**EXPLANATORY MEMORANDUM TO**

**THE FOOD (PROMOTION AND PLACEMENT) (ENGLAND) REGULATIONS 2021**

**2021 No. 1368**

## 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 Her Majesty.

## 2. Purpose of the instrument

2.1 The purpose of this instrument is to restrict the promotion of high fat, sugar and salt (HFSS) products by location and volume price in medium and large businesses that sell food or drink in England (50 or more employees). Locations restrictions will apply to store entrances, aisle ends and checkouts and their online equivalents (that is, entry pages, landing pages for other food categories, and checkout pages).Volume price restrictions will prohibit medium and large businesses that sell food or drink in England from offering promotions such as "buy-one-get-one-free" or "3 for 2" offers on HFSS products.

2.2 The aim of this measure is to reduce overconsumption of HFSS products that can contribute to children being overweight or living with obesity. This measure intends to shift the balance of promotions toward healthier options and maximise the availability of healthier products available on promotion. This policy can significantly improve our food environment by ensuring healthier food is more widely available, more easily accessible and more visible in shops, and ultimately support people to make healthier choices.

## 3. Matters of special interest to Parliament

***Matters of special interest to the Joint Committee on Statutory Instruments***

3.1 None.

***Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)***

3.2 Not applicable.

## 4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

## 5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State (Prevention, Public Health and Primary Care) Jo Churchill MP has made the following statement regarding Human Rights:

"In my view the provisions of The Food (Promotion and Placement) (England) Regulations 2021 are compatible with the Convention rights."

## 6. Legislative Context

6.1 This instrument is being made to restrict the promotion of foods high in fat, sugar and salt in favour of healthier options to help reduce overconsumption of HFSS products in children and reduce children's sugar and calorie intakes.

6.2 As an alternative to enforcement using criminal sanctions available under the Food Safety Act 1990, the Regulations enable local authorities to impose a civil sanction of a fixed monetary penalty under the Regulatory Enforcement and Sanctions Act 2008 (RESA).

6.3 The Secretary of State has consulted in accordance with sections 48(4) of the 1990 Act and section 60(1) of the 2008 Act. The Food Safety Authority has, to the Secretary of State's knowledge, produced no relevant advice.

## 7. Policy background

***What is being done and why?***

7.1 Nearly a quarter of children in England are overweight or obese when they start primary school aged five, and this rises to one third by the time they leave aged 11. Childhood obesity rates in the UK are among the highest in Western Europe. Regular overconsumption of food and drink high in calories, sugar and fat can lead to weight gain and, over time, obesity, which in turn has a significant impact on health and wellbeing and increases the risk of obesity related diseases. Obese children are more likely to become obese adults; currently around two-thirds of adults are overweight or obese with over one in four living with obesity. Obesity in adulthood increases an individual's risk of developing type 2 diabetes, heart disease, fatty liver disease and a number of cancers.

7.2 Promotional offers can influence and shape food purchases, and they often determine the choices in our shopping baskets and eating habits. Currently, these offers tend to be widespread for less healthy, processed, and 'treat' type products, to the expense of healthier choices such as minimally processed and nutritious food. There has been growing concern about the impact of promotional offers on influencing and shaping food preferences toward less healthy products[1]. Evidence shows promotions are effective at influencing purchases and tend to be heavily skewed towards less healthy options. Volume price promotions lead us to buy almost 20% more than we otherwise would, and location promotions often lead to 'pester power' from children[1].

7.3 The academic evidence shows that promotions in stores are extensive, deep and effective at influencing food preferences and purchases[1]. Public Health England (PHE) has recommended that reducing and rebalancing promotions towards healthier food and drink is essential to help reduce children's sugar and calorie intakes and help tackle obesity. Healthier options include products that are lower in calories, saturated fat, salt or sugar or higher in fruit, vegetables or fibre.

7.4 Although promotions appear to be mechanisms to help consumers save money, data shows that they increase consumer spending by encouraging people to buy more than they intended to buy in the first place. Price promotions appeal to people from all demographic groups and increase the amount of food and drink people buy.

[1] Annexe_4._Analysis_of_price_promotions.pdf (publishing.service.gov.uk)

Promotions on food and drink in the UK reached record levels in 2015 and were the highest in Europe, with 40% of the food and drink people purchased being on promotion [1]. The latest data shows that we buy almost 20% more as a direct result of promotions[2]. Consumers typically do not stockpile these extra purchases to take advantage of the lower price, instead they increase their consumption. Evidence also shows that volume promotions (multi-buys) cause a greater sales uplift compared to other types of price promotions such as simple price reductions.

