

**Consultation response from the
National Heart Forum**

Consultation: Future Regulation of
Broadcasting Advertising

Consulting body: Ofcom

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Future Regulation of Broadcast Advertising

The National Heart Forum Response to the Ofcom Consultation

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Introduction

The National Heart Forum¹ (NHF) welcomes the opportunity to respond to the Ofcom Consultation "The Future Regulation of Broadcast Advertising". We recognise that the setting up of Ofcom provides a timely opportunity to review the regulation of broadcast advertising, particularly in the light of developments and growth in new forms of advertising and promotion and the convergence of media.

The review is also timely, for the NHF and wider public health community given the increasing recognition given to the impact of advertising on health related behaviours. There are particular concerns about the impact of food advertising and diet given the worrying recent rises in levels of Obesity amongst the UK population and its attendant health impacts.

Whilst we recognise that the causes of this rise in obesity are many and complex, it is certainly in part due to a change in children's dietary habits, particularly a rise in the consumption of foods high in sugary and fatty content. Research by Sustain² has shown that it is these products along with salty snacks which, make up the vast majority of foods advertised and marketed within broadcast media.

Whilst there has been much previous debate about the impact of advertising on behaviour, the recent Food Standards Agency (FSA) commissioned report Does Food Promotion Influence Children? A Systematic Review of the Evidence³ provides the most comprehensive evidence of the impact of advertising on children's behaviour, the report concluded that food marketing is a significant influence on children's eating patterns and diets. It is for this reason that NHF feel that the regulation of Broadcasting Advertising in particular that targeted towards children is of paramount importance to UK society.

Summary

NHF welcome this review, but we are concerned that neither the current or proposed system of broadcasting advertising regulation provide adequate protection for certain population groups particularly children NHF ask Ofcom to put specific regulations in place to address these failings.

The timetable for the implementation of the review is too short. Whilst the industry has had ample time to formulate its thinking, consumer and other public interest groups have had little opportunity to consult with their memberships. We call on Ofcom to publish a revised consultation based on the submissions to the consultations.

We are not confident that these proposals can deliver a regulatory system which will be more effective, timely and respected as the current statutory system. There is a need for greater independence from the advertising industry.

NHF recommend that Ofcom regulate or introduce statutory controls to prohibit advertising for foods high in fat, sugar and/or salt to children under 12, Developing agreed meaningful definitions of prohibited foods and drinks from independent rather than industry sources. The FSA or Coronary Prevention Group banding system could be applied.

¹ See Annex A: *About NHF*

² TV Dinners? 2001 Sustain

³ Does Food Promotion Influence Children? A Systematic Review of the Evidence 2003 Food Standards Agency

We would like to see Ofcom retain the right to intervene in individual cases though given greater independent adjudication we would anticipate that these powers would be less likely to be used.

Particular attention needs to be paid to the regulation of those channels specifically targeting children.

Should the proposals in this consultation be accepted, NHF recommend that measures to ensure greater independence from the industry be implemented. In particular by strengthening consumer and reducing industry involvement in the regulatory process.

NHF hope that if Ofcom adopts proposals to greater consumer representation in the processes, as a whole that our concerns over the rights of consumers to appeal will be mediated.

We support Ofcom's focus on "preventing inappropriate advertisements from being broadcast in the first place" (para. 87). However, in the absence of effective protective provisions within advertising codes, inappropriate advertisements, which may undermine the health and well being of vulnerable groups will continue to be broadcast and published.

We would like to see greater transparency in the appointment of the advisors for the panels.

NHF recommend that both the scheduling and content functions remain with Ofcom, as the statutory regulatory body.

NHF believe that advertising codes, regulations and enforcement processes should be strengthened in order to protect the public.

Whilst NHF understands Ofcom's reluctance to interfere with the processes from the start, if we are to address the rise in obesity amongst the population we need co-ordinated action now. We cannot wait two years.

