the school campus during the school day, at the discretion of the local educational agency.

(d) *Fruits and vegetables.* (1) Fresh, frozen and canned fruits and vegetables with no added ingredients except water or, in the case of fruit, packed in 100 percent fruit juice or light syrup or extra light syrup, are exempt from the nutrient standards included in this section.

(2) Canned vegetables that contain a small amount of sugar for processing purposes, to maintain the quality and structure of the vegetable, are also exempt from the nutrient standards included in this section.

(e) *Grain products.* Grain products acceptable as a competitive food must

include 50 percent or more whole grains by weight or have whole grain as the first ingredient. Grain products must meet all of the other nutrient standards included in this section.

(f) *Total fat and saturated fat.* (1) *General requirements.* (i) The total fat content of a competitive food must be not more than 35 percent of total calories from fat per item as packaged or served, except as specified in paragraphs (f)(2) and (3) of this section.

(ii) The saturated fat content of a competitive food must be less than 10 percent of total calories per item as packaged or served, except as specified in paragraph (f)(3) of this section.

(2) *Exemptions to the total fat requirement.* *Seafood with no added fat* is exempt from the total fat requirement, but subject to the saturated fat, trans fat, sugar, calorie and sodium standards.

(3) *Exemptions to the total fat and saturated fat requirements.* (i) Reduced fat cheese and part skim mozzarella cheese are exempt from the total fat and saturated fat standards, but subject to the trans fat, sugar, calorie and sodium standards. This exemption does not apply to combination foods.

(ii) Nuts and Seeds and Nut/Seed Butters are exempt from the total fat and saturated fat standards, but subject to the trans fat, sugar, calorie and sodium standards. This exemption does not apply to combination products that contain nuts, nut butters or seeds or seed butters with other ingredients such as peanut butter and crackers, trail mix, chocolate covered peanuts, etc.

(iii) Products that consist of only dried fruit with nuts and/or seeds with no added nutritive sweeteners or fat are exempt from the total fat, saturated fat and sugar standards, but subject to the trans fat, calorie and sodium standards.

(g) *Trans fat.* The trans fat content of a competitive food must be zero grams trans fat per portion as packaged or served (not more than 0.5 grams per portion).

(h) *Total sugars.* (1) *General requirement.* The total sugar content of a competitive food must be not more than 35 percent of *weight* per item as packaged or served, except as specified in paragraph (h)(2) of this section.

(2) *Exemptions to the total sugar requirement.* (i) Dried whole fruits or vegetables; dried whole fruit or vegetable pieces; and dehydrated fruits or vegetables with no added nutritive sweeteners are exempt from the sugar standard, but subject to the total fat, saturated fat, trans fat, calorie and sodium standards. There is also an exemption from the sugar standard for dried fruits with nutritive sweeteners

that are required for processing and/or palatability purposes;

(ii) Products that consist of only dried fruit with nuts and/or seeds with no added nutritive sweeteners or fat are exempt from the total fat, saturated fat, and sugar standards, but subject to the calorie, trans fat, and sodium standards; and

(i) *Calorie and sodium content for snack items and side dishes sold à la carte.* Snack items and side dishes sold à la carte must have not more than 200 calories and 230 mg of sodium per item as packaged or served, including the calories and sodium contained in any added accompaniments such as butter, cream cheese, salad dressing, etc., and must meet all of the other nutrient standards in this section. Effective July 1, 2016, these snack items and side dishes must have not more than 200 calories and 200 mg of sodium per item as packaged or served.

(j) *Calorie and sodium content for entrée items sold à la carte.* Entrée items sold à la carte other than those exempt from the competitive food nutrition standards in paragraph (c)(3)(i) of this section must have not more than 350 calories and 480 mg of sodium per item as packaged or served, including the calories and sodium contained in any added accompaniments such as butter, cream cheese, salad dressing, etc., and must meet all of the other nutrient standards in this section.

(k) *Caffeine.* Foods and beverages available to elementary and middle school-aged students must be caffeine-free, with the exception of trace amounts of naturally occurring caffeine substances. Foods and beverages available to high school-aged students may contain caffeine.

(l) *Accompaniments.* The use of accompaniments is limited when competitive food is sold to students in school. The accompaniments to a competitive food item must be included in the nutrient profile as a part of the food item served in determining if an item meets all of the nutrition standards for competitive food as required in this section. The contribution of the accompaniments may be based on the average amount of the accompaniment used per item at the site.

