

Virginia Board of Education Agenda Item



Agenda Item: N

Date: October 27, 2016

Title	First Review of Proposed Amendments to the Regulations Governing Nutritional Guidelines for Competitive Foods Available for Sale in the Public Schools (Final Stage)		
Presenter	Mr. Kent C. Dickey, Deputy Superintendent for Finance and Operations, and Ms. Lynne A. Fellin, Associate Director, Office of School Nutrition Programs		
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Purpose of Presentation:

Action required by state or federal law or regulation.

Previous Review or Action:

Previous review and action. Specify date and action taken below:

- Date: September 23, 2010 Action: Notice of Intended Regulatory Action (NOIRA) approved
- Date: June 23, 2011 Action: First Review of the proposed stage
- Date: October 24, 2013 Action: Public Hearing
- Date: May 22, 2014 Action: First Review of re-proposed regulations
- Date: June 26, 2014 Action: Final Review
- Date: October 22, 2015 Action: First Review of resolution to implement fundraiser exemptions pending amending the regulations to include such exemptions
- Date: November 19, 2015 Action: Final Review and adoption of resolution to implement fundraiser exemptions pending amending the regulations to include such exemptions
- Date: April 28, 2016 Action: Public Hearing on re-proposed regulations

Action Requested:

Action will be requested at a future meeting. Specify anticipated date below:
November 17, 2016

Alignment with Board of Education Goals: Please indicate (X) all that apply:

	Goal 1: Accountability for Student Learning
	Goal 2: Rigorous Standards to Promote College and Career Readiness
	Goal 3: Expanded Opportunities to Learn
X	Goal 4: Nurturing Young Learners
	Goal 5: Highly Qualified and Effective Educators
X	Goal 6: Sound Policies for Student Success
	Goal 7: Safe and Secure Schools
	Other Priority or Initiative. Specify:

Background Information and Statutory Authority:

Senate Bill 414 (2010 Acts of Assembly) amended the *Code of Virginia* by adding Section 22.1-207.4 on nutritional guidelines for competitive foods. This legislation required the Board of Education, in

cooperation with the Department of Health, to promulgate and periodically update regulations setting nutritional guidelines for all competitive foods sold to students during regular school hours that are not part of the federal school lunch or school breakfast program. The term “competitive foods” refers to all foods available for sale to students on the school campus during the school day other than meals reimbursed under programs authorized by the Richard B. Russell National School Lunch Act and the Child Nutrition Act of 1966 (i.e., School Lunch and School Breakfast). The regulations to be developed pursuant to the legislation are required to address calorie, fat, sugar, and sodium content, and may address other areas. Re-proposed regulations have been moving through the Administrative Process Act (APA) process.

As specified in enactment clause three of SB 414, the Board of Education shall work with the Department of Health, the School Nutrition Association of Virginia, the American Heart Association, the American Cancer Society, the Virginia chapter of the American Academy of Pediatrics, the Virginia Wholesalers and Distributors Association, the Virginia Automatic Merchandising Association, and other stakeholders in conducting the research necessary for the development of the regulations and in the dissemination of the nutritional guidelines to school divisions.

Further, SB 414 requires in the development and implementation of the regulations that:

- Nutritional guidelines be established for all foods available for sale to students on school grounds during regular school hours. “Competitive food” means all foods available for sale to students on the school campus during the school day other than meals reimbursed under the school breakfast or school lunch programs. In the school setting, these are typically food items available for sale to students as à la carte items in the cafeteria, in vending machines, in school stores/snack bars, and through other school activities. SB 414 explicitly excludes “beverages” under the definition of “competitive food.” In addition, food items served or provided, but not sold, to students, or those sold outside regular school hours or off the school campus are outside the purview of these regulations;
- The guidelines be based on the Institute of Medicine's (IOM) nutrition standards for competitive foods in schools or the competitive food guidelines established by the Alliance for a Healthier Generation as the initial statewide standard for competitive foods;
- The guidelines be periodically reviewed by the Board of Education with assistance from the Department of Health to ensure they remain current, science-based, and consistent with any changes to the federal laws or regulations on competitive foods; and
- Local school boards adopt the state guidelines as part of their existing local wellness policy to ensure compliance with the provisions of subsection A of Section 22.1-207.4.

The Department of Education conducted meetings with the above stakeholders on March 24, April 21, and May 25, 2011, to develop draft nutrition guidelines. The National Academy of Sciences’ Institute of Medicine’s *Nutrition Standards for Foods in Schools: Leading the Way to a Healthier Youth* was used as the basis for the nutritional standards in the proposed regulations. The IOM standards were used since it was anticipated that the U.S. Department of Agriculture (USDA) would use them in developing its own nutritional standards for competitive foods, as it was authorized to do under the 2010 federal legislation that reauthorized the federal school meal programs (Healthy, Hunger-Free Kids Act of 2010). The federal competitive food regulations were developed based on the IOM standards. Consistent with SB 414 and the core nutrition components in the IOM standards, the initially proposed Board regulations set nutritional standards for competitive foods sold to students in the areas of calorie, fat, sugar, sodium content, and foods of minimal nutritional value.

