

## **ASA system submission to Ofcom's call for evidence on the first phase of online regulation**

### **1. Background and Introduction**

**1.1.** This submission is provided by the Advertising Standards Authority (ASA), the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the 'ASA system.'

**1.2.** The ASA system is providing this written submission in response to Ofcom's call for evidence on the first phase of online regulation.

**1.3.** The ASA is the UK's independent advertising regulator. We have been administering the non-broadcast Advertising Code (written and maintained by CAP) for 60 years and the broadcast Advertising Code (written and maintained by BCAP) for 18, with our remit further extended in 2011 to include companies' advertising claims on their own websites and in social media spaces under their control.

**1.4.** We are responsible for ensuring that advertising is legal, decent, honest, and truthful and our work includes undertaking proactive projects and acting on complaints to tackle misleading, harmful or offensive advertisements. We are committed to evidence-based regulation, and we continually review new evidence to ensure the rules and our application of them remain fit-for-purpose.

**1.5.** As the UK's frontline advertising regulator, the ASA brings together different statutory, co-regulatory and self-regulatory enforcement mechanisms so they appear seamless to people and businesses. Our system involves the active participation of a range of legal backstops in the consumer protection landscape. We work closely with a network of partners including Ofcom, the Gambling Commission, the Information Commissioner's Office, the Medicines and Healthcare products Regulatory Agency, the Financial Conduct Authority and the Competition and Markets Authority.

**1.6.** Through the sharing of information, joined-up enforcement action and referral processes, our partners bolster our regulation and assist us, where necessary, to bring non-compliant advertisers into line. Together, this 'collective regulation' helps to protect people and responsible business from irresponsible ads: ads that mislead, harm or offend their audience.

**1.7.** We bring together the ad industry and media owners to set, maintain and police high standards. The UK Advertising Codes are drafted and maintained by the industry committees of CAP and BCAP, supported by experts in our Regulatory Policy team. This means businesses have a direct stake and an enlightened self-interest in adhering to the standards they set and creates a level-playing field amongst them. There are multiple checks and balances in place to ensure the committees' development of rules and guidance is transparent, open to scrutiny and adheres to the principles of good regulation. These include calls for evidence and public consultations; mandatory regard to the advice of an expert independent consumer panel; Ofcom signing off on BCAP rule changes; the ASA System's processes being open to judicial review and more besides. All to ensure the system is wholly accountable to everyone with a stake in advertising.

**1.8.** The UK Advertising Codes include rules reflecting specific legal provisions and rules developed through separate regulatory process, which in combination ensure ads don't mislead, harm or seriously offend their audience. The inclusion of the rules in the UK Advertising Codes has enormous one-stop-shop benefits for the marketing industry in their application of the rules and for consumers, who benefit from the protection they afford.

**1.9.** In addition to investigating ads, we also provide a wealth of training and advice services (most of which are free) for advertisers, agencies and media to help them understand their responsibilities under the Codes and to ensure that fewer problem ads appear in the first place. CAP and BCAP provided over 850,000 pieces of advice and training in 2021.

## **2. ASA rules and remit for online advertising**

**2.1.** There is an effective online advertising regulatory framework in place in the UK to protect people, in particular children, young and vulnerable people, from harm. With 60 years' experience regulating advertising, the ASA provides a one-stop shop for consumers and for the industry across all media and platforms. We regulate almost all advertising online, including paid ads on platforms and the open internet, influencer ads, and companies' own website and social media advertising claims. (The exceptions are [political advertising](#) and misleading-related issues in non-broadcast financial advertising, which falls to the FCA.)

**2.2.** As discussed in further detail at 7.1, the ASA regulates advertising by legitimate businesses and is not the appropriate body to tackle ads by criminal actors who are often based in non-UK jurisdictions. We're fully supportive of the aims of Online Safety Bill and, where we have role and remit (protecting children from harmful or inappropriate content, and adults from legal but harmful content) we will use the tools at our disposal to protect consumers.

