CAP Consultation: food and soft drink advertising to children

Regulatory statement

8 December 2016

Legal, decent, honest and truthful

Contents

Chairman's foreword

When the Committee of Advertising Practice (CAP) launched this consultation, I wrote that the advertising industry recognised the need to play its part in responding to the public health challenges posed by poor childhood diet. CAP made a strong, positive recommendation for change: to implement dedicated restrictions on the advertising of food and soft drink products high in fat, salt and sugar to children (HFSS).

Today, I am pleased to announce that, after a thorough process of public consultation and considered evaluation, CAP has delivered new protections for children.

From July next year, HFSS product advertising will no longer be allowed in children's non-broadcast media and other media where under-16s make up a significant proportion of the audience; including, crucially, online spaces. CAP has also created opportunities and incentives for advertisers to develop and promote the advertising of healthier foods.

Ultimately, dealing with the impact of HFSS product advertising on children is only one small part of a much wider public health challenge. But the gravity of that challenge necessitates that all stakeholders contribute solutions. I hope that the outcome explained in the regulatory statement that follows demonstrates, again, that our industry is willing and able to act on its responsibilities.

The consultation process has been invaluable, allowing CAP to hone and refine the policies necessary to make new restrictions work. I would like to thank all those members of the public, government, public health professionals, industry, and academics who took the time to respond and contribute to the consultation and the wider process.

James Best

Chairman
Committee of Advertising Practice
December 2016

1. Executive summary

1.1. New framework for food advertising to children

For the first time, advertisements for foods and soft drinks high in fat, salt or sugar (HFSS) will be subject to dedicated restrictions in non-broadcast media, including online. CAP recognises the case for stronger rules to ensure that advertising regulation plays its part in tackling the public health challenges related to poor childhood diet and responds effectively to fundamental changes in the way children consume media.

This regulatory statement sets out the outcome of the consultation, along with CAP's evaluation of responses and confirmation of the new and amended rules and associated guidance.

The Advertising Standards Authority (ASA) will begin to enforce the new restrictions from 1 July 2017.

1.2. Summary of the consultation outcome

In line with its proposals, CAP will introduce a new placement restriction and make amendments to existing rules on the creative content of advertising. The rules will:

- Prohibit HFSS advertising from appearing in children's media (children defined as being under 16);
- Prohibit HFSS advertising in other media where children make up a significant proportion of the audience;
- Prohibit brand advertising (including, branding such as company logos or characters) that has the effect of promoting specific HFSS products, even if they are not featured directly;
- Apply to all media, including advertising in online platforms like social networks and techniques such as advergames;
- Use the Department of Health (DH) nutrient profiling model to differentiate between HFSS and non-HFSS products; and
- Allow advertisements for non-HFSS products to use promotions and licensed characters and celebrities popular with children to better promote healthier options.

This is a significant change that will result in a reduction in children's exposure to advertising for HFSS products. The changes also bring the CAP Code into line with the rules for TV advertising in the UK Code of Broadcast Advertising. CAP considers that the rule will deliver on their underlying objective of altering the nature and balance of food advertising seen by children.

1.3. Advertising regulation's contribution

Poor childhood diet is caused by multiple factors. The evidence base shows advertising plays only a small part, especially when compared to factors like

parental influences and school food policy. The wider obesity problem is a multifactorial issue with very little evidence suggesting a direct link with advertising. Consultation responses have not dissuaded CAP from its view of the evidence of advertising's role in diet and obesity issues.

Following the evaluation process, CAP nevertheless concludes that there is a case for stronger rules in non-broadcast media. Even a very small positive impact from new restrictions could equate to a reduction in the potential for harm to children and, in turn, the wider detriment associated with childhood obesity as a risk factor in adult ill-health. Furthermore, CAP cannot ignore the fundamental changes over the past decade in the way children consume media. It is widely agreed by government, policy makers and public health professionals that a broad package of interventions is the optimal approach. In this regard, CAP notes the publication, in August, of the government's new strategy for England, *Childhood Obesity: A Plan For Action*.

1.4. This regulatory statement

Section 2 provides background on the policy issue and section 3 summarises the consultation process and provides an overview of responses.

Narrative evaluations of key responses to each question are included in section 4; these are the key statements of CAP's decision and rationale for each of the consultation questions. They link to the evaluation tables published alongside this regulatory statement, which include full summaries of all significant points made in response to each question.

Confirmation of the new and amended rules, the supporting guidance on brand advertising and information on their implementation are included in section 5.

This document should be read in conjunction with the consultation document and its associated annexes.

2. Background

2.1. Policy challenge: childhood diet and obesity

Childhood obesity carries a significant potential for harm in terms of children's well-being and health. Measurement data shows many children's diets are not in line with dietary recommendations. All the nations of the UK have significant rates of excess weight and obesity. The links between childhood diet and obesity in adult life have huge implications for society, the economy and individuals. Ultimately, the wider cost to society and individuals is estimated to be in the tens of billions of pounds per year. Across the nations of the UK, policy interventions are now being considered focusing on a range of different areas in the hope that coordinated action will help to reverse trends and mitigate costs that are thought to be unsustainable in the long term. Advertising is seen as a key part of this; notably, Public Heath England's 2015 review, *Sugar Reduction: The evidence for action*, specifically called for action on non-broadcast advertising.

2.2. CAP's decision to consult

CAP has long maintained rules that prevent advertising from condoning poor nutritional habits or unhealthy lifestyles in children. These were strengthened in 2007 to include specific restrictions on the use of more impactful marketing techniques, such as celebrity endorsements and licensed characters. CAP considers that no significant new evidence has emerged since then to present a case for change on the basis of advertising having a greater impact than previously thought. The growing body of research into online advertising has done little to change this. Advertising is acknowledged to have some effect on children's immediate food preferences, but this is relatively small, particularly when compared to other factors like parental influences. There is little to suggest a direct relationship with wider harms associated with obesity.