7.5 Evidence from Cancer Research UK shows that shoppers who buy more of their food and drink on promotion tend to purchase more HFSS products, in greater volume, and are more likely to be overweight or living with obesity[3].

7.6 The shopping environment plays an important part in the way products are marketed to us, with simple factors such as the location of products within stores significantly affecting what we buy. For example, end of aisle displays can increase sales of soft drinks by over 50%[4]. Children are uniquely vulnerable to the techniques used to promote sales. These effects can then be transmitted into the purchasing behaviours of parents through 'pester power', with evidence showing 70% of parents purchased at least one food item requested during a shopping trip[5].

7.7 The retail promotional environment does not align with healthy eating guidelines and makes it harder for families to make healthier choices when shopping. A recent survey from the Obesity Health Alliance[6] showed that 43% of all food and drink products located in prominent areas, such as store entrances, checkouts, and aisle ends, were for sugary foods and drinks. 70% of these products were for food and drinks that contribute significantly to children's sugar and calorie intakes and less than 1% of food and drink products promoted in high profile locations were fruit or vegetables.

7.8 There is strong public support for action on food and drink promotions. Polling has previously shown that just over half of people polled said that supermarkets should offer more healthy food in promotions, and this was named as the top action shoppers wanted from retailers[7]; 66% of people support reducing price promotions of unhealthy food[8]; more than 90% of respondents to a nationwide survey[9] believe that HFSS foods at checkouts contribute to obesity; 78% of shoppers said they found 'junk food' at checkouts 'annoying'; and 83% of them had been pestered by children to buy food at checkouts with 75% giving in and buying something through 'pester power'; 72% of people support restricting promotion of unhealthy food in prominent places like checkouts[10].

7.9 Voluntary commitments to restrict promotions of HFSS food and drink have been limited or unsuccessful in the past. The Public Health Responsibility Deal (RD)[11], a

[2] https://www.gov.uk/government/publications/sugar-reduction-from-evidence-into-action
[3] https://www.cancerresearchuk.org/sites/default/files/paying_the_price_-_full_report.pdf
[4] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4008933/
[5] https://academic.oup.com/heapro/article/29/2/267/2805693

[6] http://obesityhealthalliance.org.uk/wp-content/uploads/2018/11/Out-of-Place-Obesity-Health-Alliance-2.pdf
[7] More supermarket promotions on less healthy food – Which? Press Office
[8] Public back ban on children's junk food advertising (cancerresearchuk.org)
[9] BDA Calls for UK Government Action to Chuck Junk Food off the Checkout (foodingredientsfirst.com)
[10] 74% of the Public Support Government Action on Obesity in the Wake of Emerging Links with COVID-19 - Obesity Health Alliance
[11] https://www.gov.uk/government/news/public-health-responsibility-deal

partnership between government and industry, was unsuccessful in encouraging retailers to reach a common voluntary agreement on promotions. The evaluation of the RD[12] clearly showed the programme failed to encourage concerted action from businesses to establish healthier shopping environments and therefore did not have the anticipated impact on helping people make healthier choices. Introducing legislation across the market will ensure that a level playing field is created within the retail sector as well as across the wider food industry, and that forward-thinking businesses are not penalised for taking action.

7.10 This policy can significantly improve our food environment by ensuring healthier food is more widely available, more easily accessible and more visible in shops, and ultimately support people to make healthier choices.

*Promotion restrictions*

7.11 Promotion of HFSS products will be restricted by location and volume price as follows:

Locations restrictions will apply to store entrances, aisle ends and checkouts and their online equivalents (that is, entry pages, landing pages for other food categories, and shopping basket 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.

*Business scope*

7.12 The restrictions will apply to medium and large retailers (with 50 or more employees), including franchise and symbol group stores. Micro and small businesses (fewer than 50 employees) will be exempt from the volume price restrictions. Micro and small businesses (fewer than 50 employees) will also be exempt from the location restrictions *as well as* stores that are smaller than 185.8 square metres (2,000 square feet) (even if they are part of a medium or large business with 50+ employees) and specialist retailers that sell one type of food product category, for example chocolatiers or sweet shops.

*Food scope*

7.13 The decision on the products in scope was made following consultation feedback, reducing the scope to those categories that are of most concern to childhood obesity. There will be a two-stage approach to determine if a product is HFSS. First, the product will need to fall into this revised list of categories based on the PHE Calorie and Sugar reformulation programme and SDIL. The 2004/2005 Nutrient Profiling Model will then need to be applied to that product, if it scores 4 or more for food or 1 or more for drinks then it will not be able to be promoted. The restrictions will also apply to free refills of sugar-sweetened drinks in the out-of-home sector (for example restaurants, coffee shops etc).

