

Response to CAP and BCAP

Implementing further restrictions on advertising for “less healthy” food and drink products

February 2024

1. About ISBA

- 1.1. ISBA represents UK brand advertisers. We are the only body in the UK that enables advertisers to understand their industry and shape its future, because we bring together a powerful network of marketers with common interests, empower decision-making with knowledge and insight, and give a single voice to advocacy for the improvement of the industry.
- 1.2. ISBA is a member of the Advertising Association, and represents advertisers on the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the sister organisations of the Advertising Standards Authority (ASA) which are responsible for writing the Advertising Codes. We are also members of the World Federation of Advertisers (WFA). We are able to use our leadership role in such bodies to set and promote high industry standards, as well as a robust self-regulatory regime.

2. Introduction

- 2.1. We welcome the publication of the CAP consultation on the final guidance which will support our members to navigate the new ‘less healthy’ food and drink (LHF) restrictions, as legislated for in the Health and Care Act 2022. We are grateful for CAP’s engagement with ISBA and our members during the pre-consultation period, and look forward to continued engagement in the months and years ahead as brand advertisers seek to navigate and comply with the new LHF rules, alongside the existing requirements for HFSS advertising.

3. Consultation Response

Part A: Guidance on the less healthy product advertising rules

Question (i). Is 3.2 (Products in scope) of the proposed guidance clear and does it accurately reflect the relevant legislation? If not, please state why, including details of any alternative approach you consider more effective.

- 3.1. Yes, we believe that this section of the guidance is clear and accurately reflects the relevant legislation. We especially welcome the reference to the 2004-05 Nutrient Profile Model (NPM) and the technical guidance published in 2011. Such a reference helps to alleviate uncertainty around any potential future response to the 2018 Government consultation on a new NPM.
- 3.2. We note the general caveat in the consultation that aspects of the draft guidance are impacted by the secondary legislation on which the Government has consulted, and welcome CAP’s commitment to pay careful attention to any changes which may be required when those Regulations are eventually laid. Alongside other advertising trade bodies, we have made representations to the Secretary of State for Health and Social

Care regarding the continued absence of a response to the consultation on those Regulations, and very much regret the uncertainty which remains as a result – not least around the categories of product in scope. We continue to urge Ministers urgently to make progress with the secondary legislation to provide our members with business certainty and to aid in maximum compliance, and to align the sub-category and product-level clarifications and exclusions already provided by DHSC for the in-store and online placement restrictions.

Question (ii). Is 3.3 (Parties subject to the less healthy product advertising rules) of the proposed guidance clear and does it accurately reflect the relevant legislation? If not, please state why, including details of any alternative approach you consider more effective.

3.3. Section 3.3 of the proposed guidance is broadly clear and accurately reflects the relevant legislation, but we believe that some individual questions remain.

3.4. We welcome the statement in the guidance that as the restrictions “apply to advertisements for identifiable less healthy products, advertisers most likely to be subject to the rules are businesses involved in or associated with the manufacture or sale of food or drink” (p7). However, the position for some charities remains uncertain. The guidance goes on to state that some charity events might come into the ambit of the rules where an ad “includes an identifiable less healthy product as a result of partnership with a business that manufactures or sells the less healthy food or drink”. This would seem to imperil some notable charity operations, which cannot be said to be the original intention of the legislation. We would urge that the restrictions should apply to, as the guidance suggests, businesses involved in the manufacture or sale of food and drink.

Question (iii). Is 3.4 (Media and scope) of the proposed guidance clear and does it accurately reflect the relevant legislation? If not, please state why, including details of any alternative approach you consider more effective.

3.5. Section 3.4 of the proposed guidance is broadly clear and accurately reflects the relevant legislation.

3.6. On commercial listings, the guidance implies that paying for promotion of product listings in an online retail space – for example, on consumer-facing websites – constitutes an advertisement, and is in scope. This has been a competition concern since the restrictions were first proposed by government, and continues to be so; it would significantly limit brands’ ability to promote products in competitive categories, in an environment where consumers have already made an active choice to search for that product. Clarity on whether the restrictions apply in these circumstances is requested.

Owned Media

3.7. The guidance takes note of the exemption for small- and medium-sized enterprises (SMEs), as set out in the primary legislation. In this section, it also describes the nature of the ban on paid-for online LHF advertising, saying:

“Because the legislation applies only to instances where payment results in the placement of an advertisement, rule 15.19 is unlikely to apply to advertisers’ marketing communications appearing on their own websites, or in other non-paid for space online under their control such as marketers’ own social media

channels or apps where no payment for the placement of an advertisement is involved”.

