

The CAP Code Review

Consultation on the proposed CAP Code

**The UK Code of Non-broadcast Advertising, Sales
Promotion and Direct Marketing**

CAP Consultation Document

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2. Annex 2 - Mapping document (provided in a separate document)

3. Annex 3 - Consultation questions (provided in a separate document)

 Responding to this consultation (provided in a separate document)

 List of consultees notified in writing (provided in a separate document)

Part 1

1. Summary

- 1.i The present CAP Code was last reviewed over five years ago. The Code has changed since then in response to changes in society, for example to reflect changes in law or to address socio-political matters, but the Code is otherwise unchanged.
- 1.ii CAP considers it is timely to conduct a major review of its Code to ensure the rules for non-broadcast advertisements, sales promotion and direct marketing communications are up to date and fit for purpose.
- 1.iii CAP's general policy objective is to ensure that all non-broadcast marketing communications covered by the CAP Code are legal, decent, honest and truthful and prepared with a due sense of social and professional responsibility.
- 1.iv CAP intends its Code to be based on the enduring principles that marketing communications should not mislead, harm or offend. A CAP objective is to ensure that the Code adequately protects children and others whose circumstances seem to CAP to put them in need of special protection, yet retains an environment in which responsible advertising can flourish. CAP intends its rules to be transparent, accountable, proportionate, consistent, targeted only where regulation is needed and written so that they are easily understood, easily implemented and easily enforced.
- 1.v CAP proposes to add to, delete, replace or amend existing rules in line with its general policy objectives. But proposed changes to the existing Codes are the exception and not the norm; most of CAP's proposed Code includes standards established in the present Code, which have stood the test of time and continue to offer necessary protection for the public and a level playing field for the non-broadcast advertising industry.
- 1.vi The CAP Code is media-neutral. The interpretation of the Code will continue to take into account the characteristics of each medium and other contextual factors that determine whether an advertisement, a sales promotion or a direct marketing communication complies with the Code.
- 1.vii In its pre-consultation review of the present Code, CAP has held informal talks with people and organisations to fill gaps in its understanding and to gauge whether it is thinking in the right direction.
- 1.viii CAP has directly invited responses to this consultation from a wide cross-section of society and undertakes to look at each response carefully and with an open mind. CAP intends to respond to all significant comments in its post-consultation evaluation of responses, which CAP will make available on the CAP website, www.cap.org.uk, on publication of CAP's new Code.
- 1.ix The consultation will remain open for twelve weeks in line with regulatory best-practice guidelines and close at 5.00pm on Friday 19 June 2009.

Part 1

2. Introduction to CAP and the ASA

The Committee of Advertising Practice

- 2.i The Committee of Advertising Practice (CAP) is the self-regulatory body that creates, revises and enforces the CAP Code: the British Code of Advertising, Sales Promotion and Direct Marketing.
- 2.ii The CAP Code covers UK-originated, non-broadcast marketing communications, which include advertisements placed in traditional and new media, sales promotions and direct marketing communications. The CAP Code is primarily enforced against the advertiser. Compliance with the CAP Code is not voluntary. Parties that do not comply with the CAP Code could be subject to sanctions including the denial of media space and adverse publicity resulting from adjudication by the Advertising Standards Authority (ASA).
- 2.iii CAP's members include organisations that represent the advertising, sales promotion and direct marketing and media businesses. Through their membership of CAP member organisations, or through contractual agreements with media publishers and carriers, those businesses agree to comply with the Code so that marketing communications are legal decent, honest and truthful, and consumer confidence is maintained.
- 2.iv By practising self-regulation, the marketing community ensures the integrity of advertising, promotions and direct marketing. The value of self-regulation as an alternative to statutory control is recognised in EC Directives, including on misleading advertising (Directive 2005/29/EC). Self-regulation is accepted by the Department of Business, Enterprise and Regulatory Reform and the Office of Fair Trading as a first line of control in protecting consumers and the industry.
- 2.v Information about CAP is available at www.cap.org.uk, which includes a copy of the present CAP Code.

The Advertising Standards Authority

- 2.vi The ASA is the independent body responsible for administering the CAP Code so that all marketing communications are legal, decent, honest and truthful, ensuring that the self-regulatory system works in the public interest.
- 2.vii The ASA receives and investigates complaints from the public and industry. Decisions on investigated complaints are taken by the independent ASA Council. The ASA Council's adjudications are published on the ASA's website, www.asa.org.uk, and made available to the media. An Independent Review Procedure exists for interested parties.
- 2.viii If the ASA Council upholds a complaint, the marketing communication must be withdrawn or amended. CAP conducts compliance, monitoring and research to enforce the ASA Council's decisions.
- 2.ix The ASA's work in regulating non-broadcast marketing communications is funded by a levy, on the cost of advertising space, administered by the Advertising Standards Board of Finance (ASBOF). ASBOF operates independently of the ASA and that means there is no question of funding affecting the ASA's decision-making.
- 2.x Information about the ASA, including the complaint-handling and investigations procedures and the ASA's independent review procedure, is available at www.asa.org.uk. Information about ASBOF is available at www.asbof.co.uk.

Part 1

3. The Regulatory Context

- 3.i** The fundamental basis of the CAP Code is self-regulatory. By creating and following self-imposed rules, the marketing community produces advertisements, sales promotion and direct marketing communications that are legal, decent, honest and truthful so that consumer and business confidence is maintained.
- 3.ii** The CAP Code and the self-regulatory framework that exists to administer it have been developed to work within and complement legal controls. The UK's legal context allows for and promotes the use of self-regulation as an alternative instrument to statutory regulation and as a proportionate and effective enforcement measure. A clear distinction about jurisdiction, competences and responsibilities is maintained between the ASA and other public authorities.
- 3.iii** The CAP Code includes rules that give effect to legal provisions; those rules ensure the Code is relevant and they help marketers to satisfy a general requirement of the Code to comply with the law. In practice, the ASA's administration of rules that reflect legal provisions is often sufficiently effective that recourse to statutory regulatory bodies and the courts is considered undesirable and often unnecessary. Consumer protection legislation goes far wider and deeper than could be reflected in a self-regulatory Code of practice but compliance with the Code goes a long way to ensuring compliance with the law in subjects covered by the Code.
- 3.iv** The CAP Code supplements the law by filling in the gaps where the law does not reach. For example, the Code sets principles that help advertisers, agencies and publishers to ensure marketing communications are socially responsible and take account of generally accepted standards.
- 3.v** CAP's proposed Code has been drafted in the light of the Human Rights Act 1998 and the European Convention on Human Rights. In particular, the right to freedom of expression, as expressed in Article 10 of the Convention.
- 3.vi** CAP is not required to consult on changes to the Code beyond its members, which include advertiser, agency and non-broadcast media-owner trade bodies. If necessary, however, it may consult with expert bodies beyond its membership, particularly if it wants the Code to reflect a change in the law. If CAP proposes to change rules that give effect to the Consumer Protection from Unfair Trading Regulations (CPRs) 2008 or the Business Protection from Misleading Marketing Regulations (BPRs) 2008, the OFT must be assured that such changes are not incompatible with those Regulations. That is because the OFT recognises the ASA as the 'established means' for ensuring that marketing communications that are misleading, aggressive or otherwise unfair are prohibited, as required by the CPRs and the BPRs. The ASA and CAP maintain a rapport with the OFT and with other bodies that have a responsibility for creating, administering or enforcing laws that have a bearing on marketing communications.

Enforcement

- 3.vii** The vast majority of advertisers, promoters and direct marketers comply with the CAP Code.
- 3.viii** If the ASA judges that it has breached the Code, a marketing communication must be amended or withdrawn and publishers must agree to deny media space to it. CAP co-ordinates the activities of its members and oversees the sanctions operated by them to ensure that ASA adjudications are routinely and robustly enforced.
- 3.ix** A direction to amend or withdraw a marketing communication can be accompanied by unwelcome publicity that could result from ASA adjudications that are published weekly on its website, www.asa.org.uk. Those adjudications are typically made known to the public through reports in the media or, increasingly, as a consequence of searching for a company through internet search engines. Adverse publicity serves to warn the public.
- 3.x** Those sanctions are generally considered proportionate to the nature of the breach but, for more serious or repeated breaches of the Code or for non-compliance with an ASA adjudication, the self-regulatory system reserves additional sanctions.

- 3.xi** CAP may issue 'Ad alerts' to inform publishers not to accept a marketing communication without consulting its Copy Advice team. Trading privileges (including direct mail discounts) and recognition may be revoked, withdrawn or temporarily withheld. Pre-publication vetting may be imposed and non-complying parties can be referred to the ASA's back-stop powers, where statutory sanctions may be imposed. For example, if the self-regulatory system is unable to secure compliance for a marketing communication that breaches a misleading rule, the ASA may refer the advertiser to the Office of Fair Trading for action under the Consumer Protection from Unfair Trading Regulations 2008 or the Business Protection from Misleading Marketing Regulations 2008. That is rarely considered necessary.
- 3.xii** For more information on the ASA's complaint-handling and investigations procedure, sanctions available to it and the ASA's independent review procedure, go to www.asa.org.uk.

Part 1

4. The Code Review

Background

- 4.i The Code establishes a standard against which marketing communications are assessed.
- 4.ii The present CAP Code was last reviewed over five years ago. The Code has changed since then in response to changes in society, for example to reflect changes in law or to address socio-political matters, but is otherwise unchanged.
- 4.iii CAP considers it is timely to conduct a major review of its Code to ensure the rules for advertisements, sales promotion and direct marketing communications are up to date and fit for purpose.

CAP's general policy objectives

- 4.iv CAP's general policy objective is to set standards to ensure that all non-broadcast marketing communications covered by the CAP Code are legal, decent, honest and truthful and prepared with a due sense of social and professional responsibility.
- 4.v CAP intends its Code to be based on the enduring principles that marketing communications should be responsible, respect the principles of fair competition generally accepted in business, and should not mislead, harm or offend. A CAP objective is to ensure that the Code adequately protects children and others whose circumstances seem to CAP to put them in need of special protection yet retains an environment in which responsible non-broadcast advertising can flourish. CAP intends its rules to be transparent, accountable, proportionate, consistent, targeted only where regulation is needed and written so that they are easily understood, easily implemented and easily enforced.
- 4.vi CAP considers that users of the Code should feel confident that it does not conflict with or otherwise undermine the law. CAP's proposed Code includes rules that give effect to general and specific provisions of recent legislation that is directly relevant to non-broadcast marketing communications. Those rules will help advertisers, agencies and publishers to comply with the Code's general requirement that marketing communications must comply with the law.

