

EXPLANATORY MEMORANDUM TO
THE TRANSFER OF FUNCTIONS (FOOD) REGULATIONS 2011

2011 No. 3012

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The purpose is to change the designated competent authority under each statutory instrument, from the Food Standards Agency (FSA) to the Secretary of State for Health.

2.2 The competent authority is required to be notified (under each of the instruments) before certain foods are placed on the market or, before certain health claims are made in respect of foods to be placed on the market.

2.3 These amendments will bring the legislation into line with machinery of government changes and the consequent transfer of staff and areas of policy responsibility from the FSA to the Department of Health, which occurred on 1 October 2010. The policy areas transferred included nutrition and health claims issues and foods for particular nutritional uses both of which are dealt with in the instruments being amended.

2.4 One drafting error in the Notification of Food for Particular Nutritional Uses (England) Regulations 2007 is also corrected in Regulation 3(2) of the Regulations.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The enabling act is referred to in detail in the preamble to the instrument.

4.2 The four statutory instruments being amended by the Regulations, implemented requirements laid down by European legislation. The relevant European legislation is:

- In relation to the Medical Food (England) Regulations 2000, Commission Directive 1999/21/EC.
- In relation to the Notification of Marketing of Food for Particular Nutritional Uses (England) Regulations 2007, Directive 2009 /39/EC.
- In relation to the Nutrition and Health Claims (England) Regulations 2007, Regulation (EC) No. 1924/2006.
- In relation to the Infant Formula and Follow-on Formula (England) Regulations 2007, Commission Directive 2006/41/EC and Commission Directive 1999/21/EC,

5. Territorial Extent and Application

This instrument applies to England.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- What is being done and why

The transfer of certain policy areas from the Food Standards Agency to the Department of Health has made these amendments necessary (see 2 above). The instrument does not of itself reflect any substantive change in policy but merely a transfer of functions from one government department to another.

8. Consultation outcome

8.1 There has been no consultation on the transfer of competent authority functions made by this instrument.

8.2 Technically, this puts the Department of Health in breach of Article 9 of Regulation (EC) No. 178/2002 which requires that a public consultation take place “during the preparation, evaluation and revision of food law”.

8.3 It was decided to dispense with the required consultation on four grounds:

8.3.1 a genuine consultation exercise is impossible to undertake as, whatever the result of that exercise, the door is effectively closed to the reversal of the transfer of policy areas from the FSA to the Department of Health. This fact would render any consultation exercise meaningless.

8.3.2 the changes made by the instrument do not reflect any change or development in food policy but are merely administrative. The spirit of Regulation (EC) No. 178/2002 has not been breached as the purpose of the provision is clearly to ensure consultation on substantive changes to food law.

8.3.3 in view of 8.3.2 above, the likelihood of infraction proceedings is considered to be very low.

8.3.4 Ministerial clearance to dispense with consultation, on the basis of this advice, has now been obtained.

9. Guidance

There is no intention to produce guidance for such a simple, wholly administrative change. However, statements were published following the Machinery of Government Changes.

10. Impact

An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 It does not increase the existing administrative burden on small business.

12. Monitoring & review

Not applicable here.

13. Contact

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