On June 28, 2013, USDA issued the interim final rule, *National School Lunch and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010 (Smart Snacks in Schools rule)*. The interim final rule amended the National School

Lunch Program and School Breakfast Program regulations to establish nutrition standards for all foods available for sale to students in schools during the school day on the school campus other than meals reimbursed under programs authorized by the Richard B. Russell National School Lunch Act and the Child Nutrition Act of 1966. These new federal regulations governing competitive foods became effective July 1, 2014. The final rule was issued by USDA in September 2016.

The initially proposed regulations for Virginia schools were presented to the Board of Education for first review on June 23, 2011. The Board accepted these proposed regulations for first review and authorized the Department of Education to proceed with the next steps of the regulatory process under the Administrative Process Act (APA), including a public comment period and a public hearing.

SB 414 required the guidelines to be periodically reviewed by the Board of Education to ensure they remain current, science-based, and consistent with any changes to the federal laws or regulations on competitive foods. In light of this requirement, and the comments received at both the public hearing conducted on October 24, 2013, and during the public comment period, the proposed regulations were reviewed and revised to align with the USDA interim and now final rule, *Smart Snacks in Schools*. Due to the significant changes in the language of the initial proposed regulations, the regulations were re-proposed and subject to the steps of the regulatory process under the Administrative Process Act (APA), including public comment.

Through HB 2114 (shown below), the 2015 General Assembly further amended Section 22.1-207.4 to allow schools to conduct up to 30 school-sponsored fundraisers that would be exempt from the nutrition standards outlined in these regulations, as allowable in the federal *Smart Snacks in Schools* regulations. The Board of Education initially implemented this amendment to the legislation by a Resolution, 2015-34, passed on November 22, 2015, pending proposing further amendments to the regulations to incorporate language governing fundraiser exemptions.

HB 2114

CHAPTER 568

An Act to amend and reenact § 22.1-207.4 of the Code of Virginia, relating to competitive foods; school-sponsored fundraisers.

[H 2114]

Approved March 23, 2015

Be it enacted by the General Assembly of Virginia:

1. That § 22.1-207.4 of the Code of Virginia is amended and reenacted as follows:

§ 22.1-207.4. Nutritional guidelines for competitive foods.

A. *For purposes of this section, "competitive food" means any food, excluding beverages, sold to students on school grounds during regular school hours that is not part of the school breakfast or school lunch program.*

B. The Board, in cooperation with the Department of Health, shall promulgate regulations setting nutritional guidelines for all competitive foods ~~sold to students during regular school hours.~~

~~B.~~C. The Board, with assistance from the Department of Health, shall periodically review the nutritional guidelines for competitive foods to ensure that they remain current and science-based and shall also review the nutritional guidelines upon changes to federal law or regulations for competitive foods.

~~C.~~ D. The regulations promulgated pursuant to this section shall include but not be limited to: calorie, fat, sugar, and sodium content.

~~For purposes of this section, "competitive food" means any food, excluding beverages, sold to students on school grounds during regular school hours that is not part of the school breakfast or school lunch program.~~

E. The regulations promulgated pursuant to this section shall permit each public school to conduct on school grounds during regular school hours no more than 30 school-sponsored fundraisers per school year, during which food that does not meet the nutrition guidelines for competitive foods may be sold to students.

Summary of Important Issues:

The language in this final stage of the regulations is updated to align with the federal *Smart Snacks in Schools* regulations governing competitive foods available to students during the school day to provide clarity and consistency in state and federal regulations. These revised regulations also incorporate the fundraising exemptions allowed by the federal regulations, mandated by the General Assembly, and initially implemented by a Board of Education resolution in November 2015. The Virginia Regulatory Town Hall Final Regulation Agency Background Document that provides additional background on the latest proposed changes to the regulations is attached. The latest proposed changes to the regulations include the following:

Section number	What has changed	Description of change	Rationale
8VAC 20-740-10	Added definitions for fundraisers, fundraising exemptions, and regular school hours.	<p>““Fundraiser” means a school-sponsored activity where food or non-food items are sold on the school campus during regular school hours by the school-sponsored organization to raise money for a school related program or activity. One fundraiser is defined as one or more fundraising activities by one or more school-sponsored organizations that last one school day.”</p> <p>““Fundraising Exemption” means an exception that allows the sale of food or beverages by a school-sponsored organization on the school campus during regular school hours that do not meet the nutrition standards established in this regulation and items that do not meet the United States Department of Agriculture’s <i>Smart Snacks in Schools</i> regulation. Fundraisers that sell non-food items, or that sell foods or beverages that meet the nutrition standards, are not subject to these regulations.”</p> <p>““Regular school hours” means the standard school day, as defined in 8VAC20-131-5, except, for the purpose of fundraiser exemptions, breaks for meals and recess are included in the regular school hours.”</p>	Required by legislation to include fundraisers.
8VAC 20-740-20	Applicability: D.4. was expanded to address the exempt fundraisers.	“...for exempt fundraisers as outlined in section 8VAC20-740-40 of this regulation.”	Required by legislation to include fundraisers.