CAP's decision to consult was based on the changing context in which the evidence of advertising's effect on children sits.

- There is a growing consensus on the need for renewed action on obesity to address harms caused to individuals and to lessen the wider costs to society and the economy.
- Far-reaching changes in children's media habits and evolving advertising techniques brought about by the internet have fundamentally changed children's relationship with media and advertising.

CAP considered that these factors raised fresh questions over the role of advertising regulation in helping to ensure that the nature and balance of food and soft drink advertising targeted at children remains responsible.

2.3. Consultation

The purpose of the consultation was to consider whether it was justified for the CAP Code to:

a) differentiate advertising for HFSS products from advertising for non-HFSS products; and
b) on the basis of that differentiation:

    i. prohibit the placement of HFSS product advertising in non-broadcast media that are targeted at or are likely to appeal particularly to children; and
    ii. apply existing prohibitions on the use of promotions (rule 15.14) and celebrities and licensed characters popular with children (rule 15.15) to non-broadcast advertising for HFSS products only.

CAP developed a range of positive proposals for regulatory change including the detailed policies to enable the introduction of the restrictions described above. It also decided to explore through consultation whether placement restriction should extend to under-16s. The proposals were strongly influenced by existing CAP placement restrictions and BCAP's approach to HFSS advertising on TV.

CAP also undertook a thorough pre-consultation exercise – engaging with 50 stakeholders across the UK and devolved nations – to inform its policy development. The consultation ran from 13 May to 23 July 2016.

2.4. Proposals

1a	Update the CAP Code to include rules dedicated to the advertising of HFSS products.
1b	Apply the new and amended rules to brand advertising that has the effect of promoting an HFSS product, mirroring present guidance used for TV advertising.
2	Use the DH nutrient profiling model – used for TV advertising – to identify HFSS products.
3	Amend existing rules on the creative content of food and soft drink advertising – prohibiting licensed characters, celebrities popular with children and promotions directed at children aged 11 and younger – to apply only to HFSS product advertising allowing greater opportunities for healthier foods to be advertised to children.
4a	Introduce a new rule prohibiting the placement of HFSS product advertising in media targeted at or likely to appeal particularly to children.
4b	Explore through consultation whether the new rule should prohibit HFSS advertising in media targeted at or of particular appeal to children under 12 or under 16.
5	Apply the new rule to advertising in media where more than 25% of the audience are understood to be under 12 or, subject to the outcome of the consultation, under 16.
6	Cover all non-broadcast media within the remit of the CAP Code, including online advertising.

3. Response summary and introduction to the evaluation

3.1. Response summary

There were a total of 652 responses to the consultation. Of these, 89 organisations and one member of the public provided 85 individual or joint responses. Additionally, 567 members of the public submitted a common petition response. Responses came from across the spectrum of stakeholders and included 23 responses came from bodies with a remit related to the devolved nations or regions. There were:

- 19 responses from government bodies;
- 35 responses from civil society organisations (e.g. NGOs, charities or academics/academic institutions);
- 30 responses from industry (e.g. companies or trade associations); and
- 568 responses from members of the public

3.2. Narrative evaluations

The narrative evaluations in section 4 are the core statement of CAP's response to the consultation; they:

- outline CAP's decision on each question and its reasons for taking it;
- summarise main points and themes that emerged from responses to the consultation; and
- provide CAP's response to those points and themes.

3.3. Evaluation tables

Supporting the narrative evaluations in section 4 are the evaluation tables listing all significant points in favour or against the proposals, along with other relevant significant points. The tables contain CAP's evaluation of points made by respondents that are not addressed in the narrative evaluations below.

The evaluation tables are published alongside this regulatory statement on the CAP website or via the following links: Question 1a, Question 1b, Question 2, Question 3, Question 4a, Question 4b, Question 5 and Question 6. Additionally, evaluation table 7 is an evaluation of respondents' significant points made outside their responses to each of the questions.

Please note: the abbreviations used to denote different respondents are explained in the respondent list in Annex B.

4. Narrative evaluation of responses

4.1. The case for regulatory change

4.1.1. **Question 1a:** *Should the CAP Code be updated to introduce tougher restrictions on the advertising of products high in fat, salt or sugar (HFSS)?*

CAP proposed to update the CAP Code to include rules dedicated to the advertising of HFSS products.

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4.1.2. CAP's decision

CAP concludes that there is a case for regulatory change and the principle of introducing tougher restrictions on HFSS product advertising. Some industry respondents disagreed, but, overwhelmingly, respondents across all stakeholder groups acknowledged the general need for change.

CAP's evaluation reaffirms the rationale for regulatory change outlined in section 41 of the consultation document. The evidence suggests advertising's impact on children's food preferences is relatively small. However, even a very small positive impact from new restrictions could equate to a meaningful mitigation of potential harm to children. In turn, this could help to address the wider detriment associated with childhood obesity as a risk factor in adult ill-health. At the very least, a change in children's media environments brought about by further advertising restrictions could reasonably be expected to contribute by not hindering wider efforts to increase positive messaging to children and by limiting advertisers' ability to influence children's preferences for and consumption of HFSS products.

4.1.3. Challenges to CAP's case for change

Some industry respondents disagreed. They considered that the evidence base relating to advertising's effect on children was not sufficient to justify new restrictions, especially when compared to other factors like family and peer influences. Additionally, several respondents objected in principle that new restrictions would unfairly limit advertisers' freedom and the right of consumers to receive information that might be of interest to them.

CAP disagrees. Section 40 of the consultation document outlined CAP's view on the shortcomings and limitations of the evidence base relating to advertising's impact. However, the evidence demonstrates that advertising, including through various non-broadcast media, does have an effect on children's food preferences.