Consultation Response

Question 1: Please give your views on the benefits and disbenefits of a move to co-regulation with respect to:

- Viewers and listeners***
- Broadcasters***
- Advertisers***

In respect of viewers and listeners NHF are particularly concerned with the impact of food advertising on children's dietary behaviour and thus their health. Unlike other forms of advertising, ads on television tend to be highly repetitive which has much greater impact on consumers and particularly children. We are not confident that the proposals contained in the consultation will deliver a robust and protective regulatory system.

NHF believes that a self-regulatory system is inappropriate to deliver the high levels of public protection which are essential as part of a range of policies to address the current obesity epidemic. NHF believes that the most effective approach would be to maintain and strengthen the current statutory system which, as the Government

appointed regulatory body, should be directly administered by Ofcom with much greater consumer involvement. We will set out other specific concerns in response to later questions.

The advertising industry and broadcasters unsurprisingly welcome the move towards self regulation. The UK Advertising Association argues that self-regulation is the best model because *“it works alongside the law but is more flexible than legislation and can adapt quickly to new forms of advertising and changes in public attitude.”*⁴

NHF are very concerned about the absence of non-industry involvement in drawing up voluntary codes. To allow the industry to regulate itself at the current time is unacceptable and a failure to address and incorporate issues of concern to public interest organisations and wider society will undermine the credibility of any new system and result in a lack of public confidence in the industry and the Government's capacity to regulate it.

Whilst NHF welcome this review it is because we believe that neither the current or proposed system of broadcasting advertising regulation provide adequate protection for certain population groups particularly children. NHF ask Ofcom to put specific regulations in place to address these failings.

Question 2: *Are you confident that these proposals can deliver a regulatory system which is at least as effective, timely and respected as the current statutory system? What aspects give you cause for confidence or concern? In what way might the proposals be an improvement on current arrangements?*

NHF are not confident that the current system or the proposed new system offer a regulatory system that is effective and timely. We are concerned that this is a missed opportunity to strengthen the regulation of broadcast advertising and in consultation between consumers and the industry to produce a more robust regulatory system which better serves the needs of both industry and consumer.

Given these reservations we make the following points on the proposals, we are concerned that

- The terms of reference of the voluntary code in the UK relate to individual advertisements and do not address concerns about the cumulative impact of advertising to children and young people, of products from a range of manufacturers that are high in salt, fat and/or sugar.
- There is no scope to limit advertising of products that are legally promoted and sold to children (unlike tobacco or alcohol). The public health community strongly believe that advertising to children has the potential to be as damaging to the health of children as tobacco or alcohol all be it in the longer term, and we would thus like to see the Code applied to advertising in total as well as individual advertising.
- We are concerned by the advertising industry refusal to accept the findings of the recent FSA report *Does Food Promotion Influence Children?* This despite its veracity being scrutinised and accepted by an independent board of academics does not inspire confidence in its ability to accept a public health perspective in its scrutiny of its own business.

⁴ www.asa.org.uk/self_regulation

- The current system is largely reactive and complaints driven (although under the CAP code there is provision available for 'pre-publication advice') and does not require pre-vetting. *"Indeed many complaints may not be adjudicated until the entire marketing campaign has finished, weakening the effect of sanctions."* (International Association of Consumer Food Organisations).⁵ Pre-vetting not just by industry representatives but by consumer representatives is crucial and we will return to it in more detail.
- Modeling of regulatory approaches by the National Consumer Council (NCC November 2000) suggests that self-regulation is not an appropriate model unless there is separation of management from industry, there is independent representation and adequate, enforceable sanctions yet this does seem to be addressed under these proposals.

