



**Submission to the Department of Health on Draft Regulation
No. R. 3337 - Regulations Relating to the Labelling and
Advertising of Foodstuffs**

To: Director - Food Control
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I. Introduction

1. The Dullah Omar Institute (DOI) is a research institute at the Faculty of Law, University of the Western Cape, based in Cape Town, South Africa. For over 30 years it has been involved in research, advocacy, and teaching on various issues in relation to human rights, governance, democracy and constitutionalism. Some of the first staff members of the Institute were involved in the drafting process of the South African Constitution, often regarded as one of the most progressive constitutions in the world. Since its inception, the Institute has continued to contribute toward upholding human rights and constitutionalism in South Africa and beyond. The Institute also supports numerous civil society efforts aimed at protecting marginalised and vulnerable populations.

2. Within the DOI, the Socio-Economic Rights Project (SERP) has extensive experience conducting research and teaching to ensure the realisation of socio-economic rights for vulnerable and marginalised groups within South Africa and Africa as whole. It focuses on issues such as the right to health, food, water and sanitation, housing, and social security. The Project has played an important role in shaping the jurisprudence of socio-economic rights in the country, by acting as amicus curia and providing expert opinion in some of the landmark constitutional cases on socio-economic rights, such as the [Grootboom](#) and [Treatment Action Campaign](#) cases. At the regional level, SERP has also provided technical support to the African Commission on Human and Peoples' Rights by way of developing important norms and standards on socio-economic rights.

3. One of our ongoing research projects is looking at legal and policy frameworks around diet-related non-communicable diseases (NCDs), exploring the legal arrangements and strategies which impact food environments in South Africa. This includes investigating rules, institutions and actors and the extent to which they act as enablers or obstacles to the protection of the rights of individuals and the collective, as well as the promotion of social and economic rights and interests in a sustainable and healthy way. Taking a rights-based approach to this study allows us to effectively analyse state obligations in relation to food governance and NCD prevention efforts in South Africa. Relevant here, our research also includes the potential of consumer protection laws, specifically how to strengthen the labelling, marketing, and advertising of ultra-processed foods (UPF), especially foods carrying the front-of-pack label (FOPL), to the general public and children in particular.

4. Therefore, we welcome the opportunity to comment on the Draft Regulations Relating to the Labelling and Advertising of Foodstuffs No. R. 3337 of 21 April 2023 (hereafter the Draft Regulations), made in line with section 15(1) of the [Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972](#). Our support and recommendations are set out below.

II. Human rights Framework

5. We support the decision of the Department of Health to introduce new labelling and advertising regulations, and the inclusion of various important provisions such as;

- The mandatory requirement of FOPL for food high in salt, sugar and saturated fat, as well as artificial sweeteners.
- The inclusion of two Nutrient Profiling Models for FOPL and health claims relevant to the South African context.
- The prohibition of health and nutrition claims on FOPL as well as more rigorous thresholds for the use of such claims.
- The inclusion of marketing restrictions on products carrying FOPL, especially in relation to child-directed marketing.
- Setting 18 years as the age limit for marketing restrictions to children in line with section 28 of the [Constitution of the Republic of South Africa](#) as well as the [Children's Act 38 of 2005](#).
- The restrictions of certain marketing techniques that appeal to children.
- The restriction of brand name of foods carrying FOPL on items offered for sale or donation.
- The inclusion of FOPL logos and warning messages in advertisements.
- The inclusion of infant formula products to carry FOPL for ages over 6 months.
- The six month time period for compliance with FOPL regulations.

6. This regulation will be an important addition to other nutrition policies to better regulate South Africa's food system. This is in line with South Africa's human rights obligations to promote access to safe and nutritious food and to reduce the consumption of unhealthy foods, as an extension of the right to health and food. The Bill of Rights in the Constitution entrenches several other interrelated rights, including the right to life and access to information which are further protected or promoted through this regulation. In addition, the State has the corresponding obligation to respect, protect, promote, and fulfil these rights (section 7(2)) by taking legislative and other reasonable measures toward their realisation, including the regulation of activities of businesses and non-state actors. Moreover, public participation and transparency during this process is particularly important, to uphold a democratic and accountable State.