Section number	What has changed	Description of change	Rationale
8VAC 20-740-40	Moved Implementation and Compliance to a new section 8VAC 20-740-50 to insert a new section at 8VAC 20-740-40 - Exemptions to the Nutrition Standards for School-sponsored Fundraisers.	<p>This change was to renumber a previously existing section of the regulations and to insert a new section of regulations to address exemptions for school-sponsored fundraisers.</p> <p>“Fundraisers</p> <p>A. Each public school shall be permitted to conduct, on the school campus during regular school hours, no more than 30 school-sponsored fundraisers per school year during which food or beverages that do not meet the nutrition guidelines in these regulations or in the USDA regulations may be sold to students. School divisions are not required to allow exemptions to these nutrition standards for school-sponsored fundraisers and may implement more restrictive guidelines as part of the local wellness policy requirements outlined in 8VAC 20-740-50 A.</p> <p>B. One fundraiser is defined as one or more fundraising activities that last one school day. If multiple school-sponsored organizations conduct fundraisers on the same day, the combined activities shall be counted as one fundraiser. If a fundraising activity lasts more than one school day, each subsequent day’s activity shall be considered as one fundraiser and shall count toward the 30 exempt fundraisers total per year.</p> <p>C. Any fundraiser that sells food or beverages, whether the items meet the nutrition standards or are exempt from the nutrition standards, may not be conducted during school meal service times. Pursuant to current Board of Education regulations for the School Breakfast Program (8VAC20-580-10 et seq.) and the Regulations Governing School Lunch Sale of Food Items (8VAC20-290-10), any food or beverage items cannot be sold in competition with the National School Lunch Program and School Breakfast Program from 6 a.m. until after the close of the last breakfast period and from the beginning of the first lunch period to the end of the last lunch period. Pursuant to these regulations, the income from any food or beverage sold to students during these times shall accrue to the non-profit School Nutrition Program account.</p> <p>D. An exemption is not required for non-food fundraisers or for fundraisers that sell food or beverage items that meet the nutrition standards.”</p>	Required by legislation to include fundraisers.
8VAC 20-740-50	Added two sentences related to implementation of the fundraiser exemptions.	<p>LEAs “c. shall be responsible for maintaining records each school year documenting the number of exempt fundraisers conducted at each school within the LEA.”</p> <p>The Department “... shall provide guidance to schools on alternative school-sponsored fundraisers that do not involve the sale of foods or beverages to students and guidance on how to determine if foods and beverages sold at school-sponsored fundraisers meet these standards.”</p>	Required by legislation to include fundraisers.

Impact on Fiscal and Human Resources:

It is anticipated that the adopted regulations will impact all school divisions 1) administratively, as they will be required to adopt the new nutritional guidelines as part of their required local wellness policies and maintain records documenting compliance with the competitive food nutrition standards and the fundraiser exemptions; and 2) possibly financially, as they change the food offerings on the school campus during the regular school day to meet the regulatory requirements. Local staff time will be required in implementing and monitoring the proposed requirements for school-sponsored fundraisers. The impact on the Department of Education to develop and implement these regulations is not expected to be significant and can be accomplished with existing staff. The Department is required to provide ongoing staff support and technical assistance to school divisions in the implementation and monitoring of these regulations.

Timetable for Further Review/Action:

The final review is planned for the November 17, 2016, meeting. The timetable for further action on these regulations is governed by the requirements of the Administrative Process Act.

Superintendent's Recommendation:

The Superintendent of Public Instruction recommends the Board of Education accept for first review the proposed amendments to the Regulations Governing Nutritional Guidelines for Competitive Foods Available for Sale in the Public Schools (Final Stage).

CHAPTER 740

REGULATIONS GOVERNING NUTRITIONAL STANDARDS FOR COMPETITIVE FOODS

AVAILABLE FOR SALE IN THE PUBLIC SCHOOLS

8VAC20-740-10. Definitions.

"A la carte item" means an individually priced food item served by the local school nutrition department that may or may not be part of the reimbursable meal under the federal Child Nutrition Programs.

"After school activities" means activities that occur on the school campus after the school day.

"Beverage" means a drinkable liquid.

"Calorie" means the amount of heat required to change the temperature of one gram of water from 14.5 degrees Celsius to 15.5 degrees Celsius. Calorie is used synonymously with kilocalorie as a unit of measure for energy obtained from food and beverages.

"Child Nutrition Programs" means school meal programs funded and regulated by the U.S. Department of Agriculture (USDA) and includes the National School Lunch Program (NSLP), School Breakfast Program (SBP), Afterschool Snack Programs (ASP), Child and Adult Care Food Program (CACFP), Summer Food Service Program (SFSP), and Special Milk Program (SMP).

"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.

"Competitive food" means all food available for sale to students on the school campus during the school day other than meals reimbursed under programs authorized by the Richard B. Russell National School Lunch Act (42 USC § 1751 et seq.) and the Child Nutrition Act of 1966 (42 USC § 1771 et seq.) .

