

A Bite-Sized Update on the New Restrictions on Advertising Food to Children

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May 24, 2023

Canadian advertisers are facing new restrictions on advertising food to children on two fronts: regulatory and self-regulatory.

On April 25, 2023, Health Canada published a “Policy Update” announcing its intention to amend the *Food and Drug Regulations* to restrict advertising of certain foods to children on television and digital media. Separately, Ad Standards, the advertising industry’s self-regulating body, together with four industry associations,¹ has developed the *Code for the Responsible Advertising of Food and Beverage Products to Children* (Children’s Code), which will come into force on June 28, 2023.

Under both regimes, there is a restriction on food advertising primarily directed to children under the age of 13 years, unless the food is ‘low-in’ sodium, sugars, and saturated fat. The thresholds for the nutrients are set out in Canada’s Food Classification System, part of Canada’s food guide published in 2019,² and Appendix A to the Children’s Code,³ respectively. The thresholds are similar, although the Children’s Code contains special rules for certain categories of food (e.g., restaurant meals, breakfast cereals). For example, under both regimes, prescribed foods include many (fast food) restaurant meals, candy, and sweetened breakfast cereals.

Policy Background

Both government and industry recognize that children are especially vulnerable to advertising. They only develop an awareness of an ad’s persuasive intent at an older age, yet they are exposed to more ads due to an increase of their screen time, especially during and following the pandemic. Today, almost one in three children in Canada are overweight or obese, leading to a higher risk of developing certain diseases. Research has found that food advertising directed at children contributes to an unhealthy diet and most of the advertised foods are high in sodium, sugars, and/or saturated fat.⁴

Health Canada’s Policy Update

As set out above, Health Canada’s Policy Update will restrict advertising of prescribed foods on television and digital media directed at children under the age of 13. The Policy Update is the continuation of

extensive consultations with the industry, which took place between 2016 and 2019. Health Canada is seeking feedback on their Policy Update until June 12, 2023. Once the current consultations conclude, the Policy Update will form the basis of amendments to the *Food and Drug Regulations*.

Two main factors will be used to assess whether an ad is primarily directed at children:

- The nature and intended purpose of the medium where the ad is communicated;
- Whether the advertisement targets, or is reasonably expected to appeal particularly to, children.

The amendments to the *Food and Drug Regulations* are expected late 2024.⁵

The New Children's Code

Like Health Canada's Policy Update, the Children's Code applies to children under 13 years and to food exceeding the nutrition criteria prescribed in Annex A. The Children's Code extends to all types of media. It will be administered by Ad Standards, much like it administers the Canadian Code of Advertising Standards, which was first published in 1963.

The question of whether an ad is 'primarily directed' at children is the key factor in determining whether it is restricted under the Children's Code. Three criteria must be considered in their entirety:

- The nature and intended purpose of the food product;
- The manner of presenting such advertisement; and
- The time and place it is shown.

The determination can be complicated because it is contextual and the above criteria is subjective. Ad Standards' guide⁶ accompanying the Children's Code contains detailed directions on how to interpret each criterion, such as:

- Ads are likely considered to be primarily directed at children where children make up more than 15 % of the audience
- Many aspects of an ad may lead to the conclusion that it is primarily directed at children, e.g., the level of language, depictions of child fantasies, music, sounds, animations. For example, fast food menus that include a free toy are most likely considered primarily directed at children
- While billboards within 100 meters of public elementary or middle schools will be considered primarily directed at children, advertisements in night clubs or on age restricted platforms will not

To help advertisers comply with the Children's Code, Ad Standards offers a preclearance regime. They will also review complaints by a member of the public or a fellow advertiser. In the event of noncompliance, the

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advertiser must withdraw or appropriately amend the ad. Should the advertiser disregard such request, Ad Standards may ask the hosting media to withdraw the ad in question or refer the matter to Health Canada.

Exemptions

Brand advertisements where no identifiable food is shown or referenced by name are exempt. The Children's Code also exempts packaging, labels, wrappers, containers, and product shapes, as well as in-store and in-restaurant advertising. Further exemptions extend to educational and charitable initiatives.

No Urging to Buy Policy

Even where exemptions apply under the Children's Code, advertisers must not use language that directly urges a child to purchase a restricted food product or urges a child to ask another person to do so. For example, language like "Hey kids, buy this!" or "Ask your parents to buy this product!" would fall under this restriction.

For more information about how the changing regulatory landscape could affect your business, please contact Jennifer McKenzie or Eric Buist.

¹ Association of Canadian Advertisers (ACA), Canadian Beverage Association (CBA), Food, Health & Consumer Products of Canada (FHCP) and Restaurants Canada.

² Health Canada. (2019). Canada's Food Guide and Food Classification System.

³ Ad Standards. (2023). Appendix A to the Code for the Responsible Advertising of Food and Beverage Products to Children.

⁴ For further references, see Health Canada. (2023). Policy Update on Restricting Food Advertising Primarily Directed at Children.

⁵ Health Canada. (2023). Policy update on restricting food advertising primarily directed at children.

⁶ Ad Standards. (2023). Guide for the Responsible Advertising of Food and Beverage Products to Children.