

EXPLANATORY MEMORANDUM TO
THE COMMUNICATIONS ACT 2003 (RESTRICTIONS ON THE ADVERTISING
OF LESS HEALTHY FOOD) (EFFECTIVE DATE) (AMENDMENT) (NO. 2)
REGULATIONS 2022

2022 No. 1381

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care (“DHSC”) and is laid before Parliament by Command of His Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 These Regulations amend the Communications Act 2003 (Restrictions on the Advertising of Less Healthy Food) (Effective Date) (Amendment) Regulations 2022 (S.I. 2022/1311) (“the Delay Regulations”)¹. The Delay Regulations were made on 9 December 2022, to delay the introduction of the restrictions on advertising of less healthy food and drink on television and online set out in sections 321A, 368FA and 368Z14 of the Communications Act 2003 (“the 2003 Act”) (“the advertising restrictions”) by substituting the implementation date of 1 January 2023 with a date of 1 October 2025. The Delay Regulations erroneously substituted 1 January 2025 instead of 1 October 2025 into sections 368Z14(11) and (12), rather than substituting 1 October 2025 into all provisions as intended. This instrument (“the Correction SI”) amends the Delay Regulations to correct that error and ensure that the correct date is substituted by the Delay Regulations, to delay prohibitions on advertising included in the advertising restrictions until 1 October 2025.
- 2.2 The purpose of the advertising restrictions, which were inserted into the 2003 Act by the Health and Care Act 2022 (section 172 & Schedule 18), and the rationale for the delay of the restrictions from 1 January 2023 to 1 October 2025 is set out in the Explanatory Memorandum (EM) to the Delay Regulations.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Delay Regulations were laid 22 days ahead of the instrument coming into force. However, the Correction SI will breach the 21-day convention of laying negative statutory instruments at least 21 days before the coming into force date. This breach of the 21-day convention is necessary to enable the amendments made by the Correction SI to come into force and correct the erroneous provisions in the Delay Regulations before they come into force.
- 3.2 It is necessary for the erroneous provisions in the Delay Regulations to be corrected before they come into force because the Government only has the power to change the

¹ <https://www.legislation.gov.uk/ukxi/2022/1311/made>

implementation date in sections 368Z14(11) and (12) of the 2003 Act to the same date that is substituted into section 368Z14(1).

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England, Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 The 2003 Act was amended by the Health and Care Act 2022 (sections 172 & Schedule 18) to introduce advertising restrictions on television, on demand programme services and online. The Health and Care Act received Royal Assent on the 28 April 2022.
- 6.2 The Delay Regulations were made on 9 December 2022 to delay implementation of sections 321A, 368FA and 368Z14 of the 2003 Act, from 1 January 2023 to 1 October 2025. In error, Regulation 2(4) (b) and (c) of those Regulations substituted 1 January 2023 in section 368Z14 (11) and (12)(a) with 1 January 2025.
- 6.3 The Correction SI is being made to amend Regulation 2(4) (b) and (c) of the Delay Regulations.

7. Policy background

What is being done and why?

- 7.1 This instrument is being made to correct an error in the Delay Regulations to ensure that prohibitions on advertising included in the advertising restrictions are delayed until 1 October 2025, as was intended. Sections 321A, 368FA and subsection (1) of 368Z14 of the 2003 Act were correctly amended by the Delay Regulations so that their implementation date was changed to 1 October 2025 (regulations 2(2), 2(3) and 2(4)(a) of the Delay Regulations). However, subsections (11) and 12(a) of section 368Z14 of the 2003 Act were incorrectly amended with the date 1 January 2025 (regulations 2(4)(b) and 2(4)(c)).
- 7.2 As set out above, the Government only has the power to change the implementation date in sections 368Z14(11) and (12) of the 2003 Act to a date that is the same as the implementation date in section 368Z14(1). Therefore, the Correction SI is being made before the Delay Regulations come into force to remedy this error and ensure prohibitions on advertising included in the advertising restrictions are delayed until 1 October 2025.
- 7.3 The rationale for delaying the introduction of the advertising restrictions until 1 October 2025 are outlined in the Explanatory Memorandum to the Delay Regulations.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.4 The 2003 Act includes standards related to broadcast rules, set out in statute for the regulator, Ofcom, to maintain. The new advertising restrictions supplement these standards and require Ofcom to include statutory standards to prohibit the advertising of ‘less healthy’ food and drink on television and UK-regulated on-demand programme services (ODPS) between 05:30am and 9pm. Furthermore, the advertising restrictions also amend the 2003 Act to add a prohibition for the advertising of ‘less healthy’ food and drink in paid for content online and on non-UK regulated ODPS. The Delay Regulations amended the 2003 Act so sections 321A (Objectives for advertisements: less healthy food and drink), 368FA (Advertising: less healthy food and drink) and subsection (1) of section 368Z14 come into force on 1 October 2025. However, subsections (11) and (12)(a) of section 368Z14 erroneously substituted 1 January 2023 with 1 January 2025.
- 7.5 Subsection (1) of section 368Z14 prohibits persons from paying for advertisements for an identifiable less healthy food or drink product to be placed on the internet, from the beginning of 1 October 2025. Subsection (11) of section 368Z14 states that a person has contravened subsection (1) if, before 1 January 2025, the person has made payment for advertisements to be placed on the internet on or after 1 January 2025, and such payment would have contravened subsection (1) if it had been made on 1 January 2025. Subsection (12) provides an exemption to subsection (1) if arrangements have been put in place to ensure advertisements are not placed on the internet on or after 1 January 2025.

