

**Royal Society for Public Health – Consultation Response: Introducing further advertising restriction on TV and online for products high in fat, salt or sugar.**

Royal Society for Public Health (RSPH) is an independent health education and campaigning charity, committed to improving and protecting the public's health and wellbeing. The world's longest-established public health body with over 5000 members committed to supporting the public's health, activities include providing qualifications and public health programmes, alongside campaigning on issues to support better health and wellbeing for the public.

**Question 1**

Do you agree or disagree that regulation 3 makes it clear how businesses and regulators can determine if a food or drink product is in scope of the advertising restrictions?

- **Agree, it is clear**
- Disagree, it is not clear
- I don't know

Please explain your answer

The standard for determining the nutrient profiling model score for a product is to use the Nutrient Profiling Technical Guidance.

The Nutrient Profiling Technical Guidance provides clear guidance on how to generate a nutrient Profiling score, using the Nutrient Profiling Model (NPM) to assess products, and is an evidence-based tool that is already well understood and easily used in practice to define products that can be advertised to children and dictate where products can be located in retail environments.

**Question 2**

Do you agree or disagree that regulation 3 clearly describes standards for determining the nutrient profiling model score for a product, including accessing the technical guidance document?

- **Agree, it is clear**
- Disagree, it is not clear
- I don't know

Please explain your answer

It is clear that the standard for determining the nutrient profiling model score for a product is to use the Nutrient Profiling Technical Guidance published by the Department of Health on 1 January 2011, which is accessible on the Department's website.

The Nutrient Profiling Technical Guidance provides clear guidance on how to generate a nutrient Profiling score, using the Nutrient Profiling Model (NPM) to assess products, and is an evidence-based tool that is already well understood and easily used in practice to define products that can be advertised to children and dictate where products can be located in retail environments.

**Question 3**

Do you agree or disagree that the text in the Schedule clearly and accurately describes which products fall into each category?

- **Agree, it is clear**
- Disagree, it is not clear
- I don't know

Please explain your answer

The text in the Schedule clearly and accurately describes which products fall into, and which are exempt from, each of the categories, which are also set out in the Schedule (those outlined as a limited set within the Soft Drinks Industry Levy (SDIL), Sugar and Calorie Reduction programmes).

#### Question 4

Do you agree or disagree that the text in regulation 3 makes it clear all categories apply to both retail and out-of-home food and drink products?

- **Agree, it is clear**
- Disagree, it is not clear
- I don't know

Please explain your answer

The text in regulation 3 makes it clear all categories laid out in the Schedule apply to both retail and out-of-home food and drink products that are 'less healthy as defined by the NPM', and the regulation 3 only applies to large (over 250 employee) retail and out-of-home businesses, with no exemptions.

We strongly support the Government's proposals to introduce legislation that covers paid for (monetary and non-monetary) advertising of less healthy food and drinks, within the set of categories laid out in the schedule, sold both in retail and out-of-home for large businesses.

#### Question 5

Do you agree or disagree that the definition in regulation 4 accurately and clearly describes what businesses will be classified as 'food and drink SMEs'?

- **Agree, it is clear**
- Disagree, it is not clear
- I don't know

Please explain your answer

The definition in regulation 4 accurately and clearly describes what businesses will be classified as 'food and drink SMEs'; as to being a business which involve or are associated with the manufacture or sale of food or drink during the financial year and on the first day of the financial year, employs fewer than 250 people for the purposes of those businesses (in the UK or internationally), with no exemptions other than that for a franchise business if the franchise agreement is limited to the alcoholic drinks and the franchisee is free to determine what other food or drink is provided.

The above applies to businesses that provide food for consumption both at home and elsewhere, if they undertake paid for advertising (paid for meaning any monetary or non-monetary payments).

The advertising restrictions apply to everyone that is not a "food or drink SME", regardless of whether food and drink is their primary focus. As such, the restrictions would apply to businesses that are not primarily food and drinks businesses, but that do sell less healthy food and drink (such as cinemas).

We believe it is important that the regulations include a mechanism for the scope of the restrictions to be formally reviewed and revised to close any loopholes that emerge.

#### Question 6

Do you agree or disagree that the definition in regulation 4 accurately and clearly describes how to define employees of a business?

- **Agree, it is clear**
- Disagree, it is not clear
- I don't know

Please explain your answer

The definition in regulation 4 accurately and clearly describes how to define employees of a business, as those who are employed for the purposes of the business, in a contract (in oral or in writing) that is full or part time employment, and who could work for an associated business but who work for the purposes of this (food and drink) business.

