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Open consultation

Restricting promotions of products high in fat, sugar and salt by location and by price: enforcement

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Background

In Chapter 2 of the Childhood Obesity Plan (<https://www.gov.uk/government/publications/childhood-obesity-a-plan-for-action-chapter-2>), published June 2018, the government set out its intention to end the promotion of high fat, sugar and salt (HFSS) products by location and by price and committed to consult on how this should be implemented. The consultation was launched on 12 January 2019, closed on 6 April 2019 and received 807 responses.

The government announced in Tackling obesity: empowering adults and children to live healthier lives (<https://www.gov.uk/government/publications/tackling-obesity-government-strategy>), published July 2020, that it would legislate to end promotion of HFSS products by volume (for example, “buy one get one free”) and location both online and in store in England. The government has published a formal consultation response (<https://www.gov.uk/government/consultations/restricting-promotions-of-food-and-drink-that-is-high-in-fat-sugar-and-salt>) which announced the policy detail on:

- which businesses, products and types of price and location promotions should be in scope of the restrictions
- how HFSS products should be defined
- how the proposal should be implemented

Consultation thus far has sought views on how the policy could be enforced but made no specific proposals. Having considered the feedback received, the department is seeking views on how compliance should be investigated as well as views on penalties that could be administered in instances of non-compliance.

The consultation response details that government will legislate to restrict promotion of HFSS products in store entrances, aisle ends and checkouts for stores over 185.8 square metres (2,000 square feet) and in the equivalent locations in online marketplaces. We have proposed the technical definitions of these locations within the consultation response and want to take the opportunity to test that these definitions are clear and fit for purpose across the range of retail outlets for both businesses and enforcement agencies.

We're also using this opportunity to seek comment on our draft regulations with the businesses and enforcement agencies who will have to comply with them. The aim of this consultation is to gather views on the specific text in the Regulations to ensure these are fit for purpose. This is not seeking to revisit policy decisions but to ensure that the legislation is clear and unambiguous and can be implemented effectively once enacted. Information provided outside the scope of the consultation will not be taken into account.

Respond to the survey here. (<https://consultations.dhsc.gov.uk/5fb679b038ca9054096a85cb>)

You should read this document alongside the survey.

Definitions

The department intends to legislate to introduce the policy using powers in the Food Safety Act 1990 (FSA). These regulations have been drafted with the policy detail as set out in the consultation response. The draft regulations can be found in annex A.

The volume price and location restrictions will apply to the categories of food that are significant contributors to sugar and calorie intakes and which are heavily promoted. Within these categories, the restrictions will only apply to prepackaged food and drink that is determined to be high in fat, salt or sugar (HFSS) as defined by the 2004/2005 nutrient profiling model.

The following table presents a summary of the policy scope. More detailed information about the policy objectives is set out in the government's response to the consultation.

Tables 1a to 1e: policy inclusions and exclusions

Table 1a: price promotions

In scope	Out of scope
Volume promotions ('multibuy' promotions and 'extra free' promotions) of pre-packaged HFSS products	All other types of price promotions, for example, temporary price cuts
Free refills of sugar-sweetened beverages in the out-of-home sector	Price promotions for meals in the out of home sector, for example, '2 courses for £12', 'kids eat free'

Table 1b: locations in store

In scope	Out of scope
Checkout areas: the till point or a self-checkout area and the surrounding floor space area (any area within 2 metres), as well as the queueing areas leading to the till point or self-checkout	All other in store locations
Ends of aisles: the point of purchase advertising of products placed at the ends (front and/or back) of shelf rows in stores, or on separate units adjacent to the ends of the shelf rows for example island bin displays	
Store entrances: the display of products placed at/in the vicinity of the store entrance(s)	

Table 1c: locations online

In scope	Out of scope
Entry pages of retailer's website or grocery page	Special offer pages
Landing pages when customer is browsing other categories of food	Favourites pages if a customer has made the HFSS product a favourite or previously purchased the HFSS product
Pages where customers view their shopping basket or proceed to payment	

Table 1d: businesses

In scope	Out of scope
Businesses greater than or equal to 50 employees (including online retailers and retailers who do not primarily sell food or drink) and stores that are a member of a symbol group or franchise, where there are 50 or more employees operating under that business name	Micro (fewer than 10 employees) and small businesses (10 to 49 employees) – out of scope for price and location promotions
	Specialist retailers that only sell one type of product and this is within the product categories in scope of the restrictions, for example chocolatiers or sweet shops – out of scope for location promotions only
	Store areas less than 185.8 square metres (2,000 square feet) – out of scope for location promotions only

Table 1e: products

In scope	Out of scope
Soft drinks with added sugar that are in scope of the soft drinks industry levy	Non-pre-packaged products (except for free refills of sugar sweetened beverages in the out of home sector)
Chocolate confectionery	All other products outside the specified categories in scope of the policy
Sugar confectionery	Products not deemed to be high fat, salt or sugar as defined by the nutrient profiling model
Cakes	
Ice cream	
Morning goods (for example pastries)	
Puddings and dairy desserts	
Sweet biscuits	
Breakfast cereals	
Yogurts	
Milk drinks with added sugar	

In scope	Out of scope
Juices with added sugar	
Pizza	
Crisps and savoury snacks	
Ready meals and meal centres	
Chips and similar potato products	

Volume promotions

The volume price promotion restrictions will apply to multibuy and “X% extra free” promotions of **H.F.S.S.** products, defined in the regulations as follows:

55.—(1) Subject to paragraph (5), a qualifying business must not offer volume price promotions on specified food (whether the specified food is offered in store or online).

(2) “Volume price promotion” means—

(a) a multibuy promotion, meaning the offer of a discount or special price for buying multiple items compared with the price for buying each item separately (for example “three for the price of two”, “3 for £10”, “buy 6 and save 25%”);

(b) a promotion that indicates that a product, or any part of a product, is free (for example “fifty per cent extra free”, or “buy one get one free”).

(3) For the purposes of paragraph (2)(a), “multiple items” includes—

(a) more than one of the same item; and

(b) different items from within one of the categories in Schedule 1.

(4) This regulation applies to promotions that are included on the packaging of food as well as to promotions that are communicated to a consumer via other means.

(5) Where the packaging of specified food includes a volume price promotion, a qualifying business may offer the specified food for sale until 5 April 2023.

See the draft Regulations at annex A for full details of these provisions.

Question: Does the legislation describe the volume price promotions accurately and clearly for both business and enforcement agencies to implement and enforce?

- Yes

- No
- Don't know

Please explain your answer. If you disagree with the proposed description, please outline how you would describe volume price promotions instead.

Free refills

The restrictions will also apply to free refills of sugar-sweetened beverages in the out-of-home sector. This restriction is defined in the regulation as follows:

(2) A qualifying business must not offer a free refill promotion on drinks to which this regulation applies.

(3) In paragraph (2), "free refill promotion" means a promotion that offers the consumer the same drink, or another drink to which this regulation applies, for free (including free top-ups of any part of a drink).

Question: Does the legislation describe the free refill restrictions accurately and clearly for both business and enforcement agencies to implement and enforce?

- Yes
- No
- Don't know

Please explain your answer. If you disagree with the proposed description, please outline how you would describe free refill restrictions instead.

Locations

The consultation response outlined that having considered stakeholder feedback and conducting further engagement with regard to exemptions based on the size of a store, the government has decided that stores 185.8 square metres (2,000 square feet) or greater will be in scope of the location restrictions. This is because they are expected to have distinct checkout and front-of-store areas and typically have multiple aisles and aisle ends.