Recent adjudication's by the Independent Television Commission (broadcast regulatory authority) and the Advertising Standards Authority (print regulatory organisation) against advertising claims made in the UK for Knorr Vie carton soup illustrate the inadequacies of a reactive approach to regulation. While this is not an advertisement aimed at children, it serves to demonstrate how the principle of a reactive, complaints-based regulatory framework lacks consistency and adequacy to protect the public against inappropriate advertisements. (See annex)

NHF are not confident that these proposals that these proposals can deliver a regulatory system which is at least as effective, timely and respected as the current statutory system. There is a need for greater independence from the advertising industry. In addition to changes recommended in response to question one

Question 3: *Can you suggest any changes to the proposals which would either improve on current standards of regulation or remedy any detriments you perceive compared to the current system?*

NHF would like to see the Government and as its operative Ofcom adopt the precautionary principle in its regulation of advertising towards children

A precautionary approach to protect children and young people from unlimited marketing of foods high in salt, fat and sugar would be consistent with the government's own strategy to handle risk to the public.⁶ The Government is about to launch a Children's Health policy strategy, cross governments there are initiatives to counter the obesity epidemic. If Ofcom fails to adopt this line in the regulation of broadcast advertising then it will be acting contrary to Government policy.

"There is a case for adopting the precautionary principle for the marketing of foods to children. Industry should be asked to take a more responsible approach to the promotion (especially to children) of foods high in fat, salt and added sugars and balance this with the promotion of healthier options..." CMO Annual Report 2002⁷.

⁵ Dalmeny K, Hanna E, Lobstein T. 2003. Broadcasting bad health: Why food marketing to children needs to be controlled. IACFO.

⁶ Strategy Unit. Risk: Improving government's capability to handle risk and uncertainty. 2002. Cabinet Office.

⁷ Chief Medical Officers Annual Report 2002, Department of Health 2003

In February 2000, the European Commission also adopted a Communication on the use of the precautionary principle that acknowledges that the scope of the principle is much wider than environmental protection – the only prescription for its application under the Treaty of Amsterdam. The Communication underlines the fact that, the precautionary principle forms parts of a structured approach to the analysis of risk, as well as being relevant to risk management. It covers: “cases where scientific evidence is insufficient, inconclusive or uncertain and preliminary scientific evaluation indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen by the EU.”⁸

In light of this the NHF has considered the following changes to the regulations other than a total ban on all advertising to all children

1. To support statutory regulation to Regulate or introduce statutory controls to prohibit all advertising to children under 12

drawing on the experience of Sweden where

- TV commercials should not have purpose of attracting attention of children under 12
- Persons and characters that play a prominent part in children’s programmes should not appear in TV commercials
- Commercials should not be broadcast in breaks immediately before or after children’s programmes

This has the advantage that a total ban is simple for regulators to enforce and creates an ‘even playing field’ for the food industry. and could contribute to prevention of early ‘branding’ exposure among young children. Whilst the NHF accept that it is difficult to disaggregate effect of ad ban from other influences. There is evidence that regulated markets have lower obesity rates to unregulated markets⁹ Whilst recent opinion polls have suggested that most parents would welcome stricter regulation of broadcast advertising towards children whether an outright ban would be accepted is a matter for further debate.

2. Regulate or introduce statutory controls to prohibit food/drink advertising to children under 12

The FSA review of food promotion on children’s diets has shown that food marketing (specifically TV advertising is a significant influence on children’s eating patterns and diets.¹⁰ This type of tighter regulation of food advertising to children has greater public support than a total ban.

Food and drink advertising simple to define and prohibit. NHF accept that any blanket ban would also effect “healthier foods” but given the limited advertising spend on these products we deem this acceptable.

2. Regulate or introduce statutory controls to prohibit advertising for foods high in fat, sugar and/or salt to children under 12,

There are no models available for comparison but this would not prohibit the advertising of “healthy foods”. It would require agreed meaningful definitions of prohibited foods and drinks from independent rather than industry sources. The FSA or Coronary Prevention Group banding system could be applied. It avoids any problems with defining what are children’s programmes.

This is the model preferred by the NHF.

⁸ Communication from the Commission on the precautionary principle. COM (2000)1.

⁹ JP Morgan. 2003

¹⁰ Does food promotion influence children? A systematic review. 2003. Food Standards Agency

4. Regulate or introduce statutory controls to prohibit food advertising during children's TV programming (e.g. CITV). The advantage is that children's programming is easy to define. But it would cover only younger age groups and there are concerns that advertising would be displaced to the programmes broadcast either side of children's TV which also attract a large children's audience. An alternative solution is the prohibition of this type of advertising before the 9pm watershed.