*Enforcement*

7.14 The Regulations are to be enforced by food authorities in their local areas. In instances of non-compliance with the Regulations, enforcement officers are required

[12] Has a public–private partnership resulted in action on healthier diets in England? An analysis of the Public Health Responsibility Deal food pledges - ScienceDirect

to issue an improvement notice before any penalty can be levied, affording businesses an opportunity to take steps to comply with the requirements. Non-compliance with an improvement notice is an offence; in such cases enforcement officers may impose a fixed monetary penalty of £2,500 using powers under the Regulatory Enforcement and Sanctions Act 2008. This is intended to provide food authorities with a proportionate alternative means of enforcement to criminal prosecution under the Food Safety Act 1990.

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

7.15 No such restrictions on less healthy food and drink products have existed in England before.

7.16 Some supermarkets have made voluntary commitments in this space, for example pledges to no longer sell confectionery at checkouts and stopping volume promotions and the Department welcomes this action from forward thinking retailers. However, these commitments are not implemented consistently or at scale and therefore do not support a level playing field for business nor for the consumer.

*What will it now do?*

7.17 The policy aims to reduce excess purchases and therefore overconsumption of HFSS products that contribute significant sugar and calories to children's diets and are of most concern for childhood obesity. These products are associated with a greater propensity to create impulse purchases and is likely to lead to excess calorie intake and therefore, over time weight gain. By encouraging retailers to provide healthier options in key selling locations, wider improvements in diets may be experienced. Mandating consistent promotional restrictions ensures that there is a level playing field for businesses.

7.18 Analysis suggests that the benefits from improving diets, in terms of the burden to the NHS and wider society, outweigh the associated costs by a large margin. Health benefits result from a reduction in the number of cases of type 2 diabetes, coronary heart disease, stroke, colorectal cancer, liver disease and breast cancer.

7.19 The Impact Assessments for this policy showed that for the location promotion restrictions the total net present social value in 2019 prices would be an estimated £68,152m. For location restrictions, over the 25-year appraisal period the health benefits expected to accrue because of lower calorie consumption amongst overweight and obese people are estimated to be £57,600m. In addition, it would provide NHS savings of £4,364m, social care savings of £4,896m and reduced premature mortality is expected to deliver an additional £6,788m of economic output.

7.20 The Impact Assessments showed that for the volume price promotion restrictions the total net present social value in 2019 prices would be an estimated £2,916m. For volume price promotion restrictions, the expected direct benefits are the health benefits that would accrue because of lower calorie consumption amongst overweight and obese people – equivalent to £2,390m over the 25-year assessment period. Social care benefits would amount to £212m, NHS cost savings of £180m and reduced premature mortality would be expected to deliver an additional £283m of economic output.

## 8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union or 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 A public consultation was conducted between 12 January 2019 and 6 April 2019 and received 807 responses including feedback from organisations (non-governmental organisations, charities, public health bodies) and businesses (retailers, manufacturers, out of home businesses, food/drink industry trade bodies)[13]. This consultation sought views on the proposed policy, specifically which businesses, products and types of price and location promotions should be in scope of the restrictions; how HFSS products should be defined and how the proposal should be implemented.

10.2 Overall, there was support for introducing restrictions for promotions of HFSS products, with around 60% of respondents agreeing that the restrictions should apply to all retail businesses that sell food and drink products in England.

10.3 The overarching themes from businesses' responses included the need for a level playing field across the food industry and the need to ensure that the policy is proportionate and will have an impact on childhood obesity.

10.4 A summary of the decisions made by government as a result of the consultation is presented below:

- micro and small businesses (below 50 employees) will not be in scope of the price and location restrictions due to the likely disproportionate burden on them resulting from this policy

- stores that are below 185.8 sq m (2,000 sq. ft) and all specialist retailers (for example sweet shops) will not be in scope of the location restrictions due to the likely practical implementation challenges resulting from this policy

- the price and location restrictions will only apply to a specified list of product categories that are significant contributors to children's sugar and calorie intakes and are heavily promoted. The list includes products such as soft drinks, cakes, chocolate confectionery, sugar confectionery, ice cream, and pizza