7. The Draft Regulations are also in line with South Africa's international and regional commitments, as it has ratified a number of treaties, including the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; The African Charter on Human and Peoples Rights; the African Women's Protocol; the African Children's Charter; the Convention on the Rights of the Child, among others. According to the Committee on Economic Social and Cultural Rights (CESCR), States have an obligation to protect socio-economic rights such as health and food, including in the context of business activities which may

infringe them. This extends to interventions and regulations to restrict activities, such as the marketing and advertising of certain goods and services, in the interest of protecting public health ([General Comment No. 24](#), para 14, 19).

8. This also shows commitment toward achieving the Sustainable Development Goals 2030 (SDGs), especially SDG 3.4, which aims to reduce premature mortality from NCDs by one-third by 2030. Moreover, it aligns with international guidelines on the prevention of NCDs, including the [UN General Assembly Political Declaration on NCDs Prevention and Control](#) and the [Brazzaville Declaration on NCDs prevention and Control](#).

9. In addition, it aligns with the [WHO Best buys](#) which is a list of cost-effective interventions to guide developing countries in their efforts to address and prevent diet-related NCDs. This is important because preventive measures which are evidence-based, proven, cost-effective and scalable can have huge [economic and health benefits](#) in the long term. In addition, these interventions are considered [double-duty actions](#), because they can address under-nutrition (including micronutrient deficiencies) and overnutrition. Therefore, FOPL, by informing healthier food choices, has the potential to improve both undernutrition and overnutrition. In particular, the former [United Nations Special Rapporteur on the Right to Health](#) has called on States to take measures to ensure people have accurate, easily understandable, transparent and comprehensible information to make informed choices towards healthy diets, and FOPLs were identified among policy measures that could effectively reduce diet-related NCDs and other forms of malnutrition.

10. Research in South Africa by [Bopape et al](#) on warning labels has also shown that they provide information that is understandable and accessible and can help inform people to make better and healthier food choices. Moreover, it has the potential to level the playing field and improve nutritional literacy and education for all, including vulnerable groups. In addition, requiring warning labels on packaged food could encourage various food manufacturers to reformulate their products, by using healthier ingredients and not having to introduce FOPL where applicable.

11. The Draft Regulations are also in line with the government's overall NCDs prevention strategy outlined in the [National Strategic Plan for the Prevention and Control of NCDs 2022-2027](#) (NSP). In the NSP, the government demonstrated commitment to reducing the levels of the five major shared and modifiable risk factors for NCDs, which includes unhealthy diet. This requires among others, interventions to improve the food environment and FOPL will help to achieve this goal. This Regulation on FOPL will also further the purpose of the Consumer Protection Act 68 of 2008 which aims to protect consumers, including vulnerable groups such as minors, from misleading representation in the promotion of packaged foods (section 29 and section 41). Children, the elderly, people with disabilities, rural dwellers among others have been identified as vulnerable to certain

industry marketing tactics which necessitates a higher level of protection. As such, [consumer protection laws and regulations in various countries](#) give special protection to children because of their age, immaturity, limited experience and credulity which makes them more susceptible to persuasive industry marketing tactics. Moreover, this regulation gives effect to section 5 of the [Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972](#) (FCDA) which prohibits misleading descriptions of foodstuffs in respect of their composition, nutritional value among others.

12. We recognise the notable progress in preventing NCDs through the Sodium and Trans-fat regulations as well as the Health Promotion Levy (HPL) and commend the intention of the Department of Health to strengthen diet-related NCDs prevention policy efforts through this new warning labelling and advertising regulations.

III. Guidelines to improve key provisions in the Draft Regulations

13. This section highlights certain provisions in the Draft Regulations for further consideration to ensure that the Regulation maintains its intended purpose, objective, and efficiency.

Regulation 51 and 52 - Marketing restrictions of foods carrying FOPL to children

14. Exposing children to unhealthy food and beverages through marketing and advertising is a violation of their right to health, adequate nutrition and freedom from exploitation, besides undermining the child's best interest. [Children are a lucrative consumer group targeted especially by the food and beverage industry](#) from promotion of infant formula, ready-made baby and toddler foods, drinks and snacks, fast foods; often marketed as convenient and promising various nutritional benefits, to the [manipulative marketing](#) of various UPF food and beverage products to children of all ages.

