EXPLANATORY MEMORANDUM TO

THE FOOD (PROMOTION AND PLACEMENT) (ENGLAND) (AMENDMENT) REGULATIONS 2023

2023 No. 949

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 The purpose of this instrument is to amend the Food (Promotion and Placement) (England) Regulations 2021 to enact a two-year delay to the implementation of the 'volume price promotion restrictions' which were due to come into force on 1 October 2023. The delay was in light of higher than expected global energy and goods prices following the pandemic which have already led to an unavoidable increase in the cost of living around the world. The delay will support businesses and allow them to focus on making food more affordable and making it easier for consumers to make healthier choices.

2.2 The Food (Promotion and Placement) (England) Regulations 2021 restricts the promotion of high fat, sugar or salt (HFSS) products by location and volume price, in medium and large businesses (50 or more employees) that sell food or drink in England. The location restrictions apply to store entrances, aisle ends, checkouts and their online equivalents. The volume price promotion restrictions will prohibit medium and large businesses that sell food or drink in England offering promotions such as "buy-one-get-one-free" or "3 for 2" offers on HFSS products.

2.3 This instrument only amends the implementation date of the volume price promotion restrictions. This instrument does not amend the implementation date of the location restrictions which came into force on 1 October 2022.

2.4 This instrument will come into force on 30 September 2023.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation no statement is required.

6. Legislative Context

6.1 This instrument is being made to delay the implementation on the volume price promotion restrictions by two years, so that they will come into force on 1 October 2025.

6.2 The Food (Promotion and Placement) (England) Regulations 2021 were made to restrict the promotion of HFSS food and drink in favour of healthier options to help reduce the overconsumption of HFSS products in children and reduce children's sugar and calorie intakes. The regulations were due to come into force on 1 October 2022

6.3 On 16 May 2022 DHSC announced to Parliament that the implementation of the volume price promotion restrictions part of the Regulations would be delayed by twelve months, so that they would come into force on 1 October 2023. This was due to the unprecedented global economic situation. Food (Promotion and Placement) (England) (Amendment) Regulations 2022 was used to implement this delay.

6.4 The location restrictions were unaffected by the announcement and came into force on 1 October 2022.

6.5 In accordance with the requirements set out in section 48(4) of the Food Safety Act 1990 the Secretary of State consulted with stakeholders including industry trade bodies, organisations (non-governmental organisations and charities) and enforcement officers from 14 July to 28 July 2023.

6.6 In accordance with the requirements set out in section 48(4A) of the 1990 Act, the Secretary of State sought advice from the Food Standards Agency as to the proposed legislative change. The Food Standards Agency confirmed that it has no relevant advice.

7. Policy background

What is being done and why?

7.1 This instrument is being made to delay the implementation date of the volume price promotion restrictions by two years, to October 2025. The volume price promotion restrictions were due to come into force on 1 October 2023 as part of the Food (Promotion and Placement) (England) Regulations 2021. This delay is in light of higher than expected global energy and goods prices following the pandemic which have already led to an unavoidable increase in the cost of living around the world. The delay will support businesses and allow them to focus on making food more affordable and making it easier for consumers to make healthier choices.

Explanations

What did any law do before the changes to be made by this instrument?

7.2 The Food (Promotion and Placement) (England) Regulation 2021 aims to reduce excess purchases and therefore overconsumption of HFSS products that contribute significant sugar and calories to children's diets and are heavily promoted, and therefore are of most concern for childhood obesity. The Regulations restrict the promotion of HFSS products by location and volume price as follows:

Location restrictions apply to store entrances, aisle ends, checkouts and their online equivalents (entry pages, landing pages for other food categories, and shopping baskets or payment pages).

Volume price restrictions will prohibit retailers from offering promotions such as "buy-one-get-free" or "3 for 2" offers on HFSS products. The restrictions will also apply to free refills of sugar sweetened drinks in the out-of-home sector (for example restaurants and coffee shops).

7.3 The Regulations apply to medium and large businesses (with 50 or more employees) including franchise and symbol groups. Micro and small businesses (fewer than 50 employees) are exempt from the restrictions. Stores that are smaller than 185.8 square metres (2,000 square feet) (even if they are part of a medium or large business) are exempt from the location restrictions. Specialist retailers that mainly sell only one type of food product category, for example chocolatiers or sweet shops are exempt from the location restrictions.

7.4 There is a two-stage approach to determine if a product is HFSS. First, products will need to fall into a list of categories, which is listed in schedule 1 of the Food (Promotion and Placement) (England) Regulations 2021. The 2004/5 Nutrient Profiling Model is then applied to the product, if it scores 4 or more for food or 1 or more for drinks then it cannot be promoted.

7.5 The location restrictions came into force on 1 October 2022.

7.6 The volume price promotion restrictions were due to come into force on 1 October 2023.

Why is it being changed?

7.7 On 20 June 2023 DHSC announced to Parliament the intention to delay the implementation of the volume price promotion restrictions by two years. This delay is in light of higher than expected global energy and goods prices following the pandemic which have already led to an unavoidable increase in the cost of living around the world. The delay will support businesses and allow them to focus on making food more affordable and making it easier for consumers to make healthier choices.

What will it now do?

7.8 This instrument will delay the implementation date of the volume price promotion restrictions by two years. The volume price promotion restrictions are due to come into effect from 1 October 2023 as part of the Food (Promotion and Placement) (England) Regulations 2021. The volume price promotions restrictions will therefore come into effect from 1 October 2025, as a result of this amending instrument. This instrument does not change the implementation date of the rest of the Regulations (including the location restrictions), which came into effect on 1 October 2022.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This instrument does not involve consolidation and there are no plans to consolidate the relevant legislation at this time.