Competitive food includes all foods available for sale to students:

1. In school cafeterias as a la carte items.

2. In vending machines located on the school campus during the school day.
3. As fundraisers held on the school campus during the school day.
4. In school snack bars on the school campus during the school day.
5. In school stores operated on the school campus during the school day by the school, a student association, or other school-sponsored organization.
6. At school activities such as special fundraisers, achievement rewards, classroom parties, school celebrations, classroom snacks, or school meetings held on the school campus during the school day.
7. In culinary education programs where food prepared as part of the educational curriculum is sold to students; however, this provision does not apply if food is sold to adults only.

This term does not apply to food a student brings from home for consumption at school or items available for sale to adults only in areas not accessible to students (e.g., teachers lounges).

"Dietary Guidelines for Americans" means guidelines jointly issued by the U.S. Department of Health and Human Services and U.S. Department of Agriculture and revised every five years and that provide authoritative advice based on current scientific evidence and medical knowledge for people two years of age and older about how good dietary habits can promote health and reduce risk for major chronic diseases.

"Entree item" means an item that is either (i) a combination food of meat or meat alternate and whole grain rich food; (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 (e.g., dried beef jerky).

["Fundraiser" means a school-sponsored activity where food or non-food items are sold on the school campus during regular school hours by the school-sponsored organization to raise money for a school-related program or activity. One fundraiser is defined as one or more fundraising activities by one or more school-sponsored organizations that last one school day.]

"Fundraising Exemption" means an exception that allows the sale of food or beverages by a school-sponsored organization on the school campus during regular school hours, that do not meet the nutrition standards established in this regulation and items that do not meet the United States Department of Agriculture's Smart Snacks in Schools regulation. Fundraisers that sell non-food items, or that sell foods or beverages that meet the nutrition standards, are not subject to these regulations.]

"Obesity" means obesity in children and adolescents referring to the age-specific and sex-specific body mass index (BMI) that is equal to or greater than the 95th percentile of the BMI charts of the Centers for Disease Control and Prevention (CDC).

["Regular school hours" means the standard school day, as defined in 8VAC20-131-5, except for the purpose of fundraiser exemptions, breaks for meals and recess are included in the regular school hours.]

"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.

"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.

"School food authority" or "SFA" means, under the federal child nutrition laws, the entity that is legally responsible for the operations and administration of the local school nutrition programs (i.e., school division).

"Trans fat" means food items containing vegetable shortening, margarine, or any partially hydrogenated vegetable oil unless the label required on the food, pursuant to applicable federal and state law, lists the trans fat content as zero grams per serving.

"Wellness policy" means a policy required for public schools participating in a nutrition program authorized by the Richard B. Russell National School Lunch Act (42 USC § 1751 et seq.) or the Child Nutrition Act of 1966 (42 USC § 1771 et seq.) that meets minimum standards designed to support school environments that promote student wellness.

"Whole grains" means grains that are made with enriched and whole grain meal or flour in accordance with the most recent grains guidance from the U.S. Department of Agriculture Food and Nutrition Service.

"Whole-grain rich" means products that contain at least 50% whole grains and the remaining grains in the product must be enriched.

8VAC20-740-20. Applicability.

A. This chapter shall apply to all public school divisions, public schools, and public school food authorities (SFAs) in the Commonwealth of Virginia.

B. This chapter shall not apply to beverages.

C. This chapter shall apply to the nutritional content of food items available for sale to students on the school campus of any public school and other public SFAs such as residential childcare institutions, during the school day. It shall apply to:

1. Foods available for sale to students in vending machines.
2. Foods available for sale to students as a la carte items in the school cafeteria.
3. Foods available for sale to students at snack bars and stores operated by the school, a student association, or other school-sponsored organization.
4. Foods available for sale to students at school activities such as fundraisers.
5. Foods available for sale to students by culinary or other educational programs.

D. This chapter shall not apply to the nutritional content of foods:

1. Provided as meals reimbursed under programs authorized by the Richard B. Russell National School Lunch Act (42 USC § 1751 et seq.) and the Child Nutrition Act of 1966 (42 USC § 1771 et seq.).
2. Available for sale at snack bars, concession stands, or athletic events after the school day.

3. Available for sale either during intermission or immediately before or after athletics events scheduled after the school day.
4. Available for sale for school-related fundraising activities that take place off the school campus or [for exempt fundraisers as outlined in section 8VAC20-740-40 of this regulation.]
5. Available for sale during activities that take place after the school day, such as clubs, yearbook, band and choir practice, student government, drama, sports practices, interscholastic sporting events, school plays, and band concerts.
6. Available for sale to adults only in areas not accessible to students.

E. The requirements of this chapter supplement 8VAC20-290 and 8VAC20-580, which remain in effect.

8VAC20-740-30. Nutrition standards.

A. The nutrition standards apply to all foods available for sale to students (i) outside the school meal programs; (ii) on the school campus; and (iii) at any time during the school day. The nutrition standards shall be consistent with the most recent Dietary Guidelines for Americans.