Using the 185.8 square metre (2,000 square feet) size threshold also means that retailers that operate on Sundays that are just under 3,000 square ft (as required in the Sunday Trading Act) will be in scope of the location restrictions.

The definition is drafted in legislation as follows:

(3) This regulation does not apply to—

(a) stores with a floor area of less than 185.8m²;

... (4) In this regulation— ...

(b) “floor area” means an area equal to the store’s main shopping area;

Question: Does the legislation describe this exemption for stores below 185.8m² (2000 sq ft) accurately and clearly for both business and enforcement agencies?

- Yes
- No
- Don't know

Please explain your answer. If you disagree with the proposed description, please outline how you would describe this exemption.

Question: Will enforcement officers readily be able to access information regarding the size of a store?

- Yes
- No
- Don't know

Please explain your answer.

Question: Do enforcement officers or retailers foresee any challenges with enforcing based on the size of a store?

- Yes
- No
- Don't know

Please explain your answer.

Question: Are there any operational implications of setting the size of the store at 185.8 square metres (2,000 square feet)?

- Yes
- No
- Don't know

Please explain your answer.

In-store

The location promotion restrictions will only apply to checkout and queuing areas, end of aisle displays, and store entrance displays.

These in-store location definitions are described in the regulations as the following:

Restrictions on the placement of specified food – in store

7.—(1) Subject to paragraph (3), a qualifying business must not place specified food inside a physical store —

(a) within two metres of a checkout area;

(b) within two metres of a designated queuing area, unless the specified food is placed in a main shopping aisle;

(c) in an end-of-aisle display;

(d) [OPTION 1: in the prohibited entrance area];

(e) [OPTION 2: at any point within the prohibited distance of the midpoint of any public entrance to the store’s main shopping area];

(f) in a covered external area.

(2) In paragraph (1)—

(a) “checkout area” means a point in the store intended to be used by consumers to pay for products, including a self-checkout till and a counter at which a cash register is used (including the area behind such a counter);

(b) “designated queuing area” means an area where consumers are intended to queue when waiting to complete a purchase;

(c) “end-of-aisle display” includes a separate display unit located adjacent to the end of a main shopping aisle (such as an island bin display);

(d) [OPTION 1: “prohibited entrance area” means an area immediately inside each public entrance to the store’s main shopping area, being a square—

(i) of area equal to the smaller of 225m² or 5% of the store’s floor area, and

(ii) drawn so one edge of the square coincides with the line of the entrance, with the midpoint of that edge coinciding with the midpoint of the entrance.

irrespective of whether such area is obstructed by walls or other structural features of the store];

(e) [OPTION 2: “the prohibited distance” means a distance being the smaller of 15m or the following—

(square root of (0.05 x area))

(3) This regulation does not apply to—

(a) stores with a floor area of less than 185.8m²;

(b) stores which only or mainly sell food from a single category listed in Schedule 1. (4) In this regulation—

(a) “covered external area” means a covered area outside a store’s main shopping area connected to the store and through which the public passes to enter the store (such as a foyer, lobby or vestibule);

(b) “floor area” means an area taken up by the store’s main shopping area;

(c) “main shopping area” includes all service areas accessible to the public (such as deli and checkout counters and the areas behind them) but excludes external covered areas and areas with no public access (such as backrooms and storerooms).

Question: Which of these 2 options is most appropriate to describe the restricted store entrance area?

OPTION 1: In the prohibited entrance area;

“prohibited entrance area” means an area immediately inside each public entrance to the store’s main shopping area, being a square—

(i) of area equal to the smaller of 225m² or 5% of the store’s floor area, and

(ii) drawn so one edge of the square coincides with the line of the entrance, with the midpoint of that edge coinciding with the midpoint of the entrance.

irrespective of whether such area is obstructed by walls or other structural features of the store;

OPTION 2:

At any point within the prohibited distance of the midpoint of any public entrance to the store’s main shopping area;

“the prohibited distance” means a distance being the smaller of 15m or the following—

(square root of (0.05 x area))

Please explain your answer. If you disagree with both options, please outline how you would describe the store entrance area.

Question: Do the check-out, aisle end and store entrance definitions accurately and effectively capture these prominent in-store locations?

- Yes
- No
- Don’t know

Please explain your answer. If you disagree with the proposed descriptions, please outline how you would describe these locations.

Question: Are the definitions clear for both business and enforcement agencies to implement and enforce?

- Yes
- No
- Don't know

Please explain your answer. If you disagree with the proposed descriptions, please outline how you would describe these locations.

Question: Do these definitions need any further clarity?

- Yes
- No
- Don't know

Please explain your answer.

Online

To ensure a level playing field and to reflect the increasing trend of people shopping online, the government has also decided that the location restrictions should be reflected in online locations.

The online equivalents are defined as follows: a store entrance equates to the homepage of the website; end of aisle displays include promoting HESS products when a customer is browsing other food categories; and a checkout is when the customer views their basket or proceeds to make a payment.

The location promotion restrictions will only apply to the following online locations:

- The homepage of the website;
- landing pages for other product categories.
- view basket or proceed to payment pages.

These are described in the regulations as the following:

8.— (1) Subject to paragraphs (3) and (4), a qualifying business must not promote specified food on an online marketplace—

(a) on an entry page (whether or not the consumer enters the online marketplace via the entry page);

(b) while a consumer is searching for or browsing products other than specified food;

(c) while a consumer is searching for or browsing specified food, unless the promoted food falls within the same Schedule 1 category;

(d) on a page not opened intentionally by the consumer (such as a “pop-up” or “pop-under” page);

(e) on a favourite products page, unless the consumer has previously purchased the promoted food or intentionally identified it as a favourite product;

(f) on a checkout page.

(2) For the purposes of this regulation—

(a) “entry page” means any of—

(i) an online marketplace’s highest level public page;

(ii) the highest level public page of an online marketplace’s grocery section;

(iii) a page containing pre-determined offers to which a consumer is directed on entering an online marketplace (a landing page);

(b) “checkout page” means a page shown to a consumer as part of the checkout process, such as a page listing items the consumer has so far selected for purchase or a page dealing with payment, collection or delivery;

(c) “favourite products page” means a page opened by a consumer for the purpose of browsing products they have previously purchased or intentionally identified as favourite products;

(d) “promote”—

(i) means offer for sale or otherwise present in a way intended to attract the attention of a consumer (including “in case you missed it” or, except on a favourite products page, “previously purchased” recommendations);

(ii) does not include any presentation of third-party advertising material which is outside the control of the qualifying business.

(3) Paragraph (1) does not prohibit promoting specified food on a page opened intentionally by a consumer for the purpose of browsing special offers generally.

(4) This regulation does not apply to retail stores which only or mainly sell food from a single category listed in Schedule 1.

Question: Does the legislation correctly capture the online equivalents to in-store locations described above?

- Yes
- No
- Don’t know

Please explain your answer. If you disagree with the proposed descriptions, please outline how you would describe these online locations.

Question: Does the legislation describe the locations accurately and clearly for both business and enforcement agencies to implement and enforce online?

- Yes
- No
- Don't know

Please explain your answer. If you disagree with the proposed description, please outline how you would describe these locations.