15. The CRC Committee has noted in its [General Comment No. 16](#), that the child's best interest is of utmost importance, and States should be in a position to explain how the right to have the best interests of the child considered has been respected in decision-making, including how it has been weighed against other considerations (para 17). In this context, this would involve weighing children's health and well-being against economic/business interests. In line with the duty to protect, the CRC Committee also in [General Comment No. 16](#) recommends that States take necessary measures including laws and regulations to prevent business enterprises from contributing to the abuse of children's rights through unhealthy food marketing, including enforcement mechanisms to ensure compliance (para 28).

16. It is important to note that marketing restrictions of unhealthy food and beverages to children is a human rights imperative, with corresponding obligations on the South African government by virtue of children's rights

enshrined in the Constitution, the Children's Act and by ratifying the CRC, ICESCR, the African Charter as well as the African Children's Charter. The obligation of States to protect the health of children permits governments to impose relevant restrictions, backed by scientific evidence, in line with the best interests of the child. Imposing comprehensive restrictions on marketing of UPF and beverages to children is in line with this duty. The [WHO](#) has noted that comprehensive rather than stepwise restriction has the highest potential to achieve the desired result. Moreover, the CRC Committee has in its [General Comment No. 15](#) noted that all business enterprises have an obligation to identify, prevent and mitigate their negative impact on children's right to health and in particular limit advertisement of energy-dense, micronutrient-poor foods, and drinks containing high levels of caffeine or other substances potentially harmful to children (para 80-81).

16. The [WHO](#) and [UNICEF](#) have issued policy guidelines to guide states in regulating unhealthy food and beverage marketing to children. They include;

- Protecting all children.
- Adopting a broad definition of marketing to children, including various communication channels.
- Covering a broad set of persuasive techniques that appeal to children.
- Applying a strict nutrient profile model.
- Adopting effective enforcement mechanisms to ensure compliance, including sanctions for non-compliance.

17. Other jurisdictions such as Chile, and Quebec, Canada, have imposed restrictions on marketing of unhealthy foods to children. For instance, the [Food and Advertising Law](#) in Chile introduced time-based restrictions on TV advertising to children. Section 248-249 of the [Quebec Consumer Protection Act](#) restricts commercial advertising to children on television, radio, print, internet, mobile phones, signage as well as the use of promotional items, including enforcement mechanisms such as fines or possible criminal actions against violators.

18. Where adequate [marketing restrictions are implemented and enforced](#), it could significantly reduce exposure of children to unhealthy foods, with the potential to reduce the rate of obesity and positively impact child health. We commend the Department for the protections that this regulation provides to children. Firstly, it applies to children up to 18 years of age. Secondly, it sets a nutrient profile model for FOPL foods which may not be marketed to children. Thirdly, the regulation details what must not be contained on packages, labels and advertisements of foods carrying FOPL. *The Foodstuffs, Cosmetics and Disinfectant Act* under which this regulation sits, contains a broad definition of advertising which extends to representations in various forms, through various channels, brought to public attention for the purpose of promoting sale of or encouraging the use of foodstuffs. Fourthly, it restricts the use of appealing techniques on labels, packages or advertisements such as celebrities or sport stars, cartoon-type

characters, animation, gift items or tokens that are attractive to children and similar strategies.

19. In addition to this, we make the following recommendations to strengthen the marketing restriction of products carrying FOPL to children;

- **Restrict in-store/retail marketing of food products carrying FOPL including standout product displays (such as store entrances, end of aisles and checkout aisle) and promotional pricing.** Product placement as a means of advertising within supermarkets has been shown to [influence consumer choice](#). [Checkout aisles](#) in particular are unavoidable points where impulsive purchases of mostly unhealthy food can be made. There has thus been [growing support](#) for policies to [limit prominent placement](#) of unhealthy foods in stores.
- **Restrict sponsorships of school events by brands that produce products which carry FOPL.**
- **Ban advertising of foods carrying FOPL in child centred settings including schools, ECDs, and health centres.**
- **Children should not be used in advertisements of products that are required to carry an FOPL.** This is recommended as an expansion of the limitation of the restriction already contained in Regulation 52(1)(b)(i)(cc), which requires that the package, label, or advertising of foods carrying FOPL shall not depict or contain references to children in mixed group with young adults older than 18.