5. Regulate or introduce statutory controls to prohibit advertising for foods high in fat, sugar and/or salt during children's TV programming.

Again children's programming is easy to define and this would not prohibit option of advertising 'healthy' foods. Again it would require agreed meaningful definitions of prohibited foods and drinks. Combines targeting of restrictions in terms of both products advertised and TV scheduling.

6. Self-regulation by advertising industry to control food advertising to children,

In New Zealand there operates a self-regulated children's TV policy, although it only applies to 'free to air' programmes. It is difficult to assess the impact.

NHF recommend that Ofcom regulate or introduce statutory controls to prohibit advertising for foods high in fat, sugar and/or salt to children under 12, Developing agreed meaningful definitions of prohibited foods and drinks from independent rather than industry sources. The FSA or Coronary Prevention Group banding system could be applied

Question 4: *In order to safeguard the co-regulator's effectiveness and to avoid possible double jeopardy, it is proposed that Ofcom would not be entitled to intervene in individual cases, though it would remain responsible for the overall effectiveness of the system. Does this seem a sensible approach?*

This does not seem to be a sensible approach, NHF are concerned that this means that given Ofcom's inability or unwillingness to intervene on individual cases, viewers will have no right of appeal against an ASA judgement to an independent body.

It appears that Ofcom's role as a co-regulator's responsible for the overall effectiveness is concerned with process of dealing with complaints rather than nature of complaints, we are also concerned with the statement that Ofcom would only have the right to suggest, but not impose or initiate code changes. Under the current system the Independent Television Commission (ITC) has the power to override decisions of the Broadcast Advertising Clearance Centre (BACC) on vetting of advertising on questions of taste and consumer protection under the proposed system once an advert has been cleared by BACC there is no such statutory recourse. The proposals are modeled on voluntary system, which currently governs press, cinema and billboard advertising but are not subject to the same repetition, which makes TV advertising so invasive particularly to children.

NHF would like to see Ofcom retain the right to intervene in individual cases though given greater independent adjudication we would anticipate that these powers would be less likely to be used.

Question 5: *Do you believe there would be additional costs, or cost savings, for the broadcast and advertising industries as a result of the proposed changes? Please specify. If you anticipate higher costs in any area, do the benefits of the proposed new system justify these?*

Question 6: *Does the proposed system appear capable of regulating fairly and effectively the advertising which appears on all those services which Ofcom will license, including small or specialist audience channels, foreign language stations, and very local or community broadcasters? If not, where might the problems arise?*

NHF share the same reservations about the proposed system with respect to these as we do with the larger media. We are particularly concerned with the regulation of the many channels specifically targeted at children. These channels are amongst the successful of the new channels but NHF would prefer to see them financed through subscription rather than advertising and sponsorship revenue.

NHF would like to see particular attention paid to the regulation of those channels specifically targeting children.

Question 7: *Are the safeguards proposed sufficient to ensure that the co-regulatory system remains independent of the commercial interests and pressures of advertisers and broadcasters?*

The Ofcom consultation summary notes states that the proposals will allow “industry to take more responsibility for its own actions through self-regulation”.¹¹ In addition, the proposals also state that the proposals will allow the advertising industry to “assume responsibility for its own behavior” (para. 37).

Advertisers and most broadcasters are driven by overriding need to make profits for their shareholders rather than protect the well being of the consumer. Whilst it may be argued that the system is independent of individual advertisers it is difficult to see how it will fail to reflect the interests of the industry as a whole. The failure by the industry to accept the findings of the Food Standards Agency research shows that even when presented with high quality evidence of this type it hides behind its own self interest.

The Ofcom model proposes that the proportion of lay to non-lay members on the ASA Council would be 2:1. It is difficult to imagine how the non-lay members, selected for their “industry experience” would “act independently of the business” (para. 47). Furthermore, no mention is made in the proposals of the need for representation on the ASA Council of a range of public interest experts from, for example, health, environmental and consumer organisations.

