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. Given the current challenges caused by higher food prices, this government does not want to take action now that could risk contributing further to the rise.

2.2 The delay will support businesses and allow them to focus on making food more affordable. The implementation of the volume price promotion restrictions may have diverted resources and energy away from trying to reduce food prices for consumers. By delaying the implementation of the volume price promotion restrictions, businesses will not need to incur the one-off transition costs for a further two years. The one-off transition costs are expected to be £5 million, consisting of familiarisation costs, product assessment costs and IT system costs.

2.3 The delay will also mean that businesses will not incur the annual direct costs to businesses for a further two years, which is £54 million, per year. The implementation of the volume price promotion restrictions will have an annual net cost to businesses of £6 million per year[1], after businesses have introduced mitigations, such as temporary price cuts replacing volume price promotions. The delaying of the volume price promotion restrictions will delay the incurring of these costs and will support businesses to focus on making food more affordable and not implementing the restrictions at this unprecedented time.

2.4 The Food (Promotion and Placement) (England) Regulations 2021 restrict 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.

[1] The was stated previously as £7 million per year, this is the undiscounted annual net cost to businesses. £6 million is the discounted figure over 25 years.

2.5 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.

2.6 This instrument came 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 of 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 ("the 2021 regulations") 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. They 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. The Food (Promotion and Placement) (England) (Amendment) Regulations 2022 were used to implement this delay.

6.4 The location restrictions came into force on 1 October 2022 and were unaffected by the decision to delay the volume price promotion restrictions.

6.5 In accordance with the requirements set out in section 48(4) of the Food Safety Act 1990 ("the 1990 Act") the Secretary of State a consultation on this instrument was conducted 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.

7.2 The original promotion regulations were brought in as part of a number of policies designed to tackle the significant problem of rising rates of obesity. As there is no silver bullet or policy that will solve this issue, a range of actions is therefore needed. This includes the Soft Drinks Industry Levy, the voluntary reduction and reformulation programmes, the requirement to place calories on menus in out of home businesses, and the further restrictions on the advertising of less healthy products.

7.3 The government also recently announced a pilot over the next two years to explore ways to make the newest obesity drugs available to more patients. This illustrates the government's commitment to a comprehensive strategy that provides support for people living with obesity and also tackling the underlying causes of obesity.

Explanations

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

7.4 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-one-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).

7.5 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.

7.6 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.

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

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

Why is it being changed?

7.9 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 government considered the decision to delay at a time when inflation was 7.3%[2] and inflation for food prices was 17.4%[3]. The government has taken a number of actions to support households with the cost of living pressures. Given the current challenges caused by higher food prices, this government does not want to take action now that could add to costs for industry or potentially increase pressure on families' food budgets. The government welcomes the recent reductions in inflation to 6.3%[4] and 13.6%[5] in inflation for food prices in August 2023 and hopes to see this decrease further.

7.10 The delay will support businesses and allow them to focus on making food more affordable. The implementation of the volume price promotion restrictions may have diverted resources and energy away from trying to reduce food prices for consumers. By delaying the implementation of the volume price promotion restrictions, businesses will not need to incur the one-off transition costs for a further two years. The one-off transition costs are expected to be £5 million, consisting of familiarisation costs, product assessment costs and IT system costs.

7.11 The delay will also mean that businesses will not incur the annual direct cost to businesses for a further two years, which is £54 million, per year. The implementation of the volume price promotion restrictions will have an annual net cost to businesses of £6 million, per year, after businesses have introduced mitigations, such as temporary price cuts replacing volume price promotions. The delaying of the implementation of the volume price promotion restrictions will delay the incurring of these costs.

7.12 The health benefits of the policy are expected to be over £2 billion and provide NHS savings of £180 million, over 25 years once the volume price promotion restrictions are implemented. However, the expected benefits will be minimal in the first few years of implementation as it will take time for the restrictions to have an effect and in turn cause a reduction in obesity rates and associated harms. Delaying the implementation is expected to result in a shift of the benefits curve, with larger benefits (expected in later years following implementation) occurring later. However, the expected costs to businesses will be front loaded with the one-off transition costs

[2] https://www.ons.gov.uk/economy/inflationandpriceindices/timeseries/l55o/mm23

[3] https://www.ons.gov.uk/economy/inflationandpriceindices/articles/costoflivinginsights/food

[4] https://www.ons.gov.uk/economy/inflationandpriceindices/timeseries/l55o/mm23

[5] https://www.ons.gov.uk/economy/inflationandpriceindices/articles/costoflivinginsights/food

associated with the implementation of the restrictions. Delaying the policy by two years is therefore a temporary measure to reduce the immediate costs to businesses, with minimal immediate impact on health benefits, during this challenging time.