The Scope of the Code

- 4.vii The CAP Code is, in principle, media neutral; by being media-neutral the Code guarantees a high level of protection for consumers across media and ensures a level playing field for businesses. The scope of the Code is determined by the advertising industry mindful of that principle and the practical constraints of regulating a diverse and ever-changing advertising sector. The scope of the Code is not, therefore, subject to consultation.
- 4.viii The Introduction to the Code sets out what the Code applies to and what it does not. The present Code covers most non-broadcast media, from print to cinema, direct marketing to online. CAP's proposed Code will spell out, for the avoidance of any doubt, the extent to which new forms of digital advertising are already regulated by the ASA.
- 4.ix The Digital Media Group (set up by the Advertising Association) is the communications industry policy group consisting of experts and practitioners from a variety of industry bodies, including traditional and digital media owners, agencies and advertisers. It is presently considering if and how the scope of CAP's Code might, for example, extend to an advertiser's claims that appear on that advertiser's website. Further information about this work will be communicated separately to this review.

Principles and definitions

- 4.x CAP's proposed Code includes, at the beginning of key sections, principles that make clear what that section is designed to achieve, to inform the rules that follow and, in terms of compliance, to help advertisers, agencies and media owners to make necessary judgments.
- 4.xi The proposed Code includes definitions, if CAP considers those necessary for a proper interpretation of a rule.

Guidance

- 4.xii From time to time, CAP produces for the industry Help Notes that give detailed guidance on specific sectors or subjects that are covered only generally in the Code.
- 4.xiii Guidance can help users of the Code to interpret rules. (Because a CAP objective is to ensure that each rule is easily understood, CAP anticipates that guidance on the interpretation of a rule will not generally be considered necessary.) CAP will take into account responses to this consultation that raise concerns about the clarity of a rule and CAP might produce guidance that addresses those concerns.

Managing readers' expectations

- 4.xiv A general Code Review provides an opportunity to tidy-up the Code after year-on-year changes to it. CAP has done that but it has, more importantly, undertaken a root-and-branch review of the present Code to assess whether the policy that underpins each rule is consistent with CAP's general policy objectives. If it is not, CAP has explained why and set out its rationale for deleting, amending or replacing that rule. CAP has proposed, in line with its general policy objectives, to add new rules that take account of changes in society. Here again, CAP has explained its proposal, setting out the rationale.
- 4.xv Proposed changes to the existing Code are the exception and not the norm; most of CAP's proposed Code includes standards established in the existing Code but that remain relevant.
- 4.xvi CAP has proposed to retain an existing rule if a review of the policy that underpins that rule does not merit, in CAP's opinion, a significant change. Readers can assume, therefore, that proposed rules that directly reflect or approximate rules in the present Code have been thoroughly considered by CAP and are, in CAP's opinion, in line with its general policy objectives. CAP has not explained why it has proposed to retain an existing rule unless exceptional circumstances relevant to that rule merit its discussion. If a rule has recently been subject to review, the consultation document directs the reader to that review for ease of reference.
- 4.xvii CAP welcomes comments on any rule included in or omitted from its proposed Code, not merely those that signify a substantive change. CAP will respond to all significant comments in its post-consultation evaluation of responses, which CAP will make available on the CAP website, www.cap.org.uk, on publication of CAP's new Code.
- 4.xviii Readers may note that rules in the proposed Code state 'must', for example 'must not mislead'. Rules in the present Code state 'should'. 'Should' might imply that compliance with the Code is voluntary when it is not. The decision to use 'must' does not signify a substantive change; it merely removes ambiguity about the intent of the rules.

Part 1

5. Key to the Review of each Code Section

- 5.i CAP proposes to add to, delete, replace or otherwise amend rules in the present CAP Code. To show proposed changes, CAP has provided a mapping document (see Annex 2), which compares the existing and proposed Code and, in Part 2 of this consultation document, CAP discusses proposed substantive changes to the Code and invites the reader's view on its proposals..
- 5.ii Readers are invited to consider the mapping document and to bring to CAP's attention any changes that are likely to amount to a substantive change, are not discussed in Part 2 and should be retained or otherwise be given dedicated consideration.
- 5.iii Part 2 is intended to give the reader necessary information to consider CAP's significant proposals. The review of most Code sections will be presented in this way:

Background

The Law

- 5.iv This sub-section references legislation that is directly relevant to the particular Code section under review. For example, CAP will reference legislation if one of its provisions is reflected in a proposed CAP rule or legislation that is contextually important to the rules in that section.

Other relevant regulatory bodies

- 5.v CAP and the ASA are the main bodies in the UK with responsibility for the regulation of non-broadcast advertisements, sales promotion and direct marketing.
- 5.vi 'Other relevant regulatory bodies' can include a non-exhaustive list of bodies that are conferred with legal powers to act against the advertiser or to regulate the product or service that is the subject of the section under review, for example the Medicines and Healthcare products Regulatory Agency (MHRA) for medicine advertising.
- 5.vii CAP also includes a non-exhaustive list of bodies that play a significant role in the pre-publication vetting of a marketing communication, a sales promotion or a direct marketing communication but are not conferred with legal powers to do so, for example the Proprietary Association of Great Britain (PAGB), which provides advice to its member companies (manufacturers of over-the-counter medicines and food supplements) on advertisement regulations.
- 5.viii CAP's CopyAdvice team provides a fast, free and confidential service designed to help create non-broadcast marketing communications that comply with the CAP Code. To find out more, see www.cap.org.uk/cap/copy_advice/

Recent CAP review of rules in this section

- 5.ix If a rule has recently been subject to review by CAP readers are directed to that review.

Why rules in this section are necessary and how the present and proposed Code meet that need

- 5.x In this sub-section, CAP explains why it considers it is necessary to maintain rules for the subject of the section under review. CAP sets out in general terms the policy that underpins rules in that Code section and how the present and the proposed Code regulate marketing communications that fall under that section.
- 5.xi If a Code section contains rules that give effect to specific legal requirements, CAP identifies those rule in this part of its review.

CAP's proposals for substantive changes to the present Code

- 5.xii** To facilitate the reader's understanding of proposed substantive changes, CAP has divided its proposals into 'New rules', 'Revised rules', 'Deleted rules' and 'Other'. CAP intends those headings will serve as a reasonably accurate guide as to the effect of a CAP proposal.

New rules

- 5.xiii** A proposal to include a rule that is entirely new to the present CAP Code.

Revised rules

- 5.xiv** A proposal to change or replace an existing rule to the extent that that change amounts to new advertising policy and practice.

Deleted rules

- 5.xv** A proposal to delete, in its entirety or in part, an existing rule to the extent that that deletion amounts to new advertising policy and practice

Other

- 5.xvi** Any combination of the above or, in exceptional circumstances, an explanation of CAP's decision to maintain a rule.

Part 2 - Section 1

Compliance

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

The law

Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

- 1.1 On 26 May 2008 the CPRs came into force. The CPRs prohibit unfair trading practices and identify misleading and aggressive practices as forms of unfair practice. As marketing communications are a form of trading practice they are subject to the CPRs. Schedule 1 of the CPRs contains a list of commercial practices that are in all circumstances considered unfair, this includes number 9, below, which rule 1.10.1 reflects in this section:

(9) Stating or otherwise creating the impression that a product can legally be sold when it cannot.

- 1.2 Please see the text of this Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

Other relevant regulatory bodies

Office of Fair Trading (OFT)

- 1.3 The OFT is the UK's consumer and competition authority. The OFT formally recognises the ASA as a first line of control in protecting consumers from unfair advertising: advertising that misleads, is aggressive or otherwise unfair. If certain types of marketing communication, including those that are misleading, aggressive or otherwise unfair, continue to appear after the ASA Council has ruled against them, the ASA can refer the matter to the OFT for action under the Consumer Protection from Unfair Trading Regulations 2008 or the Business Protection from Misleading Marketing Regulations 2008. The OFT can seek an undertaking that the marketing will be stopped from anyone responsible for commissioning, preparing or disseminating it. If that is not given or is not honoured, the OFT can seek an injunction from the Court to prevent its further appearance. Anyone not complying can be found to be in contempt of court and is liable to be penalised accordingly. For more on the OFT see: www.oft.gov.uk/

Recent changes to this section of the CAP Code

- 1.4 The CPRs came into force on 26 May 2008. Marketing communications are a form of trading practice and are therefore subject to the CPRs. CAP amended its Codes to ensure that they were in line with the new legal requirements. The amended Codes came into force on 21 November 2008. Please see: www.cap.org.uk/cap/news_events/news/2008/News+Story+CPRs+and+the+Codes.htm
- 1.5 Proposed rules 1.9 and 1.10.1 were recently added to the present Code to reflect the CPRs.

Meeting the need to ensuring that marketing communications meet the standards set out in the Code

- 1.6** In the UK, the CAP Code is the rule book for non-broadcast advertisements, sales promotions and direct marketing communications (marketing communications). Through their membership of CAP member organisations, or through contractual agreements with media publishers and carriers, businesses agree to comply with the Code so that marketing communications are legal, decent, honest and truthful, and consumer confidence is maintained. CAP co-ordinates the activities of its members to achieve the highest degree of compliance with the Code and, from time to time, it produces for the industry Help Notes that give detailed guidance on specific sectors or subjects that are covered only generally in the Code.
- 1.7** The present and the proposed Code set out the over-arching principles and rules that inform the sections that follow. The Compliance section ensures that the public and marketers understand that the Code requires marketing communications to reflect the spirit, and not merely the letter, of the Code.

Proposed substantive changes

- 1.8** None.

Questions

Question 1

i) Taking into account CAP's general policy objectives, do you agree that CAP's rules, included in the proposed Compliance Section are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Compliance rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 - Section 2

Recognition of marketing communications

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

The law

Consumer Protection from Unfair Trading Practices Regulations 2008 (CPRs)

- 2.1 On 26 May 2008 the CPRs came into force. As marketing communications are a form of trading practice they are subject to the CPRs. Schedule 1 of the CPRs contains a list of commercial practices that are in all circumstances considered unfair, this includes practice 22:

Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.

- 2.2 See the text of this Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3480871

Electronic Commerce (E-Commerce) Directive

- 2.3 The E-Commerce Directive was adopted in 2000 by the EU. It establishes harmonised rules on issues including transparency and information requirements for online service providers, electronic contracts and commercial communications. It was incorporated in UK by the Electronic Commerce (EC Directive) Regulations 2002.