**2.3.** Moreover, under our [More Impact Online strategy](#) (which is discussed further at 4.1), we're using proactive, tech-assisted, collective regulation to tackle irresponsible ads at scale and speed.

**2.4.** Our role is to ensure that the content of ads seen by UK consumers, including those appearing online and in social media, follow the Advertising Code. The enduring principles of the advertising rules are that ads must not mislead, harm or offend and should be prepared in a socially responsible way. We also require that ads are targeted responsibly and are appropriate for the audience that sees, hears and engages with them.

**2.5.** The standards we apply through the Codes are, almost without exception, the same for broadcast advertising and for non-broadcast advertising, including online. That is in no small measure because many of the rules directly or indirectly reflect law that applies across media.

**2.6.** The ASA system sets specific standards for content and placement of advertising, including on a sectoral or thematic basis. For example, ads for alcohol, gambling and HFSS food and drink are all subject to placement rules, while advertising rules on misleadingness seek to reflect consumer protection regulation.

**2.7.** As mentioned in 1.5 and 1.6 the ASA operates a system of collective regulation. We also have a long established and strong co-regulatory partnership with Ofcom. It is our statutory backstop for broadcast advertising and co-regulator for Video On Demand / Video Sharing Platforms. We stand ready to build on that relationship in relation to any advertising issues that might emerge from its new role as the Online Safety Regulator. Through better intelligence sharing, referral processes, joint sector compliance work and joined-up enforcement action, our regulatory partners bolster our regulation.

### 3. ASA online advertising complaints

**3.1.** The balance of the ASA's work has increasingly shifted to tackling online ads. In 2021, we received 20,735 complaints about online advertising resulting in 14,558 cases. For context, in 2021, across all media, we received a total of 43,325 complaints about 22,115 cases which resulted in 20,456 ads being amended or withdrawn.

**3.2.** Of those, there were 14,558 online cases. The majority (8,283 cases) were about advertising claims on companies' own websites or social media channels. Ads appearing in third-party, paid-for space online ('paid ads') accounted for 4,368 online cases. Complaints about influencer ads made up almost a quarter of the online cases (4,889 cases).

**3.3.** Many of the 20,456 ads amended or withdrawn in 2021 resulted from the ASA's own initiative sector compliance action. The ASA undertakes sector compliance action when it becomes apparent that a significant percentage of companies in a given sector are in breach of the Code. This can involve sectors where the number of organisations is relatively small (e.g. the broadband sector and other utility sectors); or sectors involving a large number of organisations characterised, in the main, by SMEs (e.g. dentists, florists, estate agencies, beauty clinics, complementary and alternative medicine practices etc.).

**3.4.** We are able to secure compliance in over 99% of cases where a breach of the Advertising Codes is identified, without having to refer an advertiser to a legal backstop. Referrals are rare because UK media and platforms agree to act as gatekeepers for the ASA. If we spot a bad ad on YouTube, on Instagram, on a TV channel, in cinemas, in outdoor media or in print media, those organisations and platforms typically work with us to remove the offending ad quickly.

**3.5.** Our experience tells us that the majority of advertisers want to play by the rules. However, we have a range of sanctions at our disposal which we can use when they don't comply. For example:

- CAP can issue Ad Alerts to its members, including the media, advising them to withhold services such as access to advertising space.
- We can ask internet search websites to remove an advertiser's paid-for search advertisements when those advertisements link to a page on the advertiser's website that contains material which breaks the rules.
- The name and details of problem advertisers may be featured on a dedicated section of our website, designed to appear in search engine results when a consumer searches for a company's website.
- If necessary, we can also place our own ASA search ads, further highlighting a companies' non-compliance, thereby disrupting online 'footfall' to the site featuring non-compliant advertising claims.