What will it now do?

7.13 This instrument will delay the implementation date of the volume price promotion restrictions by two years. The volume price promotion restrictions were 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 force 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 1990 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 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 Three health NGOs 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 (raised by two health NGOs) or the use of affirmative procedure to lay this instrument (raised by two health NGOs).

10.6 Two health NGOs suggested removing the 12-month transition period of on pack promotions, which commences from when the volume price promotion restrictions come into force. The transition period applies to a small proportion of products where the volume price promotion is placed on the packaging of the product, rather than at point of sale. The original policy intention of the transition period was to avoid food

wastage, this was still considered to be relevant. A purpose of the delay to the volume price promotion restrictions is to ease burdens on businesses and to ensure that businesses did not incur any transition costs during this delay period. While the delay period could be used by businesses to update their packaging, the original policy intention was that industry would have an additional two years after the regulations came into force to reflect the specific but small issue of on-pack packaging. To alter the length of this transition period would change the regulations rather than delay them in full and would not fully alleviate costs to businesses. It was therefore concluded that no change was needed to the transition period.

10.7 Five of the responses (four health NGOs and one enforcement body) noted that a further delay to the implementation of the volume price promotion restrictions would have substantial impact on the obesity rates and children's health. The cost to society and the NHS was referenced as well as the potential economic impact of not reducing obesity rates in terms of productivity. This was noted but the need to support businesses during this difficult time was deemed the priority given this is only a short delay, with the expected health benefits in the first few years of implementation to be minimal.

10.8 Five of the responses (four health NGOs and one enforcement body) disagree with the rationale for the delay. One health NGO queried if the delay would help businesses make food more affordable for consumers. This was noted but the need to support businesses as much as possible during this difficult time was deemed the priority so that they could focus on making food more affordable for families and not implementing the volume price promotion restrictions.

10.9 Three health NGOs expressed concern that the further delay to the volume price promotion restrictions would undermine the progress already made by industry to implement the restrictions and reformulate products. This was noted, however, we remain committed to our voluntary reduction and reformulation programmes and the implementation of the location restrictions in 2022 also encourage reformulation.

10.10 Two health NGOs called on the government to publish all representations and evidence submissions that they received regarding this policy during the period when the decision to delay was made. This was noted but is not standard practice.

10.11 Industry trade bodies provided no proposed changes.

10.12 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.[6]

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

[6] 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. Impact

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

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 2021 Regulations has been produced and is published on the gov.uk website.[7] 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. The annual net costs to businesses are expected to be £6 million, and the one-off transition costs to businesses are expected to be £5 million, consisting of familiarisation costs, product assessment costs and IT system costs. Costs to the public sector of enforcing the policy will also be delayed by an additional two years, three years in total.

12.7 The health benefits of the policy are expected to be over £2 billion and provide NHS savings of £180 million. These benefits are expected to accrue over 25 years once the volume price promotion restrictions are implemented. However, the expected benefits will be minimal in the first few years of implementation as it will take time for the restrictions to have an effect and in turn cause a reduction in obesity associated harms, with the larger benefits expected in later years. This is why the impact assessment for the volume price promotion restrictions considered a 25-year period rather than the usual 10 years. The expected costs to businesses will be front loaded with the one-off transition costs associated with the implementation of the restrictions. As a result of delaying the policy, the benefits and costs will start to materialise later by the Net Present Value of the policy over a 25-year period from introduction will be unchanged.

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

12.9 Both Tesco and Sainsbury's no longer offer volume price promotions on less healthy products. Tesco voluntarily introduced the volume price promotion restrictions on 1

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

October 2022, the original implementation date. Sainsbury's had already phased out the use a number of years ago. The government will continue to engage with retailers and is supportive of retailer's efforts to voluntarily implement the restrictions ahead of October 2025.

12.10 The location restrictions were unaffected by the announcement and came into force on 1 October 2022. The location restrictions are the single most impactful policy at reducing children's calorie consumption. The restrictions are expected to deliver health benefits of over £57 billion and NHS savings of over £4 billion, over the next 25 years. This accounts for 96% of the expected health benefits of the promotions restrictions.

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 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 efficient and effective. The review must take place as soon as practical after three years have elapsed following implementation.

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 the Parliamentary Under Secretary of State for Public Health, Start for Life and Primary Care, the Rt Hon Andrea Leadsom 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 at the Department on Health and Social Care Telephone: 02079725139 or email: caitlin.hyde@dhsc.gov.uk can be contacted with any queries regarding the instrument.

15.2 Kevin Dodds, Deputy Director for Healthy Weight and Nutrition 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 Public Health, Start for Life and Primary Care, the RT Hon Andrea Leadsom MP at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.