CAP has had regard to the key legal and regulatory considerations laid out in section 14 of the consultation document, including the right to commercial freedom of expression. As demonstrated in the consultation document and this evaluation, CAP has introduced new rules to fulfil the policy aim of placing appropriate restrictions on advertising to help protect the health and well-being of children, including by not undermining progress towards national dietary improvement. The

approach is targeted and has regard to the evidence of advertising's effect and the potential for harm to occur. CAP has also assessed the likely regulatory and economic impact of the proposals (see Annex 7 of the consultation document) and concluded that they are proportionate; the evaluation of responses to the consultation has not altered this view.

4.1.4. Significant responses supporting CAP's rationale for change

Responses to Question 1a – along with points made relating to other consultation questions – reaffirm the importance of the factors underlying CAP's rationale for change and the evidence base of advertising's effect on children.

- Responses further demonstrate a strong consensus that action should be taken. CAP notes, in particular, respondents stressed the importance of the WHO Commission on Ending Childhood Obesity recommendations for implementing restrictions on the impact of food and soft drink advertising as evidence of a strong commitment and agreement on a global level over the need for action.

- Respondents provided further data on children's dietary behaviour and evidence of the extent and impact of rates of excess weight and obesity in terms of disease and wider costs; notably, to the health service. In particular, CAP notes responses from devolved and regional bodies highlighting the contribution of obesity to health inequalities. Additionally, CAP notes responses from organisations with expertise in dental health. Their responses provide further evidence of the potential for poor dietary choices to cause harm and result in significant wider costs.

- Responses further emphasised the importance of media change as a key dynamic since CAP introduced the existing rules on food and soft drink advertising to children in 2007. Respondents from all stakeholder groups provided further insights and data highlighting the importance of the growth of online platforms and the impact on children's media habits and their exposure to advertising.

4.1.5. Criticism of the existing rules

CAP acknowledges that a significant number of respondents, who agreed with the proposal for new restrictions, at the same time made points that challenge CAP's rationale. Government, public health and NGO bodies highlighted what they considered to be deficiencies in the existing rules. They asserted that the rules failed to differentiate between healthier and less healthy products, were vague and inconsistently applied and they pointed to what they considered to be "loopholes".

As detailed above, CAP acknowledges there is now a case for regulatory change, primarily, by means of the introduction of differentiation through nutrient profiling to facilitate relatively greater restrictions on advertising for HFSS products. However, this is not based on the present rules having been ineffectively enforced or lacking a clear regulatory focus and a basis in the evidence.

The existing rules responded to the evidence base for the effect of non-broadcast advertising on children as it was in 2007. There was no case to regard non-broadcast advertising as having a similar level of impact as TV advertising (upon which media placement restrictions were imposed at that time). Evidence of the ASA's enforcement activity included in section 20 of the consultation document shows that advertisers have largely complied with the rules of their own accord. When necessary, the ASA has taken effective enforcement action to address instances of non-compliance.

Respondents also pointed to what they considered to be "loopholes" in the existing rules: that the CAP Code does not cover certain commercial practices such as packaging or sponsorship, and that there were no rules governing certain techniques, such as the use of brand equity characters. The first issue is dealt with in greater detail in section 4.8 (below) and, the second in the evaluation of point 3.3.2 (Question 3).

In brief, CAP disagrees with such criticisms. The CAP Code regulates advertising (but not practices like sponsorship or packaging), and the consultation was launched to explore the impact of advertising, primarily in terms of the media in which it can be responsibly placed. The decision not to carry out further work on brand equity characters is based on the limited evidence of their impact and the need to adopt a proportionate approach. Importantly, the new media placement restriction will inherently reduce the use of HFSS-related brand equity characters by prohibiting HFSS advertising from appearing in children's media or in media where they make up a significant part of the audience.

4.1.6. Challenges to the rationale for change: importance of the evidence base

Respondents also challenged CAP's view of the importance of the evidence base. In general, they considered that the evidence demonstrated that advertising played a much more significant role in influencing children's diet. Respondents cited or submitted several pieces of evidence not considered in the consultation document. Evidence – including systematic reviews – related to the WHO recommendations on tackling childhood obesity – CAP notes in particular the systematic review Cairns, Angus and Hastings (2009), *The Extent, Nature and Effects of Food Promotion to Children: a Review of the Evidence to December 2008*. Original research carried out by several respondents, notably the focus group study carried out by the Social and Public Health Sciences, University of Glasgow. In general, there were also views on the importance that CAP should attach to the recent PHE review (Ells et al, 2015); they argued that more emphasis should be placed on the body of evidence identified.

Evidence submitted or cited by respondents is assessed as necessary in the relevant evaluation tables. In general, CAP considers that consultation responses do not change its conclusions on the evidence of advertising's impact on children set out in section 40 of the consultation document.

There is evidence that non-broadcast advertising has an effect on children's food preferences and behaviour; most notably online techniques such as advergames.

However, the evidence base as it relates to non-broadcast advertising is limited in scope; evidence mainly focuses on more impactful TV advertising. It is also subject to several methodological limitations (see in particular sections 40.11–14 of the consultation document). As such, CAP does not agree with respondents' assertions that non-broadcast advertising is a significant driver of children's dietary choices.

Moreover, CAP also considers that, while evidence of poor dietary habits and the incidence and costs associated with excess weight and obesity are important factors in the decision to introduce new restrictions, no robust evidence has been submitted to link advertising directly to health and obesity (see section 40.2 of the consultation document).