### 4. Our More Impact Online Strategy

**4.1.** We know people are spending more time online, businesses are increasingly advertising online, and the pace of technological change online is contributing to societal concerns. That's why, in November 2018, we launched our five year strategy, [More Impact Online](#), which focuses on improving the effectiveness of our online advertising regulation. We're proud of the technological initiatives we've undertaken as a part of that.

#### 4.2. The strategy prioritises:

- Delivering high quality, proactive regulatory projects on ads that cause the most detriment to people, particularly children and other vulnerable people.
- Working more closely both with the large online platforms and with the Government and Ofcom, both on Video Sharing Platform advertising regulation and to address any gaps in online advertising regulation.
- Using machine learning to improve our regulation, act more nimbly, simplify and make more efficient our regulation where we can.

**4.3.** One of the first projects launched as a part of our strategy was our Avatar Monitoring programme, our proactive capture and analysis of online ads using 'Avatars' that mimic the browsing profiles of children and young people. This innovative technology helps us to identify inappropriate ad targeting by, for example, gambling operators, HFSS and alcohol brands, enabling us to take swift action to tackle problems. This is world leading work and we're sharing the methodology with advertising and media regulators in other countries. Additionally, we've worked on proactive tech-related projects around ads in Children's apps and e-cigarette ads on Instagram.

**4.4.** Our message to companies and platforms is clear: if you fail to use or develop filters and controls to target age-restricted ads away from children and other vulnerable people, we will take action.

**4.5.** Under the strategy, we've been working more closely with online platforms and using machine learning to improve our regulation as outlined in the next two sections.

## 5. Our relationship with the online platforms

**5.1.** Under the UK Advertising Code, parties involved in preparing or publishing marketing communications accept an obligation to abide by the rules. For non-broadcast media, this means taking steps to ensure third party ads comply with the Code and, where they don't and the advertiser refuses to cooperate with the ASA, the medium works with the ASA to remove the ad.

**5.2.** The ASA has worked, and continues to work, effectively with social media platforms and other online ad networks in this way, developing informal compliance procedures and partnerships with the larger platforms and other advertising networks.

**5.3.** Social media platforms and online advertising networks help the ASA secure advertising standards by removing non-compliant ads we bring to their attention and raising awareness of our regulation.

**5.4.** As an example of our work with platforms, in 2020, we [issued an enforcement notice](#) to 130,000 wide-ranging businesses across the beauty and cosmetic services industry about ads for Botox. Botox is a prescription-only medicine, and so is prohibited from being advertised to the public. We identified a trend of these ads appearing on social media, particularly in organic Instagram posts, and took action to ensure advertisers reviewed their advertising. We used monitoring technology to identify where these ads were appearing on Instagram and flagged them with the platform to have them quickly removed. We made it clear that any advertisers that

continue to break the rules risked being referred to the Medicines and Healthcare products Regulatory Agency or their professional regulatory body.

**5.5.** These industry partners also participate in our Scam Ad Alert system (discussed further at 7.3) which has successfully led to the disruption of fraudulent activity online, by identifying and removing paid-for scam ads across multiple platforms.

**5.6.** In June, we launched a [pilot to extend our role online](#), a world first involving some of the largest companies in the digital advertising supply chain, that extends the ASA's role online and aims to formalise and improve transparency and widen accountability in online advertising.

**5.7.** The initiative is the result of collaboration between the ASA and members of IAB UK currently comprising of Adform, Amazon Ads, Google, Index Exchange, Magnite, Meta, Snap Inc., TikTok, Twitter and Yahoo.

**5.8.** It is piloting a set of principles covering how participating companies raise advertisers' awareness of the rules that apply to their ads online and help us to secure compliance in cases when an advertiser appears unwilling or is unable to comply with the rules. The pilot will run for one year.

**5.9.** As part of the pilot, participating companies voluntarily agree to provide information to us to demonstrate how they operate in accordance with the pilot's principles. We will use this information, and other intelligence collected throughout the reporting period, to publish an aggregated interim report and a final report. This will provide an independent account of how companies have performed against the principles - with an understanding that different companies can meet the principles in different ways - to identify examples of good practice, as well as areas where we identify room for improvement.

