

EXPLANATORY MEMORANDUM TO
THE NUTRITION AND HEALTH CLAIMS (ENGLAND) (AMENDMENT)
REGULATIONS 2024

2024 No. 165

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.

2. Declaration

- 2.1 Minister Leadsom, Parliamentary Under Secretary of State for Public Health, Start for Life and Primary Care, at the Department of Health and Social Care confirms that this Explanatory Memorandum meets the required standard.
- 2.2 Kevin Dodds, Deputy Director for Healthy Weight, Food and Nutrition, at the Department of Health and Social Care confirms that this Explanatory Memorandum meets the required standard.

3. Contact

- 3.1 Andrew Herd at the Department of Health and Social Care Telephone: 01132546121/07584265932 or email: Andrew.herd@dhsc.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

- 4.1 These Regulations amend the Nutrition and Health Claims (England) Regulations 2007 (“the 2007 Regulations”). They modify the enforcement regime relating to certain requirements specified in Regulation (EC) No. 1924/2006 of the European Parliament and of the Council on nutrition and health claims made on foods (“the Claims Regulations”). This will enable improvement notices to be used as a more proportionate first step in the enforcement of the requirements around the use of nutrition and health claims on food and drinks in England.

Where does the legislation extend to, and apply?

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

5. Policy Context

What is being done and why?

- 5.1 The government wants to ensure that consumers can have confidence about the claims made about one or more of the ingredients in food and drinks or their beneficial properties. This includes a safety net of legislation that covers nutrition labelling,

composition and standards, including controls on the use of nutrition and health claims which are used on food and drinks.

- 5.2 The 2007 Regulations operate to enforce certain requirements of the Claims Regulations to ensure that nutrition and health claims made on food and drinks are accurate so that consumers can make informed choices and are not misled. Without these Regulations food and drinks labels might contain unreliable statements regarding the perceived health or nutritional benefits of food and drinks which are not backed up by supporting scientific evidence. Nutrition and health claims can only be used if they have been authorised following scientific assessment of the evidence and where the food and drinks meet the conditions of use which are set - for example, nutrients being present at the required level in the food and drinks to support the claim that the food and drinks has a beneficial impact on health.
- 5.3 Currently, the 2007 Regulations provide that non-compliance with the various requirements of the Claims Regulations is an offence, with criminal prosecution therefore being the enforcement route.
- 5.4 These amending Regulations will provide local authorities with a more proportionate way to ensure compliance with the various requirements of the Claims Regulation through the introduction of improvement notices, as an alternative route of enforcement to prosecution, for nutrition and health claims. This would mean that in the future if a local authority has reason to believe there is a breach of nutrition and health claims legislation, it can issue an improvement notice to a business in the first instance.
- 5.5 Improvement notices are already available as an enforcement option in other areas of nutrition law, such as in the Food for Specific Groups (Information and Compositional Requirements) (England) Regulations 2016 (“the 2016 Regulations”). Harmonising the enforcement of nutrition-related legislation provides consistency and clarity to businesses about how enforcement authorities will respond to potential breaches of regulations. It provides a single common framework for enforcement authorities and businesses.

What was the previous policy, how is this different?

- 5.6 This policy change will enable enforcement authorities to act more swiftly and more proportionately where a breach of the specified requirements of the Claims Regulation occurs and businesses to respond more quickly to ensure compliance.
- 5.7 Improvement notices will provide enforcement officers with a more viable and cost-effective enforcement tool to tackle low-level breaches that would not reach prosecution thresholds.
- 5.8 Enforcement authorities’ experience of the use of improvement notices relating to food information and novel foods have been that appeals against the issue of such notices have been very low in numbers, less than double figures. Overall, the threat of an improvement notice can focus businesses on compliance rather than simply defending their position which is usually the case in a prosecution situation. The ability for a prosecution to be brought where that was considered to be the correct course of action would remain.

6. Legislative and Legal Context

How has the law changed?