- 2.4 The E-Commerce directive includes:

Commercial communications

7. A service provider shall ensure that any commercial communication provided by him and which constitutes or forms part of an information society service shall -

a) be clearly identifiable as a commercial communication; ...

Unsolicited commercial communications

8. A service provider shall ensure that any unsolicited commercial communication sent by him by electronic mail is clearly and unambiguously identifiable as such as soon as it is received.

- 2.5 See a copy of the Directive at:
<http://www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=1585643>

Recent changes to this section of the CAP Code

- 2.6 The CPRs came into force on 26 May 2008. Marketing communications are a form of trading practice and are therefore subject to the CPRs. CAP amended its Codes to ensure that they were in line with the new legal requirements. The amended Codes came into force on 21 November 2008. Please see:

www.cap.org.uk/cap/news_events/news/2008/News+Story+CPRs+and+the+Codes.htm

- 2.7 Proposed rule 2.3 was added to the present Codes to reflect the CPRs.

Relevant Regulatory Bodies

Office of Fair Trading (OFT)

- 2.8** The OFT is the UK's consumer and competition authority. The OFT formally recognises the ASA as a first line of control in protecting consumers from unfair advertising; advertising that misleads, is aggressive or otherwise unfair. If certain types of marketing communication, including those that mislead, are aggressive or are otherwise unfair continue to appear after the ASA Council has ruled against them, the ASA can refer the matter to the OFT for action under the Consumer Protection from Unfair Trading Regulations 2008 or the Business Protection from Misleading Marketing Regulations 2008. The OFT can seek an undertaking from anyone responsible for commissioning, preparing or disseminating it that the marketing will be stopped. If that undertaking is not given or is not honoured, the OFT can seek an injunction from the Court to prevent its further appearance. Anyone not complying can be found to be in contempt of court and is liable to be penalised accordingly.
- 2.9** For more on the OFT see: www.offt.gov.uk/

Meeting the need to ensure that marketing communications are recognised as such

- 2.10** The CAP Code has long-established the need to ensure that marketing communications are clear as such. If they are not, CAP considers they have the potential to cause confusion, mislead or otherwise be unfair. The present CAP Code prevents that from occurring through a general rule, 2.1, and by a specific rule, 2.4, on advertorials. The other two rules in this section approximate the law, rule 2.2 is derived from the E-Commerce Directive and rule 2.3 is derived from the CPRs as discussed above.

Proposed substantive changes

- 2.11** None.

Questions

Question 2

- i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Recognition of Marketing Communications Section, are necessary and easily understandable? If your answer is no, please explain why.
- ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Recognition of Marketing Communications rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that you believe should be retained or otherwise given dedicated consideration?
- iii) Do you have other comments on this section?

Part 2 - Section 3

Misleading

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

The law

Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

- 3.1** Business-to-consumer marketing communications must comply with the CPRs. The CPRs forbid advertisers from using misleading, aggressive or unfair sales techniques. They impose a general prohibition on unfair, misleading or aggressive practices, which are defined in the Regulations, and specific prohibitions on certain practices that are deemed to be unfair in any circumstances.
- 3.2** The CPRs implement European Directive 2005/29/EC.
- 3.3** You can read the CPRs at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3480871

Business Protection from Misleading Marketing Regulations 2008 (BPRs)

- 3.4** Business-to-business marketing and comparative marketing communications must comply with the BPRs. The BPRs prohibit advertising that is misleading to the traders to whom it is addressed or that injures or is likely to injure a competitor.
- 3.5** The BPRs implement European Directive 2006/114/EC.
- 3.6** You can read the BPRs at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3480825

Other relevant regulatory bodies

Office of Fair Trading (OFT) and Trading Standards Authorities

- 3.7** The OFT is the UK's consumer and competition authority. If certain types of marketing communication, including those that are misleading or contain an impermissible comparison, continue to appear after the ASA Council has ruled against them, the ASA can refer the matter to the OFT for action under the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008. The OFT can seek an undertaking that the marketing will be stopped from anyone responsible for commissioning, preparing or disseminating it. If that is not given or is not honoured, the OFT can seek an injunction from the Court to prevent its further appearance. Anyone not complying can be found to be in contempt of court and is liable to be penalised accordingly.
- 3.8** The ASA and CAP maintain a rapport with the OFT and with other bodies that have a responsibility for creating, administering or enforcing laws that have a bearing on marketing communications. If necessary, they may notify those bodies of non-compliant marketers and work with them to ensure that unacceptable marketing communications are amended, withdrawn or stopped.
- 3.9** The OFT and other 'qualified entities', such as Trading Standards Authorities, can use the Enterprise Act 2002 Part 8 to enforce consumer protection laws, including the Consumer Protection from Unfair

Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008. These regulations provide that qualified entities should have regard to the desirability of encouraging control by the 'established means' before taking action themselves.

3.10 For more information on the OFT see: www.oft.gov.uk/

3.11 For more information on Trading Standards Authorities see: www.tradingstandards.gov.uk/

Recent changes to this Section of the CAP Code

3.12 The CPRs and the BPRs (see above) came into force on 26 May 2008. Marketing communications are a form of trading practice and are therefore subject to the CPRs and the BPRs. CAP amended its Codes to ensure that they were in line with the new legal requirements. The amended Codes came into force on 21 November 2008. Please see:

www.cap.org.uk/cap/news_events/news/2008/News+Story+CPRs+and+the+Codes.htm

3.13 and

www.cap.org.uk/cap/news_events/news/2008/BCAP+Consultation+The+Regulation+of+Unfair+Commercial+Practices+in+TV+and+Radio+Advertisements.htm

3.14 Meeting the need to ensure that marketing communications do not mislead

3.15 Two of the founding principles of advertising self-regulation are that advertising must be honest and truthful. The CAP Code has always provided that advertisements should not mislead either directly or by implication, that evidence be held in support of any objective claim made, that important qualifications to an offer should be made clear and that comparative advertisements should be presented fairly. The CPRs introduced more detailed provisions to the Codes relating to unfair practices defined in legislation.

Proposed substantive changes

New rules

Clarity of qualifications

3.16 CAP notes that an increasing number of non-broadcast advertising media, whether online, outdoor or on mobile telephone, incorporate audio or audio-visual material or allow for marketing communications that appear only briefly. The limits that time and space place on the information that may be provided by marketing communications in some media are recognised in the CAP Code, but those limits do not relieve marketers of the responsibility to ensure that claims requiring qualification are clearly communicated. For that reason, CAP proposes the following rule:

3.10

Qualifications must be clear to consumers who see or hear the marketing communication only once.

Question 3

Do you agree that rule 3.10 should be included in the Code? If your answer is no, please explain why.

Exaggerated performance

3.17 Exaggeration is one of the key ways in which marketing communications may mislead and claims for a product will breach the Code if they imply that it may yield results that consumers will not achieve. CAP proposes the following rule to make that clear:

3.11

Marketing communications must not exaggerate the capability or performance of a product; claims must be based on normal use.

Question 4

Do you agree that rule 3.11 should be included in the Code? If your answer is no, please explain why.

Revised rules

Restrictions on availability

3.18 The present Code does not include an explicit requirement that geographical restrictions to an offer should be stated. CAP proposes the following rule to make that and other requirements clear:

3.28

Marketing communications that quote a price for a featured product must state any reasonable grounds the marketer has for believing that it might not be able to supply the advertised (or an equivalent) product at the advertised price within a reasonable period and in reasonable quantities. In particular:

...

3.28.3

marketing communications must state restrictions on the availability of products, for example, geographical restrictions or age limits.

Question 5

Given CAP's policy consideration, do you agree with the revisions made to rule 3.28.3? If your answer is no, please explain why.

Testimonials

3.19 The present Code requires marketers to hold signed copies of testimonials. That requirement is beginning to cause problems for marketers who use testimonials that were originally sent to them as e-mails. In recognition of that fact, CAP proposes to amend the Code to make a more realistic requirement of marketers:

3.45

Marketers must hold documentary evidence that a testimonial or endorsement used in a marketing communication is genuine, unless it is obviously fictitious, and hold contact details for the person who, or organisation that, gives it.

Question 6

Given CAP's policy consideration, do you agree that rule 3.45 should be amended to require documentary evidence and contact details only? If your answer is no, please explain why.

Deleted rules

Additional rights provided by guarantees

3.20 Rule 17.2 in the present Code states:

Marketers should inform consumers about the nature and extent of any additional rights provided by the guarantee, over and above those given to them by law, and should make clear how to obtain redress.

3.21 CAP notes that rule 3.54 states:

Marketing communications must make clear each significant limitation to an advertised guarantee (of the type that has implications for a consumer's rights). Marketers must supply the full terms before the consumer is subject to the guarantee.

3.22 The CAP Code is primarily concerned with the content of marketing communications and not with terms of business or products themselves. Some rules, however, go beyond content, for example those that cover the administration of sales promotions, the suitability of promotional items, the delivery of products ordered through an advertisement and the use of personal information in direct marketing. In this case, CAP considers the requirement for the marketer to inform the consumer about additional rights provided by the guarantee, over and above those given to them by law, and how to obtain redress is unnecessarily prescriptive. CAP considers it sufficient to ensure any significant limitations to an advertised guarantee are made clear in the marketing communication and the consumer is aware of the full terms of the guarantee before he or she is subject to it.

Question 7

Given CAP's policy consideration, do you agree that rule 17.2 should be deleted from the Code? If your answer is no, please explain why.

Other

The unavoidable cost of responding

3.23 Rule 32.5 in the present Code states:

Consumers' liability for costs should be made clear in all material featuring "free" offers. An offer should be described as free only if consumers pay no more than:

- a) the minimum, unavoidable cost of responding to the promotion, eg the current public rates of postage, the cost of telephoning up to and including the national rate or the minimum, unavoidable cost of sending an e-mail or SMS text message
- b) the true cost of freight or delivery
- c) the cost, including incidental expenses, of any travel involved if consumers collect the offer.

Promoters should not charge for *packing* [emphasis added], handling or administration.

3.24 CAP notes that the word ‘packing’ is ambiguous and may be seen to refer either to packaging or to the labour involved in packing the “free” product. For clarity, and because it considers the ASA would have difficulty in determining whether charges for packaging reflected the true, uninflated cost of packaging, CAP proposes to amend the rule to include an explicit reference to packaging:

3.24

Marketing communications must not describe items as “free” if:

3.24.1

the consumer has to pay for packing, packaging, handling or administration.

Question 8

Given CAP’s policy consideration, do you agree that marketing communications should not describe items as “free” if the consumer has to pay for packaging? If your answer is no, please explain why.