B. To be allowable, a competitive food must (i) meet all of the competitive food nutrient standards and (ii) must either:

1. Be a grain product that contains 50% or more whole grains by weight or have as the first ingredient a whole grain (i.e., whole-grain rich);
2. Have as the first ingredient one of the nongrain major food groups: fruits, vegetables, dairy, or protein foods (e.g., meat, beans, poultry, seafood, eggs, nuts, seeds, etc.);
3. Be a combination food that contains 1/4 cup of fruit or vegetable; or
4. ~~Contain 10% 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) for~~

the period through June 30, 2016. Effective July 1, 2016, this criterion is obsolete and may not be used to qualify as a competitive food.

If water is the first ingredient, the second ingredient must be one of the food items listed in this subsection.

C. General exemptions:

1. Fresh, canned, and frozen fruits or vegetables with no added ingredients except water or, in the case of fruit, packed in 100% juice, extra light, or light syrup are exempt from the nutrient standards.
2. Canned vegetables that contain a small amount of sugar for processing purposes are also exempt from the nutrient standards.
3. An entree item offered as part of the national school lunch program under 7 CFR Part 210 or the school 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 entree 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 a la carte must meet the nutrition standards in this section.

D. 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 the nutrition standards for competitive food. The contribution of the accompaniments may be based on the average serving size of the accompaniment used per item.

E. Nutrient standards:

1. Standard 1: Calories.

a. Snack items and side dishes sold a la carte (i) shall be no more than 200 calories per item as served or as packaged, including the calorie content in any accompaniments, such as butter, cream cheese, and salad dressing, and (ii) must meet all other nutrient standards .

b. Entree items sold a la carte, unless the entree item meets the exemption for NSLP/SBP entree items in subdivision C 3 of this section, shall (i) contain no more than 350 calories, including the calorie content of any accompaniments, per item as served or as packaged, and (ii) meet all of the other nutrient standards in this section.

c. The calories contained in any accompaniments must be included in the nutrient profile as a part of the item served.

2. Standard 2: Fat.

a. Total fat. Competitive foods shall contain no more than 35% of total calories from fat per item as packaged or served. Exemptions to the total fat standard are granted for:

(1) Reduced fat cheese and part-skim mozzarella cheese. This exemption does not apply to combination foods.

(2) Nuts, seeds, and nut or seed butters. This exemption does not apply to combination foods that contain nuts, seeds, or nut or seed butters, such as peanut butter and crackers and trail mix.

(3) Products consisting of only dried fruit with nuts or seeds with no added nutritive sweeteners or fat.

(4) Seafood with no added fat.

b. Saturated fat. Competitive foods shall have less than 10% of total calories from saturated fat per item as packaged or served. Exemptions to the saturated fat standard are granted for:

(1) Reduced fat cheese and part-skim mozzarella cheese. This exemption does not apply to combination foods.

(2) Nuts, seeds, and nut or seed butters. This exemption does not apply to combination foods that contain nuts, seeds, or nut or seed butters, such as peanut butter and crackers and trail mix.

(3) Products consisting of only dried fruit with nuts or seeds with no added nutritive sweeteners or fat.

c. Trans fat. Competitive foods must have zero grams of Trans fat per item as packaged or served.

3. Standard 3: Sugar. Total sugar shall be no more than 35% of weight per item as packaged or served. Exemptions to the sugar standard are provided for:

a. Dried whole fruits or vegetables.

b. Dried whole fruit or vegetable pieces.

c. Dehydrated fruits or vegetables with no added nutritive sweeteners.

d. Dried fruits with nutritive sweeteners that are required for processing or palatability purposes.

4. Standard 4: Sodium.

a. Sodium content in snacks (i) shall be no more than ~~230~~ 200 mg per item as packaged or served, including the sodium content in any accompaniments, such as butter, cream cheese, and salad dressing; and (ii) must meet all other nutrient standards. ~~[Effective July 1, 2016, the sodium standard shall be no more than 200 mg per item as packaged or served, including the sodium content in any accompaniments]~~

b. Entree items sold a la carte, unless the entre item meets the exemption for NSLP/SBP entree items in subdivision C 3 of this section (i) shall have no more than 480 mg of sodium

per item as packaged or served, including the sodium content in any accompaniments, such as butter, cream cheese, and salad dressing; and (ii) must meet all other nutrient standards in this section.

8VAC20-740-40. Exemption to the Nutrition Standards for School-Sponsored Fundraisers

A. Each public school shall be permitted to conduct, on the school campus during regular school hours, no more than 30 school-sponsored fundraisers per school year during which food or beverages that do not meet the nutrition guidelines in these regulations or in the USDA regulations may be sold to students. School divisions are not required to allow exemptions to these nutrition standards for school-sponsored fundraisers and may implement more restrictive guidelines as part of the local wellness policy requirements outlined in 8VAC 20-740-50 A.

B. One fundraiser is defined as one or more fundraising activities that last one school day. If multiple school-sponsored organizations conduct fundraisers on the same day, the combined activities shall be counted as one fundraiser. If a fundraising activity lasts more than one school day, each subsequent day's activity shall be considered as one fundraiser and shall count toward the 30 exempt fundraisers total per year.