Businesses in scope: symbol groups

Following careful consideration of the feedback received, government has decided that the restrictions will apply to medium and large businesses (which we are defining as 50 or more employees, see section 172 of the Taxation (International and Other Provisions) Act 2010 (<https://www.legislation.gov.uk/ukpga/2010/8/section/172>) and EU Recommendation 2003/361 (https://ec.europa.eu/growth/smes/sme-definition_en) that sell food or drink in England. This includes franchises or symbol group arrangements where multiple businesses operate under the same name (where the total number of employees operating under that business name is 50 or more). A symbol group retailer is an independent or multiple retailer that is a member of and trades under the name of a larger organisation known as a symbol group or franchise. The symbol group is considered a large business which has small and micro independent and multiple retailers trading under the group name.

We believe symbol groups fit under the umbrella of franchise arrangements and have described this in the regulations as follows:

(4) For the purposes of determining how many employees a business has, a business that is carried on pursuant to a franchise agreement is to be treated as part of the business of the franchisor and not as a separate business carried on by the franchisee.

(5) For the purposes of paragraph (4), a “franchise agreement” exists where one undertaking (“the franchisee”) and another undertaking (“the franchisor”) agree that the franchisee carries on a business activity which includes the sale or distribution of food (“the franchise business”), and paragraph (6) applies to the franchise business.

(6) This paragraph applies if one or more of—

(a) the products provided in the franchise business;

(b) the internal or external appearance of the premises where the franchise business is carried on; or

(c) the business model used for the operation of the franchise business, are agreed by the franchisor, and are similar to that of other undertakings in respect of which the franchisor has entered into comparable contractual arrangements.

Question: Does the legislation describe the symbol groups accurately under franchises?

- Yes
- No
- Don't know

Please explain your answer. If you disagree with the proposed description, please outline how you would describe these businesses.

Question: Are there any implications to the businesses model in including symbol groups as part of this policy?

- Yes
- No
- Don't know

Please explain your answer.

HFSS products

Government decided that the restrictions should apply to product categories that are significant contributors to children's sugar and calorie intakes and are heavily promoted, and therefore are the categories of most concern for childhood obesity. We expect that products within these categories should be clear to identify for both retailers and enforcement agencies.

For these product categories, anything that is classed as **HFSS** cannot be promoted through volume or location promotions. **HFSS** is defined by the 2004/2005 Nutrient Profile Model (**NPM**). The **NPM** provides products with a score calculated based on their nutritional composition.

The product categories in scope are outlined in the consultation response and described in the regulations as follows:

Category 1: Non-alcoholic soft drinks with added sugar which are either ready to drink or which, to be made ready to drink, must be processed.

For the purposes of this category—

(a) “added sugar” means sugar added to a drink during production which is of a type or in such quantity not naturally occurring in the other ingredients;

(b) “non-alcoholic” means with a content of not more than 1.2% alcohol by volume;

(c) “processed” means one or more of the following—

(i) diluted with water;

(ii) mixed with crushed ice;

(iii) processed to make crushed ice;

(iv) mixed with carbon dioxide;

(d) “soft drinks” means—

- (i) still or carbonated water-based drinks;
- (ii) milk-based drinks;
- (iii) fruit or vegetable juice-based drinks;
- (e) “sugar” includes all monosaccharides and disaccharides, including—
 - (i) all types of cane and beet sugar;
 - (ii) sugar from other sources such as coconut palm sugar;
 - (iii) crystalline sucrose, invert sugar, dextrose, molasses;
 - (iv) sugars in honey, treacle, malt extract and all types of syrup including malt syrup, fruit syrup, rice malt syrup, corn syrup, high-fructose corn syrup, maple syrup, glucose syrup, glucose-fructose syrup;
 - (v) fructose, sucrose, glucose, lactose, hydrolysed lactose and galactose added as an ingredient;
 - (vi) sugars in all types of nectars such as coconut blossom nectar, date nectar, agave nectar;
 - (vii) sugars in juice concentrates.

Category 2: Crisps and other savoury snacks including all potato crisps and similar products made from potato, other vegetables, grain or pulses, including extruded, sheeted and pelleted snacks such as pitta bread based snacks, pretzels, poppadums, prawn crackers, pork scratchings, salted popcorn, and savoury crackers or biscuits which are in individually-portioned bags. This category does not include savoury snacks that are nuts, whether raw or to which other food has been added (such as salt).

Category 3: Breakfast cereals including ready-to-eat cereals, granola, muesli, porridge oats and other oat-based cereals.

Category 4: Confectionery including chocolates and sweets.

Category 5: Ice cream, ice lollies, frozen yogurt, water ices and similar frozen products.

Category 6: Cakes (including cupcakes).

Category 7: Sweet biscuits.

Category 8: Morning goods, meaning croissants, pains au chocolat and similar pastries, crumpets, pancakes, buns, teacakes, scones, waffles, Danish pastries and fruit loaves.

Category 9: Desserts and puddings, including pies, tarts and flans, cheesecake, gateaux, dairy desserts, sponge puddings, rice pudding, crumbles, fruit fillings, powdered desserts, custards, jellies and meringues.

Category 10: Yoghurt.

Category 11: Pizza (except plain pizza bases).

Category 12: Roast potatoes, potato and sweet potato chips, fries and wedges, potato waffles, novelty potato shapes (such as smiley faces), hash browns, rostis, crispy potato slices, potato croquettes.

Category 13: Products that are marketed as a meal that is ready for cooking or reheating without requiring further preparation and which include a carbohydrate accompaniment.

Category 14: Products that are marketed as a meal that is ready for cooking or reheating without requiring further preparation and which do not include a carbohydrate accompaniment, such as prepared fish, shellfish, meat, poultry and meat alternative products in a sauce, but not including fish, shellfish, meat, poultry and meat alternatives (either served plain or) in a marinade, glaze, dressing, seasoning or similar accompaniment.

Category 15: Breaded or battered fish, shellfish, meat, poultry and meat alternative products including fish fingers, fish cakes, chicken nuggets and breaded Quorn.

Question: Does the legislation adequately capture the intended categories?

- Yes
- No
- Don't know

Please explain your answer.

Question: Is it clear from the legislation which products are in scope? If not, how can this be clarified?

- Yes
- No
- Don't know

Please explain your answer.

Question: Are there any products that are unclear as to whether they are in scope of the current categories?

- Yes
- No
- Don't know

Please explain your answer.

Enforcement

Consultation response

The consultation asked for views on the enforcement of the proposed restrictions but did not make specific proposals about how the policy should be enforced. The most common responses were that:

- it would be appropriate for local authorities and Trading Standards to be responsible for enforcement, but there will be a need for additional funding for this new requirement;

- the Primary Authority principle should be used to allow for existing arrangements between businesses and local authorities to be used for this new requirement;
- there should be an appropriate and proportionate enforcement regime that allows for warnings and fines, not leading straight to prosecution, and any fixed penalties should be appropriate for the type of business (for example, taking into account turnover and size of business);
- the enforcement regime should promote a level playing field; and clear guidance will be needed.

Having considered the above feedback and further stakeholder engagement, government is proposing the below high-level principles for the enforcement of this policy:

- local authorities will be responsible to enforce the policy.
- an enforcement process that focuses on supporting compliance rather than penalising non-compliance is best suited.
- giving a range of enforcement options to local authorities, for example, the option of civil penalties as well as the criminal penalties.

Enforcement powers

Food Safety Act 1990

The government is committed to ensuring enforcement of regulatory policies is proportionate and fair. The FSA permits the use of improvement notices in instances of non-compliance with its measures. Improvement notices afford a food business the opportunity to undertake corrective measures to ensure their compliance with regulations before a penalty is levied. Any person failing to comply with an improvement notice is guilty of an offence.