Other questions

Question 9

i) Taking into account CAP’s general policy objectives, do you agree that CAP’s rules on misleading are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 - Section 4

Harm and Offence

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

Other relevant regulatory bodies

Equality and Human Rights Commission (EHRC).

- 4.1 The EHRC is responsible for eliminating discrimination, reducing inequality and protecting human rights. Part of its duties, therefore, is to ensure that advertisements do not discriminate on the grounds of sex, race, disability, age, sexual orientation or religion or belief, principally in relation to advertisements for employment, education and training opportunities and accommodation, goods, facilities and services provided to the public. The EHRC may take legal action on behalf of individuals, especially where there are chances to create legal precedents or to clarify and improve the law. It does not regulate advertisements on a day-to-day basis, and it recognises CAP and BCAP as the bodies that set standards for advertisements. The EHRC is a non-departmental public body accountable for its public funds but independent of Government; it was established under the Equality Act 2006 and opened in October 2007. The EHRC replaced three previous Commissions: the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission. As well as assuming the responsibilities of those Commissions, it gained enforcement powers under the Equality Act to guarantee people's equality and it has a mandate to promote understanding of the Human Rights Act. The EHRC's website is www.equalityhumanrights.com.

Meeting the need to ensure that marketing communications do not cause harm or serious or widespread offence

- 4.2 The present and the proposed CAP Codes enshrine in rules the fundamental tenet that marketing communications should be legal, decent, honest and truthful. The present CAP Code includes rules that ensure marketing communications are decent by preventing them from causing serious or widespread offence or having the potential to cause harm, for example by condoning or encouraging dangerous practices.
- 4.3 CAP considers that the present approach is important to protect consumers from potentially offensive and harmful marketing communications and proposes largely to retain that approach in the proposed CAP Code. CAP has, in proposing the rules in the Harm and Offence section, weighed up the importance of protecting consumers from offensive and harmful material in marketing communications against marketers' fundamental right to freedom of expression. CAP considers it reasonable to restrict that right if it is necessary to protect consumers from harm or serious or widespread offence.

Proposed substantive changes

New rules

Flashing images

- 4.4 The present BCAP Television Code requires broadcasters to ensure that TV advertisements do not adversely affect members of the audience with photosensitive epilepsy¹. Ofcom's Guidance Note for Licensees on Flashing Images and Regular Patterns in Television² assists broadcasters to comply with that rule.

1 Note to rule 6.7 (Health and safety) of the BCAP Television Advertising Standards Code.

2 www.ofcom.org.uk/tv/ifi/guidance/bguidance/guidance2.pdf, p. 14.

- 4.5** CAP considers that the need to protect consumers who have photosensitive epilepsy is also relevant to non-broadcast media. Flashing images in cinema, Internet, mobile and poster advertisements, for example, have the potential to trigger seizures in members of the public who have photosensitive epilepsy. More and more posters offer marketers the opportunity to display moving images; with the development of mobile phone technology, moving-image advertisements may be sent to and viewed by consumers, and dynamic advertisements on the Internet often use flashing images to attract consumers' attention.
- 4.6** CAP proposes to introduce a rule with the intention of protecting members of the public who have photosensitive epilepsy by requiring marketers to take particular care to avoid effects or techniques in their marketing communications that might trigger seizures. CAP's proposed rule is:

4.7

Marketers must take particular care not to include in their marketing communications visual effects or techniques that are likely to adversely affect members of the public with photosensitive epilepsy.

- 4.7** By making clear in the Code the potential risk posed to members of the public who have photosensitive epilepsy by the use of particular visual effects or techniques, CAP's rule could prevent marketing communications that feature those effects or techniques, which would otherwise reach the public. If it were to receive a complaint under the rule, and the grounds for complaint seemed reasonable, the ASA would ask the marketer how it had satisfied itself that the use of visual effects or techniques in its marketing communication were unlikely to adversely affect members of the public who have photosensitive epilepsy. CAP envisages that, in time, it might support this rule with guidance informed by the ASA's interpretation of the rule and, perhaps, by borrowing general principles that are relevant to all moving-image media from Ofcom's Guidance Note for Licensees on Flashing Images and Regular Patterns in Television.

Question 10

Given CAP's policy consideration, do you agree that rule 4.7 should be included in the proposed CAP Code? If your answer is no, please explain why.

Revised rules

- 4.8** None.

Deleted rules

- 4.9** None.

Other Questions

Question 11

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Harm and Offence section, are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Harm and Offence rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 – Section 5

Children

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

The law

Consumer Protection from Unfair Trading Practices Regulations 2008 (CPRs)

- 5.1 The CPRs prohibit unfair trading practices and identify misleading and aggressive practices as forms of unfair practice. Because they are a trading practice, marketing communications are subject to the CPRs. The CPRs sets out in schedule 1 a list of commercial practices that are in all circumstances considered unfair; it includes practice 28:

Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.

- 5.2 See the text of the Regulations at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3480871

Other relevant regulatory bodies

Office of Fair Trading (OFT)

- 5.3 The OFT is the UK's consumer and competition authority. The OFT formally recognises the ASA as a first line of control in protecting consumers from unfair advertising: advertising that misleads, is aggressive or otherwise unfair. If certain types of marketing communication, including those that are misleading, aggressive or otherwise unfair continue to appear after the ASA Council has ruled against them, the ASA can refer the matter to the OFT for action under the Consumer Protection from Unfair Trading Regulations 2008 or the Business Protection from Misleading Marketing Regulations 2008. The OFT can seek an undertaking from the marketer that the marketing will be stopped from anyone responsible for commissioning, preparing or disseminating it. If that is not given, or if it is given but not honoured, the OFT can seek an injunction from the Court to prevent that marketing communication's reappearance. Anyone not complying can be found to be in contempt of court and is liable to be penalised accordingly.
- 5.4 For more on the OFT see: www.oft.gov.uk

Recent changes to this section of the CAP Code

- 5.5 The CPRs came into force on 26 May 2008. Advertisements are a form of trading practice and are therefore subject to the CPRs. CAP amended its Code to ensure that it was in line with the new legal requirements. The amended Codes came into force on 21 November 2008. Please see:
- www.cap.org.uk/cap/news_events/news/2008/News+Story+CPRs+and+the+Codes.htm
- 5.6 Rules 5.4.2 and 5.6 in the proposed Code reproduce rules in the present Code that were recently revised to ensure they do not conflict with the CPRs.

Meeting the need to ensure that marketing communications addressed to, targeted at or featuring children do not harm them

- 5.7** The present CAP Code includes rules intended to prevent marketing communications that have the potential to cause harm to children. CAP considers that, to ensure that marketing communications that are addressed to, targeted directly at or featuring children do not harm or distress them, a dedicated section of rules relating to children and marketing should continue to be included in the Code. On that basis, CAP's proposed Children section reflects many of the present rules, which provide important and necessary protection to children from potentially harmful, distressing and misleading advertisements.

Proposed substantive changes

New rules

Promotions that contain a direct exhortation to buy a product

- 5.8** When the CAP Code was amended to reflect the requirements of the CPRs, CAP deleted these rules:

47.5a

Promotions addressed to or targeted at children should not encourage excessive purchase

47.5c

Promotions addressed to or targeted at children should clearly explain the number and type of any proofs of purchase needed to participate

- 5.9** CAP deleted those rules because it considered they were inconsistent with the CPRs' prohibited practice of directly exhorting children to make a purchase: it considered a promotion addressed to or targeted at children that encouraged a purchase would amount to a direct exhortation to those children to make a purchase.

- 5.10** To make that clear, CAP now proposes to include proposed rule 5.7:

5.7

Promotions that contain a direct exhortation to buy a product must not be addressed to or targeted at children.

- 5.11** CAP considers that its proposal would not amount to a change in advertising policy or practice but would provide clarification that promotions that require a purchase to participate, and include a direct exhortation to make a purchase, must not be addressed to or targeted at children.

Question 12

Given CAP's policy consideration, do you agree that rule 5.7 should be included in the Code? If your answer is no, please explain why.

Marketing communications that contain a direct exhortation to buy products via a direct-response mechanism

- 5.12** CAP proposes to introduce a rule that specifically prohibits marketing communications that contain a direct exhortation to buy products via a direct-response mechanism from being directly targeted at children. CAP considers that its proposed new rule would not amount to new advertising policy or practice because the present Code prevents marketing communications from including a direct exhortation to children to buy any products, including those bought via a direct-response mechanism. CAP considers that it would be helpful for the Code to clarify that fact. On that basis, CAP proposes this rule:

5.5

Marketing communications that contain a direct exhortation to buy products via a direct-response mechanism must not be directly targeted at children. For a definition of “direct-response” mechanism, see the Distance Selling Section (Section 9).

- 5.13** The proposed Distance Selling section defines a ‘direct-response mechanism’ as mechanisms ‘that allow readers to place orders without face-to-face contact with the marketer’.

Question 13

Given CAP’s policy consideration, do you agree that rule 5.5 should be included in the Code? If your answer is no, please explain why.

Revised rules

- 5.14** None.

Deleted rules

- 5.15** None.

Other questions

Question 14

i) Taking into account its general policy objectives, do you agree that CAP’s rules, included in the proposed Children section, are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Children rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 - Section 6

Privacy

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

The law

- 6.1 Featuring someone in a marketing communication without his or her consent is not, in and of itself, a breach of his or her rights in the UK, but that person might have a legal case.

Meeting the need to ensure that marketing communications do not infringe individuals' privacy

- 6.2 The present CAP Code includes rules intended to preserve individuals' privacy prevent individuals' from being unfairly portrayed or referred to in an adverse or offensive way. CAP proposes to replicate those rules in the proposed Code because they remain in line with CAP's general policy objectives and offer an important degree of protection for members of the public.

Proposed substantive changes

- 6.3 None.

Questions

Question 15

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Privacy section, are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Privacy rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 – Section 7

Political Advertisements

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

The law

European Convention on Human Rights

- 7.1 The Convention protects the freedom of expression, including political speech (Article 10).
- 7.2 For more information about the Convention see:

www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf

Public Order Act 1986

- 7.3 The Act includes statutory controls on 'hate' speech.
- 7.4 For more information about the Act see:
www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=2236942

CAP's policy on political advertising

- 7.5 Until 1999, political advertising was subject to the CAP Code, although it had always been exempt from certain requirements such as those relating to truthfulness. Following the 1997 general election there were concerns that the impartiality of the self-regulatory system could be damaged by rulings for or against political parties, and that the ASA could not be expected to respond with the speed necessary at an election. From October 1999, therefore, political advertising aimed at influencing voters in elections or referendums has been exempt from the CAP Code.
- 7.6 The Committee on Standards in Public Life considered the issue of political advertising and in their 1998 report concluded that the best way forward would be for the parties to adopt a new code of practice. The Electoral Commission considered, however, that political advertising should remain exempt from the CAP Code and it does not consider that there should be a separate code to govern non-broadcast political advertising³. It advises political advertisers to be guided by the principle in the CAP Code that 'all marketing communications should be prepared with a sense of responsibility to consumers and society.'
- 7.7 CAP's rules continue to cover marketing communications that are not intended to influence voters in a local, regional, national or international election or referendum and marketing communications by central or local government, as distinct from those concerning party policy.