Why is it being changed?

- 7.6 The Government was not able to use a different date in regulations 2(4)(b) and 2(4)(c), to that included in regulation 2(4)(a) of the Delay Regulations, as the powers conferred by section 368Z14(7) of the 2003 Act to delay the date of implementation must state the same date.
- 7.7 The error in regulation 2(4)(b) of the Delay Regulations also renders section 368Z14(11) of the 2003 Act ineffective. Subsection (11) of section 368Z14 states that a person has contravened the prohibition in subsection (1) if before 1 January 2025, the person has made payment for advertisements to be placed on the internet on or after 1 January 2025, and that payment would have contravened subsection (1) if it had been made on 1 January 2025. As the prohibition in subsection (1) does not take effect until 1 October 2025, no payments made on 1 January 2025 would contravene subsection (1), so subsection (11) will not apply to any payments. As a result, the exemption in subsection (12) is redundant.

What will it now do?

- 7.8 This instrument will amend regulations 2(4)(b) and 2(4)(c) of the Delay Regulations to substitute the date 1 January 2025 with the date 1 October 2025. The dates in sections 368Z14(11)(a) and (b) and 368Z14(12) of the 2003 Act will be substituted accordingly.
- 7.9 The effect will be that, under section 368Z14(11) of the 2003 Act, if a person makes a payment prior to 1 October 2025 for an advertisement to be placed on the internet on or after 1 October 2025, and that payment would contravene the restriction in section 368Z14(1) of the 2003 Act if it were made on 1 October 2025, then that person will be

treated as having contravened the restriction in section 368Z14(1). Under section 368Z14(12) of the 2003 Act, subsection (11) will not apply if the person has made arrangements to ensure that the advertisement is not placed on the internet on or after 1 October 2025.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

9.1 This instrument does not involve consolidation and there are no plans to consolidate the relevant legislation at this time.

10. Consultation outcome

10.1 This instrument amends the Delay Regulations which delay implementation of the advertising restrictions in the 2003 Act. There is no legal duty to consult before exercising the powers to delay the implementation date of the advertising restrictions under the 2003 Act. Therefore, we have not consulted on the regulations to delay the implementation of the advertising restrictions.

11. Guidance

11.1 Guidance is not required in respect of this instrument to amend the instrument to delay implementation of the advertising restrictions.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because this instrument is being made to amend the delay to the implementation date of the advertising restrictions included in the Delay Regulations – ensuring prohibitions on advertising included in the advertising restrictions are delayed until 1 October 2025.

12.4 Details regarding the full impact assessment of the advertising restrictions can be found in the EM accompanying the Delay Regulations.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 This instrument does not include a statutory review clause because this instrument only amends the implementation date of the advertising restrictions set out in the Delay Regulations

14.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Neil O'Brien MP has made the following statement, "It is not appropriate in the circumstances to make provision for review in this instrument, as the purpose of the

instrument is to simply delay the implementation of the introduction of further restrictions on the advertising of less healthy products on television and online”

15. Contact

- 15.1 Thari Fernando at the Department of Health and Social Care Telephone: 020 7972 1689 21689 or email: thari.fernando@dhsc.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Sean Povey, Deputy Director for Strategies and New Priorities, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Parliamentary Under-Secretary of State for Primary Care and Public Health, Neil O’Brien MP at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.