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DRAFT STATUTORY INSTRUMENTS

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**2021 No.**

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

**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 1st October 2022.

(2) These Regulations—

- (a) extend to England and Wales, and
- (b) apply in relation to England, but not in relation to the territorial waters adjacent to England.

**Interpretation**

2.—(1) In these Regulations—

“consumer” has the meaning given in section 2(3) of the Consumer Rights Act 2015<sup>(1)</sup>;

“online marketplace” means any software (including a website, part of a website, or an application) that is used to offer the qualifying business’s products for sale to consumers;

“prepacked food item” means an item referred to in Article 2(2)(e) of [Regulation \(EU\) No 1169/2011](#) of the European Parliament and of the Council on the provision of food information to consumers<sup>(2)</sup>;

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

“qualifying person” means a person acting in the course of carrying on a qualifying business;

“relevant special offer” means an offer of a discounted price for multiple items promoted as intended to be consumed together as, or as part of, a single meal by one person or by two or more people together (as, for example, in “meal deal” or “dine in for two” offers);

“Schedule 1 food” means food<sup>(3)</sup> falling within a Schedule 1 category;

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

“the Nutrient Profiling Technical Guidance” means the guidelines published by the Secretary of State on 14th January 2011 about the application of the 2004-2005 Nutrient Profiling Model<sup>(4)</sup>.

(2) For the purposes of these Regulations, a qualifying person offers a qualifying business’s products for sale on an online marketplace if they determine (whether on behalf of the qualifying

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(1) [2015 c.15](#). Section 2(3) defines “consumer” as an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession.

(2) [EUR 1169/2011](#), which was incorporated into domestic law, with effect from 11.00 p.m. on 31st December 2020, by section 3 of the [European Union \(Withdrawal\) Act 2018](#).

(3) The definition of “food” in section 1(1) of the Food Safety Act 1990 refers to [Regulation \(EC\) No. 178/2002](#) of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

(4) An electronic copy can be found at <https://www.gov.uk/government/publications/the-nutrient-profiling-model>. Hard copies can be obtained by request to Obesity Team, Department of Health and Social Care, 39 Victoria Street, London, SW1H 0EU.

business or on behalf of another business) that the product is to be offered for sale and its price, irrespective of who undertakes on behalf of the qualifying business—

- (a) to obtain payment from the purchaser, or
- (b) to otherwise operate the online marketplace.

### **Specified food**

**3.—**(1) For the purposes of these Regulations, “specified food” is food contained in a prepacked food item which—

- (a) is Schedule 1 food,
- (b) is less healthy (as defined in paragraph (4)), and
- (c) is not food to which paragraph (5) (charity food sales) applies.

(2) Where a prepacked food item contains more than one type of food, all of the food contained in the item is to be treated for the purposes of paragraph (1)(a) as Schedule 1 food where one (or more) of the types of food contained in the item would, on its own, be Schedule 1 food.

(3) Where a product contains multiple items of which one (or more) is a prepacked food item containing specified food, the entire product is to be treated as specified food.

(4) For the purposes of this regulation—

- (a) food that is not a drink is less healthy if it scores 4 or more points in accordance with the Nutrient Profiling Technical Guidance;
- (b) a drink is less healthy if it scores 1 or more points in accordance with the Nutrient Profiling Technical Guidance.

(5) 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 to raise funds for its charitable activities at a single event.

(6) For the purposes of paragraph (5)—

- (a) “charity” has the meaning given by section 1 of the Charities Act 2011<sup>(5)</sup>;
- (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.

### **Qualifying businesses**

**4.—**(1) For the purposes of regulations 5 (price promotion restriction), 7 (placement restriction) and 8 (online promotion restriction) a business is a “qualifying business” if—

- (a) a person offers, in the course of carrying on the business, any prepacked food item for sale (whether in store or on an online marketplace) to consumers,
- (b) on the first day of the financial year during which any such sale took place, the business had 50 or more employees, and
- (c) the business is not—
  - (i) a care home;
  - (ii) an educational institution;

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(5) 2011 c. 25.

(iii) a restaurant.

(2) For the purposes of regulation 6 (drink refill promotion restriction) a business is a “qualifying business” if—

- (a) a person offers, in the course of carrying on the business, any drink to which regulation 6 applies for sale (in store) to consumers,
- (b) on the first day of the financial year during which any such sale took place, the business had 50 or more employees, and
- (c) the business is not—
  - (i) a care home;
  - (ii) an educational institution.

(3) 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.