**5.10.** The information gathered as part of the pilot will provide valuable evidence to help us, the industry and other stakeholders to collectively consider whether and where gaps exist in our ability to enforce the CAP Code online, and how this can effectively be addressed.

## **6. Influencer advertising**

**6.1.** Influencer advertising is covered by the Code, be it in the form of a blog, vlog, tweet, post, story or other channel-specific format. The ASA defines an influencer as anyone who has been paid by a brand, in money or in kind, to advertise a product or service on their own social media account.

**6.2.** Our remit covers influencers and brands based in the UK, but the ASA works with regulatory bodies in other countries and refers cases to them so that they can take relevant action against posts in their own jurisdictions.

**6.3.** Influencer posts tend to be either '[advertorial](#)' or '[affiliate](#)' ads, but instances where an influencer is promoting their own products/services etc. are also covered by the Code. Put simply, advertorials on social media are copy, usually presented in a similar way as the influencer's editorial content, which is controlled by the brand and disseminated by the influencer in exchange for a payment or other reciprocal arrangement. Affiliate ads include links in social media posts that direct consumers to the website of a company, where the influencer is paid on a cost per click and/or cost per purchase arrangement.

**6.4.** Though the ASA recognises there are differences between the arrangements behind 'advertorial' and 'affiliate' advertising, both are subject to exactly the same rules, including that they must be obviously identifiable to the audience as advertising.

**6.5.** If a particular post is found to breach the Code, both the publisher (i.e. the influencer) and the brand can be named in the ASA ruling. The negative publicity that arises from our interventions can erode consumers' trust in the brand and followers' trust in the influencer; so, neither party wins from a failure to disclose advertising as such.

**6.6.** The majority of our regulatory work involving influencer advertising, to date, concerns issues around disclosure i.e. is an influencer being upfront and clear with their followers when they have been paid to post an ad.

**6.7.** The CAP Code states that advertising needs to be obviously identifiable. This means that it should be immediately obvious to a consumer when the media content they see, hear or interact with is advertising. Put simply: viewers of social media content should not have to 'play the detective' to deduce the status of that content. This rule is well established in offline media and existed long before influencer marketing became a trend.

**6.8.** The ASA expects such posts to include a prominent 'ad' label upfront to highlight that a post is a marketing communication. We consider that, in most cases, the use of #ad (or similar) is the clearest way of communicating the commercial nature of advertising content, though using a platform's own disclosure tools, such as Instagram's Paid Partnership tool, can also distinguish advertising from other content.

**6.9.** If something falls within the ASA's remit, it has to comply with all appropriate rules contained within the Code. It therefore should not, amongst other things, materially mislead consumers or cause serious or widespread offence.

**6.10.** Age-restricted products like alcohol and gambling must not be advertised directly to under-18s. The rules prohibit ads posted by influencers for cosmetic intervention, alcohol, gambling, lotteries and e-cigarettes from being of particular appeal to under-18s, especially by reflecting youth culture, and from featuring under-25s (or people who look under 25) in a significant role. For example, in 2019, we ruled against Instagram ads by four different e-cigarette brands ([British American Tobacco](#), [Ama Vape](#), [Global Vaping Group](#), [Attitude Vapes](#)) because they featured people under the age of 25.

**6.11.** These rules mean that brands should take into account the age/demographics of an influencer's followers before deciding to work with them. For example, the ASA previously ruled against the targeting of a [Tanya Burr story for Heineken](#) (alcohol) and a post from [PointlessBlog for Nutella](#) (HFSS). In both cases the ASA was not persuaded that the under 18/ under 16 audience comprised less than 25% of the overall audience, as required by the rules.

**6.12.** Although technically not 'age-restricted' products, similar rules apply to ads for slimming/weight loss products/regimes in that they must not be directed at under-18s or appeal particularly to them, so brands / influencers should consider this before promoting them. We have taken action, and will continue to take action, against irresponsible social media ads which contribute towards a culture of negative body image and confidence. For example, we ruled against an influencer for [irresponsibly promoting weight loss products](#).