4.2. Introducing guidance on brand advertising that has the effect of promoting HFSS products

4.2.1. Question 1b: *Should CAP use the existing Broadcast Committee of Advertising Practice (BCAP) guidance on identifying brand advertising that promotes HFSS products to define advertising that is likely to promote an HFSS product for the purposes of new and amended rules?*

CAP proposed to apply the new and amended rules to brand advertising that has the effect of promoting an HFSS product, mirroring present guidance used for TV advertising

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4.2.2. CAP's decision

CAP will adopt a revised and strengthened version of the BCAP brand guidance, *Differentiating HFSS product TV advertisements from brand TV advertisement rules.* See Annex A for the new version of the now joint CAP and BCAP guidance.

The guidance addresses the fact that HFSS products can be promoted both directly, by including them in an advertisement, and indirectly, through the use of brands or branding that is synonymous with a specific HFSS product. This can be through product-related branding or, more widely, company or corporate branding that relates to a specific range or ranges of products. The guidance serves to define the scope of the term "HFSS product advertisements" for the new and amended rules.

CAP considers that the BCAP guidance is a firm basis for the new guidance it has adopted. It was based on the principle of the likely relationship of a piece of branding (for instance, a company logo, a character or other brand imagery) with a specific product capable of being nutrient profiled. It also recognised the complexities of making distinctions between different types of branding and the need for the ASA to make decisions having regard to the guidance on a case-by-case basis. Ultimately, CAP considers that there is a need for balance; it would be disproportionate to restrict the placement of brand advertising that is not likely to promote a specific HFSS product.

The guidance also has clear practical advantages. As several respondents have stated, the guidance provides consistency in protection for children and greater practicality and certainty for industry. It also accords with better regulation principles. These encourage consistency unless circumstances present a strong case for a differentiated approach. CAP is satisfied that that is not the case and has worked with BCAP to develop the amended guidance.

Nevertheless, CAP acknowledges responses from government bodies, the public health community and NGO respondents calling for stronger guidance and from industry requesting greater clarity on its application. In response, CAP has made several amendments to ensure that the guidance is clearer and the scenarios better reflect the objective of identifying circumstances where brand advertising is likely to promote a specific HFSS product (see 4.2.4 below).

4.2.3. Restrictions on "HFSS brands" and HFSS-related branding

Several respondents called for the guidance to be strengthened to prohibit advertising for brands associated with HFSS products or ranges that include HFSS products. Several NGOs called for use of characters and promotions in advertisements to be prohibited unless they related to a range of solely non-HFSS products.

CAP does not agree. Unlike for HFSS products, there is no objective tool to discriminate brands that have the effect of promoting an HFSS product from those that do not. To achieve proportionality and consistency, the guidance is premised on the relationship of a brand or piece of branding to a specific product, which can be objectively classified through nutrient profiling. Ofcom recognised this when it introduced restrictions for TV advertising; BCAP's guidance was created to identify brand advertising that has the effect of promoting a specific HFSS product.

Moreover, in the context of the overall evidence of advertising's relatively limited impact on children, it would be disproportionate to impose restrictions that sought to prohibit advertising for brands with any association to HFSS products. The evidence submitted in response to the consultation does not change CAP's view. Additionally, in line with the objective of altering the nature and balance of advertising seen by children and acknowledging the potential benefits of brand advertising, CAP considers that there is a strong case for the guidance to incentivize advertisers to promote healthier foods.

4.2.4. Revisions to the guidance

CAP has made several changes to the "Principles" and the "Scenarios" sections to clarify the application and better reflect the objective of identifying circumstances where brand advertising is likely to promote a specific product. These respond to areas of concern highlighted by respondents:

- Respondents were generally concerned that more clarity on the application of the guidance by the ASA was necessary.
- There were concerns around advertising for a range or ranges of products; could a predominantly HFSS range advertise using its branding?

- NGO and public health respondents were concerned about company branding for businesses with a strong association to the provision of HFSS products.
- Several respondents raised concerns over non-HFSS product advertising by businesses with a strong association to the provision of HFSS products.

The following table provides details of the changes. The new guidance is included in Annex A and a mark-up of the changes is included in Annex C.

Issue	Detail	Amendment
General application	CAP acknowledges the need for more general clarity and has made the amendments listed below to provide it. It has also changed the Principles section to make clearer that the scenarios outlined are only part of the picture; it is up to the ASA to assess advertising on a case-by-case basis. It will have regard to the example scenarios, but it will also look at the content of advertising.	Various; see "Principles" section in particular
Branding relating to a range of products	The existing version of the guidance does not envisage that branding related to a range of products could promote a specific HFSS product. Such branding is unlikely to relate to a single, specific product, but, if most of the products sold in that range are HFSS, it has a significant likelihood of promoting those products. CAP has amended the guidance to make clear that use of a brand or branding that promotes a specific range of products is unlikely to promote a specific HFSS product, if products in that range are mainly non-HFSS.	See first paragraph, scenario 3 (part 2)
Company brands	Company brands have broader identities than being synonymous with individual products. CAP has amended the guidance recognising that companies are often "synonymous with" a range or ranges of products they manufacture or sell. The amendment creates a new test to allow the advertiser to demonstrate and the ASA to assess whether a company has sufficient identity beyond the provision HFSS products to ensure that company brand advertising would not be likely to have the effect of promoting a specific HFSS product; for example, by demonstrating a very close association with the provision of non-HFSS products or goods and services other than food and soft drink. The amendment also highlights the importance of the theme of the advertisement; for instance, an advertisement focusing on a corporate and social responsibility initiative is less likely to have the effect of promoting HFSS products.	See paragraphs 2-4, scenario 3 (part 2)
Non-HFSS advertising	The existing version of the guidance allows for HFSS-related branding to be used in advertising for non-HFSS products. CAP acknowledges the potential for cross-promotion. However, branding can evolve and be a useful tool in promoting healthier options; for instance, as companies diversify their product range or reformulate existing products. In line with its view of the evidence and underlying objective of altering the nature and balance of food and soft drink advertising seen by children, CAP has strengthened the scenario to make clear that the ASA is likely to have regard to the relative prominence of the non-HFSS product compared to the branding associated with an HFSS product and the general context. If the ASA considers an advertisement places too much emphasis on the branding over the product, the ASA is likely to consider the ad to have the effect of promoting an HFSS product.	See second paragraph, scenario 5 (part 2)

The guidance has also been amended more generally to reflect the fact that it is now a joint CAP and BCAP Advertising Guidance note.

