

BIRMINGHAM CITY COUNCIL

**REPORT OF THE DIRECTOR OF REGULATION AND ENFORCEMENT
TO THE LICENSING AND PUBLIC PROTECTION COMMITTEE**

18 JANUARY 2023
ALL WARDS

**NEW LEGISLATION RESTRICTING PROMOTIONS OF PRODUCTS HIGH IN FAT,
SUGAR OR SALT**

1. Summary

- 1.1 A new series of restrictions on the promotion of foods that are high in fat, sugar and salt (HFSS) came into force, in part, in England and Wales in October 2022, with further implementation dates in October 2023 and January 2024.
- 1.2 To encourage food and drink businesses to produce and promote healthier foods and lifestyles, the legislation now restricts the placement and in-store promotions, of certain HFSS products.
- 1.3 The new rules banning multibuy deals on foods and drinks and restrictions on free refills for soft drinks will now be delayed for a year. The planned restrictions for banning HFSS being advertised on TV before 9pm and paid-for adverts online have also been pushed back and will come into force January 2024.

2. Recommendations

- 2.1 That the report be noted.

Contact Officer: Nick Lowe, Operations Manager Food
Telephone: 0121 303 2491
Email: nick.lowe@birmingham.gov.uk

3. Background

- 3.1 The Government consulted in 2019 on restricting the promotion of HFSS products by volume price (for example, multibuy offers such as 'buy one get one free') and location, both online and in store. Evidence shows that food retail price promotions are widespread and effective at influencing food preferences and purchases (particularly for children). Previous reports recommended that reducing and rebalancing promotions towards healthier food and drink is essential to help reduce children's sugar and calorie intake, and help tackle obesity.
- 3.2 Furthermore, the shopping environment plays an important part in the way products are marketed to us, with simple factors such as the location of products within stores significantly affecting what we buy. The current retail promotional environment:
- does not always align with government healthy eating guidelines
 - makes it harder for families to make healthier choices when shopping
- 3.3 Compliance by industry with the promotion and placement regulations could significantly improve our food environment by ensuring healthier food is more easily accessible and more visible in shops, ultimately supporting people to lead healthier lives.

4. What is an HFSS Product and what businesses are in scope

- 4.1 Impacted food and drink categories are listed in [The Food \(Promotion and Placement\) \(England\) Regulations 2021](#) (referred to as a Schedule 1 food) and include soft drinks, savoury snacks, confectionery and pizza. However, this does not mean every product within each category is impacted. Each is rated on an individual product level by a 'Nutrient Profile Score' with negative points for calorie density, saturated fat, sugar and sodium, and positive points for protein, fibre, fruit, vegetables and nuts. Foods that score four or more and drinks that score one or more are classed as HFSS products.
- 4.2 As part of the 2019 consultation on restricting promotions, the government decided that the volume price and location restrictions should apply to product categories that:
- have been identified as being the biggest contributors to children's sugar and calorie intakes
 - are heavily promoted
 - are therefore the categories of most concern for childhood obesity
- 4.3 Within these categories, the restrictions will only apply to prepacked food that is determined to be HFSS or 'less healthy' as defined by the nutrient profiling model (NPM) 2004 to 2005. The nutrient profiling technical guidance 2011 provides instructions on how to calculate the NPM score for different products. The restrictions will apply to products, not brands, meaning that a brand's product range may have products in and out of scope of the restrictions. It should also be noted that there may be products that, when sold as a single item, are out of scope of the promotion restrictions, but when they are included within a ready meal or whole product, they are in scope of the restrictions (for example, sausages are out of scope of the promotions restrictions, but a sausages and mash ready meal is in scope).

- 4.4 In applying the legislation officers will first need to determine whether they are a qualifying business as described in the regulations. Businesses in scope of the restrictions are referred to as 'qualifying businesses' and are defined in regulation 4. The restrictions will apply to medium and large retailers (with 50 or more employees) offering prepacked food for sale in store and online, including franchises and symbol group stores.
- 4.5 There are a number of exemptions, including small business (less than 50 employees), schools, care homes, military establishments, and charity organisations.
- 4.6 In addition businesses with a floor space of less than 185.2 m² (2000sq ft) are exempt from the location requirements but will still be subject to volume price promotion restrictions when they come into force. Also, specialist retailers that only or mainly sell food from a single category in schedule 1, or a specific type of 'less healthy' product (for example, chocolatiers, confectioners or cake stores) are exempt from location restrictions but must comply with volume price promotion restrictions.
- 4.6 Manufacturers are not considered as a qualifying business unless they sell directly to the final consumer. Where non-compliance is found at any intervention, local authorities should take appropriate action to secure compliance including formal enforcement action as necessary.