(m) *Beverages.* (1) *Elementary schools.* Allowable beverages for elementary school-aged students are limited to:

(i) Plain water or plain carbonated water (no size limit);

(ii) Low fat milk, unflavored (no more than 8 fluid ounces);

(iii) Non fat milk, flavored or unflavored (no more than 8 fluid ounces);

(iv) Nutritionally equivalent milk alternatives as permitted in § 210.10 and § 220.8 of this chapter (no more than 8 fluid ounces); and

(v) 100 percent fruit/vegetable juice, and 100 percent fruit and/or vegetable juice diluted with water (with or without carbonation and with no added sweeteners) (no more than 8 fluid ounces).

(2) *Middle schools.* Allowable beverages for middle school-aged students are limited to:

(i) Plain water or plain carbonated water (no size limit);

(ii) Low fat milk, unflavored (no more than 12 fluid ounces);

(iii) Non fat milk, flavored or unflavored (no more than 12 fluid ounces);

(iv) Nutritionally equivalent milk alternatives as permitted in § 210.10 and § 220.8 of this chapter (no more than 12 fluid ounces); and

(v) 100 percent fruit/vegetable juice, and 100 percent fruit and/or vegetable juice diluted with water (with or without carbonation and with no added sweeteners) (no more than 12 fluid ounces).

(3) *High schools.* Allowable beverages for high school-aged students are limited to:

(i) Plain water or plain carbonated water (no size limit);

(ii) Low fat milk, unflavored (no more than 12 fluid ounces);

(iii) Non fat milk, flavored or unflavored (no more than 12 fluid ounces);

(iv) Nutritionally equivalent milk alternatives as permitted in § 210.10 and § 220.8 of this chapter (no more than 12 fluid ounces);

(v) 100 percent fruit/vegetable juice, and 100 percent fruit and/or vegetable juice diluted with water (with or without carbonation and with no added sweeteners) (no more than 12 fluid ounces);

(vi) Calorie-free, flavored water, with or without carbonation (no more than 20 fluid ounces);

(vii) Other beverages that are labeled to contain less than 5 calories per 8 fluid ounces, or less than or equal to 10 calories per 20 fluid ounces (no more than 20 fluid ounces); and

(viii) Other beverages that are labeled to contain no more than 40 calories per 8 fluid ounces or 60 calories per 12 fluid ounces (no more than 12 fluid ounces).

(n) *Implementation date.* This section is to be implemented beginning on July 1, 2014.

■ 5. In newly redesignated § 210.11a and add paragraph (c) to read as follows:

§ 210.11a Competitive food services.

* * * * *

(c) *Effective date.* This section remains in effect through June 30, 2014.

■ 6. In § 210.18, paragraph (h)(6) is added to read as follows:

§ 210.18 Administrative reviews.

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(h) * * *

(6) *Competitive food standards.* The State agency must ensure that the local educational agency and school food authority comply with the nutrition standards for competitive food and retain documentation demonstrating compliance with the competitive food service and standards.

■ 7. Appendix B to Part 210 is amended by adding paragraph (c) to read as follows:

Appendix B to Part 210—Categories of Foods of Minimal Nutritional Value

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(c) Appendix B remains in effect through June 30, 2014.

PART 220—SCHOOL BREAKFAST PROGRAM

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

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

§ 220.2 [Amended]

■ 9. In § 220.2, remove the definitions of “Competitive foods” and “Foods of minimal nutritional value”.

■ 10. In § 220.8, amend paragraph (a)(1) by adding a sentence at the end to read as follows:

§ 220.8 Meal requirements for breakfasts.

(a) * * *

(1) * * * When breakfast is served in the cafeteria, schools must make potable water available and accessible without restriction to children at no charge.

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§ 220.12 [Redesignated as § 220.12a].

■ 11. Redesignate § 220.12 as § 220.12a and add new § 220.12 to read as follows:

§ 220.12 Competitive food services.

School food authorities must comply with the competitive food service and standards requirements specified in § 210.11 of this chapter.

■ 12. In newly redesignated § 220.12a, add paragraphs (c) and (d) to read as follows:

§ 210.12a Competitive food services.