**6.13.** Beauty filters are designed to enhance a person's appearance and are included as in-app features on social media, including on Instagram, TikTok and Snapchat. They are becoming



increasingly popular and are often applied when sharing selfies to social networks. Influencers and advertisers promoting beauty products, and indeed any other products, are advised to avoid applying filters to photos or videos which are directly relevant to the product being advertised and which are likely to exaggerate the effect the product is capable of achieving. For example, we [banned a post](#) by an influencer for using an Instagram filter to exaggerate the efficacy of a tanning product.

**6.14.** As part of our More Impact Online strategy, both the ASA and CAP have invested significant resource and effort into helping the influencer marketing industry understand their responsibilities under the ad rules.

**6.15.** On top of the numerous rulings the ASA has published on ad disclosure on social media, we have hosted an [‘Influencer Responsibility’ event](#) and produced myriad and comprehensive pieces of [advice online](#), including the [‘Influencers guide to making clear that ads are ads’](#) and an [ABC Guide](#) specifically designed to help Love Islanders navigate the rules.

**6.16.** We offer clear and concise advice to influencers/brands when advertising on specific social media platforms, including Instagram, TikTok, Twitter, Facebook Snapchat, and YouTube. We also provide guidance for advertisers when marketing materials are directed at children.

**6.17.** We’re always trying to find new and creative ways to raise awareness about the advertising rules. In October 2021, we partnered with TikTok and nine content creators to raise awareness about the rules that are in place for influencers. The videos the content creators made provided top tips on how to make sure anyone who promotes a brand or product follows the rules and advertises responsibly.

**6.18.** Although we work closely with influencers and brands to encourage them to follow the rules, we reserve the right to apply sanctions to both influencers and brands if we identify an ongoing problem such as an unwillingness or inability to adhere to the rules.

**6.19.** In September 2020, we undertook a three-week monitoring exercise to review the Instagram accounts of 122 UK-based influencers to assess whether advertising content was being properly disclosed. That involved assessing over 24,000 Instagram Stories, posts, Reels and IGTV to check compliance rates.

**6.20.** Influencers were primarily chosen to be monitored on the basis of having been previously contacted about non-disclosure of advertising by the ASA, either in response to a complaint or via our proactive engagements with them on the matter.

**6.21.** Our [findings](#), published in March 2021, categorised nearly one in four Stories as marketing, but found that only 35% of them were clearly labelled as ads.

**6.22.** The ASA was disappointed with the findings and our Compliance team contacted all the influencers and put them on notice that we would take enforcement action against those continuing to flout the rules.

**6.23.** In 2021, the ASA system introduced influencer-specific sanctions to address circumstances when an influencer will not or cannot agree to abide by rules that require advertising to be immediately recognisable as such. We launched a [non-compliant social media influencer page](#) and our own On-Platform Targeted Ads (OPTA) sanction, which notify social media users of the influencer’s misleading practice. Brands have mentioned to us that they’re using our page before deciding who to work with. We are very encouraged by the early results of the OPTA sanctions in

tackling recidivist behaviours and by advances in our application of data science, which better enable us to identify and tackle non-compliance at pace and scale.

**6.24.** If influencers refuse to come back into compliance despite sanctions such as these, we will have no hesitation in escalating the sanctions again: seeking platform-level support to address the non-compliance and putting in place the necessary steps to refer them to our legal enforcement backstop.

**6.25.** In support of our influencer enforcement work, our Data Science team has developed and deployed into production a suite of machine learning algorithms that can significantly help us determining if an Instagram Story is likely to be an ad, and if it appears to be correctly labelled. These algorithms are helping our Compliance team to sort through influencer content more quickly and efficiently.