4.3. Adopting the Department of Health nutrient profiling model

4.3.1. Question 2: *Should the CAP Code adopt the Department of Health (DH) nutrient profiling model to identify HFSS products? Please explain your reasons and, if applicable, the details of your preferred nutrient profiling model.*

CAP proposed to use the Department of Health nutrient profiling model to differentiate advertising for HFSS products from that for non-HFSS products.

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4.3.2. CAP's decision

CAP concludes that the DH nutrient profiling model performs best against the criteria set out in Annex 6 of the consultation; proportionality, usability and credibility. CAP will therefore adopt the model to identify HFSS products for the purposes of the new and amended rules.

Respondents from all stakeholder groups supported the adoption of the DH nutrient profiling model. As the consultation document (see section 45) recognised, there is no ideal approach. However, the DH model is widely regarded as scientifically robust and effective in identifying less healthy products for the purposes of advertising restrictions. Many consultation respondents have reaffirmed this view. Crucially, CAP places significant emphasis on the fact that the DH model is well-established in the UK. Its use in relation to TV advertising makes it easier for businesses to implement, mitigating compliance costs associated with new restrictions. The general level of familiarity with the model will allow quicker implementation of the new non-broadcast HFSS restrictions and is likely to improve their immediate effectiveness.

Other models – principally, the EU Pledge and WHO Europe models identified in the consultation as potential options for consideration – performed less well in terms of proportionality, usability and credibility. They are not as well-established and do not have the same track record of effective use in the UK regulatory environment. CAP is also concerned that models based on separate approaches to different categories of food have the potential to be overly-complex. Another important concern with schemes like the WHO Europe model is that there are some categories of product where the model imposes a prohibition irrespective of their nutritional composition. CAP considers that such approaches add further complexity to enforcement and are potentially unfair.

4.3.3. Objections to the DH model

Some respondents raised concerns over the impact of the model in certain circumstances. In particular, responses from the dairy industry questioned the proportionality of classifying cheese products as HFSS. CAP notes the evidence cited on dairy products' role in a healthy diet. Further, CAP notes the PHE review

will take into account various factors in updating the model, which is likely to set a new standard for the classification of HFSS products. CAP considers that that the PHE review is the appropriate avenue for the dairy industry and others to address concerns over how their product categories are treated.

CAP notes Dairy UK requested that cheese products be exempt from the new HFSS advertising restrictions until the PHE review is completed. CAP does not agree that it is appropriate for it to grant a sector or product-specific exemption, even in the interim. By adopting the current DH nutrient profiling model until at least such time as a new model is published, CAP is applying the same nutrient profiling standards to non-broadcast as have been in place for TV food advertising for nearly a decade. CAP's fuller response is included in the evaluation of point 2.2.5 (Question 2).

4.3.4. Approach to the PHE review

Respondents disagreed over the proposed approach to the outcome of the PHE nutrient profiling model review. Some called on CAP to commit to adopting automatically the revised model that emerges from the review.

CAP acknowledges the need to update the DH model due to the findings of the Scientific Advisory Committee on Nutrition (SACN) report, *Carbohydrates and Health* (2015), most notably on the need to reduce sugar intake. It welcomes PHE's commencement of a comprehensive review process involving experts and a broad range of stakeholders, including CAP.

As the PHE review is in its early stages, it is not yet possible for CAP to fulfil its responsibilities by assessing the regulatory and economic impact of any new model. In the consultation, CAP said it would consider any revised nutrient profiling model against criteria set out in the consultation document: proportionality, usability and credibility. CAP acknowledges the likelihood that any revised model will change the standards against which food and soft drink products are classified as HFSS. However, CAP will need to consider carefully whether any new model continues to achieve a proportionate regulatory balance, mindful of the evidence of advertising's limited impact on children's food preferences.

4.4. De-restricting the present content rules to apply only to HFSS products

4.4.1. Question 3: *There are existing rules in place relating to the creative content of food and soft drink advertising directed at children aged 11 and younger. Should these rules now be applied to advertising for HFSS products only?*

CAP proposed to amend existing rules on the creative content of food and soft drink advertising – prohibiting licensed characters, celebrities popular with children and promotions directed at children aged 11 and younger – to apply only to HFSS product advertising, allowing greater opportunities for healthier foods to be advertised to children.

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4.4.2. CAP's decision

CAP has decided to maintain the ban on using promotions, licensed characters, and celebrities popular with children in advertising for HFSS products, directed through its content at under-12s. Evidence shows that these techniques are more impactful. In 2007, CAP introduced restrictions on all food and soft drink advertising to children for this reason. However, with the introduction of rules that discriminate between HFSS and non-HFSS product advertising, CAP's decision responds to the underlying objective of altering the nature and balance of food and soft drink advertising seen by children.

Greater opportunity for healthier foods to be advertised, using these techniques, also creates longer-term incentives for the food industry to reformulate products. It also brings rules for non-broadcast advertising in to line with rules for TV. CAP is particularly mindful that better regulation principles encourage consistency unless circumstances present a strong case for a differentiated approach. CAP is satisfied that that the difference in media does not present a case for a different approach in this aspect of its regulation.