- 6.1 The Claims Regulations (which are assimilated direct legislation under the Retained EU Law (Revocation and Reform) Act 2023) set out, amongst other things, the requirements which must be complied with in respect of, and conditions for the use of, nutrition and health claims on foods and provides for a register of authorised claims. Claims must comply with the general requirements as specified in Article 3 of the Claims Regulations which include not being false, ambiguous or misleading. A range of general conditions for the use of nutrition or health claims are set out in Articles 4 and 5 and include the condition that claims are only permitted to be made if the average consumer can be expected to understand the beneficial effects expressed in the claim.
- 6.2 As part of the work to identify which EU derived nutrition legislation was no longer needed in the context of what became the Retained EU Law (Revocation and Reform) Act 2023, the enforcement of nutrition and health claims was identified as an area that could be made to work in a way that was less burdensome both for businesses and enforcement authorities, and could be aligned more closely with the enforcement of other food law.
- 6.3 These amending Regulations, therefore, use a number of regulation making powers in the Food Safety Act 1990 (“the 1990 Act”) to amend the 2007 Regulations to reform the way that the requirements in the Claims Regulation in respect of nutrition and health claims in England will be enforced. The 2007 Regulations provide for the enforcement of the Claims Regulation by means of making it an offence to contravene certain provisions of the Claims Regulation, and by applying certain provisions of the 1990 Act, with modifications, to nutrition and health claims. These amending Regulations apply (with modifications) additional provisions of the 1990 Act to nutrition and health claims, in order to enable improvement notices to be served for non-compliance with certain requirements in the Claims Regulation, for it to be an offence to fail to comply with an improvement notice, and to deal with the punishment of such an offence and an appeal against such an offence (which will be to the First-tier Tribunal). They additionally apply (and modify) sections of the 1990 Act relating to powers of entry (to enable enforcement officers to enter premises to ascertain whether there is any breach, or evidence of a breach, of the 2007 Regulations) and the obstruction of officers (to make it an offence to obstruct persons acting in execution of the 2007 Regulations, to fail to give such persons assistance or information or to give them false or misleading information).. The application and modification of these sections of the 1990 Act reflect the similar application and modification of sections of the 1990 Act to other nutrition legislation in the 2016 Regulations, to harmonise enforcement across the policy area. The intention is that improvement notices will be an alternative means of enforcement to criminal prosecution, which will remain as an option.

Why was this approach taken to change the law?

- 6.4 The introduction of improvement notices in England in relation to nutrition and health claims would provide an additional early step for enforcement authorities in England to specify measures to be taken by a business to secure compliance with those requirements. The ability for a prosecution to be brought where that was considered to be the correct course of action would remain. By means of the introduction of improvement notices, enforcement authorities would be able to act more quickly to deal with non-compliance and businesses would be able to respond faster to ensure

compliance, whilst potentially avoiding costly and burdensome court proceedings for both parties.

- 6.5 The government has committed to provide at least three months' notice between legislating and implementation. The Statutory Instrument comes into force on 1 October 2024 in line with the Common Commencement Dates.

7. Consultation

Summary of consultation outcome and methodology

- 7.1 A consultation¹ was published on Gov.uk on the 9th August 2023 for a period of 12 weeks, closing on the 31st October 2023. The consultation invited any person or organisation to provide their views and evidence on the reform proposals contained within the consultation. The consultation was required by article 9 of 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.
- 7.2 The consultation was developed through engagement with officials in the devolved administrations in Scotland, Wales and Northern Ireland. It is also in line with the provisional Nutrition-related Labelling, Composition and Standards Common Framework, which has been developed by administrations in England, Scotland, Wales and Northern Ireland to maintain a consistent and co-ordinated policy approach across the UK.
- 7.3 The consultation was sent to stakeholders including industry trade bodies, organisations (non-governmental organisations and charities) and enforcement officers. The consultation sought views on the proposed text of this instrument. The consultation received 52 responses including from organisations and industry trade bodies that represent manufacturers and retailers. A significant majority (84%) of consultation responses agreed with the proposal to introduce Improvement Notices. Government response can be found here² on Gov.uk.
- 7.4 Following consideration of the consultation responses the Government decided to introduce an improvement notices regime for nutrition and health claims as a more proportionate and effective enforcement regime, providing the right incentives for businesses and enforcement authorities, without placing any additional burden upon them.

