

# Advertising foods high in fat, sugar or salt (HFSS)



► **Inside**

Health and Care Act 2022  
Promotional marketing relating to HFSS foods  
BCAP and CAP Code rules



Advertising of HFSS foods is under a lot of scrutiny in the UK due to the obesity crisis, but recently has been put more on a back burner by the UK government due to the cost-of-living crisis and opposition to proposed legislative measures from some government MPs. Advertising HFSS products is already tightly regulated in the UK, but there are new rules on the horizon.

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### Which products are covered?

The Nutrient Profiling Model (NPM) developed by the Food Standards Agency determines if a product is HFSS. Food with an NPM score of 4 or more and drinks scoring 1 or more are classified as HFSS. This includes food items such as cake, pizza, cereal and sweets (as well as some other less obvious items like honey) and most sugary drinks. However, the new rules explained below will only apply to food and drink products that are classified as HFSS and have links to childhood obesity, so ads for certain HFSS foods such as honey or olive oil will be exempt.

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### Health and Care Act 2022

The Health and Care Act 2022 contains provisions to restrict HFSS promotion online and on pre watershed TV in the UK. Originally, the rules were due to come into force in January 2023 but have now been delayed until 1 October 2025.

The restrictions provide that:

- ▶ between 5:30am and 9:00pm, TV programmes and on-demand services must not include HFSS advertisements, and
- ▶ a person must not pay for HFSS advertisements to be placed online (this includes paying under a sponsorship agreement as a result of which such ads are placed online) - as this restriction is limited to paid-for advertising, it does not extend to 'owned media' (i.e. any online property owned and controlled, usually by a brand, where the brand exerts full editorial control and ownership over content), but it does apply to payments made to influencers to post about HFSS

products on their social media channels.

Neither of the restrictions apply to brand advertising (provided there are no identifiable HFSS products in the adverts) or small and medium enterprises (SMEs) with fewer than 250 employees.

In addition, the online restrictions do not apply to online audio-only content where it is streamed; business-to-business promotions; or transactional content (e.g. point of sale information). Broadcast radio is also out of scope.

Ofcom is the regulator but the Advertising Standards Authority will carry out regulation day to day. Broadcasters and on-demand programme services (ODPS) under UK jurisdiction will be liable for breaches of the less healthy food and drink TV watershed. For non-UK ODPS and paid-for advertising online, the persons paying for advertising will be liable for breaches. The maximum penalty is an amount not exceeding the greater of (i) 5% of the turnover of the person's relevant business for the relevant period, and (ii) £250,000.

In December 2023, CAP and BCAP issued a consultation on implementing the new rules into the CAP and BCAP Codes, as well as issuing draft guidance on the new rules and guidance on the difference between HFSS advertising and brand advertising. The [consultation](#) ends on 7 February 2024.

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### Promotional marketing relating to HFSS food and drink

The Food (Promotion and Placement) (England) Regulations 2021 set out restrictions on the promotion of HFSS products by volume (e.g. buy one get one free promotions) and location both



online (e.g. landing pages, checkout pages) and in-store (e.g. checkouts, entrances, aisle ends). They also restrict free refills of HFSS or “less healthy” drinks (as defined by the NPM), including in the restaurant and out of home sector. The Regulations apply in England and Wales.

Following a ministerial meeting on the cost-of-living crisis, the government announced that the volume rules (and the restriction on free refills) would be delayed for a year until October 2023 and then again until October 2025. However, restrictions on the placement of HFSS products came into force on 1 October 2022. The rules only apply to certain pre-packaged products offered for sale by medium and large retailers (with 50 or more employees).

The regulations are enforced by Trading Standards, which are required to issue an improvement notice before any penalty can be levied in instances of non-compliance. Failure to comply with an improvement notice is an offence, for which enforcement officers may impose a fixed monetary penalty of £2,500 using powers under the Regulatory Enforcement and Sanctions Act 2008.

Both the Scottish and Welsh governments have been consulting about similar, and in part, stricter, restrictions in their territories. The Welsh government has issued proposals for new rules to come into force in 2025, largely modelled on the English rules, but including meal deals.

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### BCAP and CAP Code rules

In addition to the new laws, the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code) applies to non-broadcast advertising, and the UK Code of

Broadcast Advertising (BCAP Code) applies to broadcast advertising. Both include specific rules relating to food advertising as well as general rules that apply to all advertising. They are enforced by the ASA.

Section 15 of the CAP Code contains a dedicated section on food and soft drink advertising and children, covering diet and lifestyle, promotional offers, licensed characters and celebrities, pressure to purchase, nutrition claims and health claims, and HFSS product ad placement. Unless stated otherwise, a ‘child’ is a person under the age of 16.

Additional rules were introduced in 2017 relating specifically to HFSS product advertisements following a public consultation by CAP on the advertising of food and soft drinks to children. In summary, HFSS product ads:

- ▶ cannot appear in children's media or media where the audience is more than 25% under-16s, and
- ▶ cannot include promotions, or licensed characters or celebrities popular with under-16s, if the content of the ad is directly targeting under-12s.

Similar restrictions can be found in section 13 of the BCAP Code in respect of broadcast advertising. The restrictions on scheduling HFSS product ads, set out in section 32 of the BCAP Code, are as follows:

- ▶ television channels devoted to children's programmes, or whose programmes are or are likely to be of particular appeal to children, must not carry HFSS product ads, and
- ▶ HFSS product ads are prohibited from appearing during or adjacent to TV programmes commissioned for, principally directed at, or likely

to appeal particularly to audiences under 16.

It is the advertiser's responsibility to comply with the HFSS product ad placement restrictions.

Advertisers should make use of what data is available to them to understand the likely audience composition of their chosen medium or piece of content. Where available, they should use age data to exclude or include individuals based on their age. When targeting HFSS ads online, interest-based or behavioural data should be used to support demographic data and any available age restriction or interest-based targeting tools should be utilised. Advertisers should be prepared to demonstrate compliance with the placement restrictions if there is a complaint and keep appropriate records of how they concluded that the targeting was appropriate.

A breach of the ASA Code will not lead to a financial penalty for a one-off breach of the HFSS rules, as the ASA does not have the power to levy fines; repeat offenders may be referred to Trading Standards for court action which might result in a fine. However, this is an area that is under increased scrutiny. Therefore, any breach of these ASA rules is likely to be reported on and may attract some media coverage.



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