The Government clearly set out in its response to its original consultation on new LHF restrictions that there was to be an exemption for ‘owned media’,¹ and the draft guidance refers directly to this response when it says on p6 that the CAP document “has appropriate regard to the UK Government’s policy statement on the new restrictions including indications of their intended scope such as the exclusion of owned-media and certain types of brand advertising”. That being the case, it seems that the guidance should be clear that it is not just that rule 15.19 is “unlikely” to apply to ads appearing on brands’ own websites or social media channels, but that it does not apply.

- 3.8. ISBA members have also asked how the ban on paid-for online LHF advertising applies to organic social media and e-mail communications.

Sponsorship

- 3.9. Members have raised the question of how commercial relationships would be assessed when it comes to online media, and the extent to which, for example, sponsorships might be said to extend into this arena. For example, if a company sponsors a sports team, and the sports team then mentions one of those company’s LHF products in their online media, would this trigger the restrictions – even if the mention of the product was done without any brand knowledge? Who would be responsible for the breach of the rules, if indeed there was a breach?

Influencer Marketing

- 3.10. ISBA members have given clear feedback that the guidance may benefit from a dedicated section on how the new restrictions apply to influencer marketing and paid partnerships, and clarifying whether and how influencer activity is captured.
- 3.11. In the first instance, members have queried how influencer content and the stated exemptions interact – particularly the owned media exemption. (This is another reason why absolute clarity on owned media would be useful, as stated above.) We are working on the assumption that a brand could pay an influencer to make content containing an identifiable LHF product and, if that content appeared only on a brand’s own channels, then it would not trigger the restrictions; whereas if it appeared on the influencer’s channels, then it would.
- 3.12. Other questions touch on matters of the payment and control test and how it interacts with the restrictions. For example: a product is gifted to an influencer and there is no brand editorial control over any subsequent content, but the influencer posts content and labels it #ad. Would the fact of the gifting be enough to qualify as ‘paid-for’ online advertising?
- 3.13. Influencers often post content outside of a contractual arrangement with a brand. Any payment may have been historic and not cover the content, and there is no editorial control by the brand. In those circumstances, if an influencer posted content which included an identifiable LHF product, could the brand still be held responsible for a

¹ [“Introducing further advertising restrictions on TV and online for products high in fat, salt and sugar: government response”](#), June 2021.

breach in the restrictions, even though there was no contract, payment, or control – or would the influencer be held responsible?

- 3.14. In a similar vein, if an influencer reposts content a brand has posted on its own channels which contains an LHF product (which the brand would be allowed to do via the owned media exemption), and no contractual relationship exists, would the brand or influencer be held responsible?
- 3.15. The restrictions cover advertising and sponsorship; but how do they apply to gifting which may take place around broadcast programming (for example, if a brand were to provide an LHF product as a prize in a gameshow, or during a product review section on daytime TV – which would of course not be constituted as an advertisement). Would this lie outside the scope of the restrictions? Would the use of gift vouchers be caught?
- 3.16. It would be useful to clarify whether prop placement is out of scope of the restrictions. A brand's media agency may utilise a third party to coordinate the supply of products to certain appropriate broadcast programming (e.g. appearing in a local shop in an episode of a soap). Again, this would not be constituted as an advertisement, and we assume would not be covered.
- 3.17. How would the restrictions apply to general brand ambassadors?

Question (iv). Is 3.5 (Identifiable less healthy product advertisements) of the proposed guidance clear and does it accurately reflect the relevant legislation? If not, please state why, including details of any alternative approach you consider more effective.

- 3.18. Section 3.5 involves a great deal of detail in an effort to be clear as to what will bring ads within scope of the 'identifiable product' test and what will constitute brand advertising, and this is very welcome. In particular, we welcome the clarity provided on generic products, and on packaging (namely, the confirmation that the shape of a package, even though it may denote a particular product, shall not be taken to mean an LHF product if there are examples of non-LHF products in a range). We also welcome confirmation that ingredients and their manipulation do not trigger the restrictions.
- 3.19. On a point of language, the draft guidance appears to use the terms 'people' and 'consumers' interchangeably. For example, section I on 'References, imagery, or other representations likely to result in an ad for an identifiable less healthy product' uses 'consumer' recognition as a qualifying factor in all but (h). However, sections II, III and IV tend to refer to 'people' viewing. We believe that consistent language would be helpful throughout the guidance (including section I(h) including reference to consumers, to align with the rest of the section).
- 3.20. In a similar vein, section I(h) refers to 'product'; elsewhere, the common phraseology is 'specific product'. Consistency here would also be welcome.
- 3.21. We note that audio might bring an ad within scope of the LHF restrictions if it relates to a particular product. We assume in turn that audio which is associated with a brand rather than a product will not do so.