This definition has undergone extensive recent consultation and now applies in The Food (Promotions and Placement) (England) Regulations 2021<sup>1</sup> and The Calorie Labelling (Out of Home Sector) (England) Regulations 2021<sup>2</sup>.

We believe it is important that the regulations include a mechanism for the scope of the restrictions to be formally reviewed and revised to close any loopholes that emerge.

Whether agency workers or individuals engaged under zero hours contracts are classed as employees will depend on the individual case and their contract, and it would ultimately be a question of employment law. We would like to ensure clarity on employees is understandable by SMEs in the final guidance.

#### Question 7

Do you agree or disagree that regulation 4 clearly describes what features of a business would constitute a franchise?

- **Agree, it is clear**
- Disagree, it is not clear
- I don't know

Please explain your answer

The definition in regulation 4 accurately and clearly describes what features of a business would constitute a franchise, with no exemptions other than that for a franchise business if the franchise agreement is limited to the alcoholic drinks and the franchisee is free to determine what other food or drink is provided.

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<sup>1</sup> <https://www.gov.uk/government/publications/restricting-promotions-of-products-high-in-fat-sugar-or-salt-by-location-and-by-volume-price> [accessed 27th March 2023]

<sup>2</sup> <https://www.legislation.gov.uk/uksi/2021/909/made> [accessed 27th March 2023]

This definition has undergone extensive recent consultation and now applies in The Food (Promotions and Placement) (England) Regulations 2021<sup>3</sup> and The Calorie Labelling (Out of Home Sector) (England) Regulations 2021<sup>4</sup>. It is vital that a level playing field is provided for all food and drink SMEs both in and out of the home.

We believe it is important that the regulations include a mechanism for the scope of the restrictions to be formally reviewed and revised to close any loopholes that emerge.

#### Question 8

Do you agree or disagree that regulation 4 clearly describes what would constitute a franchise agreement?

- **Agree, it is clear**
- Disagree, it is not clear
- I don't know

Please explain your answer

The definition in regulation 4 accurately and clearly describes what would constitute a franchise agreement, with no exemptions other than that for a franchise business if the franchise agreement is limited to the alcoholic drinks provided in the franchise business and the franchisee is free to determine what other food or drink is provided.

This definition has undergone extensive recent consultation and now applies in The Food (Promotions and Placement) (England) Regulations 2021<sup>5</sup> and The Calorie Labelling (Out of Home Sector) (England) Regulations 2021<sup>6</sup>.

We believe it is important that the regulations include a mechanism for the scope of the restrictions to be formally reviewed and revised to close any loopholes that emerge.

#### Question 9

Do you agree or disagree that regulation 4 clearly describes that the total number of employees in a business includes those employed outside of the UK or by franchises?

- **Agree, it is clear**
- Disagree, it is not clear
- I don't know

Please explain your answer

The definition in regulation 4 accurately and clearly describes that the total number of employees in a business includes those employed outside of the UK or by franchises. It is vital that parity is provided for all food and drink SMEs whether inside or outside the UK.

We believe it is important that the regulations include a mechanism for the scope of the restrictions to be formally reviewed and revised to close any loopholes that emerge.

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<sup>3</sup> <https://www.gov.uk/government/publications/restricting-promotions-of-products-high-in-fat-sugar-or-salt-by-location-and-by-volume-price> [accessed 27th March 2023]

<sup>4</sup> <https://www.legislation.gov.uk/uksi/2021/909/made> [accessed 27th March 2023]

<sup>5</sup> <https://www.gov.uk/government/publications/restricting-promotions-of-products-high-in-fat-sugar-or-salt-by-location-and-by-volume-price> [accessed 27th March 2023]

<sup>6</sup> <https://www.legislation.gov.uk/uksi/2021/909/made> [accessed 27th March 2023]

### Question 10

Do you agree or disagree that the definitions in regulation 4 provide sufficient overall clarity on the definition of an SME?

- **Agree, it is clear**
- Disagree, it is not clear
- I don't know

Please explain your answer

The definition in regulation 4 accurately and clearly describes the complex definition of an SME as being a business, or franchise business, with fewer than 250 employees working for the purposes of food and drinks business (by any contract, part time or full time, in oral or in writing) based anywhere in the world, with only an exemption for franchise agreements that are limited to the alcoholic drinks where the franchisee is free to determine what other food or drink is provided.