C. Any fundraiser that sells food or beverages, whether the items meet the nutrition standards or are exempt from the nutrition standards, may not be conducted during school meal service times. Pursuant to current Board of Education regulations for the School Breakfast Program (8VAC20-580-10 et seq.) and the Regulations Governing School Lunch Sale of Food Items (8VAC20-290-10), any food or beverage items cannot be sold in competition with the National School Lunch Program and School Breakfast Program from 6 a.m. until after the close of the last breakfast period and from the beginning of the first lunch period to the end of the last lunch period. Pursuant to these regulations, the income from any food or beverage sold to students during these times shall accrue to the non-profit School Nutrition Program account.

D. An exemption is not required for non-food fundraisers or for fundraisers that sell food or beverage items that meet these nutrition standards.

8VAC20-740-[40-50]. Implementation and compliance.

A. Each local school board shall incorporate and adopt the nutrition standards in this chapter as a compulsory component of the divisionwide local wellness policy mandated by federal regulation for all local education agencies that participate in the national school lunch program. In addition to incorporating the nutrition standards for competitive foods, the local wellness policy shall (i) establish and identify school division leadership with the authority to enforce the local wellness policy throughout the school campus; (ii) establish specific goals for nutrition promotion, nutrition education, physical activities, and other school-based activities that promote wellness; and (iii) establish policies that address marketing and advertising of only foods that meet the nutrition standards for competitive foods, serve to promote student health, prevent childhood obesity, and combat problems associated with poor nutrition and physical inactivity .

B. Local educational agencies and school food authorities must retain the records used to document compliance with this chapter; that is, the documentation used to assess the nutritional profile of the food item and determine whether a food item is an allowable competitive food (e.g., the nutrition labels, recipes, or product specifications).

1. Local educational agencies:

a. Shall be responsible for maintaining records documenting compliance with the competitive food nutrition standards for food available for sale in areas that are outside of the control of the school nutrition programs operation.

b. Shall be responsible for ensuring any organization or school activity designated as responsible for food service at the various venues in the school (other than the school nutrition programs) maintains records documenting compliance with the competitive food nutrition standards.

[c. shall be responsible for maintaining records each school year documenting the number of exempt fundraisers conducted at each school within the LEA.]

~~[e-d.]~~ Shall designate an individual at the division or school level to monitor and ensure compliance with this chapter in all areas that are outside the control of the school nutrition programs operation. This designee shall not be school nutrition personnel.

2. The school food authority shall be responsible for maintaining records for foods served under the auspices of the nonprofit school nutrition programs account.

3. The Department of Education shall ensure that the local education agencies and school food authorities comply with these nutrition standards and shall provide guidance to schools on alternative school-sponsored fundraisers that do not involve the sale of foods or beverages to students and guidance on how to determine if foods and beverages sold at school-sponsored fundraisers meet these standards. Noncompliance determined by the local education agency, school food authority, or Department of Education shall require corrective action.



Final Regulation Agency Background Document

Agency name	BOARD OF EDUCATION
Virginia Administrative Code (VAC) citation(s)	<u>8 VAC 20-740</u>
Regulation title(s)	REGULATIONS GOVERNING NUTRITIONAL GUIDELINES FOR COMPETITIVE FOODS AVAILABLE FOR SALE IN THE PUBLIC SCHOOLS
Action title	To establish nutritional guidelines for all foods available for sale to students on the school campus of any public school, and other public School Food Authorities such as Residential Child Care Institutions, during the school day other than meals reimbursed under programs authorized by the Richard B. Russell National School Lunch Act and the Child Nutrition Act of 1966 (National School Lunch and School Breakfast Programs); to update the BOE regulations to incorporate language for fundraiser exemptions to the nutrition standards as required by legislation and Board of Education Resolution 2015-34.
Date this document prepared	09/09/2016

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

In this final stage of the re-proposed regulations (8 VAC 20-740), updates were made to incorporate comments from the public comment period and the public hearing. The initial legislation requiring this regulation (SB 414,

2010) specified that these nutrition guidelines be periodically reviewed by the Board of Education to ensure they remain current, science-based, and consistent with any change to the federal laws or regulations on competitive foods. In 2015, the Virginia General Assembly passed legislation that amended the original SB 414 to allow public schools to conduct no more than 30 school-sponsored fundraisers per school year on the school campus, during regular school hours that would be exempt from the standards in the regulations. This 2015 legislation was initially implemented by a Board of Education Resolution because the regulations were still in the APA process. In light of the comments received at the public hearing and during the public comment period, and with the continued implementation of the U.S. Department of Agriculture (USDA) final rule governing competitive foods in schools, *National School Lunch and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010 (Smart Snacks in Schools rule)*, the re-proposed regulations were reviewed and updated to align with the USDA rule and to incorporate the fundraiser exemptions as required by HB 2114.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

There are no acronyms or technical terms that are not also defined in the definitions section of the regulations.

Statement of final agency action

Please provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

First Review by the Virginia Board of Education October 27, 2016.

Title: **Regulations Governing Nutritional Standards for Competitive Foods Available For Sale in the Public Schools (8VAC 20-740-10-50)**

Legal basis

Please identify the (1) the agency (includes any type of promulgating entity) and (2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

Legal authority: SB 414 (2010) enacted on April 13, 2010, as Chapter 718 and codified as Section 22.1-207.4, *Code of Virginia*, HB 2114 (2015) enacted on March 23, 2015, as Chapter 568 and codified in Section 22.1-207.4, *Code of Virginia*.