10. Consultation outcome

10.1 The Secretary of State consulted in accordance with Section 48(4) of the Food Safety Act.

10.2 A consultation on this instrument was conducted between 14 July 2023 and 28 July 2023. The consultation was sent to stakeholders including industry trade bodies, organisations (non-governmental organisations and charities) and enforcement officers. The consultation sought views on the proposed text of this instrument. The consultation received 7 responses including from organisations that represent over 50 health organisations and industry trade bodies that represent manufacturers and retailers.

10.3 The consultation sought specific views and proposed changes to this instrument. All proposed changes were considered in light of ensuring this instrument serves the intended purpose of delaying the implementation of the volume price promotion restrictions.

10.4 Several of the responses noted that no new Impact Assessment was produced for this instrument. This was deemed unnecessary as this instrument only delayed the implementation date of the volume price promotion restrictions and the existing Impact Assessment was therefore still relevant.

10.5 Some of the proposed changes were either not procedurally possible or inappropriate to include, such as the inclusion of a 'backstop' to ensure that the volume price promotion restrictions came into force in October 2025 or the use of affirmative procedure to lay this instrument.

10.6 A further proposed change suggested removing the 12-month transition period of on pack promotions, which commences from when the volume price promotion restrictions comes into force. The original policy intention of the transition period was to avoid food wastage. This was considered to still be relevant and therefore it was concluded that no change was needed to the transition period.

10.7 Some of the responses went beyond the scope of the consultation and were therefore discounted.

10.8 As a result of the consultation, it was concluded that none of the proposed changes were required to ensure that this instrument enacted the desired change of delaying the volume price promotion restrictions.

11. Guidance

11.1 Guidance to support businesses and local authorities to implement the requirements of the Regulations was published on 6 April 2022 and can be found on the gov.uk website.[1]

11.2 We will update the guidance to reflect this instrument and the 1 October 2025 commencement date of the volume price promotion restrictions.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

[1] https://www.gov.uk/government/publications/restricting-promotions-of-products-high-in-fat-sugar-or-salt-by-location-and-by-volume-price/restricting-promotions-of-products-high-in-fat-sugar-or-salt-by-location-and-by-volume-price-implementation-guidance

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because this instrument is being made only to delay the implementation date of the volume price promotion restrictions by two years.

12.4 A full Impact Assessment for the Regulations has been produced and is published on the gov.uk website.[2] This instrument only delays the implementation date of the volume price promotion restrictions rather than the policy of the Regulations. A new impact assessment therefore did not need to be produced.

12.5 The volume price promotions restrictions are estimated to have a significant value of associated health benefits. The Net Present Value over a 25-year period for the volume price promotion restrictions is expected to be £2.9 billion due to the reduction in calories consumed. Costs associated with the restrictions are expected to be £149 million over 25 years. The costs of obesity to individuals, society and the NHS are significant and the benefits from reducing the calorie intake across the population are therefore substantial.

12.6 This instrument will enact a two-year delay to the volume price promotion restrictions. As a result, the full impact of the benefits and costs of the restriction will take an additional two years to start accruing, three years in total. This includes the health benefits associated with this policy. Businesses may benefit from the additional time to plan and implement the volume price promotion restrictions and the delay to the costs associated with the implementation of the restrictions. Costs to the public sector of enforcing the policy will also be delayed by an additional two years, three years in today.

12.7 Businesses affected by this instrument were informed in June and mainly welcomed the decision to delay.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses. The legislation applies to businesses which have 50 or more employees so does not apply to small businesses.

13.2 For the purpose of determining how many employees a business has, and therefore whether a business will be subject to the Regulations, a franchisee's business may be treated as part of a franchisor's business. This means that franchisees trading as a business under a franchise agreement, where the sum of the employees operating under the franchise are 50+, are considered a qualifying business for the purpose of the Regulations and therefore required to abide by the restrictions. This only applies, however, where the franchisee and franchisor agree that the franchisee carries on a business activity which includes the sale or distribution of food and the food, appearance of the premises and business model are agreed by the franchisor and are similar across its franchise network.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is unchanged by this instrument. The Regulations include a statutory review clause. The clause requires that a review of the

[2] https://www.gov.uk/government/consultations/restricting-promotions-of-food-and-drink-that-is-high-in-fat-sugar-and-salt

regulatory provisions in the Regulations is conducted from time to time and a report published setting out the conclusions of the review. The conclusions of the review must be set out in a report published within five years of the implementation. Reviews must be carried out and reports published within every five years after that.

14.2 In addition, under section 67 of the Regulatory Enforcement and Sanctions Act 2008 a review will be carried out to determine whether enforcement of the Regulations has been proportionate and effective. The conclusions of the review must be set out in report to be published within five years of the implementation. Reviews must be carried out and reports published within every five years after that.

14.3 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 Parliamentary Under-Secretary of State for Primary Care and Public Health, Neil O'Brien MP, has made the following statement "It is not appropriate in the circumstances to make provisions for review in this instrument, as the purpose of this instrument is to simply delay the implementation date of the volume price promotion restrictions by two years."

15. Contact

15.1 Caitlin Hyde and Cindy Blick at the Department on Health and Social Care Telephone: 02079725139 or 02072105928 or email: caitlin.hyde@dhsc.gov.uk or cindy.blick@dhsc.gov.uk can be contacted with any queries regarding the instrument.

15.2 Sean Povey, Deputy Director for Strategy and New Priorities (Diet, Obesity and Health Behaviours) at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Parliamentary Under-Secretary of State for Primary Care and Public Health, Neil O'Brien MP at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.