- The technical guidance specified in the regulations (currently known as the "Nutrient Profiling Technical Guidance" published by the Department of Health on 1 January 2011 which supports the 2004/5 Nutrient Profile Model (NPM)) will be used to define HFSS products within the specified list of product categories in scope, to determine whether they can or cannot be promoted

- the price restrictions will only apply to volume promotions ('multibuys' and 'extra free')

- the location restrictions will apply to checkouts, ends of aisles and store entrances

[13] https://www.gov.uk/government/consultations/restricting-promotions-of-food-and-drink-that-is-high-in-fat-sugar-and-salt/outcome/restricting-promotions-of-products-high-in-fat-sugar-and-salt-by-location-and-by-price-government-response-to-public-consultation#fn:19

- there will be at least a 6-month implementation period for businesses to prepare and plan for the new requirements

- enforcement powers will be given to Local Authorities who will be responsible for enforcing the policy. We have consulted on how the restrictions should be enforced.

- we will review and evaluate the policy within 5 years post implementation.

10.5 A technical enforcement consultation was launched on 28 December 2020 and closed on 22 February 2021. This consultation sought views on how compliance should be investigated as well as views on penalties that could be administered in instances of non-compliance. This consultation received 73 responses from enforcement bodies, trade associations, businesses, individuals and organisations such as Non-Governmental Organisations. A full draft of the regulations was shared as an annex with the enforcement consultation. This consultation was not seeking to revisit policy decisions but to ensure that the legislation is clear and unambiguous and can be implemented and enforced effectively once enacted.

10.6 In general, there was support for the proposed enforcement approach in line with Regulatory and Enforcement Sanctions Act 2008 (RESA). In response to a business's non-compliance with the promotion restriction regulations, local authorities will have the option to issue an improvement notice. Any business failing to comply with an improvement notice is guilty of an offence and the enforcement authority may issue a notice of intent to impose on the business a Fixed Monetary Penalty of £2,500. This is a standard penalty.

10.7 Overall, all respondents asked for more clarity on the definitions provided in the regulations to help businesses comply and to assist enforcement officers as part of their enforcement process. We have engaged extensively with industry throughout the consultation period to address their questions on the regulations to ensure the regulations were clear and fit for purpose.

10.8 Scotland, Wales and Northern Ireland have been engaged throughout the consultation process. Although the scope of this policy is England-only we know that the Devolved Administrations (DA) are developing similar policies on promotions.

## 11. Guidance

11.1 Guidance to support businesses and local authorities to implement the requirements introduced by this instrument will be published upon Parliament approving the instrument.

## 12. Impact

12.1 The impact on business is such that there are transition costs for retailers totalling a combined £52m. Retailers will also have on-going product assessment costs for new and reformulated products, totalling £24m and a net loss in profits of £3.7bn. Manufacturers will incur a net loss of profits of £1.9bn.

12.2 The impact on the public sector is the costs for enforcement of the policy. The final policy places a new financial burden on local authorities currently estimated to be £179,000 in year 1 and £102,000 per year thereafter.

12.3 A full Impact Assessment has been published on the gov.uk website[14]. The promotion restrictions are estimated to have a significant value on associated health benefits. The Net Present Value over a 25-year period from both the volume price promotion restrictions and the location restrictions is fuelled by a reduction in calories consumed. Current estimates show that while the combined costs might be £5.6bn over 25 years, the monetised benefits greatly outweigh the costs on a ratio of around 14:1, such that over 25-years the net present value of the promotion restrictions is £71.1bn. The costs of obesity to individuals, society and the NHS are huge and the benefits from reducing calorie intakes across the population are therefore substantial.

## 13. Regulating small business

13.1 The legislation applies to businesses which have 50 or more employees, so does not apply to small businesses. To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is the restrictions will apply to medium and large retailers (with 50 or more employees), including symbol group stores. However, for the purpose of determining how many employees a business has, and therefore whether a business will be subject to the promotion restrictions, a franchisee's business may be treated as part of the franchisor's business. This means that franchisees trading as a business under a franchise agreement, where the sum of employees operating under the franchise are 50+, are considered qualifying businesses for the purposes of the Regulations and therefore required to abide by the promotion 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 A statutory review clause is included in the instrument that 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 report to be published within 5 years of 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 a report to be published within 3 years from when Regulations come into force.

## 15. Contact

15.1 Cindy Blick at the Department of Health and Social Care Telephone: 0207 210 5928 or email: cindy.blick@dhs.gov.uk can be contacted with any queries regarding the instrument.

15.2 Kevin Dodds, Deputy Director for Healthy Weight and Nutrition Branch, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

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

15.3 Jo Churchill MP at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.