### Question 11

Are there any unintended consequences that the government should consider regarding the definition of an SME?

- Agree, it is clear
- Disagree, it is not clear
- I don't know

Please explain your answer

The definition contained within the Health and Care Act, which applies to these regulations, is clear that only large businesses (over 250) employees, that are involved or associated with the manufacture or sale of food or drink within the specified categories in the Schedule, that are less healthy, as defined by the NPM, will be included in the regulations. And only if they undertake paid for advertising (paid for meaning any monetary or non-monetary payments). SMEs that manufacture or sell unhealthy food and drinks, whether for consumption at home or elsewhere, are still contributors to the UK's obesity problem.

However, in recognising that small and medium businesses, particularly those out of the home, will argue that they find the regulations more burdensome to implement, we support the application of restrictions to the sale of less healthy food and drinks in businesses with over 250 employees as a pragmatic solution, which is consistent with The Calorie Labelling (Out of Home Sector) (England) Regulations 2021. Large businesses already have to provide calorie information for menus, and all businesses that sell food in packaging have to provide nutrition information, and will be well placed to calculate the NPM.

### Question 12

Do you agree or disagree that regulation 5 clearly describes and fully captures what constitutes a service connected to regulated radio services?

- Agree, it is clear
- Disagree, it is not clear
- **I don't know**

Please explain your answer

Broadcast radio is not within scope. Audio advertisements on the online streams of regulated commercial and community radio stations are in scope but will be exempt provided there are no visual accompaniments to the sound.

The online marketing environment is fast-paced and innovative with new formats and marketing techniques developing all the time. It will be challenging for the Government to effectively future proof this policy by identifying now all types of marketing communications and platforms that will be in use in the future. Therefore, it is vital that the new regulations have a regular two-yearly review mechanism built in where the scope can be adjusted to capture new marketing techniques that have evolved that may be exempt and address any other loopholes that may have arisen from the exemptions.

We believe it is important that the regulations include a mechanism for the scope of the restrictions to be formally reviewed and revised to close any loopholes that emerge.

### Question 13

Do you agree or disagree that regulation 6 clearly describes and fully captures what audio-only content is?

- **Agree, it is clear**
- Disagree, it is not clear
- I don't know

Please explain your answer

It is clear. Audio-only is described as consisting wholly of sound and including no visual component, whether moving or still images, or legible text, or a combination of those elements.

We believe it is important that the regulations include a mechanism for the scope of the restrictions to be formally reviewed and revised to close any loopholes that emerge.

### Question 14

Do you agree or disagree that regulation 6 makes it clear what is considered a visual advertisement included with an audio item?

- Agree, it is clear
- **Disagree, it is not clear**
- I don't know

Please explain your answer

It is not clear. Audio advertising which has a visual component is in scope of the restrictions.

We seek clarity as to whether this includes either brand or product identifiable, or both, visuals. E.g. an audio ad that is product-identifiable, but if the visual component could not be product-identifiable, but it could be brand-identifiable.

We are concerned the phrase 'visual', in regard to products, not brands, could lead to a loophole in the restriction where brands can promote HFSS products, providing they can't be identified as particular branded products. Examples of this could be using cartoon or drawn pictures of products, or emojis that are likely to be HFSS or have the effect of promoting HFSS products.

### Question 15

Do you agree or disagree that the relevant parts of the regulations provide sufficient overall clarity on the services in scope of the advertising restrictions?

- Agree, it is clear
- **Disagree, it is not clear**
- I don't know

Please explain your answer

It is not clear. Audio advertising which has a visual component is in scope of the restrictions. We seek clarity as to whether this includes either brand or product identifiable, or both, within the visual component.

### Question 16

**Do you have any additional comments on the draft regulations?**

RSPH fully supports the proposal to introduce a 9pm watershed on TV and a total online HFSS advertising restriction as the most effective way to protect children from influential unhealthy food and drink adverts.

We were disappointed that the Government delayed the introduction of these regulations. Retailers and manufacturers have been aware of the Government's intention since chapter 1 of the Childhood Obesity Plan was published in 2016. We are frustrated that the Government has not made more progress in tackling the obesity crisis in our population. There is a pressing need for effective regulation to restrict junk food advertising online as part of a comprehensive approach to reduce obesity. In the UK we have an established principle that unhealthy food marketing causes harm and needs effective restriction. The conversation now should be how to make the restrictions as effective as possible across media accessed by children.