Proposed substantive changes

- 7.8 None.

³ http://www.electoralcommission.org.uk/_data/assets/pdf_file/0010/70948/political-advertising.pdf

Questions

Question 16

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Political Advertisements Section, are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Political Advertisements rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 – Section 8

Sales Promotions

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

The law

Consumer Protection from Unfair Trading Practices Regulations 2008 (CPRs)

- 8.1 Business-to-consumer advertisements must comply with the CPRs. The CPRs forbid advertisers from using misleading, aggressive or unfair sales techniques. They impose a general prohibition on unfair, misleading or aggressive practices, which are defined in the Regulations and, under Schedule 1, specific prohibitions on certain practices that are deemed to be unfair in all circumstances, including practices 19 and 31:

19. Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.

31. Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:

- there is no prize or other equivalent benefit, or
- taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

- 8.2 Please see: <http://www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3480871>

The Electronic Commerce (EC Directive) Regulations 2002

- 8.3 These Regulations implement the Electronic Commerce (E-Commerce) Directive, which was adopted in 2000 by the EU. The Directive establishes harmonised rules on issues including transparency and information requirements for online service providers, electronic contracts and commercial communications. It was incorporated in UK law in 2002 by statutory instrument. The Regulations include:

Commercial communications

7. A service provider shall ensure that any commercial communication provided by him and which constitutes or forms part of an information society service shall -

be clearly identifiable as a commercial communication;

(b) clearly identify the person on whose behalf the commercial communication is made;

(c) clearly identify as such any promotional offer (including any discount, premium or gift) and ensure that any conditions which must be met to qualify for it are easily accessible, and presented clearly and unambiguously; and

(d) clearly identify as such any promotional competition or game and ensure that any conditions for participation are easily accessible and presented clearly and unambiguously.

- 8.4 Please see: <http://www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=1585643>

Gambling Act 2005

- 8.5 The Gambling Act 2005 came into force on 1 September 2007. It controls all forms of gambling in England, Wales and Scotland, including gambling over the Internet.
- 8.6 The Gambling Act 2005 contains provisions in section 14, titled Lottery, and Schedule 2, titled Lotteries: Definition of payment to enter, that are relevant to this section.
- 8.7 Please see: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=1419110
- 8.8 Please note the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 (as amended) continues to cover those activities in Northern Ireland.
- 8.9 Please see: <http://www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=2912211>

Charity-based promotions

- 8.10 Charities Act 2006
- 8.11 This Act provides for the establishment and functions of the Charity Commission for England and Wales and the Charity Tribunal; to make other amendments of the law about charities, including provision about charitable incorporated organisations; to make further provision about public charitable collections and other fund-raising carried on in connection with charities and other institutions; to make other provision about the funding of such institutions; and for connected purposes.
- 8.12 See the full text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=2939707

Charities Act Northern Ireland (2008)

- 8.13 This Act provides for the establishment and functions of the Charity Commission for Northern Ireland and the Charity Tribunal for Northern Ireland; to make provision about the law of charities, including provision about charitable incorporated organisations; to make further provision about public charitable collections and other fund-raising carried on in connection with charities and other institutions; and for connected purposes.
- 8.14 See the full text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3528436

Charities and Trustee Investment (Scotland) Act 2005

- 8.15 This Act establishes a system of charity regulation in Scotland. The Office of the Scottish Charity Regulator was established through Part 1 of the Act and is required to regulate all charities in Scotland. See the full text of the Charities and Trustee Investment (Scotland) Act 2005 at:

www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=1781480

Other relevant regulatory bodies

The Gambling Commission

- 8.16** The Gambling Commission was set up under the Gambling Act 2005 and was formally established in October 2005. It regulates casinos, bingo, gaming machines and lotteries and also has responsibility for the regulation of betting and remote gambling, as well as helping to protect children and vulnerable people from being harmed or exploited by gambling.
- 8.17** Please see: www.gamblingcommission.gov.uk/Client/index.asp

Other

- 8.18** Bodies that play a part in regulating a marketing communication or a product or service of relevance to this section but are not conferred with legal functions to do so include: The Institute of Sales Promotions (www.isp.org.uk).

Charity-based promotions

Charity Commission

- 8.19** The Charity Commission for England and Wales is established by law as the regulator and registrar of charities in England and Wales.
- 8.20** Please see: www.charity-commission.gov.uk/

Office of the Scottish Charity Regulator (OSCR)

- 8.21** The OSCR is established by law as the regulator and registrar of charities in Scotland. The Act gives OSCR a number of key functions in relation to charities. These can be found on their website.
- 8.22** Please see: www.oscr.org.uk/

The Department for Social Development Northern Ireland (DSDNI)

- 8.23** The DSDNI is the charity authority for Northern Ireland. The introduction of the Charities Act (Northern Ireland) 2008 means that by May 2009 the Northern Ireland Charity Commission will be established and bring Northern Ireland broadly into line with the Charity Commission and the Office of the Scottish Charity Regulator.
- 8.24** Please see: www.dsdni.gov.uk/

Recent changes to this section of the CAP Code

- 8.25** The Consumer Protection from Unfair Trading Practices Regulations 2008 (CPRs) came into force on 26 May 2008. Marketing communications are a form of trading practice and are therefore subject to the CPRs. CAP amended its Code to ensure that it was in line with the new legal requirements. The amended Codes came into force on 24 June 2008 and included changes to the Sales Promotion section. Please see:

www.cap.org.uk/cap/news_events/news/2008/News+Story+CPRs+and+the+Codes.htm

Meeting the need to regulate marketing communications for sales promotions

- 8.26** Like other categories of commercial communication, sales promotions have the potential to mislead, harm or offend. In addition, the promoter must ensure that those who take part are dealt with fairly in all stages of the promotion, including competitions and prize promotions. The Sales Promotion section contains specific sub-sections that pertain to promotional availability, promotion administration and significant conditions that must be made clear prior to purchase or entry, as well as specific rules for prize promotions and trade promotions.
- 8.27** CAP considers the present Sales Promotion rules are effective. It has focused on making the section more user-friendly and as future-proof as possible. CAP has identified several areas that could be improved upon to prevent specific misleading practices and it has proposed to curb those practices. CAP's proposals seek to protect consumers by preventing misleading practices and those promoters whose reputation is placed at risk by promoters or promotions that breach the spirit of the rules. The proposed rules are intended to improve clarity for promoters, so that the standards are easy to understand and easy to implement.
- 8.28** Proposed Code rules 8.15.1, 8.18, 8.17.1, 8.21.1 approximate legal provisions in the CPRs and rules 8.17 and 8.28 mirror those of the E-Commerce Directive. The proposed Principles section makes clear that promoters should seek legal advice before embarking on promotions with prizes to ensure that the mechanisms involved do not make them unlawful lotteries and includes references to the Gambling Act 2005 for Great Britain and the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 (as amended).

Proposed substantive changes

New rules

Withholding prizes

- 8.29** On 24 June 2008, the CAP Code was changed to take account of CPRs. (See 'Recent changes to this section of the CAP Code'). Rules were added, revised or deleted to ensure that the Code did not conflict with the Regulations. The following rule, which does not conflict with the CPRs, was deleted in error:

8.27

Withholding prizes is justified only if participants have not met criteria set out clearly in the rules of the promotion.

- 8.30** CAP proposes to reinstate the rule; the rule usefully makes clear when it is acceptable to withhold a prize.

Question 17

Given CAP's policy consideration, do you agree that rule 8.27 should be included in the Code? If your answer is no, please explain why.

Revised rules

Promotions directed at children; the need for a closing date

- 8.31** Presently, CAP rule 34.1c requires that all promotions addressed to or targeted at children include a closing date. This is to avoid causing unnecessary purchase and disappointment to children by making sure that it is clear when the promotional offer ends. CAP proposes to retain this rule but to exempt the requirement for promotional packs that include the promotional item or prize, because the only limit is the availability of the pack. CAP considers that the exemption removes an unnecessary restriction for marketers and will not disadvantage consumers.

8.32 CAP proposes this rule:

8.17.4.b

Unless the promotional pack includes the promotional item or prize and the only limit is the availability of that pack, prize promotions and promotions addressed to or targeted at children always need a closing date

Question 18

Given CAP's policy consideration, do you agree that rule 8.17.4.b should be included in the Code? If your answer is no, please explain why?

Prizes and Gifts

- 8.33** Present rule 34.1e requires promoters to specify the minimum number of any prizes. That requirement informs consumers about the likelihood of receiving a prize and, therefore, their decision to participate in the promotion. CAP considers the present rule can be abused; for example a promoter that states '100+ prizes' implies a relatively higher quality of prize than '10,000 prizes'. In addition, because there is no present requirement for the number of gifts to be stated in any capacity, that has allowed some promoters to blur the line between what is a prize and what is a gift and mislead consumers.
- 8.34** CAP proposes that, if the exact number is not known, a reasonable estimate of the number of prizes or gifts should be stated in order to prevent that abuse.
- 8.35** CAP's proposal protects consumers from a misleading practice and promoters whose reputation is placed at risk by those undertaking that practice. CAP considers the proposed revision to the Code is proportionate, because for the purposes of running their promotion, promoters should already know, or be able to make a reasonable estimate of, the number of items that they will need to supply in preparation for their promotion.
- 8.36** CAP proposes this rule:

8.17.6

Prizes and gifts

Promoters must specify the number and nature of prizes or gifts, if applicable. If the exact number cannot be predetermined, a reasonable estimate of the number and a statement of their nature should be made.

Question 19

Given CAP's policy consideration, do you agree that rule 8.17.6 should be included in the Code? If your answer is no, please explain why.

- 8.37** Confusion presently occurs when promoters do not distinguish between prizes that are available to be won and those that are guaranteed to be won. The present Code is silent on this specific issue. In order that the consumer has the necessary information to decide whether or not to respond to the promotion, CAP considers it is reasonable for promoters to make clear which of the prizes stated *will* be awarded in the promotion and those that *could* be awarded, including estimated prize funds.