5. Location Restrictions

5.1 Businesses in scope must not place specified food in store at:

- any area within 2m of the checkout facility – this being the point in the store intended to be used by consumers to pay for products. This includes any point 2m away from a counter at which a cash register is used (including the area behind the counter) and any point 2m away from the external surface of a till point, electronic point of sale or self-service checkout machine. Specified food is permitted to be placed in an aisle (but not at the end of an aisle) even if it is within 2m of the checkout. Specified food is not permitted to be placed in kiosk gantries behind a checkout if it is within 2m of the checkout
- any area within 2m of a designated queuing area or a queue management system – this being an area, structure or demarcation built or outlined with the intention for consumers to queue when waiting to complete a purchase. For example, it could be formed or marked by signs, floor markings, barriers, units or shelving designed to guide customers in a queue to the point of purchase. This does not prevent food in scope of the regulations being placed in (but not at the end of) a shopping aisle within 2m of the designated queuing area
- the ends of aisles – these are defined as a display at the end of (but not in) an aisle, where the aisle end is adjacent to a main customer route through the store, or a separate structure (for example, an island bin, free-standing unit such as fridge or freezer, side stack or clip strip) connected to, adjacent to or within 50cm of such an aisle end. The end-of-aisle display includes all end-of-aisle displays including those facing the checkout, into the store or the store perimeter. This differs from island-type structures that can be dotted around the store, which are not in scope of the restrictions as they are not aisles. An 'end-of-aisle display' is not the last section of an aisle but instead the perpendicular end of the aisle
- store entrances – meaning at any point within the prohibited distance of the midpoint of any public entrance to the store's main shopping area (generally within 15m. Specified food should not be placed at any point within the prohibited store entrance area. This is irrespective of whether it can be seen from the store entrance. If there are multiple entrances this applies to all such entrances

- a covered external area – meaning a covered area outside and connected to a store's main shopping area, through which the public passes to enter the main shopping area (for example, the foyer, lobby or vestibule). Individual cases will of course be considered and assessed individually by officers to determine whether the aisle in question is in scope of the restrictions

6. Volume Price Promotions

6.1 Businesses in scope of the regulations must not offer volume price promotions on food in scope of the regulations.

6.2 'Volume price promotion' means:

- 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%')
- 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'). Other examples include 'buy 300g and save 10%' and '50% extra free when you buy 500g'
- Financial incentives can also include offers, such as if a volume price promotion offered 'buy 3 products and get 1,000 loyalty points' – this would be in scope as the customer is being incentivised to buy more to get the deal.

6.3 A multipack sold as a single item is not necessarily the same as a multibuy promotion. However, a multipack sold as a single outer pack containing 6 separate packs of crisps would be in scope of the volume price promotion restrictions if its packaging promoted its price of a single multipack in comparison with separate individual packs as '6 for the price of 4' or '50% extra free'. It would also be subject to the restrictions if a volume price promotion was offered on multiple purchases of the multipacks themselves – for example, 'buy 2 multipacks and get one multipack free' or '20% extra for the same price'.

7. IMPLICATIONS FOR RESOURCES

7.1 This activity is not accounted for in the resources allocated to Environmental Health, but authorities are asked to be pragmatic in applying the regulations, focussing on compliance rather than penalising non-compliance. However, there are enforcement provisions by way of improvement notices and then fixed penalty notices. Even with a pragmatic approach this is another duty that falls to Councils with no additional resource.

8. IMPLICATIONS FOR POLICY PRIORITIES

8.1 Supporting citizens to choose a healthy lifestyle, with emphasis on food choices as an integral part of that strategy. It supports the existing priority of Birmingham is an aspirational city to grow up in as well as being a key part of the draft City Council Corporate Plan (2022-2026) priority 'A bold healthy Birmingham'.

9. PUBLIC SECTOR EQUALITY DUTY

9.1 Equality issues are accounted for during activities carried out by officers.

DIRECTOR OF REGULATION AND ENFORCEMENT

Background Papers: nil