* * * * *

(c) *Definitions.* For the purpose of this section:

(1) *Competitive foods* means any foods sold in competition with the

School Breakfast Program to children in food service areas during the breakfast period; and

(2) *Foods of minimal nutritional value* means:

(i) In the case of artificially sweetened foods, a food which provides less than five percent of the Reference Daily Intake (RDI) for each of eight specified nutrients per serving; and

(ii) In the case of all other foods, a food that provides less than five percent of the RDI for each of eight specified nutrients per 100 calories and less than five percent of the RDI for each of eight specified nutrients per serving. The eight nutrients to be assessed for this purpose are protein, vitamin A, vitamin C, niacin, riboflavin, thiamin, calcium and iron. Categories of foods of minimal nutritional value are listed in appendix B of this part.

(d) *Effective date.* This section remains in effect through June 30, 2014.

13. Appendix B to Part 220 is amended by adding paragraph (c) to read as follows:

Appendix B to Part 220—Categories of Foods of Minimal Nutritional Value.

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(c) Appendix B remains in effect through June 30, 2014.

Dated: June 21, 2013.

Kevin W. Concannon,

Under Secretary, Food, Nutrition, and Consumer Services.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix A

Regulatory Flexibility Analysis—Interim Final Rule

Nutrition Standards for All Foods Sold In School

Agency: Food and Nutrition Service, USDA.

Background: The Regulatory Flexibility Act (RFA) requires agencies to consider the impact of their rules on small entities and to evaluate alternatives that would accomplish the same objectives without undue burden when the rules impose a significant economic impact on a substantial number of small entities. Inherent in the RFA is the desire to remove barriers to competition and encourage consideration of ways to tailor regulations to the size of the regulated entities.

The RFA does not require that agencies necessarily minimize a rule’s impact on small entities if there are significant, legal, policy, factual, or other reasons for the rule’s impacts. The RFA requires only that agencies determine, to the extent feasible, the rule’s economic impact on small entities, explore regulatory alternatives for reducing any significant economic impact on a substantial number of such entities, and explain the reasons for their regulatory choices.

I. Reasons That Action Is Being Considered

This interim final rule sets forth provisions to implement section 208 of Public Law 111–296, the Healthy, Hunger-Free Kids Act of 2010 (HHFKA). Section 208 amends Section 10 of the Child Nutrition Act of 1966 (42 U.S.C. 1779) (CNA) to give the Secretary of Agriculture new authority to establish science-based nutrition standards for all foods sold outside of the Federal child nutrition programs on the school campus during the school day. The Act also specifies that the nutrition standards shall apply to all foods sold (a) outside the school meal programs; (b) on the school campus; and (c) at any time during the school day.

II. Objectives of, and Legal Basis for, the Interim Final Rule

As stated above, the legal basis for the interim final rule are the amendments made to the CNA by HHFKA. The objectives of this rule are to establish nutrition standards for all foods and beverages sold to students in schools other than meals served through child nutrition programs authorized under the NSLA or the CNA and to improve the health and well being of the Nation’s school-aged children.

III. Number of Small Entities to Which the Interim Final Rule Will Apply

Small entities include independently owned and operated small businesses¹⁰ or not-for-profit organizations that are not dominant in their fields. Small businesses or non-profits that fall below certain size standards established by SBA (in terms of annual receipts or number of employees) are presumed not to be dominant in their fields.¹¹ Small entities also include small governmental jurisdictions (including school districts) with populations under 50,000.

The interim final rule directly regulates the 54 State education agencies and 3 State Departments of Agriculture that operate the NSLP pursuant to agreements with USDA’s Food and Nutrition Service. In turn, its provisions apply to school food authorities (SFAs) and non-SFA school groups that sell competitive foods and beverages to students during the school day. While State agencies are not considered small entities as State populations exceed the 50,000 threshold for a small government jurisdiction, many of the service-providing institutions that work with them to implement the program do meet definitions of small entities:¹²

¹⁰ Small businesses for purposes of the RFA are “small business concerns” as defined by the Small Business Act. These include independently owned and operated firms that are not dominant in their field of operation.

¹¹ “Guide to SBA’s Definitions of Small Business,” <http://www.sba.gov/content/guide-size-standards>, accessed 06/03/2013. Small business concerns for purposes of the RFA.

¹² For purposes of this analysis we refer to business “establishments” that serve the school market. Establishments are the smallest units of a firm; large firms may include multiple establishments. We use statistics for establishments rather than larger corporate entities to avoid understating the number of small business entities that may be indirectly affected by the interim final rule. SBA Office of Advocacy, *A Guide for*