(4) For the purposes of paragraph (3), 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 (5) applies to the franchise business.

(5) This paragraph applies if—

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

(6) 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) a “care home” is a care home within the meaning of section 3 of the Care Standards Act 2000<sup>(6)</sup> which only provides food to residents of that care home and charges for that service as part of the cost of the accommodation;
- (c) “contract of employment” means a contract of service, whether express or implied, and (if it is express) whether oral or in writing;
- (d) “educational institution” means an institution providing education only to pupils below the age of 18;
- (e) “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;
- (f) “financial year” means the 12-month period ending on 31st March;
- (g) “restaurant” means a business whose premises are used mainly for the preparation or sale of food intended for immediate consumption, whether on or off the premises (including a café, coffee shop, fast food or takeaway business).

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(6) 2000 c.14.

### **Restriction on the price promotion of specified food**

5.—(1) Subject to paragraph (5), a qualifying person must not offer specified food for sale as part of a volume price promotion (whether in store or on an online marketplace).

(2) “Volume price promotion” means—

- (a) a multibuy promotion, being the express offer of a financial incentive for buying multiple items compared with buying each item separately (including “3 for the price of 2”, “3 for £10”, or “buy 6 and save 25%”);
- (b) a promotion that indicates that an item, or any part of an item, is free (including “50% extra free”, or “buy one get one free”).

(3) For the purposes of paragraph (2)(a), a multibuy promotion does not include a relevant special offer.

(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 person may offer the specified food for sale until the end of the period of 12 months beginning on the day these Regulations come into force.

### **Restriction on the price promotion of certain drinks**

6.—(1) This regulation applies to a drink which is not a prepacked food item and which—

- (a) falls within category 1 of Schedule 1,
- (b) is less healthy by virtue of scoring 1 or more points in accordance with the Nutrient Profiling Technical Guidance, and
- (c) is not food to which regulation 3(5) (charity food sales) applies.

(2) A qualifying person must not offer a free refill promotion on a drink 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 (including free top-ups of any part of such a drink), for free after consumption of a first drink.

### **Restriction on the placement of specified food – in store**

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

- (a) within two metres of a checkout facility, unless the specified food is placed in (but not at the end of) an aisle;
- (b) within two metres of a designated queuing area, unless the specified food is placed in (but not at the end of) an aisle;
- (c) in a display—
  - (i) at the end of (but not in) an aisle, where the aisle end is adjacent to a main customer route through the store, or
  - (ii) on a separate structure (such as an island bin, free-standing unit, side stack or clip strip) connected or adjacent to, or within 50cm of, such an aisle end;
- (d) at any point within the prohibited distance of the midpoint of any public entrance to the store’s main shopping area;
- (e) in a covered external area.

- (2) This regulation does not apply to—
- (a) stores with a relevant floor area of less than 185.8m<sup>2</sup>;
  - (b) stores which only or mainly sell food from a single category listed in Schedule 1.
- (3) In this regulation—
- (a) “checkout facility” means a facility intended to be used by consumers to make a purchase, including a self-checkout terminal and a counter at which a cash register is used (including the area behind such a counter);
  - (b) “covered external area” means a covered area, outside and connected to a store’s main shopping area, through which the public passes to enter the main shopping area (such as a foyer, lobby or vestibule);
  - (c) “designated queuing area” means an area set aside and marked for the purpose of providing a place for consumers to wait to make a purchase;
  - (d) “prohibited distance” means the smaller of 15m or the following—  
$$\sqrt{0.03 \times a}$$
where *a* is the store’s relevant floor area;
  - (e) “relevant floor area” means the internal floor area of so much of a store as consists of or is comprised in a building, excluding any part of the store which—
    - (i) is not used for displaying goods or for serving customers in connection with the sale of goods,
    - (ii) is used mainly for the preparation or sale of food intended for immediate consumption, whether on or off the premises (including, for example, a coffee shop or a canteen);
    - (iii) is a room used for consultation with customers in connection with any medical services (such as pharmacy or opticians’ services) offered in the store, or
    - (iv) is occupied by a business other than the business primarily responsible for managing and operating the store (“a concession”), but only where the concession operates its own payment facilities.