Promulgating entity: Board of Education in cooperation with the Department of Health

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The regulations are required to be developed by statute (Section 22.1-207.4).

Additionally, rising rates of obesity in children have become a major health concern, because of both the impact on childhood health and the potential effect on the development of chronic disease in adulthood. In response to this growing concern, attention has focused on the need to establish nutrition standards for foods in schools. Federal regulations governing the National School Lunch Program and the School Breakfast Program establish nutrition standards for school meals that must be implemented. Federal regulations also require every school division to have a local wellness policy that addresses nutrition and physical activity. The content and implementation requirements for these local wellness policies have recently been updated to require more rigor, ongoing evaluation, updating and posting for the public. These final Board of Education regulations require each local school board to adopt the state nutrition guidelines as part of their local wellness policies. This would strengthen the local wellness policies and help to address factors that impact childhood obesity while increasing the nutritional quality of foods offered in the school setting.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both.

The language in the final re-proposed regulations is updated to align with changes in the federal regulation governing competitive foods in schools to provide clarity and consistency and avoid having different sets of regulations that school divisions would be required to follow and to incorporate the Virginia legislation that allows for exemptions to the nutrition standards for up to 30 school-sponsored fundraisers.

- 8VAC 20-740-10 - Definitions: Added definitions for fundraisers, fundraiser exemptions, and regular school hours.
- 8VAC 20-740-20 - Applicability: D.4. was expanded to address the exempt fundraisers.
- 8VAC 20-740-30 - Nutrition Standards: deleted wording that allowed for phasing of some of the standards through July, 2016 as this date has passed and these standards have been enacted.
- 8 VAC 20-740-40 – Moved Implementation and Compliance to a new section 8VAC 20-740-50 and inserted a new section at 8VAC 20-740-40 - Exemptions to the Nutrition Standards for School-Sponsored Fundraisers.
- 8 VAC 20-740-50 - added two sentences to address the fundraiser exemptions.

Issues

Please identify the issues associated with the proposed regulatory action, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.

Advantages will be healthier food options for all public school children. This may have a long-term effect on health and well-being, improve academic performance, and reduce health risks. Healthier food choices at school may also serve to increase consumption of healthier food options at home. Nutritional standards for competitive foods will complement the federal school meal nutrition standards for an overall healthier eating environment in schools. Additionally, the rising rate of childhood obesity has become a major health concern, because of both its impact on childhood health and as a contributing factor to the development of chronic disease in adulthood. In response to this growing concern, attention has focused on the need to establish nutrition standards for foods in schools by offering healthier food options on school grounds. From a nutritional perspective, the goal is to increase the consumption of whole grains, fruits, vegetables, and nonfat or low-fat dairy, and to reduce fat, sugars, and sodium. Federal regulations governing the National School Lunch Program and School Breakfast Program established updated nutrition standards for school meals in 2012 and strengthened federal nutrition standards governing competitive foods effective July 1, 2014.

Statewide nutritional guidelines for competitive foods available for sale to students during the school day on the school campus would strengthen the local wellness policies and help address some of the factors that impact childhood obesity, and increase the nutritional quality of foods offered in the school setting.

Fundraisers exempt from meeting the nutrition standards required for all of the school nutrition programs and any other foods available for sale may present conflicting messages to students and could lead to unhealthy food options being available to students on the school campus during the regular school day.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

No requirements of this regulation exceed federal requirements. These regulations align with federal regulations.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

The adopted regulations would apply to all public school divisions, public schools, and other public school food authorities (SFAs) in the Commonwealth of Virginia.

Family impact

Please assess the impact of this regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.,

This regulation could have a positive impact on families by educating children about healthier food options available at school. It may also help to address both the childhood obesity issue and the childhood hunger issue.

Changes made since the proposed stage

*Please list all changes that made to the text of the proposed regulation and the rationale for the changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. *Please put an asterisk next to any substantive changes.*

Section number	Requirement at proposed stage	What has changed	Rationale for change
8VAC 20-740-10 - Definitions:		Added definitions for fundraisers, fundraiser exemptions, and regular school hours.	Required by legislation to include fundraisers.
8VAC 20-740-20		Applicability: D.4. was expanded to address the exempt	Required by legislation to include fundraisers.

		fundraisers.	
8VAC 20-740-30		Nutrition Standards: deleted wording that allowed for phasing in of some of the standards through July 2016, as that date has passed and the standards have been enacted.	Rationale: The date has passed, the Federal regulations have been enacted, and the language was updated to align with the legislative changes.
8VAC 20-740-40		Moved Implementation and Compliance to a new section 8VAC 20-740-50 to insert a new section at 8VAC 20-740-40 - Exemptions to the Nutrition Standards for School-sponsored Fundraisers.	Required by legislation to include fundraisers.
8VAC 20-740-50		Added two sentences related to implementing the fundraiser exemptions.	Required by legislation to include fundraisers.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate. Please distinguish between comments received on Town Hall versus those made in a public hearing or submitted directly to the agency or board.