Under the FSA, non-compliance with or breach of an improvement notice can result in the issuing of a criminal penalty on the grounds that an offence has been committed under the Act. Where there is non-compliance with a notice issued under the FSA a criminal prosecution may follow. It is understood however, that there may be a range of circumstances determining a businesses' capability to meet the conditions of an improvement notice, and therefore to ensure penalties are proportionate to the situation, the department proposes that local authorities should be permitted to issue fixed monetary penalties (a form of civil penalty) for non-compliance with an improvement notice.

The Regulatory Enforcement and Sanctions Act 2008

The Regulatory Enforcement and Sanctions Act 2008 (RESA) provides local authorities with powers to impose such penalties. Fixed monetary penalties can be imposed when the local authority is satisfied beyond reasonable doubt that an offence has been committed and decides that a civil penalty is the most appropriate action to take.

A requirement of the RESA is that the government consults those who will be affected by the policy. This consultation is being conducted to fulfil that obligation under the Act. In addition, the RESA imposes a number of responsibilities on local authorities which are outlined in the section titled 'Additional Requirements'. The process for administering a fixed monetary penalty is also outlined in this document.

The Department of Health and Social Care is committed to supporting local authorities and the judicial system with the additional costs that would be incurred as a result of enforcing the policy.

We will work with local authorities to set guidance outlining the enforcement approach and penalties for non-compliance.

Assessing compliance

It is important for both businesses and the enforcement agencies ensuring the regulations are being followed to understand what is expected of them to demonstrate compliance. It is also important to be clear where responsibility lies for ensuring that the law has been complied with.

Responses through our consultation discussed how promotions were typically agreed between manufacturers and retailers. However, retailers are the businesses selling the products to the public and therefore the expectation is that compliance with the regulations falls to them. This means that any business that displays **H.F.S.S** products or causes **H.F.S.S** products to be displayed in a way that does not meet the requirements of the legislation, will be liable, unless an exemption applies.

It is expected that retailers will need to assess whether each of the products they stock is within the categories in scope of the restrictions and, if yes, they will need to assess whether it is considered **H.F.S.S** by calculating its **N.P.M** score. If the products are deemed in scope then it will be the responsibility of the retailer to ensure that they comply with the restrictions on promotions as set out in the regulations, a draft of which is attached at annex A. Therefore, we expect retailers to be responsible for ensuring the products they are promoting are compliant. To assist retailers and minimise the burden of this assessment, DHSC will provide guidance to help businesses implement the restrictions. There may be some instances where retailers may need to ask manufacturers to provide the **N.P.M** score or further information for their products, given that retailers may not always have all the nutrient information needed to calculate the **N.P.M** score for branded products. Manufacturers may therefore choose to provide **N.P.M** scores to retailers if they wish to promote a product that is in a product category within scope but that is not **H.F.S.S** due to its **N.P.M** score.

Any such information provided by a manufacturer to a retailer should be accurate and should not be misleading. If information provided to a retailer is considered misleading an enforcement authority may take enforcement action against the manufacturer under separate legislation (for example, they may consider their powers under section 14 of the Food Safety Act 1990, which prohibits selling food not of the nature or substance or quality demanded).

Question: Are there any implications of the above approach to liability for non-compliance?

- Yes
- No
- Don't know

Please explain your answer. If you disagree with the proposed approach, please outline what approach you would see instead.

Enforcement approach

Enforcement officers are accustomed to undertaking enforcement activities within store and online. We propose an approach for volume and location promotion restrictions both in store and online where enforcement officers will make the following checks:

- whether the store is part of a medium or large business (where the total number of employees operating under that business name is 50 or more).
- whether the store is a specialist store selling one type of product (exempt from location restrictions).
- whether the internal store size is less than 185.8 square metres (2,000 square feet) 185.8 (exempt from location restrictions).
- the presence of any products that are part of the 'in scope' categories in a restricted volume or location promotion.
- if there are products in these categories on volume or location promotions, to ascertain from the retailer how they have ensured that these are not H.F.S.S., as defined by the 2004/5 N.P.M score.

Question: Are the proposed checks appropriate to assess compliance with promotion restrictions?

- Yes
- No
- Don't know

Please explain your answer. If you disagree with the proposed approach, please outline what approach you would see instead.

To assess compliance with the restriction on 'free refills' of sugar-sweetened drinks in scope of the regulations, we propose an enforcement officer will check:

- whether the out of home business (for example restaurant) is part of a medium or large business (where the total number of employees operating under that business name is 50 or more).
- the presence of any 'free refill' offers on drinks that are in scope of the regulations.
- if there are free refills offered on drinks, to ascertain from the business how they have ensured that these are not H.F.S.S., as defined by the 2004/2005 N.P.M score.

Question: Are the proposed checks appropriate to assess compliance with free refill restrictions?

- Yes
- No
- Don't know

Please explain your answer. If you disagree with the proposed approach, please outline what approach you would see instead.

Penalties for non-compliance

It is important that penalties are fair and proportionate, taking into account the risk of harm of non-compliance. Through the consultation many businesses expressed a preference for a model of enforcement that supports businesses to comply with the regulation. We believe improvement notices serve as a means to facilitate this by providing businesses with the ability to take corrective steps before any penalty is levied.

Compliance via improvement notices or stop notices are considered by local authorities to be an effective means of securing compliance and changing a food businesses behaviour. Enforcement action against food businesses typically make use of improvement notices. In some cases, such as with food hygiene and safety regulations, local authorities have the option of prosecuting without issuing an improvement notice. Unlike these policies, failure to comply with promotions restrictions does not pose an immediate risk to human life, therefore we believe that local authorities should be equipped to issue an improvement notice before contemplating prosecution.

Although improvement notices are the preferred option for dealing with issues of non-compliance, there may be instances, such as repeat offences, where a different approach or penalty may be more appropriate. Enforcement officers have expressed support for a range of tools to ensure compliance.

We would appreciate views on whether there are specific circumstances, such as repeat offences, where an improvement notice may not be appropriate.

Question: Should local authorities issue improvement notices in cases of non-compliance with promotions restrictions as the first formal action?

- Yes
- No
- Don't know

Please explain your answer. If you disagree with the proposed approach, please outline what approach you would see instead.

Question: Are there other circumstances where an improvement notice may not be appropriate?

- Yes
- No
- Don't know

Please explain your answer.

As failure to accurately comply with the restrictions on promotions of H.F.S.S products does not pose an immediate risk to human life, we believe it would be disproportionate for non-compliance to risk imprisonment. We propose that failure to comply with an improvement notice results in the option of issuing a fixed monetary penalty of £2,500 as an alternative to prosecution.

If the government decides to extend the restrictions on promotions of H.F.S.S products to smaller businesses in the future, we will consider introducing different thresholds for businesses of different sizes.

Question: Where a business fails to meet the terms of an improvement notice is a fixed monetary penalty of £2,500 appropriate?

- Yes
- No
- Don't know

Please explain your answer. If you disagree with the proposed approach, please outline what approach you would see instead.

Question: Are there circumstances where a different approach might be more appropriate?

- Yes
- No
- Don't know

Please explain your answer. If answered yes, please explain the specific circumstance and preferred enforcement approach.

Process for issuing a fixed monetary penalty

Where an enforcement officer has reasonable grounds for believing that a business is failing to comply with the regulations, they may issue an improvement notice stating:

- the officer's grounds for believing that the business is failing to comply with the regulations,
- the measures which, in the officer's opinion, the business must take action in order to secure compliance,
- the requirement to take the relevant corrective measures within a given time period.