V. Exemption of infant formula up to the age of six months from carrying FOPL - Regulation 51(4)

20. We support the regulation in requiring infant formula above six months to carry FOPL. However, we think that exemption of infant formula for under six months from bearing FOPL may be contradictory, also considering concerns that have been raised about the sugar content of infant formula in some studies ([2015](#), [2020](#)). Similarly, it has been [noted](#) that early life exposure to sugars other than lactose which naturally occurs in breastmilk can have negative implications for taste preference for sugary foods in the long term. We recognise that infant formula must be regulated in accordance with the WHO International Code of Marketing of Breastmilk Substitutes, with consideration of the need for infant formula, especially for mothers who cannot breastfeed their children. However, this does not negate the importance of knowing the nutritional content of said products. **Therefore, we recommend that the Department reviews the exemption of infant formula.**

V. Accountability, Enforcement, Monitoring and Evaluation Mechanisms

21. The CESCR in [General Comment No. 24](#) noted that States must monitor progress in the implementation of policies and ensure corporate

accountability for violation of human rights through their business activities, including through the use of administrative sanctions (para 49-50). This means that there must be an effective process of monitoring for compliance and relevant sanctions for breach. Without an effective mechanism for monitoring compliance with the standards set in the regulation, they will merely be regulations on paper. Similarly, according to the African Commission in [General Comment No. 7](#), monitoring includes processes such as inspection, data collection, and routine evaluation which are vital to ensure compliance with regulatory standards and also for the state to assess its compliance with its human rights obligations (para 47).

22. Therefore, we support the inclusion of the six-month period for compliance with the Regulations, giving industry sufficient time for implementation. However, the Draft Regulation currently provides no monitoring, evaluation, and enforcement mechanisms except those in the *Foodstuffs Cosmetics and Disinfectant Act*, presenting a major gap in ensuring compliance. This is because the penalties prescribed in section 18 of the Act are not stringent enough to ensure compliance. The penalty for a first offender is a fine not exceeding R400 or imprisonment not exceeding six months or both. A second offender attracts either R800 or imprisonment not exceeding 12 months or both. The penalty for a third time or subsequent offender is a fine not exceeding R2000 or imprisonment not exceeding 24 months or both. To enforce measures such as FOPL and restrictions on advertising requires a robust legal framework and monitoring mechanisms. **Here, we recommend that more effective compliance mechanisms be put in place in the form of an oversight body or committee responsible for monitoring, enforcement, and evaluation purposes.**

VI. General observations

Terminology:

23. This subsection highlights certain words that appear inconsistent, repetitive, or confusing that need to be reconsidered.

- *Ready to eat foodstuffs*- is defined in the interpretation section. However, in the regulation, some sections refer to 'ready to eat' (Regulation 46(4)(b); 47(5)(b)(i); Reg 65(8); Annexure 9 and some to 'ready to consume' (see definition of catering establishment; Reg 50(1); Reg 74(3)(h); Annexure 2 (1.1, 1.2).
- *Regulation 50(1)* - If the term 'pre-packed' is used in a sense different from 'pre-packaged', it should be defined. Rather, there should be a consistent use of the term. Also, 'non-packed' and 'naked' should be defined in the definition section if they have different meanings. Otherwise, one term should be used. The definition section contains 'pre-packaged' as well as 'un-prepacked'.

VII. Considerations for the NDoH on state obligations

25. In this section we aim to reaffirm the State obligations relevant here. It is common practice for industry to raise [several arguments](#) in opposition of health-related policies that affect their business interests. This is prevalent in [South Africa](#), where trade associations are very active and hold considerable weight in the decision-making processes of the country. Such pushback has been seen in relation to the alcohol, tobacco and the food and beverage industries. Therefore, we anticipate that industry will attempt to oppose and/or water down the Draft Regulations. Therefore, we seek to clarify the obligations of the NDoH, using a human rights lens that could help support the regulations and its implementation.

26. *Cost implications* - A common argument put forward by industry is the high costs of implementation that businesses will have to bear by revising their packaging in line with the new regulations, along with conducting new research and reformulation studies. While there will be cost implications for any business who has to comply with the new regulation, this is outweighed by the [economic benefits](#) that improved health outcomes would bring, as well as the opportunities for product reformulation to improve the nutritional quality, which [WHO](#) recognises as one of the action areas aimed at creating healthier food environments. Therefore, the Department must consider this argument against the long-term benefits of the regulation.