Incidental depiction and ‘sufficient prominence’

- 3.22. We note the general approach that if the intention of an ad is to sell a particular LHF product, then that is clearly in scope, but if an LHF product appears in the background of an ad then the judgment as to whether the restrictions are triggered is context-dependent. We note that the guidance states that an “incidental depiction” of a product unlikely to be recognisable in real time, for instance on supermarket shelves, will be less likely to trigger the restrictions. How would the regulator propose to deal with an ad which showed an LHF product among non-LHF goods in a basket being carried by a shopper, where the ad could not reasonably be said to be ‘for’ that product?
- 3.23. We note the part of the guidance which states that the restrictions will be triggered if there is “background imagery or other representations of a specific less healthy product that is sufficiently prominent for consumers to recognise it”. The guidance gives the example of a product which “might be included as a graphical background or wallpaper to a creative, in a table scene intended to contextualize the main product promoted, or as part of a creative promoting a serving suggestion”. This would at first glance seem to rule out, for example, a LHF product being shown as part of a table spread in a Christmas ad. However, the guidance later states that “A generic product shown as part of a serving suggestion or to provide context to the promotion of an out-of-scope product, such as a table scene in a Christmas-themed creative”, will *not* trigger the restrictions. We believe this point would bear clarifying – and that the question of what “sufficient prominence” is should be more clearly addressed.
- 3.24. Members have raised the possibility of greater clarity when it comes to the depiction of *more than one* identifiable product in an ad, not least because the guidance consistently talks about a “specific product”. It would be useful for the guidance to more clearly state that ads featuring more than one identifiable product are in scope (for instance, on p10: stating “where one or more specific product is identifiable ...” instead of “where a specific product is identifiable ...”). This would help to provide clarity between ads showing multiple specific identifiable products, as compared to indicating a *range* where no specific products can be identified (and where the ad is therefore out of scope).

Packaging and logos

- 3.25. We have been grateful for discussions around packaging and what constitutes an identifiable product. It would be extremely helpful if the guidance were to clearly explain what is and is not in scope when ranges all have the same distinctive shape but contain different flavours. For instance – could the shape appear in a masterbrand colour in ads without falling into scope, or without the presence of an additional colour which might identify a specific product?
- 3.26. If a master brand logo includes the image of the shape of a product which may be LHF, is the logo permitted to be shown?

Ranges of products

- 3.27. Several members have pointed to the need for clarity thanks to two pieces of the guidance which are perceived to be in conflict. On p10, the guidance states that:

“Guidance users should note that, for the purposes of the less healthy product advertising rules, which apply to specific products and not ranges of products,

different pack sizes (for example, single or multipack) or formats (for example, block or bag) of the same product will not be considered sufficient to constitute a range.”

Later, on p14, the guidance says:

“Branding outside of the scope of the less healthy product rules includes: ‘Master brands’ owned by a company or wider group that relate to a range or ranges of specific products. This applies to master brands that include multiple product variants (like different flavours of crisps), have a core product with brand extensions ... or comprise just one product (including where it is available in different pack sizes or product formats).”

Multiple members have expressed that it would be helpful for the definition of a range on p10 of the guidance to be clear that, whilst having several pack sizes or formats of the same product is not sufficient to constitute a range, the masterbrand exemption allows for use of branding in ads even when the masterbrand comprises just one product in multiple pack sizes or formats. Currently, it appears to be a contradiction within the two sections of the guidance, so further clarity around this point would be welcome.

- 3.28. Further, clarity on whether a brand name which is the same as the name of the range would be outside of the scope of these restrictions, or whether they would be considered so inextricably linked with a specific LHF product that they would trigger them, would be welcome.

Other considerations

- 3.29. Members have also asked for some more clarity on how the restrictions apply to written text, as well as visual creative. For example, could a brand state “Click here to view our Easter chocolate range”, if such text were not accompanied in an ad by a visual of an Easter egg? Equally, is such a call to action in an ad allowed if it clicks through to the brand’s own website, which features Easter eggs?
- 3.30. Some LHF products can of course be broken down into or may come in pieces, or slices, and the question therefore arises of what constitutes an ‘identifiable product’ in circumstances where only a section of a finished LHF product is shown (the guidance states that “the concept of a specific product does not include ... a serving suggestion involving a specific product as part of a finished item”). Does the whole of an LHF product have to be seen in an ad to trigger the restrictions, or can parts of it be shown?
- 3.31. ISBA members have raised the question of merchandise which their company sells which is itself a callback to a product which might be caught by LHF restrictions (a pool which is in the shape and has the logo on it of a condiment, for example). Would ads for such merchandise be ruled out by the new restrictions?
- 3.32. The draft guidance lists the factors likely to result in an ad being for, or not being for, an identifiable LHF product. It goes on in section IV to talk about how combinations of those factors may result in a cumulative effect whereby the ad effectively *becomes* one for an identifiable product (“for example, a distinctive ... piece of packaging or depiction of a generic product that relates to a range of products and [is] therefore outside scope, could be rendered within scope if included in an advertisement with branding, colours or other identifiers ... likely to lead people to recognise a particular flavour in the range