Any business failing to comply with an improvement notice is guilty of an offence and the enforcement authority will have the option to issue a fixed monetary penalty as an alternative to prosecution.

The enforcement authority may issue a fixed monetary penalty without issuing an improvement notice in appropriate cases such as for repeat offences. Guidance will set out under which circumstances such an approach may be taken.

The **RESA** outlines the process for issuing a fixed monetary penalty. The regulator serves a Notice of Intent to impose a fixed monetary penalty. The Notice of Intent includes information on:

- the level of the penalty
- why it has been issued
- the option to discharge liability by paying a prescribed sum
- details on how the person may make representations and objections to the regulator if they choose not to discharge liability

At the end of the period for making representations or objections, the regulator decides whether to impose the fixed monetary penalty. If a fixed monetary penalty is imposed the regulator issues a final notice, requiring the person to pay or appeal the issuing of a penalty.

Once a final notice has been issued the person is required to either pay the sum or appeal within the prescribed period.

We make the following recommendations for the procedure to administer fixed monetary penalties:

- a person has 28 days in which to make representations and objections to the regulator or to discharge liability
- a person may discharge liability upon being issued with a fixed monetary penalty at a rate of 50% of the penalty issued
- upon being issued with a final notice, a person has 28 days in which to pay the penalty or appeal to a first-tier tribunal
- failure to pay or appeal a penalty within 28 days of being issued with a final notice will result in the penalty being increased by 50%

Question: Is 28 days an appropriate period to make representations and objections or to discharge liability for a Notice of Intent?

The RESA specifies that 28 days is the longest period that can be permitted therefore any alternative suggestions must be less than 28 days.

- Yes
- No
- Don't know

Please explain your answer.

Question: Where a fixed monetary penalty has been issued, for example, for failure to comply with an improvement notice, should a person be able to discharge liability upon being issued with a fixed monetary penalty at a rate of 50% of the penalty issued?

- Yes
- No
- Don't know

Please explain your answer.

Question: Is 28 days an appropriate length of time to pay or appeal a final notice?

The RESA specifies that 28 days is the longest period that can be permitted therefore any alternative suggestions must be less than 28 days.

- Yes
- No

- Don't know

Please explain your answer.

Question: Should failure to pay or appeal a penalty within 28 days result in the penalty being increased by 50%?

- Yes
- No
- Don't know

Please explain your answer.

Additional requirements

Guidance

As the regulator, local authorities will be required to produce guidance about the new penalties and how they will be used to enforce an offence. This will include information on the circumstances in which a penalty is likely to be imposed or not, how liability for the penalty may be discharged, and rights to make representations and objections or to appeal. Local authorities will be required to consult persons specified in the regulations before publishing or revising guidance. The DHSC will develop guidance, in consultation with stakeholders, for use by enforcement bodies and businesses to help them comply with the Regulations. This may be adapted for use by local authorities as required.

Transparency

Local authorities will be required to publish the details of any cases in which a civil sanction has been imposed. Where a penalty is overturned through appeal it is not required to be included in the publication.

There may be certain circumstances where it might be inappropriate for local authorities to publish details of these cases. We would appreciate views on what circumstances they may be, if any.

Question: Are there any circumstances where it might be inappropriate for local authorities to publish details of cases where a civil sanction has been imposed?

Please explain your answer.

Review

The government is required to review the use of RESA powers to enforce the policy within 3 years of them coming into force. That review will consider whether RESA penalties have been implemented effectively and achieve their objective.

Question: Will the additional requirements place any additional costs on your local authority?

Please justify your answer including evidence where possible.

Further feedback

The draft regulations can be found in annex A. By providing an opportunity for stakeholders to review the regulations in draft, comments can be received on the clarity of the regulations to ensure these are fit for purpose.

The estimated costs for enforcement of this policy have been updated in the impact assessments (<https://www.gov.uk/government/consultations/restricting-promotions-of-food-and-drink-that-is-high-in-fat-sugar-and-salt>) following the consultation.

Question: Are there any comments on the draft of the regulations?

Please explain your answer.

Question: Are there any comments on the revised costs for enforcement in the impact assessments?

Please explain your answer, including evidence where possible

Ahead of laying the regulations we are proposing to produce guidance to help businesses and enforcement bodies to implement the policy.

Question: Are there any areas that need to be specified in guidance to allow businesses to implement the policy successfully?

Please explain your answer.

Question: Are there any areas that need to be specified in guidance to allow enforcement agencies to implement the policy successfully?

Please explain your answer.

Question: If there are any further matters that you would like to raise or any further information that you would like to provide in relation to this consultation, please give details here.**Annex A: draft regulations**

Draft Regulations laid before Parliament under section 62(3) of the Regulatory Enforcement and Sanctions Act 2008, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2021 No.

FOOD, ENGLAND

PUBLIC HEALTH, ENGLAND

The Food (Promotion and Placement) (England) Regulations 2021

Made - - - - ***

Coming into force - - 6 April 2022

The Secretary of State, in exercise of the powers conferred by sections 6(4), 16(1)(e) and (f), 26(3) and 48(1) of the Food Safety Act 1990^[footnote 1] by sections 36, 39, 52, 54, 55, 62(2), 63 and 65 of the Regulatory Enforcement and Sanctions Act 2008^[footnote 2] (“the 2008 Act”) and by section 105 of the Deregulation Act 2015^[footnote 3] makes the following Regulations.

The Secretary of State has carried out consultations in accordance with sections 48(4) of the Food Safety Act 1990 and section 60 of the 2008 Act.

The Secretary of State is satisfied in accordance with section 66 of the 2008 Act that food authorities (who are the regulators for the purpose of these Regulations) will act in accordance with the principles referred to in section 5(2) of that Act in exercising a power conferred by these Regulations.

A draft of these Regulations was laid before Parliament in accordance with section 62(3) of the 2008 Act, and approved by a resolution of each House of Parliament.

Citation, commencement, extent and application

1.—(1) These Regulations may be cited as the Food (Promotion and Placement) (England) Regulations 2021 and come into force on 6 April 2022.

(2) These Regulations extend to England and Wales, and apply in relation to England only.

Interpretation

2. In these Regulations—

“consumer” has the meaning given in section 2(3) of the Consumer Rights Act 2015;

“prepacked food” means any single item for presentation as such to the final consumer, consisting of a food and the packaging into which it was put before being offered for sale, whether such packaging encloses the food completely or only partially, but in any event in such a way that the contents cannot be altered without opening or changing the packaging; ‘prepacked food’ does not cover foods packed on the sales premises at the consumer’s request or prepacked for direct sale;

“specified food” has the meaning given in regulation 3;

“qualifying business” has the meaning given in regulation 4;

“the 2004/05 Nutrient Profiling Model” means the tool developed by the Food Standards Agency to identify food which is high in fat, salt or sugar.^[footnote 4]

Specified food

3.—(1) For the purposes of these Regulations “specified food” is prepacked food which—

(a) falls within any of the categories listed in Schedule 1 to these Regulations,

(b) is high in fat, salt or sugar, and

(c) is not food to which paragraph (3) applies.

(2) For the purposes of this regulation—

(a) food that is not a drink is high in fat, salt or sugar if it scores 4 or more points under the 2004/05 Nutrient Profiling Model;

(b) a drink is high in fat, salt or sugar if it scores 1 or more points under the 2004/05 Nutrient Profiling Model.