Commenter	Comment	Agency response
School Nutrition Association of Virginia	<p>The School Nutrition Association of Virginia would like to express our support for the proposed regulations. We represent over 1,700 members who provide high quality, affordable, nutritious meals to students across the Commonwealth. The SNA-VA was one of the stakeholder groups who worked on the “Healthy Snacks” legislation in 2010 and served on the advisory group that helped craft these regulations. We appreciate being included in this process and strongly support the purpose of the proposed regulations.</p> <p>We previously submitted comments in support of the regulations in October 2013. We understand that the proposed regulations must be amended in order to comply with legislation passed during the 2015 legislative session. HB 2114 will allow up to 30 fundraisers per school to be exempt from the regulations. SNA-VA did not support this legislation and we are deeply concerned about the effect this law will have on students’ health and well-being. However, we understand that the Board of Education is obligated to amend the regulations to comply with this law. While the language that will exempt fundraisers has not been added yet at this point in the process, the SNA-VA would like to give our input regarding the potential new language. We respectfully request that the Board of Education do the following:</p> <ul style="list-style-type: none"> • Provide clarification that it is optional to exempt up to 30 fundraisers. Individual school divisions may still enforce 	Thank you for the response. The Agency will consider the recommended language for defining fundraisers.

	<p>their own policies and not exempt any fundraisers.</p> <ul style="list-style-type: none"> •Provide clarity on the timeframe of the fundraisers. SNA-VA requests that a fundraiser be considered to last one academic school day. Therefore, a fundraising activity that lasts two weeks would count as 10 fundraisers, not just one fundraiser. •Provide guidance to schools on alternative fundraisers that do not involve the sale of unhealthy foods to students. <p>Thank you for the opportunity to submit comments. We look forward to remaining engaged in the process and will provide comments again once the regulations are revised to reflect the 2015 legislation.</p>	
<p>Prince Edward County Public Schools Food Service Department</p>	<p>I am in support of the proposed regulations but I have some concerns on HB 2114. This bill allows up to 30 fundraisers per school to be exempt from the regulations.</p> <p>Clarification is needed on the timeframe of the fundraisers. Can one fundraiser last a whole year? I request that a fundraiser be no longer than one week and count as 5 fundraisers.</p> <p>Encourage school divisions to use alternative fundraisers that do not involve the sale of food. Make half of all fundraisers during the school year be nonfood sales.</p> <p>Thanks you for the opportunity to submit comments.</p>	<p>Thank you for the response. The Agency will clarify the definition of fundraisers.</p>
<p>Wilfrid Nixon, Salt Institute</p>	<p>In the Purpose, section of this re-proposed regulation, you state “Section 22.1-207.4 requires the development and implementation of regulations regarding nutritional guidelines. In addition, the rising rate of obesity in children has become a major health concern, both because of its impact on childhood health and its potential effect on the development of chronic disease in adulthood.” However, there is no evidence to suggest that obesity is in any way caused by excessive ingestion of sodium. If anything, the opposite is true.</p> <p>Although certainly not a primary cause, the continued promotion of salt reduction found in the recommendations in the <i>Dietary Guidelines</i> and the anticipated call by the FDA for voluntary salt reductions in food products will likely worsen, not improve, the ongoing obesity crisis because people will consume more calories just to satisfy their innate salt appetite.</p> <p>In conclusion, the scientific evidence is clear that sodium intake in the US is toward the low end of the safe range, and thus attempts to restrict sodium intake are unnecessary. Further, there is evidence</p>	<p>Thank you for your comments. Sodium standards will not be removed for this regulation as it aligns with the Federal regulations that include sodium as one of the nutrition standards.</p>

	that there is a “salt appetite” that needs to be satisfied by humans, and so reducing the levels of sodium in foods would only result in students in the schools eating more food, thus perhaps contributing to the very issue of obesity which these regulations purport to address. We would therefore again urge most strongly that you remove Standard 4: Sodium from the four nutritional standards proposed in regulation 8VAC20-740	
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All changes made in this regulatory action

Please list all changes that are being proposed and the consequences of the proposed changes. Describe new provisions and/or all changes to existing sections. Explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
None	<u>8VAC20-740-10. Definitions</u>		Added new definitions for fundraiser, fundraiser exemptions and regular school hours. Rationale: to incorporate legislative changes.
	<u>8VAC20-740-20. Applicability sections D.4.</u>		Included language to address the fundraiser exemptions. Rationale: to incorporate legislative changes.
	<u>8VAC20-740-30. Nutrition standards</u>		Updated information related to the phasing in of some standards by July 1, 2016. Rationale: The date has passed and the Federal regulations have been enacted and to incorporate legislative changes.
	<u>8VAC20-740-40. Exemption to the Nutrition Standards for School Sponsored Fundraisers</u>		New section to address fundraisers. Rationale: to incorporate legislative changes
	<u>8VAC20-740-50. Implementation and compliance</u>		Renumbered section to 50. Added language for fundraiser exemptions. Rationale: to incorporate legislative changes.