**6.26.** These algorithms are currently targeted at Stories produced by influencers who have either already been sanctioned by the ASA for non-compliance with the rules or are of interest to our Compliance team because of recent complaints. Every Story they produce is captured and 'scored' by our tools to determine the likelihood of non-compliance. This allows the team to be quickly alerted to problematic content while spending less time manually monitoring influencers. Using our data science capabilities, the Compliance team also now receives other insight into topics such as trends in compliance over time and the ability to search for brands and products, even when those products appear as text embedded in images and videos.

**6.27.** The ASA system is working with platforms, trade bodies, the CMA and Ofcom (the latter under new powers applying to UK-established video-sharing platforms) to better address non-compliance in this important area of our work. To this end, we especially welcome the government announcement to strengthen the powers of the CMA allowing it to make determinations of its own that a business has infringed the rules and fine companies up to 10% of their global turnover.

## **7. Scam advertising**

**7.1.** The ASA regulates ads published on behalf of legitimate businesses, and our system works because the advertising industry buys into it. This is obviously not the case with criminals, often based in non-UK jurisdictions, placing illegal scam ads. While we play an active role in seeking to disrupt scam ads, we do not investigate them because criminals, who have little regard for the law, clearly have no incentive to comply with the UK advertising rules. The ASA system staunchly supports, however, the tackling of criminal actors via appropriately funded, sufficiently resourced and suitably empowered domestic and international law enforcement bodies.

**7.2.** While it is not our role or remit to speak about fraud in a broad sense, we do have a view specifically on scam ads. The scale of online fraud is extremely challenging for regulators. More needs to be done to tackle online fraud across a broad array of fronts. Tackling online scam ads is a global problem, requiring a joined-up response involving law-enforcement bodies and statutory regulators, platforms and all involved in the online ad industry, as well as national advertising regulatory bodies such as the ASA.

**7.3.** In June 2020, we launched our UK Scam Ad Alert system in partnership with major digital advertising and social media platforms to help play our role in disrupting ads which seek to scam consumers.



**7.4.** The ad platforms, networks and other companies who participate in the Scam Ad Alert system are Google; Meta (Facebook/Instagram); Taboola; Outbrain; Microsoft; TikTok; Yahoo; Snap; Twitter; Amazon Ads; Sizmek Ad Suite; RevContent; Index Exchange; Clean.io; Reach; and the Media Trust.

**7.5.** For the last two years, consumers have been reporting scam ads appearing in paid-for space online to us via an [online form](#).

**7.6.** If we believe that a post may be a scam ad, we promptly send an Alert to all participating platforms with key details of the scam ad, as well as to publishers when the ad appeared on a publisher owned site. If they locate them, partners remove the offending ad and suspend the advertiser's account. In some instances they may also add them to blocklists, even when the ads weren't appearing on their platform, stopping them from appearing in future.

**7.7.** We also share all alerts with the Government's [National Cyber Security Centre \(NCSC\)](#). They operate the [Government's takedown service](#), which seeks to remove malicious email addresses and websites. They scan the Alert for website addresses (URLs) to find the host website and remove it if it's found to be malicious. This means that alerts not only result in action against the ads but also the websites they link to, which increases their effectiveness in protecting consumers.

**7.8.** We assess reports within 24 hours, enabling us to quickly and effectively alert platforms to scam ads so that they can promptly remove them, suspend the advertisers' accounts and stop similar ads appearing in future.

**7.9.** The majority of Scam Ad Alerts we've sent over the last 12 months have been for scams relating to cryptocurrency. However, we also sent Alerts for other scam types, including fake energy saving devices and diet pill subscription scams.

**7.10.** The majority of those scams involved misleading landing pages featuring fake news stories, including fake celebrity endorsements. This has been a persistent theme since the Scam Ad Alert system launched, indicating that this remains a successful approach for scammers in their efforts to entice consumers to engage with scams.

**7.11.** We will continue to monitor the performance of our system and work collaboratively with stakeholders to play our part in tackling scam ads online.

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