(3) This paragraph applies to food which is—

(a) provided by a charity, in the course of its charitable activities, free, or for a price which is less than the cost of providing that food, or

(b) offered for sale by or on behalf of a charity, at a single event, to raise funds for its charitable activities.

(4) For the purposes of paragraph (3)—

(a) “charity” has the meaning given by section 1 of the Charities Act 2011^[footnote 5];

(b) “charitable activity” means an activity carried out for a charitable purpose, other than primarily for the purpose of raising funds;

(c) “charitable purpose” has the meaning given by section 2(1) of the Charities Act 2011 (reading the reference in section 2(1) to the law of England and Wales as including a reference to the law of Scotland and the law of Northern Ireland).

Qualifying businesses

4.—(1) For the purposes of these Regulations a business is a “qualifying business” if—

(a) it sells to consumers (whether in store or online)—

(i) any prepacked food, or

(ii) any drinks to which regulation 6(1) applies,

(b) on the first day of the financial year during which any such sale took place, it had 50 or more employees, and

(c) it is not an exempt business.

(2) A business is an exempt business if it is—

- (a) an institution providing education to pupils below the age of 18;
- (b) a canteen at a work-place unless paragraph (3) applies;
- (c) a military establishment or prison (other than a restaurant run at a prison which offers food to the public);
- (d) a care home (within the meaning of section 3 of the Care Standards Act 2000^[footnote 6]) which only provides food to residents of the care home and charges for that service as part of the cost of the accommodation.

(3) This paragraph applies if the catering services at a work-place canteen are provided for the employer by another business having 50 or more employees on the first day of the financial year during which any such services are provided.

(4) For the purposes of determining how many employees a business has, a business that is carried on pursuant to a franchise agreement is to be treated as part of the business of the franchisor and not as a separate business carried on by the franchisee.

(5) For the purposes of paragraph (4), a “franchise agreement” exists where one undertaking (“the franchisee”) and another undertaking (“the franchisor”) agree that the franchisee carries on a business activity which includes the sale or distribution of food (“the franchise business”), and paragraph (6) applies to the franchise business.

(6) This paragraph applies if one or more of—

- (a) the products provided in the franchise business;
- (b) the internal or external appearance of the premises where the franchise business is carried on; or
- (c) the business model used for the operation of the franchise business, are agreed by the franchisor, and are similar to that of other undertakings in respect of which the franchisor has entered into comparable contractual arrangements.

(7) For the purposes of this regulation—

- (a) the employees of a business are the persons who are employed for the purposes of the business;
- (b) “employee” means an individual who has entered into, or works under, a contract of employment, whether that contract is for full-time or part-time employment;
- (c) “contract of employment” means a contract of service, whether express or implied, and (if it is express) whether oral or in writing;
- (d) “financial year” means the 12-month period ending on 31st March;
- (e) “military establishment” means an establishment intended for use for naval, military or air force purposes or for the purposes of the Department of the Secretary of State responsible for defence;
- (f) “prison”—
 - (i) includes any youth detention accommodation within the meaning of section 107(1) (detention and training orders) of the Powers of Criminal Courts (Sentencing) Act 2000^[footnote 7], but
 - (ii) does not include any naval, military or air force prison.

Restrictions on the price promotion of specified food

5.—(1) Subject to paragraph (5), a qualifying business must not offer volume price promotions on specified food (whether the specified food is offered in store or online).

(2) “Volume price promotion” means—

(a) a multibuy promotion, meaning the offer of a discount or special price for buying multiple items compared with the price for buying each item separately (for example “three for the price of two”, “3 for £10”, “buy 6 and save 25%”);

(b) a promotion that indicates that a product, or any part of a product, is free (for example “fifty per cent extra free”, or “buy one get one free”).

(3) For the purposes of paragraph (2)(a), “multiple items” includes—

(a) more than one of the same item; and

(b) different items from within one of the categories in Schedule 1.

(4) This regulation applies to promotions that are included on the packaging of food as well as to promotions that are communicated to a consumer via other means.

(5) Where the packaging of specified food includes a volume price promotion, a qualifying business may offer the specified food for sale until 5 April 2023.

Restrictions on the price promotion of certain drinks

6.—(1) This regulation applies to drinks which are not prepacked food and which—

(a) fall within category 1 of Schedule 1,

(b) are high in fat, salt or sugar by virtue of scoring 1 or more points under the 2004/05 Nutrient Profiling Model, and

(c) are not food to which regulation 3(3) (charity food sales) applies.

(2) A qualifying business must not offer a free refill promotion on drinks to which this regulation applies.

(3) In paragraph (2), “free refill promotion” means a promotion that offers the consumer the same drink, or another drink to which this regulation applies, for free (including free top-ups of any part of a drink).

Restrictions on the placement of specified food – in store

7.—(1) Subject to paragraph (3), a qualifying business must not place specified food inside a physical store —

(a) within two metres of a checkout area;

(b) within two metres of a designated queuing area, unless the specified food is placed in a main shopping aisle;

(c) in an end-of-aisle display;

(d) [OPTION 1: in the prohibited entrance area];

(e) [OPTION 2: at any point within the prohibited distance of the midpoint of any public entrance to the store's main shopping area];

(f) in a covered external area.

(2) In paragraph (1)—

(a) “checkout area” means a point in the store intended to be used by consumers to pay for products, including a self-checkout till and a counter at which a cash register is used (including the area behind such a counter);

(b) “designated queuing area” means an area where consumers are intended to queue when waiting to complete a purchase;

(c) [OPTION 1: “prohibited entrance area” means an area immediately inside each public entrance to the store's main shopping area, being a square—

(i) of area equal to the smaller of 225m² or 5% of the store's floor area, and

(ii) drawn so one edge of the square coincides with the line of the entrance, with the midpoint of that edge coinciding with the midpoint of the entrance.

irrespective of whether such area is obstructed by walls or other structural features of the store];

(d) [OPTION 2: “the prohibited distance” means a distance being the smaller of 15m or the following

—
(square root of (0.05 x area))

(3) This regulation does not apply to—

(a) stores with a floor area of less than 185.8m²;

(b) stores which only or mainly sell food from a single category listed in Schedule 1.

(4) In this regulation—

(a) “covered external area” means a covered area outside a store's main shopping area connected to the store and through which the public passes to enter the store (such as a foyer, lobby or vestibule);

(b) “floor area” means an area equal to the store's main shopping area;

(c) “main shopping area” includes all service areas accessible to the public (such as deli and checkout counters and the areas behind them) but excludes external covered areas and areas with no public access (such as backrooms and storerooms).

Restrictions on the promotion of specified food – online

8.—(1) Subject to paragraphs (3) and (4), a qualifying business must not promote specified food on an online marketplace—

(a) on an entry page (whether or not the consumer enters the online marketplace via the entry page);

(b) while a consumer is searching for or browsing products other than specified food;

(c) while a consumer is searching for or browsing specified food, unless the promoted food falls within the same Schedule 1 category;

(d) on a page not opened intentionally by the consumer (such as a “pop-up” or “pop-under” page);

(e) on a favourite products page, unless the consumer has previously purchased the promoted food or intentionally identified it as a favourite product;

(f) on a checkout page.