that constitutes a specific less healthy product”). Members are interested to know how CAP/BCAP might approach judgments of these combinations of factors (e.g. is it based on the number of factors present, and if so what number might be the trigger?). It could be argued that this section is very much open to interpretation; this might be an area where a hypothetical worked example of how factors might combine to trigger the restrictions would be useful.

Question (v). Do respondents have comments on any other parts of the proposed guidance document?

3.33. Members have asked about the position of aggregator websites and apps. We understand that businesses cannot pay for placement of identifiable LHF products in an aggregator’s list, as this would clearly be a paid-for online advertisement. Could the brand pay, not for products, but for its own position in any list of search results? Or, if the brand has not paid any money to the aggregator, can the thumbnail image of that brand be an identifiable LHF product?

Question (vi). Recognising that guidance produced in accordance with a statutory duty must focus on the statutory restrictions, and the need for the new less healthy product advertising rules to function within the wider framework of food and drink advertising rules, respondents are invited to provide detail of further resources that would be useful, in addition to the guidance, to help affected businesses to comply.

3.34. Through no fault of the regulator’s, the new LHF policy represents an uncomfortable additional layer being placed on top of the existing HFSS rules and restrictions. Navigating this complex environment is a challenge for marketers who are anxious to comply with the requirements. We therefore welcome CAP’s openness to ideas as to the kind of resources which would aid advertisers’ decision-making and understanding.

3.35. A clear understanding of the scope of the LHF rules, and what is permitted under the brand advertising exemption, must clearly carry through all parts of the advertising ecosystem, including pre-clearance bodies. We trust that the system will be pursuing conversations and agreements in the coming months to ensure that common understanding.

3.36. A recent example of new guidance – that on gambling advertising – included a RAG table which illustrated in a clear and concise manner what would constitute a high-, medium- and low-level risk when it came to ad content. It is possible that this would assist in the case of LHF (and help address the point about the combination of factors described above).

3.37. CAP’s Copy Advice service will clearly play an important role here, especially in the early months of the restrictions, and ISBA will encourage our members to avail themselves of it. We believe that some website resources would also prove useful, including a flow chart or clickable decision-trees, as well as examples of ads which would fall in or out of scope. (This might be particularly helpful for questions around influencer marketing.)

3.38. In a related way, example of ads which show what would fall in or out of scope around branding – for example, to demonstrate what branding would be considered as identifying a range of products rather than a specific product; or what branding would be permitted by the masterbrand exemption – would be useful.

Part B: New rules reflecting the less healthy product advertising restrictions

Question (vii). Do you agree that the proposed wording of the ODPS rule (30.16) set out in 3.5 above adequately reflects the relevant legislation? If not, please state why including details of any alternative approach you consider more effective.

3.39. Yes, we agree that the proposed wording of the ODPS rule adequately reflects the relevant legislation.

Question (viii). Do you agree that the proposed wording of the paid online media rule (15.19) set out in 3.6 above adequately reflects the relevant legislation? If not, please state why including details of any alternative approach you consider more effective.

3.40. Yes, we agree that the proposed wording of the paid online media rule adequately reflects the relevant legislation.

Part C: Consequential amendments to the existing Codes and guidance

Question (ix). Do you agree that the proposed consequential amendments to the BCAP Code in Annex B are clearly set out alongside the new rules on less healthy product advertising? If not please state why including details of any alternative approach you consider more effective.

3.41. Yes.

Question (x). Do you agree that the proposed consequential amendments to the CAP Code in Annex C are clearly set out alongside the new rules on less healthy product advertising? If not please state why including details of any alternative approach you consider more effective.

3.42. Yes.

Question (xi). Do you agree that the proposed consequential amendments to CAP and BCAP's HFSS branding guidance in Annex D are clear having regard to the changes to the Codes summarised above? If not please state why including details of any alternative approach you consider more effective.

3.43. Yes.

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