8.38 CAP proposes this rule:

8.17.6.a

Promoters must:

distinguish those prizes that could be won, including estimated prize funds, from those prizes that will be won by someone by the end of the promotional period

Question 20

Given CAP's policy consideration, do you agree that rule 8.17.6.a should be included in the Code? If your answer is no, please explain why.

Significant conditions exception: limited by time or space

- 8.39** The CPRs make clear that marketing communications must not omit material information if that omission, or presentation, is likely to affect consumers' decisions about whether and how to buy the advertised product, unless the information is obvious from the context or the marketing communication is limited by time or space and the advertiser takes steps to make that information available to consumers by other means.
- 8.40** Present CAP rule 34.1 states that all applicable significant conditions for promotions, including 'how to participate', 'start' and 'closing' dates, for example, should be included in marketing communications for promotions. (It adds that participants should be able to retain the above conditions or have easy access to them throughout the promotion. Advertisements for promotions should specify all of the significant conditions above that are applicable.)
- 8.41** In line with CPRs, CAP proposes to update rule 34.1:

8.18

Marketing communications that include a promotion and are significantly limited by time or space must include as much information about significant conditions as practicable and must direct consumers clearly to an easily-accessible alternative source where all the significant conditions of the promotion are prominently stated. Participants should be able to retain those conditions or easily access them throughout the promotion.

Question 21

Given CAP's policy consideration, do you agree that rule 8.18 should be included in the Code? If your answer is no, please explain why.

Distinction between prizes and gifts: a significant proportion

- 8.42** Presently, CAP rule 35.1 prohibits gifts offered to all or most consumers in a promotion from being described as prizes. CAP understands that some promoters abuse the spirit of this rule by distributing, for example, one type of low-value gift to one third of recipients, another type of low-value gift to the second third of recipients and a third type of low-value gift to the final third of recipients and describing those gifts as prizes. The promoter has, in that example, complied with the letter of the rule, i.e. most consumers have not received one type of gift but the gift would not equate to the recipient's presumed value of an actual prize and so the consumer is misled. To close this loophole, CAP proposes that the term 'a significant proportion' should be used instead of "gifts offered to all or most consumers".

8.43 CAP proposes this rule:

8.19

Promoters must not claim that consumers have won a prize if they have not. The distinction between prizes and gifts must always be clear: items offered to a significant proportion of consumers in a promotion should be described as gifts, not prizes. If a promotion offers a gift to a significant proportion and a prize to those who win, special care is needed to avoid confusing the two: the promotion must, for example, state clearly that consumers "qualify" for the gift but have merely an opportunity to win the prize. If a promotion includes, in a list of prizes, a gift for which consumers have qualified, the promoter must distinguish clearly between the two.

Question 22

Do you agree that rule 8.19 should be included in the CAP Code? If your answer is no, please explain why.

Supervising Prize Draws

8.44 Present rule 35.7 states:

Promoters of prize draws should ensure that prizes are awarded in accordance with the laws of chance *and under the supervision of an independent observer*. [Emphasis added]

8.45 CAP considers that rule should be revised to allow for the proper use of a computer to randomly select a winner in accordance with the laws of chance. CAP considers the computer process should be verified to be random, for example by the programmer or software manufacturer, and suitable for the task.

8.46 CAP proposes the following wording for the proposed rule:

8.24

Promoters of prize draws must ensure that prizes are awarded in accordance with the laws of chance and, unless winners are selected by a verifiably random computer process, under the supervision of an independent observer.

Question 23

Given CAP's policy consideration, do you agree that rule 8.24 should be included in the Code? If your answer is no, please explain why.

Auditing instant-win promotions

8.47 Present rule 35.8 states:

... Instant-win tickets, tokens or numbers should be awarded on a fair and random basis and verification should take the form of an independently audited statement that all prizes have been distributed, or made available for distribution, in that manner.

8.48 CAP considers that the principle of distributing or making available for distribution prizes on a fair and random basis should be maintained but it recognises that the requirement to obtain an independently audited statement for each instant-win promotion is an onerous requirement for promoters that offer several instant-win promotions.

- 8.49** Instead of requiring an independently audited statement for each instant-win promotion, CAP considers it is proportionate and effective to require promoters of instant-win promotions to ensure that the 'process' of allocating prizes has been verified by a suitably independent party to be secure, fair and random and that that process can be and, for national promotions must be, independently audited. CAP considers that requirement takes into account the practical difficulties that promoters face in complying with the present rule but ensures that a high level of consumer protection is maintained. The proposed requirement may promote early detection of compliance issues, so the issues can be rectified by the promoter before any consumer detriment occurs.
- 8.50** CAP considers it is appropriate that national promotions must be audited to ensure compliance with the process in order that participants are dealt with fairly and that the process of allocation is random, fair and secure. CAP considers it is not reasonable to extend the auditing requirement to all promotions of this type because of the disproportionate drain of resources to small and medium sized promoters.
- 8.51** CAP proposes this text for rule:

8.25

Participants in instant-win promotions must get their winnings at once or know immediately what they have won and how to claim without delay, cost or administrative barriers. Instant-win tickets, prizes, tokens or numbers must be allocated by a process which has been verified by a suitable independent party, to be secure, fair and random and that can be, and for national promotions must be, independently audited.

Question 24

i) Do you agree that the present requirement, in CAP rule 35.8, for a promoter to obtain an independently audited statement that all prizes have been distributed, or made available for distribution on a fair and random basis is disproportionate and should not therefore be included in the Code? If your answer is no, please explain why?

ii) Given CAP's policy consideration, do you agree that rule 8.25 should be included in the Code? If your answer is no, please explain why.

Judging of prize promotions

- 8.52** Present rule 39.5f states:

... If the selection of winning entries is open to subjective interpretation, an independent judge, or a panel including one member who is independent of the competition's promoters and intermediaries, should be appointed. Those appointed to act as judges should be competent to judge the subject matter of the competition. The full names of judges should be made available on request

- 8.53** The independence of a judge or a panel that selects winning entries on the basis of a subjective interpretation is fundamental to maintaining consumer confidence in those prize promotions. CAP considers that independence from the competition's promoters and intermediaries is not sufficient. It proposes that the judge or panel should also be independent of the pool of entrants from which the eventual winner is picked.

8.54 CAP proposes this wording for:

8.26

In competitions, if the selection of a winning entry is open to subjective interpretation, an independent judge, or a panel that includes at least one member who is demonstrably independent, especially from the competition's promoters and intermediaries and from the pool of entrants from which the eventual winner is picked, must be appointed. Those appointed to act as judges should be competent to judge the competition and their full names must be made available on request.

Question 25

Given CAP's policy consideration, do you agree that rule 8.26 should be included in the Code? If your answer is no, please explain why.

Receipt of prizes: time

8.55 Present rule 35.9c states that prize promotions should specify, before or at the time of entry, when prizewinners will receive their prizes if that is to be more than six weeks after the promotion's closing date.

8.56 CAP proposes that the time limit should be reduced from 6 weeks (i.e. 42 days) down to 30 days. CAP understands that 30 days more accurately reflects industry practice and is likely to be more in keeping with consumers' expectations.

8.57 CAP proposes this wording for:

8.23.3

prize promotions must specify before or at the time of entry: if more than 30 days after the closing date, the date prizewinners will receive their prizes.

Question 26

Given CAP's policy consideration, do you agree that rule 8.23.3 should be included in the Code? If your answer is no, please explain why.

Appeal to children

8.58 Present rule 37.1 (i) states:

Promotions run by third parties (eg commercial companies) claiming that participation will benefit registered charities or causes should:

take particular care when appealing to children

8.59 Practice 28 of Schedule 1 of the Consumer Protection from Unfair Trading Regulations 2008 bans:

Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.

- 8.60** In keeping with its general policy objectives and to help compliance with the Code's general requirement that marketing communications must comply with the law, CAP proposes this revised wording:

8.33

Promotions run by third parties (for example commercial companies) claiming that participation will benefit a registered charity or cause must:

8.33.9

not directly encourage children to buy, or exhort children to persuade an adult to buy for them, a product that promotes charitable purposes.

Question 27

Given CAP's policy consideration, do you agree that rules 8.33 and 8.33.9 correctly updates present rule 37.1(i) to reflect the CPRs? If your answer is no, please explain why.

Deleted rules

- 8.61** None

Other questions

Question 28

i) Taking into account CAP's general policy objectives, do you agree that CAP's Sales Promotions rules are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Sales Promotions rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 - Section 9

Distance Selling

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

The law

Consumer Protection (Distance Selling) Regulations 2000 (as amended) (DSRs)

- 9.1 The Regulations set out detailed requirements for distance selling. They require traders to provide certain information to consumers and oblige traders to provide refunds on cancelled orders in certain circumstances.
- 9.2 The DSRs implement European Directive 97/7/EC.
- 9.3 You can read the text of the Regulations at:
[www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=Consumer+Protection+\(Distance+Selling\)+Regulations+2000+&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=2658599&PageNumber=1&SortAlpha=0](http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=Consumer+Protection+(Distance+Selling)+Regulations+2000+&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=2658599&PageNumber=1&SortAlpha=0)

Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

- 9.4 Distance selling advertisements, like all other business-to-consumer marketing communications, must comply with the CPRs. The CPRs forbid advertisers from using misleading, aggressive or unfair sales techniques, which are defined in the Regulations and specific prohibitions on certain practices that are deemed to be unfair in all circumstances.
- 9.5 The CPRs implement European Directive 2005/29/EC.
- 9.6 You can read the text of the CPRs at:
www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3480871

Business Protection from Misleading Marketing Regulations 2008 (BPRs)

- 9.7 Business-to-business marketing and comparative advertisements must comply with the BPRs. The BPRs prohibit advertising that is misleading to the traders to whom it is addressed or that injures or is likely to injure a competitor.
- 9.8 The BPRs implement European Directive 2006/114/EC.
- 9.9 You can read the text of the BPRs at:
www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3480825

Recent changes to this section of the CAP Code

- 9.10 The CPRs and the BPRS (see above) came into force on 26 May 2008. Marketing communications are a form of trading practice and are therefore subject to the CPRs and the BPRs. CAP amended its Codes to ensure that they were in line with the new legal requirements. The amended Codes came into force on 21 November 2008. Please see:

www.cap.org.uk/cap/news_events/news/2008/News+Story+CPRs+and+the+Codes.htm

9.11 and

www.cap.org.uk/cap/news_events/news/2008/BCAP+Consultation+The+Regulation+of+Unfair+Commercial+Practices+in+TV+and+Radio+Advertisements.htm

Other relevant regulatory bodies

Office of Fair Trading (OFT) and Trading Standards Authorities

- 9.12** Primary responsibility for enforcing the Consumer Protection (Distance Selling) Regulations 2000 (DSRs) (as amended) lies with Trading Standards organisations and the Office of Fair Trading.
- 9.13** If certain types of marketing communication, including those that are misleading, continue to appear after the ASA Council has ruled against them, the ASA can refer the matter to the OFT for action under the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008. The OFT can seek an undertaking from anyone responsible for commissioning, preparing or disseminating a marketing communication that it will be stopped. If that undertaking is not given or is not honoured, the OFT can seek an injunction from the Court to prevent its further appearance. Anyone not complying can be found to be in contempt of court and is liable to be penalised accordingly.
- 9.14** The OFT and other 'qualified entities', such as Trading Standards Authorities, can use the Enterprise Act 2002 Part 8 to enforce consumer protection laws, including the CPRs and the BPRs. Those regulations provide that qualified entities should have regard to the desirability of encouraging control by the 'established means' before taking action themselves.
- 9.15** For more information on the OFT see: www.oft.gov.uk/
- 9.16** For more information on Trading Standards Authorities see: www.tradingstandards.gov.uk/

PhonePay Plus

- 9.17** Some distance selling contracts are also regulated by other bodies. Services provided on premium-rate telephone lines must comply with the PhonePay Plus Code as well as the DSRs. You can read about PhonePay Plus at www.phonepayplus.org.uk/.