4.4.3. Concern over "Borderline products"

Government, public health, NGO and academic respondents objected to the proposal on the grounds that it will allow products that fall just below the HFSS threshold to be marketed using more powerful techniques. They were concerned that such "borderline products" often contain significant quantities of sugars and are not in line with dietary recommendations.

A key premise of CAP's consultation proposals was that HFSS product advertising should be subject to relatively greater levels of restriction. This approach has been in place on TV for nearly ten years. It is also in line with the recent report from the WHO Commission on Ending Childhood Obesity. This recommends measures to reduce children's exposure to and the power of marketing for unhealthy food and soft drink products. There is a clear emphasis on identifying "less healthy" products so that regulatory measures can be adopted.

As it is not an expert authority on nutrition, it is not CAP's role to decide whether a product should be categorised as "less healthy". As noted above, PHE is presently carrying out a comprehensive review of the DH model. This is the appropriate route to resolve concerns over "borderline products". CAP notes from PHE's response to this consultation – broadly echoing the concerns noted above – that it is aware of the "borderline product" issue.

4.5. Introduction of a media placement restriction

4.5.1. Question 4a: *Should CAP introduce a rule restricting the placement of HFSS product advertising?*

CAP proposed to introduce a new rule prohibiting the placement of HFSS product advertising in media targeted at or likely to appeal particularly to children.

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4.5.2. CAP's decision

Respondents have introduced no significant new information that dissuades CAP from its proposal to introduce a media placement restriction for HFSS product advertising (see section 47 of the consultation document). There were very few significant points opposing the proposal. The majority of respondents supported the principle of a placement restriction, although there was a division of opinion on the age category.

4.6. Age category for the media placement restriction

4.6.1. *Question 4b: If a media placement restriction is introduced, should it cover media directed at or likely to appeal particularly to children:*

i) aged 11 or younger?
ii) aged 15 or younger?

CAP will explore through consultation whether the new rule should prohibit HFSS advertising in media targeted at or of particular appeal to children under 12 or under 16.

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4.6.2. CAP's decision

In line with the minimum recommended in the consultation document, CAP considers that there should be a new restriction prohibiting the placement of HFSS product advertising in non-broadcast media directed at children under the age of 12 (0-11).

Additionally, after considering responses, CAP concludes that the restriction should apply also to children aged 12-15. The new approach mirrors that existing for TV advertising: better regulation principles encourage consistency unless circumstances present a strong case for a differentiated approach. Although the evidence base for TV advertising's effect on children's food preferences remains stronger than that for the majority of non-broadcast media, CAP considers the consultation, supported by its assessment of the responses received, makes the case for equalising the level of restrictions.

There are four key considerations underpinning CAP's decision:

- As outlined in the consultation document, although the evidence of advertising's impact on food preferences is stronger for under-12s, there is evidence that advertising does have an effect on older children. In particular, the consultation noted various studies reviewed by PHE (in Ells et al, 2015) support this view.

- Consultation responses lend further weight to CAP's view of the importance of factors other than the direct evidence of advertising's impact on children's food preferences. Although older children might not have the same susceptibilities as younger children (consultation section 47.9), there is still a likelihood of risk. The potential for harm is borne out by data on the significant incidence and impact of poor diet among older children, the evidence of an ongoing shift in all children's media habits toward online platforms and the fact that older children have more independence and freedom of choice in terms of their engagement with the commercial world and in determining their diet.

- An under-16 restriction, as noted in CAP's *Regulatory and economic impact assessment*, will have a more significant impact in reducing children's exposure to HFSS product advertising. Voluntary industry initiatives, principally the EU Pledge, already limit the targeting of under-12s. Inherently, an under-16 age category will make a greater contribution to the aim of changing the nature of food and drink advertising seen by children.

- CAP has seen no substantive case to suggest that restrictions covering under-16s are likely to have a disproportionate impact. CAP's Regulatory and economic impact assessment acknowledged the resultant compliance costs to advertisers and businesses. However, it concluded that there were likely avenues for adaptation and revenue replacement to mitigate such costs. For example, CAP's decision to de-restrict the use of licensed characters, celebrities and promotions in non-HFSS advertising directed through its content at under-12s provides new opportunities to advertise healthier products and the use of the DH nutrient profiling model avoids duplication of compliance work.

4.7. Identifying media that may not carry HFSS advertising

4.7.1. Question 5: *It is often straightforward to identify media targeted at children. Where media has a broader audience, CAP uses a "particular appeal" test – where more than 25% of the audience are understood to be of a particular age or younger – to identify media that should not carry advertising for certain products media. Should the CAP Code use the 25% measure for the purpose of restricting HFSS product advertising?*

CAP proposed to apply the rule limiting the placement of HFSS product advertisements to non-broadcast media where more than 25% of the audience are understood to be under 12 or, subject to the outcome of the consultation, under 16.

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4.7.2. CAP's decision

CAP has chosen to adopt the proposal for the purposes of the new HFSS placement restriction (rule 15.18); including the 25% child audience threshold. It is a threshold the CAP Code has long used for similar rules on the placement of advertising for products such as alcohol. The bar is set deliberately high,

recognising that children also consume media that is not directed at them. Even when the vast majority – up to 75 % – of the audience is adult, restrictions on the placement of food and soft drink advertisements will still apply.

CAP considers the application of this approach to HFSS advertising is in line with the policy aim of placing appropriate restrictions on HFSS advertising to children and the underlying objective of rebalancing the nature of food advertising they see. It will deliver significant restrictions on where HFSS advertising can appear. It will no longer be permitted in:

- media that is obviously and overtly directed at children through its content (e.g. child-focused websites and children's magazines); and
- other media that are not directed exclusively at children but where more than 25% of the audience is under 16.

