

## **Food and Drink Federation submission**

The Food (Promotion and Placement) (England) Regulations 2021 will restrict volume price promotions (e.g. Buy One Get One Free and % Extra Free deals) for food and drink high in fat, salt or sugar as well as restrict the locations in-store where these products can be located (aisle ends, store entrances, and checkout areas).

The FDF (Food and Drink Federation) has the following concerns about the practical implementation of the regulation, which we urge the House of Lords Secondary Legislation Scrutiny Committee to take into their consideration of the Statutory Instrument.

### **Guidance must be developed with businesses to ensure it is fit for purpose to ensure compliance**

- It will not be possible for businesses to prepare for operational implementation without sufficient guidance, as such this needs to be ready as a priority as far in advance of implementation as possible.
- It is essential that this guidance is developed in consultation with industry to provide an opportunity to clarify the scope and raise examples which may be unclear. It is important for this guidance to be clear for both businesses and those who will enforce the policy. Therefore, the Statutory Instrument should stipulate that guidance should be developed in collaboration with businesses.
- Guidance must include a comprehensive update to the Nutrient Profiling Technical Guidance to enable manufacturers and retailers to calculate the Nutrient Profile Model (NPM) scores for all products in scope. This will be a hugely time intensive piece of work, particularly for smaller manufacturers who may not have in-house technical expertise or previous experience in this space.

### **Ensure that reformulated and smaller portion products are not penalised by the restrictions**

- The FDF is disappointed that The Food (Promotion and Placement) (England) Regulations 2021 will mean that many reformulated and smaller portioned products cannot be promoted. For example, Cadbury's 30% reduced chocolate bar will be subject to the bans.
- Companies have devoted substantial amounts of time, innovation and investment to develop products in line with Public Health England targets. Use of promotional mechanisms have been integral to their success by helping to encourage consumers to try them.
- The restrictions are inconsistent with the Government's approach to voluntary reformulation which identifies the importance of marketing to help nudge consumers to try reformulated or smaller portion products. Restricting promotion of these categories will hinder the ability of companies to bring many reformulated and smaller portion products to the market and may jeopardise reformulation work.
- If the Statutory Instrument were to allow some regulatory freedom to promote reformulated and smaller portion products, this would give businesses a clear incentive to accelerate efforts to improve the nutritional profile of products, thus improving the nutritional profile of the average UK shopping basket.

## **The Statutory Instrument should include a requirement for a comprehensive and independent review of the policy within 2-3 years and a sunset clause**

- The promotional restrictions are a highly experimental policy, which the Government has limited evidence to justify its introduction, and will place disproportionate burdens on business. Whilst we recognise that the Government has used the best information available in developing its impact assessments for this policy, the gaps in the evidence and assumptions that have been made cannot be ignored.
- As such, it is essential that a comprehensive and independent review of the policy is undertaken within 2-3 years from implementation and that a sunset clause is included. If the policy is not effective, it should be revoked.
- The review process must be transparent and clear parameters should be set now to determine what success looks like. Key stakeholders involved with making this policy an operational success should be involved with the development of the review process including consideration of the data and metrics that will be analysed to determine the impact of the policy on sales, dietary changes and obesity levels.

28 July 2021

### **Department of Health and Social Care response**

#### **Q1 Will the guidance be developed in consultation with industry to provide an opportunity to clarify the scope and raise examples which may be unclear?**

A1 Draft guidance was shared with stakeholders informally for comment on 9 August as we are keen to make sure that it meets their needs, supports their compliance and reflects their input. Publishing the guidance formally in October 2021 will give businesses 12 months to have sight of the final guidance in preparation for the policy coming into force in October 2022.

#### **Q2. The FDF claim that the Nutrient Profiling Technical Guidance is not as familiar to manufacturers and retailers as you indicated and it will take time to calculate the Nutrient Profile Model (NPM) scores for all products in scope. What is your estimate of the manufacturer's state of readiness to apply these requirements?**

A2. Having considered the consultation feedback, Government decided that the NPM was the most appropriate method to define HFSS products for the purpose of this policy. Having multiple methods of defining HFSS would likely cause confusion for businesses.

The Office of Communications (Ofcom) has been using the 2004/05 Nutrient Profiling Model (NPM) since the broadcast media restrictions came in to force in April 2007 and for non-broadcast media (including print, cinema, online and in social media) since July 2017.

We understand from some industry feedback that they would like the current NPM technical guidance to be updated further to assist with compliance with recent policies introduced as part of the obesity strategy. We are exploring ways to support users to calculate NPM scores consistently. We are working with industry on guidance and support on the NPM to help them comply with the new regulations on promotions and announcements on advertising.

**Q3 How will retailers know which products are in scope - could some symbol be put on the packaging for example?**

A3 The promotions policies will not add any new labelling requirements on businesses to flag on packaging if a product is within scope of the promotion policies. Should a company decide to do this we strongly encourage that this is done in a way that does not interfere with existing labelling requirements, either mandatory or voluntary and does not confuse or mislead the consumer.

Retailers in a qualifying businesses will need to assess whether each of the products they stock is within the categories in scope of the restrictions. If the product is in scope then these retailers will be required to assess whether the product is considered High in Fat Salt and Sugar (HFSS) by calculating the NPM score for the product in accordance with the 2011 technical guidance. If the product is deemed in scope of the restrictions then it will be the responsibility of the retailer to take steps to ensure that they comply with the regulations.

To assist retailers and minimise the burden of this assessment, DHSC will provide further guidance to help businesses implement the restrictions. This means that businesses will receive support on compliance with the regulations via the guidance on the regulations, the guidance on the NPM and it is anticipated that there will be an additional document on enforcement.

There may be some instances where retailers need to ask manufacturers to provide the NPM score or further information for their products, given that retailers may not always have all of the nutrient information needed to calculate the NPM score for branded products. Manufacturers may therefore choose to provide NPM scores to retailers if they wish to promote a product within scope of the regulations. This may be particularly helpful in circumstances where a product is in a category which is in scope of the regulations, but it does not have an NPM score high enough to be caught by the restrictions.

**Q4 We have also received representation that the food industry has put a lot of effort into reformulating products and producing smaller portions - yet no accommodation is provided in these Regulations to allow these reduced calorie versions to be promoted.**

- They ask how the public is to be encouraged to try them if they cannot be prominently displayed.

We know that industry has made some progress when it comes to reformulation of less healthy products, however we know that more needs to be done, with over a fifth of children in England obese or overweight. We hope that this policy will shift the balance of promotions towards healthier options such as minimally processed and nutritious food to make it easier for parents to make healthier choices when shopping for their families. We are

not restricting all forms of promotions, only volume price and location restrictions. We know the food industry have other means to promote products such as price reductions.

Businesses are not restricted in their use of other promotional activities not in scope of these restrictions.

- They also suggest that the legislation as it stands removes any incentive for the industry to continue developing reduced-calorie formulations.

Businesses will be able to promote food and drink products that are in Schedule 1 categories of the regulation if they pass the NPM (i.e. Foods scoring less than 4 points, or drinks scoring less than 1 on the NPM). Some products will be able to be reformulated to pass the NPM and we hope that businesses may choose to do so as a result of these Regulations.

We recognise that for some products which are inherently HFSS, reformulation to achieve the NPM threshold will be more challenging. However, there are other incentives to reformulate such as consumer demand for healthier products, the possibility of making nutrition claims, and PHE's reformulation programme, which we hope will incentivise manufacturers to reduce the salt, fat and sugar levels in their products as well as reduce portion sizes

DHSC  
13 August 2021