(2) For the purposes of this regulation—

(a) “entry page” means any of—

(i) an online marketplace’s highest level public page;

(ii) the highest level public page of an online marketplace’s grocery section;

(iii) a page containing pre-determined offers to which a consumer is directed on entering an online marketplace (a landing page);

(b) “checkout page” means a page shown to a consumer as part of the checkout process, such as a page listing items the consumer has so far selected for purchase or a page dealing with payment, collection or delivery;

(c) “favourite products page” means a page opened by a consumer for the purpose of browsing products they have previously purchased or intentionally identified as favourite products;

(d) “promote”—

(i) means offer for sale or otherwise present in a way intended to attract the attention of a consumer (including “in case you missed it” or, except on a favourite products page, “previously purchased” recommendations);

(ii) does not include any presentation of third-party advertising material which is not in the direct control of the qualifying business.

(3) Paragraph (1) does not prohibit promoting specified food on a page opened intentionally by a consumer for the purpose of browsing special offers generally.

(4) This regulation does not apply to stores which only or mainly sell food from a single category listed in Schedule 1.

Enforcement

9. Each food authority must enforce and execute these Regulations within its area.

Improvement notice

10. If an authorised officer of a food authority has reasonable grounds for believing that a person is failing to comply with regulation 5, 6, 7 or 8, the authorised officer may, by a notice served on that person (in these Regulations referred to as an “improvement notice”)—

(a) state the officer’s grounds for believing that the person is failing to comply with regulation 5, 6, 7 or 8;

(b) specify the matters which constitute the person’s failure so to comply;

(c) specify the measures which, in the officer’s opinion, the person must take in order to secure compliance; and

(d) require the person to take those measures, or measures that are at least equivalent to them, within such period as may be specified in the notice.

Offences

11. A person commits an offence if they fail to comply with an improvement notice served under regulation 10.

Sanctions

12.—(1) A person guilty of an offence under regulation 11 is liable on summary conviction to a fine.
(2) Schedule 2 makes provision for fixed monetary penalties.

Guidance as to use of fixed monetary penalties

13.—(1) Each food authority must publish guidance containing information as to—

(a) the circumstances in which a fixed monetary penalty is likely to be imposed under these Regulations;

(b) the circumstances in which it may not be imposed;

(c) the amount of the penalty;

(d) how liability for the penalty may be discharged and the effect of discharge; and

(e) a person's rights to make representations and objections and their rights of appeal.

(2) The food authority must revise the guidance where appropriate.

(3) The food authority must consult with such organisations as appear to them to be representative of interests likely to be substantially affected by the guidance before publishing any guidance or revised guidance.

(4) The food authority must have regard to the guidance or revised guidance in exercising its functions under these Regulations.

Publication of enforcement action

14.—(1) Each food authority must publish reports from time to time.

(2) The reports referred to in paragraph (1) must specify—

(a) the cases in which a fixed monetary penalty has been imposed, except where it has been overturned on appeal;

(b) the cases in which liability to the fixed monetary penalty has been discharged pursuant to paragraph 3(2)(c) of Schedule 2 to these Regulations.

(3) Nothing in this regulation authorises the processing of personal data where doing so would contravene data protection legislation, and for these purposes “personal data” and “data protection legislation” have the same meanings as in section 3 of the Data Protection Act 2018^[footnote 8].

Review

15.—(1) In addition to the review carried out under section 67 of the 2008 Act (Review), the Secretary of State must from time to time carry out a review of the regulatory provisions of these Regulations (including Schedule 1) and publish a report setting out the conclusions of the review.

(2) The first report must be published before the expiry of the period of five years beginning on the date on which these Regulations come into force.

(3) Subsequent reports must be published at intervals not exceeding five years.

(4) A report published under this regulation must, in particular—

(i) set out the objectives intended to be achieved by the regulatory provisions of these Regulations;

(ii) assess the extent to which those objectives are achieved;

(iii) assess whether those objectives remain appropriate; and

(iv) if those objectives remain appropriate, assess the extent to which they could be achieved in another way which involves less onerous regulatory provision.

(5) In this regulation “regulatory provision” has the same meaning as in 32(4) of the Small Business, Enterprise and Employment Act 2015.

Application of various sections of the Food Safety Act 1990

16.—(1) The provisions of the Act set out in paragraph (2) apply for purposes of these Regulations—

(a) as if any reference in those provisions to the Act, or to any Part of the Act, were a reference to these Regulations;

(b) with any modifications specified in paragraph (2).

(2) The provisions of the Act applying, as modified, are—

(a) section 3 (presumptions that food intended for human consumption);

(b) section 20 (offences due to fault of another person);

(c) section 21 (defence of due diligence), as if —

(i) subsections (2) to (4) applied in relation to an offence under these Regulations as they apply in relation to an offence under section 15, and

(ii) in subsection (4)(b) the reference to “sale or intended sale” included “promotion or presentation”;

(d) section 30(8) (which relates to documentary evidence);

(e) section 33(1) (obstruction etc of officers);

(f) section 33(2), as if the reference to “any such requirement as is mentioned in subsection (1)(b) above” were a reference to any such requirement as is mentioned in that subsection as applied by sub-paragraph (e);

(g) section 34 (time limits for prosecutions);

(h) section 35(1) (punishment of offences), in so far as it relates to offences under section 33(1) as applied by sub-paragraph (e);

- (i) section 35(2) and (3), in so far as it relates to offences under section 33(2) as applied by subparagraph (f);
- (j) section 36 (offences by bodies corporate);
- (k) section 36A (offences by Scottish partnerships);
- (l) section 44 (protection of officers acting in good faith); and
- (m) section 50 (service of documents).

Name

Address

Parliamentary Under Secretary of State

Date

Department

SCHEDULE 1 Regulation 3

Categories of food

Category 1: Non-alcoholic soft drinks with added sugar which are either ready to drink or which, to be made ready to drink, must be processed.

For the purposes of this category—

(a) “added sugar” means sugar added to a drink during production which is of a type or in such quantity not naturally occurring in the other ingredients;

(b) “non-alcoholic” means with a content of not more than 1.2% alcohol by volume;

(c) “processed” means one or more of the following—

(i) diluted with water;

(ii) mixed with crushed ice;

(iii) processed to make crushed ice;

(iv) mixed with carbon dioxide;

(d) “soft drinks” means—

(i) still or carbonated water-based drinks;

(ii) milk-based drinks;

(iii) fruit or vegetable juice-based drinks;

(e) “sugar” includes all monosaccharides and disaccharides, including—

(i) all types of cane and beet sugar;

(ii) sugar from other sources such as coconut palm sugar;

(iii) crystalline sucrose, invert sugar, dextrose, molasses;

(iv) sugars in honey, treacle, malt extract and all types of syrup including malt syrup, fruit syrup, rice malt syrup, corn syrup, high-fructose corn syrup, maple syrup, glucose syrup, glucose-fructose syrup;

(v) fructose, sucrose, glucose, lactose, hydrolysed lactose and galactose added as an ingredient;

(vi) sugars in all types of nectars such as coconut blossom nectar, date nectar, agave nectar;

(vii) sugars in juice concentrates.

Category 2: Crisps and other savoury snacks including all potato crisps and similar products made from potato, other vegetables, grain or pulses, including extruded, sheeted and pelleted snacks such as pitta bread based snacks, pretzels, poppadums, prawn crackers, pork scratchings, salted popcorn, and savoury crackers or biscuits which are in individually-portioned bags. This category does not include savoury snacks that are nuts, whether raw or to which other food has been added (such as salt).

Category 3: Breakfast cereals including ready-to-eat cereals, granola, muesli, porridge oats and other oat-based cereals.

Category 4: Confectionery including chocolates and sweets.