4.7.3. Criticisms of the 25% threshold

CAP notes several respondents questioned the basis of the 25% figure. They noted 0-15 year olds currently make up around 19% of the population. Another pointed out that the TV scheduling restrictions were based on audience indexing; HFSS placement restrictions were placed on TV programmes with a 20% over-representation of children in the audience. Although the approach was not devised with a relationship to the total child population in mind, an audience with 25% children is an over-representation of that group within the total population. CAP considers the approach is appropriate for media that do not have access to an audience measurement framework similar to the Broadcast Audience Research Bureau (BARB) system for TV.

CAP notes several respondents called for the adoption of a limit on the absolute size of the child audience. Advocates said this should apply even when children make up less than 25% of the total audience. CAP considers that these steps are not proportionate to the evidence of the impact on children; advertising's impact is relatively small. CAP's policy aim is to place appropriate restrictions on HFSS product advertising to children, which means reducing children's exposure, not eliminating all exposure.

As CAP noted in the consultation document, while the wider harms associated with obesity play an important role in the rationale for further intervention, restricting advertising that is not directed at children through the selection of media would yield rapidly diminishing returns in terms of regulatory impact. In other words, the more far-reaching the placement restriction, the less impact it will have in reducing children's exposure to HFSS advertising that is likely to influence them. Advertising in overwhelmingly adult media is more likely to be of interest to or targeted at older age groups with less potential impact on children. Such steps will, however, increase the overall impact of the restriction in terms of the economic and compliance costs to advertisers and media owners. CAP's approach sets an appropriate bar.

Notwithstanding this, the new placement restriction will operate in conjunction with creative content restrictions, ensuring that, where children do see HFSS product

advertising, it will be subject to prohibitions on the use of promotions, licensed characters and celebrities if the advertisement is directed through its content at under-12s (see 4.4 above). Additionally, general responsibility rules cover all food and soft drink advertising aimed at under-16s. These require, for instance, that advertisements do not:

- encourage “pester power”;
- encourage children to eat or drink a product only to take advantage of a promotional offer;
- encourage children to eat more than they otherwise would; or
- urge children or their parents to buy excessive quantities of food.

Respondents questioned the track record of advertisers’ compliance with the alcohol and gambling media placement rules: the rules prevent ads for alcohol and gambling products from being placed in media that is obviously and overtly directed at under-18s, or where more than 25% of the audience are aged under 18. These rules have been in place for a long time and CAP is not aware of any significant problems in applying them. CAP is confident that the same tests (irrespective of the product being advertised) should apply to regulate the media placement of HFSS product advertisements, only here in relation to an under 16 audience, and sees no reason why it compliance rates should not continue to be high.

4.7.4. Limitations to the available data

A significant number of both industry and non-industry respondents expressed concerns over circumstances where audience measurement data might not be available. Others were concerned that audience data was unreliable and could not be independently verified.

In most cases, media directed at children are easy to identify; for instance, a children's games website or video content directed by the media provider to a specific age group. The 25% audience threshold is intended to broaden the application of the media placement restriction to cover media not exclusively directed at children, but likely to have a significant proportion of children in the audience.

CAP acknowledges that audience measurement data for different non-broadcast media can vary in its availability and accuracy. However, there are a variety of established sources based on industry accepted methodologies for determining audience data that are necessary to sell advertising space. Proprietary data is also held by individual media owners. The ASA is experienced in evaluating such information as part of its existing role of enforcing rules on the placement of advertising for products such as alcohol and gambling.

Where measurement data is not available, the ASA relies on other factors to assess whether media is directed at children:

- the steps taken by advertisers to target or exclude specific audience groups from a particular advertising campaign using account or other data available; and

- an assessment of the media content – including themes, imagery and the like – and the context in which it appeared.

Ultimately, a basic principle of the Code is that advertisers should hold evidence or other information to demonstrate their compliance with the rules. In the event of a complaint under the new rule 15.18, advertisers will have to satisfy the ASA that they took appropriate steps to avoid targeting children with HFSS advertising.

CAP notes the calls for a new test based on the circumstances of the media carrying the advertisement, its content and the nature and appeal of the product. CAP considers that existing ASA approach outlined above is broadly in line with this proposal. However, the purpose of the rule is to restrict the placement of advertising in media of particular appeal to children, not the advertising of certain products based on their nature and appeal to children. To adopt an approach based on the appeal of a product to children would be disproportionate, necessitate a very high degree of subjectivity in assessing product appeal, and effectively ban all advertising of such products irrespective of where the advertisements are placed.

4.7.5. Practicality of implementation

Respondents raised practical concerns over the feasibility of implementing rules based on the proposed approach to defining the audience. CAP's *Regulatory and economic impact assessment* acknowledged the likelihood of compliance costs to advertisers and media owners. However, it did not conclude that there was a case to consider these disproportionate or prohibitive. Responses to the consultation have not changed CAP's view.

Although appropriate sources of data are available in many instances, CAP acknowledges industry concern over the practicalities of applying the approach in different media. CAP therefore commits to producing new guidance to provide reassurance over the types of audience data advertisers might rely on and the ASA's likely approach to assessing the appeal of media content where audience data is unavailable. The guidance will be developed based on existing ASA practice and will be published in the first half of 2017.

4.8. Scope of application of the rules

4.8.1. Question 6: *Should CAP apply the placement restriction on HFSS product advertising to all non-broadcast media within the remit of the Code, including online advertising? Please explain your reasons.*

Also, if relevant, please include information and data on why a particular media should be considered exempt from the scope of a new rule. CAP expects that respondents making a case for media exemptions will be able to demonstrate robustly the disproportionate impact on the media in question.

CAP proposed that new restrictions apply to all non-broadcast media within the remit of the CAP Code, including online advertising.

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4.8.2. CAP's decision

The new restrictions on HFSS product advertising will apply to all media. All stakeholder groups supported the proposal, with very few significant responses opposing it. Those in support pointed to the importance of the new restrictions having maximum regulatory impact and the benefits of a consistent, media-neutral approach. Online media were a significant concern for many respondents. Importantly, CAP notes there were no specific calls for an exemption by stakeholders representing particular media channels.