The Financial Services Authority

- 9.18** Contracts for financial products are not subject to the DSRs. The Financial Services Authority regulates the advertising and distance selling of some financial services under the Financial Services and Markets Act 2000 and the Financial Services and Markets Act (Financial Promotion) Order 2005 (as amended). See Section 14, Financial Products for more information about the work of the Financial Services Authority.

SHOPS

- 9.19** The national newspapers operate the Safe Home Ordering Protection Scheme (SHOPS), which provides refunds, in some circumstances, to consumers who respond to distance-selling advertisements in national newspapers but do not receive the ordered goods. You can read about SHOPS at www.shops-uk.org.uk/default.asp.

Other relevant regulatory bodies

- 9.20** Bodies that play a part in regulating a marketing communication of relevance to this section but are not conferred with legal functions to do so include the Direct Marketing Association (www.dma.org.uk) and the Direct Marketing Commission (www.dmcommission.com).

Meeting the need to ensure that distance selling marketing communications are transparent, do not mislead the consumer or otherwise treat them unfairly

- 9.21** Distance selling contracts are those that are concluded through an organised scheme without the seller and the consumer meeting face-to-face; they might be contracts for the sale of goods (for example, products sold through a mail-order catalogue) or contracts for the provision of services through distance communication (for example, helpline advice provided on a premium rate telephone number). The DSRs set out information that sellers must provide to consumers before the contract is formed as well as setting out the responsibilities of the buyer and seller after the contract is formed.
- 9.22** The present CAP Code has proved effective. In the absence of significant legislative or social changes within the area covered by the CAP Code, CAP proposes no significant changes to the present Code.
- 9.23** The present CAP Code incorporates many of the DSRs' requirements. It is intended to operate alongside the law; the Code is not intended as a substitute for the law but the inclusion of key legal requirements allows the ASA to take action to secure consumers' rights as an alternative to consumers taking legal action.
- 9.24** Some of the DSRs' requirements included in the Code relate to the marketer's conduct outside marketing communications. For example, the Code requires marketers to provide certain information at the latest at the time the contract is concluded or services begin: that information might be given in a marketing communication or in information that accompanies the contract. The Code also sets out circumstances in which marketers must provide refunds. Clauses in other sections of the CAP Code apply only to the marketer's conduct before a contract is formed. The wider scope of the Distance Selling section is unusual but has enabled the ASA to take effective action on behalf of consumers to ensure they receive the products they have ordered or refunds to which they are entitled.

Proposed substantive changes

New rules

- 9.25** None.

Revised rules

- 9.26** None.

Deleted rules

Personal visits

- 9.27** Present CAP rule 42.7 states:

If marketers intend to call on respondents personally, this should be made clear in the marketing communication or in a follow-up mailing. To allow consumers an adequate opportunity to refuse a personal visit, marketers should provide a reply-paid postcard or Freephone telephone contact instructions.

- 9.28** CAP notes that data protection law requires marketers to tell consumers how they intend to use the personal data supplied by the consumer. If the marketer intends to send a representative to visit the consumer, that should be made clear when the consumer's address information is collected. Consumers are therefore afforded the opportunity to refuse a personal visit. The ASA has received no complaints about personal calls from sales representatives in the last four years, which suggests that consumers do not look to the ASA to ensure they are protected from unexpected calls from sales representatives. For those reasons and because the rule has little bearing on consumers' perception of distance selling advertisements CAP proposes not to include 42.7 in the proposed Code.

Question 29

Given CAP's policy consideration, do you agree present rule 42.7 should not be included in the proposed Code? If your answer is no, please explain why.

The packaging of products that might fall into the hands of children

- 9.29** The Code presently states:

42.8

Marketers should take particular care when packaging products that might fall into the hands of children.

- 9.30** That rule is intended to capture packages that form part of a marketing communication. To the extent that those marketing communications are promotional, that rule is duplicated by:

8.8

Special care should be taken with promotions addressed to children or if products or items intended for adults might fall into the hands of children.

- 9.31** If packages that form part of marketing communications are not sales promotions, rule 42.8 is adequately covered by:

1.3

Marketing communications must be prepared with a sense of responsibility to consumers and to society.

- 9.32** Because it considers that rule 42.8 of the present Code is adequately covered by rules in the proposed Code, CAP proposes not to include it in the new Code.

Question 30

Given CAP's policy consideration, do you agree that present rule 42.7 should not be included in the Code? If your answer is no, please explain why.

Other questions

Question 31

i) Taking into account CAP's policy consideration, do you agree that CAP's rules on Distance Selling are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from

the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 – Section 10

Database practice

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

The law

Data Protection Act 1998 (DPA)

- 10.1** Directive 95/46/EC harmonises data protection law throughout the EU, regulating the processing of personal data in order to allow that data to travel more easily from one member state to another. The UK reflected that Directive through the DPA, which include the data protection principle that processing of personal data should be fair and lawful and it also gives the consumer the right to prevent processing of his or her data for the purposes of direct marketing.
- 10.2** Please see: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3190610

Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR)

- 10.3** PECR includes regulations for those who conduct marketing by electronic means: it includes requirements for the security and confidentiality of services, automated calling systems, unsolicited calls and the use of faxes.
- 10.4** Please see: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=859396

The Electronic Commerce (EC Directive) Regulations 2002

- 10.5** These Regulations implement the Electronic Commerce (E-Commerce) Directive, which was adopted in 2000 by the EU. The Directive establishes harmonised rules on issues including transparency and information requirements for online service providers, electronic contracts and commercial communications. It was incorporated in UK law in 2002 by statutory instrument. The Regulations include:

Commercial communications

7. A service provider shall ensure that any commercial communication provided by him and which constitutes or forms part of an information society service shall -

be clearly identifiable as a commercial communication;

(b) clearly identify the person on whose behalf the commercial communication is made;

(c) clearly identify as such any promotional offer (including any discount, premium or gift) and ensure that any conditions which must be met to qualify for it are easily accessible, and presented clearly and unambiguously; and

(d) clearly identify as such any promotional competition or game and ensure that any conditions for participation are easily accessible and presented clearly and unambiguously.

- 10.6** Please see: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=1585643

Consumer Protection from Unfair Trading Practices Regulations 2008 (CPRs)

- 10.7** On 26 May 2008 the CPRs came into force. The CPRs prohibit unfair trading practices and identify misleading and aggressive practices as forms of unfair practice. As marketing communications are a form of trading practice they are subject to the CPRs. Schedule 1 of the CPRs contains a list of commercial practices that are in all circumstances considered unfair, this includes number 26, below, which rule 10.4 reflects in this section.

Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified to enforce a contractual obligation.

- 10.8** Please see: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3480871

Other relevant regulatory bodies

Information Commissioner's Office (ICO)

- 10.9** The Information Commissioner's Office is the UK's independent authority set up to promote access to official information and to protect personal information. It provides advice to consumers and to business on rights and obligations set out in the Data Protection Act, the Freedom of Information Act, Environmental Information Regulations and the Privacy and Electronic Communications Regulations/
- 10.10** For more information see: www.ico.gov.uk

Article 29 Data Protections Working Party ('the Working Party')

- 10.11** The Working Party has been established by Article 29 of Directive 95/46/EC. It is the independent EU Advisory Body on Data Protection and Privacy. Its tasks are laid down in Article 30 of Directive 95/46/EC and in Article 14 of Directive 97/66/EC. The Working Party was set up to achieve several primary objectives: to provide expert opinion from member state level to the Commission on questions of data protection; to promote the uniform application of the general principles of the Directives in all Member States through co-operation between data protection supervisory authorities; to advise the Commission on any Community measures affecting the rights and freedoms of natural persons with regard to the processing of personal data and privacy; to make recommendations to the public at large, and in particular to Community institutions on matters relating to the protection of persons with regard to the processing of personal data and privacy in the European Community.
- 10.12** For more information see: http://ec.europa.eu/justice_home/fsj/privacy/workinggroup/index_en.htm
- 10.13** Other bodies that play a part in regulating a marketing communication or a product or service of relevance to this section but are not conferred with legal functions to do so include: The Direct Marketing Association UK (DMA) (www.dma.org.uk).

Recent changes to this section of the CAP Code

- 10.14** The Consumer Protection from Unfair Trading Practices Regulations 2008 (CPRs) came into force on 26 May 2008. Marketing communications are a form of trading practice and are therefore subject to the CPRs. CAP amended its Code to ensure that it was in line with the new legal requirements. The amended Codes came into force on 24 June 2008 and included changes to the Database Practice section. Please see:

www.cap.org.uk/cap/news_events/news/2008/News+Story+CPRs+and+the+Codes.htm

Meeting the need to regulate marketers' use of personal data

- 10.15** The CAP Code has reflected law on marketers' use of personal data since 1984 when the UK's first Data Protection Act (DPA) was introduced. CAP has updated this section as necessary when legal changes have occurred.
- 10.16** Most of the rules in this section are derived from the PECR. PECR's relevant provisions to CAP's Database Practice section include: Regulation 19, Use of automated calling systems; Regulation 20, Use of facsimile machines for direct marketing purposes; Regulation 21, Unsolicited calls for direct marketing purposes; regulation 22, Use of electronic mail for direct marketing purposes; Regulation 23, Use of electronic mail for direct marketing purposes where the identity or address of the sender is concealed and Regulation 24, Information to be provided for the purposes of regulations 19, 20 and 21.
- 10.17** Rule 10.4 has been updated to take account of the CPRs and rule 10.6 reflects provisions in the E-Commerce Directive. Rules 10.7, 10.13 and 10.14 broadly mirror those requirements of PECR, as does the definition of 'electronic mail' in this section.
- 10.18** CAP proposes to reflect the guidance of the ICO by codifying its view on collecting information from children for marketing purposes.