Category 5: Ice cream, ice lollies, frozen yogurt, water ices and similar frozen products.

Category 6: Cakes (including cupcakes).

Category 7: Sweet biscuits.

Category 8: Morning goods, meaning croissants, pains au chocolat and similar pastries, crumpets, pancakes, buns, teacakes, scones, waffles, Danish pastries and fruit loaves.

Category 9: Desserts and puddings, including pies, tarts and flans, cheesecake, gateaux, dairy desserts, sponge puddings, rice pudding, crumbles, fruit fillings, powdered desserts, custards, jellies and meringues.

Category 10: Yoghurt.

Category 11: Pizza (except plain pizza bases).

Category 12: Roast potatoes, potato and sweet potato chips, fries and wedges, potato waffles, novelty potato shapes (such as smiley faces), hash browns, rostis, crispy potato slices, potato croquettes.

Category 13: Products that are marketed as a meal that is ready for cooking or reheating without requiring further preparation and which include a carbohydrate accompaniment.

Category 14: Products that are marketed as a meal that is ready for cooking or reheating without requiring further preparation and which do not include a carbohydrate accompaniment, such as prepared fish, shellfish, meat, poultry and meat alternative products in a sauce, but not including fish, shellfish, meat, poultry and meat alternatives (either served plain or) in a marinade, glaze, dressing, seasoning or similar accompaniment.

Category 15: Breaded or battered fish, shellfish, meat, poultry and meat alternative products including fish fingers, fish cakes, chicken nuggets and breaded Quorn.

SCHEDULE 2 Regulation 12

Fixed Monetary Penalties

Interpretation

1. In this Schedule, references to an authorised officer are to an authorised officer of the food authority.

Civil sanctions

2.—(1) An authorised officer may by notice impose a fixed monetary penalty on a person in relation to an offence under regulation 11.

(2) Before doing so, the officer must be satisfied beyond reasonable doubt that the person has committed an offence.

(3) For the purposes of this paragraph, “fixed monetary penalty” means a fine of £2,500. Notice of intent

3.—(1) When an authorised officer proposes to impose a fixed monetary penalty on a person, the officer must serve on that person a notice of what is proposed (“a notice of intent”).

(2) The notice of intent must include—

(a) the grounds for the proposal to impose the fixed monetary penalty;

(b) the amount of the penalty;

(c) a statement that the liability for the penalty can be discharged by paying 50% of the penalty within 28 days beginning with the day in which the notice was received;

(d) information as to—

(i) the effect of that discharge payment;

(ii) the right to make representations and objections within 28 days beginning with the day on which the notice of intent was received;

(iii) the circumstances in which the authorised officer may not impose the requirement (including any defences relating to the offence in relation to which the notice is served). (iv) the consequences of non-payment.

Discharge of liability

4. The penalty is discharged if a person who receives a notice of intent pays 50% of the amount of the penalty within 28 days beginning with the day on which the notice was received.

Making representations and objections

5. A person on whom a notice of intent is served may within 28 days beginning with the day on which the notice was received make written representations and objections to the authorised officer in relation to the proposed imposition of the fixed monetary penalty.

Service of final notice

6.—(1) If the person who has received notice of intent does not discharge liability within 28 days, the authorised officer may serve a final notice imposing a fixed monetary penalty.

(2) The authorised officer may not serve a final notice on a person where the authorised officer is satisfied that the person would not, by reason of any defence, be liable to be convicted of the offence to which the notice relates.

(3) An authorised officer who serves a final notice relating to a fixed monetary penalty may not serve any other notice under these Regulations in relation to the offence. Contents of final notice

7. A final notice must include information as to—

- (a) the amount of the penalty;
- (b) the grounds for imposing the penalty;
- (c) how payment may be made;
- (d) the period of 28 days within which payment must be made;
- (e) details of the early payment discounts and late payment penalties;
- (f) rights of appeal;
- (g) the consequences of non-payment.

Discount for early payment

8. If a person who was served with a notice of intent made representations or objections concerning that notice within the time limit, that person may discharge the final notice by paying 50% of the penalty within 14 days beginning with the day on which the final notice was received.

Grounds of appeal

9.—(1) The person receiving the final notice may appeal against it.

(2) The grounds for appeal are—

- (a) that the decision was based on an error of fact;
- (b) that the decision was wrong in law;
- (c) that the decision was unreasonable.

Appeals

10.—(1) An appeal under paragraph 9 is to the First-tier Tribunal.

(2) A final notice is suspended pending the determination or withdrawal of the appeal.

(3) The First-tier Tribunal may—

- (a) withdraw, confirm or vary a final notice;
- (b) take such steps as an authorised officer could have taken in relation to the act or omission giving rise to a final notice; or
- (c) remit the decision whether to confirm a final notice, or any other matter relating to that decision, to an authorised person.

Non-payment after 28 days

11.—(1) The penalty must be paid within 28 days of receipt of the final notice.

(2) If the penalty is not paid within 56 days, the amount payable is increased by 50%.

(3) In the case of an appeal it is payable within 14 days of the determination of the appeal (if the appeal is unsuccessful), and if it is not paid within 14 days the amount of the penalty is increased by 50%.

Recovery of payments

12. An authorised officer may recover any penalty imposed under this Schedule as if payable under a court order.

Criminal proceedings

13.—(1) If a notice of intent for a fixed monetary penalty is served on any person—

(a) no criminal proceedings for the offence may be instituted against that person in respect of the act or omission to which the notice related before 28 days from the date on which the notice of intent is received; and

(b) if that person discharges liability, that person may not at any time be convicted of the offence in relation to that act or omission.

(2) If a fixed monetary penalty is imposed on any person, that person may not at any time be convicted of the offence in respect of the act or omission giving rise to the penalty.

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1. 1990 c.16. Section 6(4) was amended by paragraph 6 of Schedule 9 to the Deregulation and Contracting Out Act 1994 (c. 40); paragraph 10(3)(a) and (b) of Schedule 5 to the Food Standards Act 1999 (c. 28); and paragraph 1 of Schedule 2 to S.I. 2002/794. Sections 16(1) and 48(1) and (4) were amended by paragraph 8 of Schedule 5 to the Food Standards Act 1999. Section 48(4) was further amended by regulation 5(a) of the S.I. 2004/2990. There are other amendments to sections 6, 16 and 48 not relevant to this instrument.
 2. 2008 c.13. Section 39(4) was amended by paragraph 12(2) of Schedule 5 to S.I. 2015/664.
 3. 2015 c. 20.
 4. An electronic copy of guidance on the application of the 2004/05 Nutrient Profiling Model can be found at <https://www.gov.uk/government/publications/the-nutrient-profiling-model>. Hard copies of this guidance can be obtained by request to Obesity Team, Department of Health and Social Care, 39 Victoria Street, London, SW1H 0EU.
 5. 2011 c. 25.
 6. 2000, c.14. Section 3 provides that an establishment is a care home if it is not a hospital (within the meaning of the National Health Service Act 2006), a children's home, or of a description excepted by regulations, and if it provides accommodation, together with nursing or personal care, for any of the following persons: a) persons who are or have been ill; b) persons who have or have had a mental disorder; c) persons who are disabled or infirm; d) persons who are or have been dependent on alcohol.
 7. 2000 c. 6. Section 107(1) has been amended by section 34(5) and (6)(a), (b) and (c) of the Offender Management Act 2007 (c. 21) and para 12 of Schedule 9 to the Criminal Justice and Courts Act 2015 (c. 2).
 8. 2018 c. 12.

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