4.8.3. Calls for extensions to the remit of the Code

CAP notes respondents calling for the new and amended rules to be applied to commercial practices, such as sponsorship, in-store and in-school promotion and packaging.

These practices are outside the remit of the CAP Code. They might share commonalities with commercial practices covered by the CAP Code, but they are outside the framework of a self-regulatory system comprising the advertising, direct marketing and promotional marketing sectors. Some of the commercial practices listed by respondents are governed by consumer protection and food legislation, such as in-store display, pricing and packaging, and others are distinct commercial practices outside the scope of advertising, such as sponsorship arrangements. It should be noted that, although these commercial practices are outside the remit of the Code, where related content features in an advertisement, it will be subject to the rules; for instance, if an endorsement arrangement results in a celebrity being used in an advertisement.

4.8.4. Promotional marketing on-pack and in-store

CAP notes that respondents have called for the children's food rules to apply to in-store and on-pack promotions. The scope of the consultation was to explore whether new restrictions were necessary to change the nature and balance of food and soft drink advertising seen by children. CAP considers that the outcome of the consultation delivers on the aim of reducing children's exposure to advertising of HFSS products in media of particular interest to them.

Packaging and in-store materials are not within the remit of the Code. As far as the Code covers promotional marketing as a discipline, it applies to promotional marketing content appearing on-pack or as part of promotional materials at the point of sale. However, this part of CAP's remit is strictly limited to such content; for instance, it does not cover the wider content of packaging on which a promotion appears. The CAP Code's remit does not extend to wider marketing and sales practices in retail environments.

CAP's proposals must be understood in the wider context, which calls for a multi-stakeholder response to tackling what some have described as an "obesogenic environment" in the UK. CAP considers its response is proportionate to the

evidence of advertising's impact on children's food preferences and appropriately sensitive to its primary role as an advertising regulator; it is for others to take a view on whether schools' policies, fiscal measures, product formulation and trading practices, such as those associated with retail environments, need to change as part of a multi-stakeholder approach.

5. Outcome

5.1. Changes to Section 15 of the CAP Code

The following table provides a mark-up and confirmation of the rule changes:

	Previous wording	Approved changes
	Background See also the *Help Note for food or soft drink product advertisements and children*.	**Background** **"HFSS products" are those food or soft drink products that are assessed as High in Fat, Salt or Sugar in accordance with the Department of Health nutrient profiling model. Information on the nutrient profiling model is now available on the Department of Health website at:** **https://www.gov.uk/government/publications/the-nutrient-profiling-model** […]
15.14	Except those for fresh fruit and fresh vegetables, food product advertisements that are targeted through their content directly at pre-school or primary school children must not include a promotional offer […]	**HFSS** product advertisements that are targeted through their content directly at pre-school or primary school children must not include a promotional offer […]
15.15	Licensed characters and celebrities popular with children must be used with a due sense of responsibility. Except those for fresh fruit or fresh vegetables, food advertisements that are targeted directly at pre-school or primary school children through their content must not include licensed characters or celebrities popular with children. For the avoidance of doubt, that prohibition applies to food or drink advertisements only. The prohibition does not apply to advertiser-created equity brand characters (puppets, persons or characters), which may be used by advertisers to sell the products they were designed to sell. Licensed characters and celebrities popular with children may present factual and relevant generic statements about nutrition, safety, education or similar.	Licensed characters and celebrities popular with children must be used with a due sense of responsibility. **HFSS product advertisements** that are targeted directly at pre-school or primary school children through their content must not include licensed characters or celebrities popular with children. For the avoidance of doubt, that prohibition applies to food or drink advertisements only. The prohibition does not apply to advertiser-created equity brand characters (puppets, persons or characters), which may be used by advertisers to sell the products they were designed to sell. Licensed characters and celebrities popular with children may present factual and relevant generic statements about nutrition, safety, education or similar.
15.18	N/A [new rule]	**HFSS product advertisements must not be directed at people under 16 through the selection of media or the context in which they appear. No medium should be used to advertise HFSS products, if more than 25% of its audience is under 16 years of age.**

5.2. Implementation

The ASA will enforce the new and revised rules **from 1 July 2017**. Alongside the Code changes, CAP's new guidance (see Annex A) on brand advertising that has the effect of promoting HFSS products will also come into effect.

Advertisements published from this date must comply with the new and amended rules. Existing advertisements should be changed or withdrawn as soon as possible. The only exception to this will be an additional three month transitional period for advertisers who can demonstrate to the ASA that the media space in question was booked prior to CAP's announcement of the consultation outcome on 8 December 2016.

This narrow exemption recognises that some advertisers make significant, long-term budgetary commitments to buy media space. The loss of this investment owing to changes in the regulatory framework would add significantly to the general costs of complying with the new rules. See also the evaluation of point 1.a.3.21 (Question 1a) for further detail of CAP's rationale.

The additional transitional period will expire on 1 October 2017.

5.3. Further work

CAP has committed to carry out further work in response to the consultation.

Most notably, in its response to Question 5 (see section 4.7 above), CAP committed to produce new guidance to assist advertisers in identifying media subject to a placement restriction. It will be relevant to rules covering areas such as food and soft drink advertising, along with alcohol and gambling.

The work will draw on existing ASA rulings in policy areas such as alcohol to provide more information on the ASA's expectations in enforcing such rules. In particular, it will provide greater detail on relevant audience measurement data and evidence of appropriate targeting mechanisms. The guidance will be published in good time before the rules come into force next year.

CAP will also engage with industry in the first half of 2017 to provide advice and training to assist preparations for the new framework.

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