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Derek Hampson
Nutrition Division
Food Standards Agency
Rm 115B Aviation House
125 Kingsway
London WC2B 6NH

13 February 2008

Dear Mr Hampson,

**ADVERTISING STANDARDS AUTHORITY RESPONSE TO THE FOOD
STANDARDS AGENCY'S CONSULTATION ON ITS DRAFT GUIDANCE
NOTES ON THE INFANT FORMULA AND FOLLOW-ON FORMULA
(ENGLAND) REGULATIONS 2007**

1 Introduction

- 1.1 The Advertising Standards Authority (ASA) welcomes the opportunity to submit in writing its views on the Food Standards Agency's (FSA) Draft Guidance Notes on the Infant Formula and Follow-On Formula Regulations (England) 2007 ('the guidance' or 'the consultation'). The ASA is happy for this response to be published.
- 1.2 The ASA is responsible for supervising the self-regulatory system for advertising standards in both broadcast and non-broadcast media.
- 1.3 This submission will address the following points:
- The role of the ASA;
 - The ASA's response to the consultation; and
 - How the ASA will use the new guidance in practice.

2 About the ASA

- 2.1 The ASA is the UK self-regulatory body for ensuring that all advertisements, wherever they appear, are legal, decent, honest and truthful.

Chairman Rt Hon Lord Smith of Finsbury • **Director General** Christopher Graham
ASA Council James Best • Sally Cartwright • Jean Coussins • Elizabeth Fagan • Christine Farnish • Sunil Gadhia • Alison Goodman • David Harker
• Gareth Jones • Susan Murray • Colin Philpott • Donald Trelford • Nigel Walmsley • Neil Watts • Diana Whitworth

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- 2.2 The ASA has been responsible for policing non-broadcast advertising standards since 1962. The success of the self-regulatory system led to the contracting-out of broadcast regulation (TV and radio) by Ofcom in 2004. This move was approved by Parliament and created a 'one-stop shop' for all advertising complaints.
- 2.3 The ASA regulates advertising by administering five advertising codes (see 2.5 below).
- 2.4 Two industry bodies, the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) are responsible for writing and maintaining the Advertising Codes. CAP is responsible for the non-broadcast Code and BCAP is responsible for the TV and radio Codes.
- 2.5 The full names of the Codes are:
- The British Code of Advertising, Sales Promotion and Direct Marketing ('the CAP Code' [non-broadcast])
 - The BCAP TV Advertising Standards Code
 - The BCAP Radio Advertising Standards Code
 - Rules on the scheduling of television advertisements
 - Code for Text Services¹
- 2.6 The advertising self-regulatory regime sits within the legal framework and has legal or regulatory backstops in the Office of Fair Trading for misleading non-broadcast advertisements and Ofcom for broadcast advertisements.
- 2.7 ASA adjudications set precedents that are applicable to all advertisements; in this way we aim to keep a level playing field for all advertisers and maintain trust amongst consumers.
- 2.8 Further information about the ASA and the work we do can be found on our website at www.asa.org.uk. The website also contains a searchable database of all our adjudications from the past five years.
- 2.9 Further information about CAP and BCAP can be found at www.cap.org.uk.

¹ All of the Codes can be viewed at www.bcap.org.uk/cap/codes/

3 Response to the FSA Consultation on the Guidance Notes for Infant Formula and Follow on Formula

The ASA's remit

- 3.1 The ASA regulates advertising as defined by the CAP and BCAP Advertising Codes. It has no remit to apply standards to promotions or communications – commercial or otherwise – that are beyond the scope of the Codes. Annex 1 provides an indicative list of what is within the ASA's remit.
- 3.2 This point is important in relation to two aspects of the guidance document.
- 3.3 Firstly point 41 of the consultation document suggests that upheld ASA decisions on unsubstantiated claims would be enforceable in labelling and all advertising. The ASA will only take and enforce decisions on advertising that falls within the scope of the Advertising Codes.
- 3.2 Secondly, the FSA's interpretation of what it believes to constitute an advertisement is extremely broad, much broader than the Advertising Codes and again, the ASA has no role in maintaining standards in these areas.

The FSA's definition of advertising and promotion

- 3.3 The FSA's broad definition appears to capture editorial content or communications that are not disseminated and/ or paid for by the manufacturer of formula milks or their agents (e.g. an advertising agency or retailer). European law² very clearly considers that what constitutes an advertisement is restricted to materials disseminated by or on behalf of a commercial (trade or professional) interest. The FSA's definition currently appears to capture editorial content (e.g. material disseminated by journalists and TV and radio programme makers³) and even

² The FSA appears to have used some of the concepts used within the Unfair Commercial Practices Directive, however the Directive very clearly defines that its provisions apply only to business-to-consumer commercial communications.