NHF recommend that should the proposals in this consultation be accepted that measures to ensure greater independence from the industry need to be implemented particular by strengthening consumer and reducing industry involvement in the regulatory process.

Question 8: Are the appeals arrangements adequate and sufficiently independent, and do they provide adequate recourse for advertisers, broadcasters and complainants? Are they better or worse than current arrangements?

NHF are concerned that the complainant no longer has the right of appeal to an independent body that exists under the current system.

NHF hopes that if Ofcom adopts proposals to greater consumer representation in the processes, as a whole that concerns over the rights to appeal will be mediated.

Question 9: If you wished to complain about broadcast advertising would you feel more confident or less confident complaining to the ASA (the proposed co-regulator) operating under the proposed system?

NHF do not feel confident about the complaints structure that will be implemented under these proposals. We are concerned that this means that given Ofcom's inability or unwillingness to intervene on individual cases, as we have already stated that viewers have no right of appeal against an ASA judgement to an independent body. There is also no mention in the consultation of how consumer/viewer interests will be reflected in the regulatory process.

NHF are not confident with the ASA ability to deal with complaints for instance it is not unknown for ASA adjudication's to last several years, during which time offending advertisements continue to be published. NHF would recommend that the regulator has the power to suspend adverts whilst complaints are heard this

¹¹ ‘Public consultation on the regulation of TV and radio advertisements – a summary, www.ofcom.org.uk/consultations/current/bac/summary.htm

would have the added incentive of dealing with complaints quicker and would also perhaps strengthen at the pre vetting process. There are also examples of the ASA focussing solely on specific complaints, whilst overlooking other obviously misleading aspects of advertisements, the ASA will not accept complaints about misleading advertisements if they are more than 12 weeks old.

We would also suggest reform to the current system whereby complaints are only accepted by letter. This is surely anachronistic to e-Gov agenda.

NHF recommends that there is greater consumer representation on those bodies involved in dealing with complaints, they be given the power to suspend campaigns pending the hearing of complaints and widen the way in which complaints can be accepted.

***Question 10:** Ofcom proposes that the broadcasters should continue, as now, to be responsible for the advertising that they carry, and that they, rather than just the advertisers, would apply the co-regulator's decisions. Do you regard this as the right approach? If not, how would you see the system working?*

One of the advantages of the current ITC regulation of broadcast advertising over the ASA non-broadcast arrangements is the requirement for broadcasters to pre-vet advertisements. If managed appropriately, this should ensure that advertisements are in line with the relevant code before they are broadcast. This is essential for consumer protection and it is a major pitfall of the current non-broadcast advertising regulation system that there is no pre-vetting requirement. The consequence of this is that untruthful or misleading claims in advertisements are identified post publication, by which time the public has already been misled. Sometimes non-broadcast advertisers may deliberately choose to shock the public, planning that the furore and inevitable ASA injunction will create more public awareness of their message than would result from a milder advertising campaign. This highlights the dangers of a system, which precludes pre-vetting.

NHF therefore support Ofcom's focus on "preventing inappropriate advertisements from being broadcast in the first place" (para. 87). However, we are concerned that in the absence of effective protective provisions within advertising codes, inappropriate advertisements, which may undermine the health and well being of vulnerable groups will continue to be broadcast and published.

***Question 11:** We would welcome your views on the degree to which, from your reading of the proposal, the new co-regulatory body would be either more or less transparent and accountable than are current arrangements. Would such transparency and accountability be sufficient?*

NHF are unhappy about the current level of transparency and the proposed levels of accountability. Under the current system as administered by the ASA there should be a greater degree of transparency. Currently the information relating to the appointment of expert advisers is not in the public domain. Given that the ASA often depends on a single expert for its adjudication it is essential that the interests of all advisors should be publicly declared, as should the interests of all Council members to ensure the full public support for this process.

Given the recent evidence of the importance of advertising to public health, both negatively but also positively at least one advisor should have knowledge of public health.

NHF would like to see greater transparency in the appointment of advisors with at least one advisor should have knowledge of public health.