27. *Commercial Speech* - Industry often maintains that their freedom of expression/speech, referred to as 'commercial speech' is a critical component of their strategy to drive commerce and generate profits. They suggest that it informs and encourages consumers to purchase products, contributing to economic growth. However, from a human rights perspective, this must be weighed against the impact on broader society. For instance, in the [British American Tobacco](#) case, the tobacco industry questioned the ban on the advertising of tobacco products as a violation of the right to freedom of commercial speech. Industry contended that the ban was an unjustifiable limitation of the right to freedom of expression, in that it was a general blanket ban and was overly restrictive. However, the Court upheld that while commercial speech is indeed important, public health interests outweigh this, especially when the product is harmful to people's health and well-being. Therefore, the same approach should be taken here. While commercial speech does extend to the labelling, advertising, and marketing of products and services, research indicates that the overconsumption of foods high in sugar, salt and saturated fats, which would carry the FOPL, has a negative impact on public health. Therefore, the Department must consider this argument as it finalises the regulations.

28. *Self-regulation* - Industry often maintains that voluntary self-regulatory pledges or codes are more effective than imposing mandatory restrictions. However, they often have major shortcomings that make them ineffective for addressing issues or industry practices that negatively impact public health. First, self-regulatory codes or pledges only bind members of the industry. In South Africa for instance, in the case of [The Advertising Standards Authority v. Herbex \(Pty\) Ltd](#) the central issue for determination was whether the

appellant (now Advertising Regulatory Board) had jurisdiction over persons who are not its members and have not consented to its jurisdiction. The Court held that the appellant has no jurisdiction over any person or entity who is not its member, and a non-member is only bound when it submits to the jurisdiction of the Advertising Standards Authority (para 18). Also, besides the lack of jurisdiction, industry regulatory bodies tend to enforce weak sanctions, and therefore cannot serve as an effective method of ensuring compliance. Therefore, in ensuring effective compliance, this regulation cannot be substituted by self-regulation.

29. *Individual responsibility* - Industry has repeatedly highlighted the importance of individual consumer responsibility to make educated and informed consumption decisions. Similarly, industry has often emphasised that parents and guardians are responsible for what their children eat. However, the negative impact of marketing of unhealthy foods to children has been recognised in various [studies](#). Moreso, the often subtle and persuasive food marketing strategies targeting consumers, [especially children, compromises their freedom of choice](#). While one objective of the regulations is to improve consumer choices, the larger objective is to uphold the obligation of States to reduce the consumption of UPF by informing people of the content of their foods in order to make healthier food choices.

30. *A rights-based approach* - [Food industry](#) opposition to laws and regulations regarding public health interests have often sought to [make compliance voluntary, whittling down its provisions and delaying its approval implementation, among others](#). This regulation contains important provisions highlighted above in paragraph 5, which strengthen and give effect to the objective of FOPL and marketing restrictions. It is important that the Department resists push backs from industry aimed at reducing the effectiveness of the regulations. This is because the State has an obligation to protect public health interests, by ensuring access to healthy, nutritious food and this entails among others, regulating the activities of the food industry, especially activities which negatively impact people's health. As noted earlier, the CRC Committee has in its [General Comment No. 15](#) noted that the food and beverage industry as non-state actors also have an obligation to ensure their activities do not negatively impact on children's right to health (para 80-81). This aligns with the States obligation in relation to the right to health and food, specifically in the context of business activities which may infringe on them (CESCR [General Comment No. 24](#), para 14, 19). This obligation covers interventions and regulations to restrict activities, such as the marketing and advertising of unhealthy foods in the interest of protecting and promoting public health.

VIII. Conclusion

32. Therefore, this submission is in support of the Draft Regulations No. R 3337 to introduce new warning labelling and advertising regulations of foodstuffs, particularly the inclusion of FOPL, as well as marketing restrictions of unhealthy foods, especially to children. This forms part of

South Africa's strategy to address NCDs, by promoting access to safe and nutritious food and reducing the consumption of UPFs.

We urge the State to make all submissions and letters of address public and available, including those from industry. In addition, these regulations could also be used to inform future measures and interventions. For instance, products that are required to comply with the FOPL should not be sold or served in certain public settings, including in hospitals, prisons and beyond. This could also be used to encourage or incentivise the industry to consider reformulation.

The Dullah Omar Institute maintains that the State is obligated to ensure that these regulations are developed and implemented in line with the highest attainable standard of health, which includes access to safe and nutritious food for all.