³ Appendix II – 1st bullet point, "*electronic and printed material (including editorial content and advertorials)*"; 9th bullet point, "*press releases and other public relations material and activities*)

communications between individuals⁴. The ASA presumes that this is not intentional and strongly recommends that the FSA considerably tightens the wording of its guidance.

The status of the FSA's guidance in relation to the Advertising Codes

- 3.4 The ASA notes that the document is the FSA's own guidance on its interpretation of the Infant Formula and Follow On Formula Regulations (England) 2007 ('the Regulations', 'the 2007 Regulations') and that a definitive interpretation of the Regulations can only be provided by the Courts.
- 3.5 The ASA understands that once the Regulations have been confirmed, it is the intention of CAP and BCAP to reference the 2007 Regulations in the Advertising Codes, much in the same way that the 1995 Regulations⁵ are currently referenced.
- 3.6 As the FSA is aware, CAP and BCAP are currently conducting a root and branch review of the Advertising Codes. During this process, consideration will be given to whether the Advertising Codes should include specific rules on infant and follow-on formula and/or a reference to the FSA's guidance. The revised Codes will be subject to full public consultation⁶.
- 3.7 In the meantime, the ASA may refer to the FSA's guidance when investigating complaints into advertisements. However, the ASA's remit is to make decisions only under the Advertising Codes. As is currently the case, the overall impression of the entire advertisement will be carefully considered and decisions will be taken on a case-by-case basis.
- 3.8 The CAP Copy Advice service (a voluntary pre-publication advice service for non-broadcast advertisements on their compliance with the CAP Code) would advise enquirers, where appropriate, of the existence of the FSA's guidance.

⁴ Appendix II – 7th bullet point, "*private correspondence*" and 8th bullet point "*oral communications, including telephone calls*"

⁵ The Infant Formula and Follow-on Formula Regulations 1995

⁶ Public consultation is currently anticipated to take place at the end of 2008

I do hope that the FSA finds these comments useful. If you require any clarification or further information about the work of the ASA in relation to this consultation, then please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Lynsay Taffe', written in a cursive style.

Lynsay Taffe
Communications and Policy Manager

Annex 1: The Remit of the ASA as defined by the CAP and BCAP Advertising Codes.

The British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code)

1.1 The Code applies to:

- a) advertisements in newspapers, magazines, brochures, leaflets, circulars, mailings, e-mails, text transmissions, fax transmissions, catalogues, follow-up literature and other electronic and printed material
- b) posters and other promotional media in public places, including moving images
- c) cinema and video commercials
- d) advertisements in non-broadcast electronic media, including online advertisements in paid-for space (eg banner and pop-up advertisements)
- e) viewdata services
- f) marketing databases containing consumers' personal information
- g) sales promotions
- h) advertisement promotions

1.2 The Code does not apply to:

- a) broadcast commercials. (The BCAP Advertising Standards Codes set out the rules that govern broadcast advertisements on any television channel and radio station licensed by Ofcom.)
- b) the contents of premium rate services, which are the responsibility of PhonepayPlus; marketing communications that promote these services are subject to PhonepayPlus regulation and to the Code
- c) marketing communications in foreign media. Direct marketing that originates outside the UK but is targeted at UK consumers will be subject to the jurisdiction of the relevant authority in the country where it originates so long as that authority operates a suitable cross-border complaint system. If it does not, the ASA will take what action it can. All members of the European Union, and many non-European countries, have self-regulatory organisations that are members of the European Advertising Standards Alliance (EASA). EASA co-ordinates the cross-border complaints system for its members (which include the ASA).
- d) Health-related claims in marketing communications addressed only to the medical, dental, veterinary and allied professions
- e) classified private advertisements, including those appearing online

- f) statutory, public, police and other official notices/information, as opposed to marketing communications, produced by public authorities and the like
- g) works of art exhibited in public or private
- h) private correspondence, including correspondence between companies and their customers about existing relationships or past purchases
- i) The Code does not apply to live oral communications, including telephone calls.
- j) press releases and other public relations material, so long as they do not fall under 1.1 above
- k) editorial content, for example of the media and of books
- l) regular competitions such as crosswords
- m) flyposting (most of which is illegal)
- n) packages, wrappers, labels, tickets, timetables and price lists unless they advertise another product, a sales promotion or are visible in a marketing communication
- o) The Code does not apply to point of sale displays, except those covered by the sales promotion rules and the rolling paper and filter rules.
- p) election advertisements as defined in clause 12.1
- q) website content, except sales promotions and advertisements in paid-for space
- r) sponsorship; marketing communications that refer to sponsorship are covered by the Code
- s) customer charters and codes of practice.