Question 12: Do you have any comments on any of these allocations of responsibility, or on the functions themselves, or on any of the issues discussed? In particular, do you think the proposal to transfer teleshopping and the non-editorial elements of sponsorship to the ASA (Broadcast) is appropriate?

NHF are concerned about the proposed division between advertising 'scheduling' and 'content' responsibilities. Whilst Ofcom will retain direct remit for non-content-related elements of advertising regulation while responsibility for 'content' will be transferred to the proposed self-regulatory system. The consultation acknowledges this will make it more difficult to maintain an integrated approach to programme and advertising policy - for example on watershed issues (para 37).

Scheduling issues are crucial in assuring the protection of vulnerable groups such as children. However, the proposal to divide regulation is not a good basis for the development of a protective environment and will make vital reforms more difficult to introduce. It appears that this is a result of organisational convenience rather than for consumer protection.

The Culture Secretary, Tessa Jowell has also recently acknowledged this problem and is quoted as saying that the new arrangements "would need to allow for sufficient interaction between scheduling and content regulation to achieve the appropriate degree of protection."¹²

NHF thus recommend that action that both functions remain with Ofcom, as the statutory regulatory body.

Question 13: Do you consider that the enforcement and sanctioning process would provide effective protection for viewers and listeners from harmful, offensive or misleading advertising material?

The NHF are not convinced that the sanctions which exist under the current regulatory systems for non-broadcast and broadcast advertising are effective. There are, for instance, a number of examples of large companies taking legal recourse after rejecting ASA adjudication's. Legal proceedings can take many months, even years, during which time companies can continue to use the same misleading claims as part of their promotional activities. In any event these companies are not even deterred by the small financial penalties imposed by courts and are evidently even less deterred by the negative publicity generated by ASA adjudication's. The example of Sunny Delight shows how a brand can become tarnished in the public mind but an ASA judgement does not seem to carry that weight. Conversely, smaller companies, for instance those involved in unscrupulous 'miracle' weight loss promotions, also seem oblivious to ASA rulings.

Advertising codes, regulations and enforcement processes should be strengthened in order to protect the public. However, the Ofcom co-regulatory proposals will reduce protection to the low levels currently found in the non-broadcast arena.

¹² 'Culture Secretary acknowledges Ofcom plan is flawed', News Release issued by Debra Shipley MP for Stourbridge, 12 December 2003

NHF believe that advertising codes, regulations and enforcement processes should be strengthened in order to protect the public.

Question 14: *Do you consider that these audit and recovery measures are adequate to enable Ofcom to fulfill its statutory duties?*

Question 15: *In the event of serious failure of the co-regulatory system, Ofcom would retain the right to revert to full statutory regulation. The industry has proposed that to give the system time to establish itself Ofcom should refrain from taking this action for an agreed period, perhaps two years. Is this reasonable, and does two years seem appropriate?*

We would like clearer definition of what constitutes a serious failure?

NHF are disappointed that there is no commitment to carry out reviews during the first two years, or even an intention to review the effectiveness of current codes as the new system is introduced. This is missing a key opportunity to address the current public policy concerns about advertising to children.

Annex One

About NHF

The National Heart Forum

The National Heart Forum (NHF) is the leading alliance of over 45 organisations working to reduce the risk of CHD in the UK. Member organisations represent the medical and health services, professional bodies, consumer groups and voluntary organisations. Members also include many individual experts in cardiovascular research. Government departments have observer status. The purpose of the NHF is to work with and through its members to reduce disability and death from CHD. Our four main objectives are:

- To provide a forum for members for the exchange of information, ideas and initiatives on coronary heart disease prevention;
- To identify and address areas of consensus and controversy;
- To develop policy based on evidence and on the views of member organisations;
- To stimulate and promote effective action.

The NHF embraces professional, scientific and policy opinion in current issues on CHD prevention. It co-ordinates action to reduce heart disease risk through information, education, research, policy development and advocacy

Status of this response

The views expressed in this paper are consensus-based and do not necessarily reflect the views of individual members of the National Heart Forum.

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