8. Applicable Guidance

- 8.1 Guidance to support businesses and local authorities to implement the requirements of these amending Regulations will be published when the legislation is laid on the gov.uk website³.
- 8.2 Guidance on the use of improvement notices in other areas of nutrition law has previously been published by the Food Standards Agency Food Law Practice

¹ <https://www.gov.uk/government/consultations/nutrition-and-health-claims-on-food-proposed-legislative-reforms>

² <https://www.gov.uk/government/consultations/nutrition-and-health-claims-on-food-proposed-legislative-reforms/outcome/government-response-to-the-consultation-on-proposed-legislative-reforms-in-relation-to-nutrition-and-health-claims-on-food>

³ <https://www.gov.uk/government/publications/nutrition-legislation-information-sources/nutrition-legislation-information-sheet--2#nutrition-and-health-claims-made-on-food>

Guidance (England)⁴. Enforcement bodies and industry are familiar with the use of improvement notices from the enforcement of other food labelling legislation that has been introduced in recent years.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full impact assessment has not been prepared for this instrument because there is a low level of impact per business. A Regulatory Triage Assessment has been completed. Our assessment is that upfront familiarisation costs are the only cost impact of these policy reforms on business and enforcement authorities and total less than £5 million.

Impact on businesses, charities and voluntary bodies

- 9.2 The total impact on businesses and enforcement authorities are the familiarisation costs with the new enforcement regime for nutrition and health claims which is estimated at £814k – £1.86m. These will be the total wage costs on a per business/enforcement authority basis for the time needed for an employee and a manager or director within the company to read and understand how the changes will affect businesses and the enforcement regime. These costs are direct costs and are assumed to be one-off and that the full amount is incurred immediately.
- 9.3 The legislation applies to activities that are undertaken by all businesses, including small businesses.
- 9.4 No specific action is proposed to minimise regulatory burdens on small businesses given these proposals either maintain existing standards or streamline enforcement processes. Therefore, the new burdens for small businesses would be a small one-off familiarisation cost estimated at £95-£217. However, we are providing a notice period of more than three months, and the coming into force date is on 1 October to align with the government’s policy of having common commencement dates for business.
- 9.5 There is no significant impact on the public sector because enforcement authorities will only have to spend a short amount of time familiarising themselves with the new procedures, which build on existing enforcement procedures in food legislation, particularly as improvement notices are already in use to enforce wider food labelling regulations. These costs are estimated at £14.7k-£28.3k. Cost impacts to the Justice System from this legislation, namely on Criminal Legal Aid and Tribunals are estimated at £26.2k given the low number of previous appeals against Improvement Notices.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring this legislation is through discussions with industry and enforcement authorities.

The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 Minister Leadsom has made the following statement “It is not appropriate in the circumstances

⁴ [Food law code of practice \(England\)](https://www.food.gov.uk/sites/default/files/media/document/Food%20Law%20Code%20of%20Practice%20%28England%29%20-%20Parliamentary%20laying%20copy%20-%20accessible%20version.pdf) -

<https://www.food.gov.uk/sites/default/files/media/document/Food%20Law%20Code%20of%20Practice%20%28England%29%20-%20Parliamentary%20laying%20copy%20-%20accessible%20version.pdf>

to make provisions for review in this Instrument, as the purpose of this Instrument will enable enforcement authorities to act more swiftly and more proportionately where a breach is highlighted and businesses to respond more quickly to ensure compliance with the regulations.”

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

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

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 (“relevant European Union Acts”).