### **Restriction on the promotion of specified food – online**

- 8.—(1) Subject to paragraphs (2) and (3), a qualifying person must not cause specified food to be offered for sale on an online marketplace—
- (a) on a home page (whether or not the consumer enters the online marketplace via the home page);
  - (b) while a consumer is searching for or browsing products other than Schedule 1 food, unless paragraph (4) or (5) applies;
  - (c) while a consumer is searching for or browsing Schedule 1 food, unless—
    - (i) the specified food falls within the same Schedule 1 category, or
    - (ii) paragraph (4) or (5) applies;
  - (d) on a page not opened intentionally by the consumer (such as a “pop-up” page or a “brand burst”);
  - (e) on a favourite products page, unless the consumer has previously purchased the specified food (whether in store or online) or intentionally identified it as a favourite product but specified food must not in any event be given greater prominence than other products on a favourite products page;

- (f) on a checkout page.
- (2) Paragraph (1) does not prohibit offering specified food for sale on a page opened intentionally by a consumer for the purpose of browsing special offers generally.
- (3) This regulation does not apply in respect of a qualifying business which only or mainly sells food from a single category listed in Schedule 1.
- (4) This paragraph applies where—
  - (a) a consumer is searching for or browsing food (whether or not specified food), and
  - (b) the qualifying person causes specified food to be offered for sale together with the food referred to in sub-paragraph (a) as part of a relevant special offer.
- (5) This paragraph applies—
  - (a) where a consumer browses or searches for a general category of product which includes the specified food (such as categories relating to seasonality, or to nutritional or dietary characteristics);
  - (b) in relation to searching, where a search term entered by the consumer matches in whole or in part—
    - (i) the name under which the specified food is marketed, or
    - (ii) an ingredient listed on the packaging of the specified food.
- (6) For the purposes of this regulation—
  - (a) “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;
  - (b) “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;
  - (c) “home 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.

## **Enforcement**

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

## **Improvement notice**

10. If a food authority has reasonable grounds for believing that a person is failing to comply with one or more of regulation 5, 6, 7 or 8, it may, by a notice served on that person (in these Regulations referred to as an “improvement notice”)—
- (a) state the authority’s grounds for believing that the person is failing to comply with, as the case may be, 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 authority’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 about its use of the power to impose fixed monetary penalties under these Regulations.

(2) The guidance must contain information including (whether or not among other things)—

- (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.

(3) The food authority must revise the guidance where it considers appropriate.

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

(5) 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 from time to time publish a report about the enforcement action it has taken under these Regulations.

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

- (a) the cases in which a fixed monetary penalty has been imposed, except in cases where at the time the report is published—
  - (i) a period of 28 days beginning with the day the fixed monetary penalty was imposed has not yet elapsed,
  - (ii) an appeal brought in accordance with paragraph 9 of Schedule 2 is pending in relation to the fixed monetary penalty, or
  - (iii) the fixed monetary penalty has been withdrawn;
- (b) the cases in which liability to the fixed monetary penalty has been discharged pursuant to paragraph 4 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(7).

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(7) 2018 c. 12, which has been amended made by SI 2019/419.

## Review

**15.—**(1) In addition to the review carried out under section 67 (review) of the Regulatory Sanctions and Enforcement Act 2008, the Secretary of State must from time to time carry out a review of the regulatory provisions of these Regulations 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) Section 30(4) of the Small Business, Enterprise and Employment Act 2015<sup>(8)</sup> (“the 2015 Act”) requires that a report published under this regulation must, in particular—

- (a) set out the objectives intended to be achieved by the regulatory provisions of these Regulations;
- (b) assess the extent to which those objectives are achieved;
- (c) assess whether those objectives remain appropriate; and
- (d) 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 2015 Act.

## Application of various sections of the Food Safety Act 1990

**16.—**(1) The provisions of the Food Safety Act 1990 set out in paragraph (2) apply for the 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 32 (powers of entry);
- (f) section 33(1) (obstruction etc. of officers);
- (g) 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 (f);
- (h) section 34 (time limits for prosecutions), as if for “section 35(2) below” there were substituted “regulation 12(1)”;
- (i) section 35(1) (punishment of offences), in so far as it relates to offences under section 33(1) as applied by sub-paragraph (f);

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<sup>(8)</sup> 2015 c. 26.



- (j) section 35(2), in so far as it relates to offences under section 33(2) as applied by sub-paragraph (g);
- (k) section 36 (offences by bodies corporate);
- (l) section 36A (offences by Scottish partnerships);
- (m) section 37 (appeals to magistrates' court or sheriff), as if the reference to an improvement notice were to an improvement notice served under regulation 10;
- (n) section 44 (protection of officers acting in good faith); and
- (o) section 50 (service of documents).

Date

*Name*  
Minister of State  
Department for Health and Social Care