The BCAP Radio Advertising Standards Code

1. Advertisements

'Advertising' in this Code refers to any items, including spot advertisements and promotions with advertisers, which are broadcast in return for payment or other valuable consideration to a licensee or which seek to sell to listeners any products or services. It does not cover product placement or sponsorship. Ofcom requires adherence to this Code for the content of sponsorship credits. 'Special Category' sponsorship credits are cleared for broadcast by the Radio Advertising Clearance Centre (RACC). See Rule 3 below.

This Rule excludes promotion of radio stations' own-branded activities, goods and events (such as websites, T-shirts and concerts) which enhance listener involvement and are not designed to make a profit or promote commercial partnerships.

Radio advertising should be legal, decent, honest and truthful, and these Rules should be applied in spirit as well as in the letter.

Licensees must make it a condition of acceptance that advertising complies fully with all legal requirements. Advertising for an acceptable product or service may have to be withdrawn if the ASA or BCAP considers that a significant effect is indirectly to publicise an unacceptable product or service.

2. Product Placement and Undue Prominence

The setting of standards and the investigation of complaints in relation to product placement and undue prominence have not been contracted out to BCAP and the ASA and remain matters for Ofcom. The ASA refers complaints about product placement and undue prominence to Ofcom.

3. Sponsorship

The setting of standards and the investigation of complaints in relation to programme sponsorship (including promotions funded by advertisers) have not been contracted out to BCAP and the ASA and remain matters for Ofcom. The ASA refers complaints about programme sponsorship to Ofcom.

Ofcom's sponsorship rules are published in the Ofcom Broadcast Code, which is available at www.ofcom.org.uk. All sponsorships which involve special category sponsors must be scripted and submitted to the RACC for central copy clearance. All claims which need substantiation must be cleared locally or by the RACC (for special categories). All sponsorships must comply fully with the requirements of this Code.

The BCAP TV Advertising Standards Code

Introduction

- (a) This Code applies to all the Ofcom licensees listed below⁷ and is designed to inform advertisers and broadcasters of the standards expected in television advertising. It is based on enduring principles; that advertising should not mislead, cause deep or widespread offence or lead to harm, particularly to the vulnerable.
- (b) It is the responsibility of the broadcasters themselves to ensure the advertising they transmit complies with both the spirit and the letter of the Code. Licensees must therefore satisfy Ofcom that they themselves have the staff and procedures to manage compliance. Clearcast can offer its clients a useful pre-transmission advertising checking and approval service (including Notes of Guidance). However, not all licensees use the service and its use does not remove the licensee's own responsibility.
- (c) This Code was updated in 2002 on the basis of wide consultation and with the aim of making it simpler and easier to use. Each group of rules – whether, for example, on editorial independence, misleadingness or particular types of advertising – is grouped with a note of explanation about their rationale and any exceptions. These explanatory notes also offer definitions, cross-references and guidance intended to help advertisers and licensees avoid common pitfalls.
- (d) BCAP is willing to give advice on the interpretation of the Code but it does not offer pre-transmission clearance of advertising. Any advice it gives is without prejudice to the right of both it and the ASA to investigate

⁷ These are ITV, GMTV, Channel 4, Channel 5, satellite television services provided by broadcasters within UK jurisdiction (whether or not their main audience is in the UK), licensable programme services, local delivery services, digital programme services and services provided under Restricted Service Licences (local television). The Code also applies to the Welsh Fourth Channel which is regulated by S4C. (Advertising on regulated text services is subject to the BCAP Code for Text Services.)

and act in the event of a breach. BCAP cannot accept liability for loss or damage alleged to result from reliance placed on such advice.

- (e) Licensees should use the ASA or CAP website, www.asa.org.uk and www.cap.org.uk to inform themselves of recent ASA Adjudications or BCAP Policy interpretations of the Code and ads that raised significant issues and which were identified either by staff monitoring or as a result of complaints. In borderline cases, if the ASA decides intervention is not justified, it may conclude "complaint not upheld (or not intervention) but guidance given". The guidance will indicate the factors which made the case borderline and which, if circumstances were slightly different in future cases, might result in a requirement to remove or modify the advertisement or restrict its times of transmission.
- (f) Given the frequency of repetition of many advertisements, anything misleading or harmful needs to be quickly dealt with. The ASA will on occasion require the suspension of an advertisement during investigation of the case, and before the adjudication is finalised.
- (g) For the purposes of the Code, 'licensees' means Ofcom licensees and the terms 'advertisement' and 'advertising' mean any publicity by advertisers in breaks during or between programmes. This is irrespective of whether payment is made. The rules also apply to 'teleshopping' channels, windows and spots.