Proposed substantive changes

New rules

Collection of data from children

- 10.19** The ICO's guidance states:

Information should not be collected from children under 12 without first obtaining the permission of a parent or guardian. Personal data about adults should not be collected from children (based on a definition of a child as a person aged 16 or under).

- 10.20** CAP understands that that guidance does not reflect any specific legislative requirements. Nevertheless, CAP is aware of concerns about the collection and use of personal data on children under 12 years of age and therefore proposes to reflect that guidance in the Code. CAP considers it is appropriate to restrict the collection of personal data from children under 12 because research indicates that after eleven or twelve children can articulate a critical understanding of advertising and know, for example, that advertising can have the intent to persuade⁴.
- 10.21** CAP considers that the concern underpinning the ICO's guidance that children should not be used to collect personal data about adults equally applies to personal data about other children.
- 10.22** CAP proposes these two rules:

10.15

Marketers must not knowingly collect personal information for marketing purposes from children under 12 about themselves without first obtaining the consent of their parent or guardian.

10.16

Marketers must not knowingly collect personal information about other people from children under 16.

Question 32

Given CAP's policy consideration, do you agree that rules 10.15 and 10.16 should be included in the Code? If your answer is no, please explain why.

Revised rules

Explicit consent of consumers: Bluetooth

10.23 Present rule 43.4 (c) states:

The explicit consent of consumers is required before:

c) sending marketing communications by e-mail or to mobile devices...

10.24 That rule reflects Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR). Rule 43.4 (c) was written without CAP's explicit consideration as to whether it should apply to marketing communications 'broadcast' by Bluetooth technology⁵ to mobile devices. The broadcast nature of Bluetooth marketing communications does not necessarily discriminate between potential recipients; it's more akin to a one-to-many communication and not a one-to-one communication.

10.25 PECR does not cover Bluetooth⁶, however, and so marketers are not required by law to obtain the explicit consent of consumers before sending marketing communications by Bluetooth technology. CAP has considered whether its Code should go beyond the law in requiring Bluetooth marketers to comply with the restriction set out in 43.4 (c).

10.26 Anecdotal information suggests that the vast majority of mobile telecommunications devices with Bluetooth technology do not, as a factory setting, have Bluetooth activated. Those devices cannot therefore receive a Bluetooth marketing communication unless the Bluetooth function is manually activated. If the Bluetooth function has been activated, the consumer has the option to employ other security settings to filter or deny Bluetooth in-bound communications. On balance, CAP considers consumers make an informed choice to potentially receive marketing communications broadcast via Bluetooth and it is, therefore, disproportionate to extend the 'explicit consent requirements' of PECR to Bluetooth marketers; that proposal is reflected in:

10.13

The explicit consent of consumers is required before:

10.13.3

sending marketing communications by electronic mail (excluding by Bluetooth technology) but marketers may send unsolicited marketing about their similar products to those whose data they have obtained during, or in negotiations for, a sale. Data marketers must, however, tell those consumers they may opt-out of receiving future marketing communications both when they collect the data and at every subsequent occasion they send out marketing communications. Marketers must give consumers a simple means to do so.

10.6

Marketing communications sent by electronic mail (but not those sent by Bluetooth technology) must contain the marketer's full name and a valid address, for example an e-mail address or a SMS short code to which recipients can send opt-out requests.

⁵ Bluetooth technology provides a way to connect and exchange information between devices, such as mobile phones or laptops over a secure, globally unlicensed short-range radio frequency. Bluetooth enables those devices to communicate with each other when they are in range.

⁶ www.ico.gov.uk/upload/documents/pressreleases/2007/bluetooth.pdf

- 10.27** For the avoidance of doubt, marketing communications sent by Bluetooth marketing communications are otherwise covered by the CAP Code.

Question 33

Given CAP's policy consideration, do you agree rules 10.13.3 and 10.6 should explicitly exempt marketing communications sent by Bluetooth technology? If your answer is no, please explain why.

Deleted rules

- 10.28** None.

Other questions

Question 34

i) Taking into account CAP's general policy objectives, do you agree that CAP's Database Practice rules are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Database Practice rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 – Section 11

Environmental Claims

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

Other relevant regulatory bodies

Ofgem

- 11.1** Ofgem's responsibilities include protecting consumers by promoting competition, wherever appropriate, and regulating the monopoly companies which run the gas and electricity networks. Under Section 5 of the Energy Act 2008, Ofgem must contribute to the achievement of sustainable development to protect the interests of consumers now and in the future.⁷ Ofgem has published guidelines on how suppliers should market green electricity tariffs that will form the basis for an independent accreditation scheme for those tariffs.
- 11.2** For more information please see: www.ofgem.gov.uk/Pages/OfgemHome.aspx
- 11.3** Readers should note that the Department for Environment, Food and Rural Affairs (Defra) has published the Green Claims Code, which sets out the standard of information that the public can expect to be given about the environmental impacts of consumer products and incorporates the international standard on environmental claims, ISO 14021, which has been developed by standards bodies around the world.
- 11.4** Defra also produce 'Green Claims – Practical Guidance. How to make a good environmental claim', which is available at:
www.defra.gov.uk/environment/consumerprod/pdf/genericguide.pdf

Meeting the need to ensure that environmental claims in marketing communications are responsible and do not mislead

- 11.5** The CAP Code has had a dedicated section on environmental claims since the ninth edition of the Code came into force in February 1995. The rules provide robust support to high standards in environmental advertising and have been amended only once since they were introduced, to include the concept of the full life cycle of a product. They seek to ensure that environmental claims do not mislead, but they are housed separately from the 'Misleading' Section because CAP considers that rules on environmental claims are needed not only to prevent adverse effects on consumers' transactional decisions but also to prevent socially irresponsible advertising.
- 11.6** For example, the claim 'all our bags are biodegradable', if it was not true, would be objectionable not only on the grounds that it might cause environmentally-concerned consumers to choose that shop, which would be misleading, but also on the grounds that it might cause consumers to throw the bags away in the countryside, which would constitute social harm.
- 11.7** CAP notes that, because both the politics and the technology in this area are developing quickly, rules that relate to specific concerns tend to become quickly out-of-date. CAP considers that the Environmental Claims clauses should include general principles but should avoid overly-prescriptive rules and that Help Notes or Guidance are more suitable for giving up-to-date advice on specific environmental topics. This principle-based approach has been vindicated by the successful application of the rules since they came into force fourteen years ago.

⁷ www.ofgem.gov.uk/Media/FactSheets/Documents1/greentariffsfs.pdf

Proposed substantive changes

New Rule

11.8 CAP proposes one new rule for this section:

11.7

Marketing communications must not mislead consumers about the environmental benefit that a product offers; for example, by highlighting the absence of an environmentally damaging ingredient if that ingredient is not usually found in competing products or by highlighting an environmental benefit that results from a legal obligation if competing products are subject to that legal obligation.

11.9 The rule is intended to apply to all advertisements and not only those that refer to a competitor's product. The rule highlights particular examples of false environmental benefits that a marketing communication might claim for a product.

Question 35

Given CAP's policy consideration, do you agree that rule 11.7 should be included in the Code? If your answer is no, please explain why.

Other questions

Question 36

i) Taking into account CAP's general policy objectives, do you agree that CAP's rules on Environmental Claims are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 – Section 12

Medicines, Treatments, Devices and Health

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

The Law

Medicines Act 1968

- 12.1** The Medicines Act governs the manufacture and supply of medicine. The Act introduces three categories of medicine: prescription only drugs, which are available only from a pharmacist if prescribed by a doctor or a dentist; pharmacy medicines, available only from a pharmacist but without a prescription; and general sales medicine which may be bought from any shop without a prescription. It makes possession of prescription drugs without a prescription an offence. See the full text of the Act at: www.statutelaw.gov.uk/content.aspx?activeTextDocId=1662209

Medicines (Advertising) Regulations 1994 and The Medicines (Monitoring of Advertising) Regulations 1994, both as amended.

- 12.2** Under Regulation 5 of The Medicines (Monitoring of Advertising) Regulations 1994 (as amended) the ASA is the established self-regulatory body authorised to deal with complaints about non-broadcast advertisements within this sector. It works closely with the MHRA in that respect. The Regulations implement Title VIII of Directive 2001/83/EC on the advertising of medicines for human use.
- 12.3** Link to the Medicines (Advertising) Regulations:
www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3125011
- 12.4** Link to the Medicines (Monitoring of Advertising) Regulations 1994:
www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3124984
- 12.5** There are other regulations that are relevant to this section, for example: the Medicines for Human Use (Marketing Authorisations Etc) Regulations 1994 (as amended), Medicines (Labelling and Advertising to the Public) Regulations 1978 (as amended), the Medicines (Traditional Herbal Medicinal Products for Human Use) Regulations 2005 and the Medical Devices Regulations 2002 (as amended).

Other relevant regulatory bodies

Department of Health (DH)

- 12.6** The work of the Department includes setting national standards, shaping the direction of health and social care services and promoting healthier living. Please see: www.dh.gov.uk

Healthcare Commission

- 12.7** The Healthcare Commission is the independent inspection body for both the NHS and independent healthcare. Please see: www.healthcarecommission.org.uk

Medicines and Healthcare products Regulatory Agency (MHRA)

- 12.8** The MHRA is the government agency which is responsible for ensuring that medicines and medical devices work, and are acceptably safe.

Medicines

- 12.9** The MHRA works with other statutory regulators and self-regulatory bodies to ensure advertising fully complies with EC and UK medicines law. They include:
- Advertising Standards Authority (general advertising).
 - Proprietary Association of Great Britain (over-the-counter medicines).
 - Prescription Medicines Code of Practice Authority (prescription medicines).
- 12.10** The advertising of medicines is controlled by a combination of statutory measures (with both criminal and civil sanctions), enforced by the MHRA and self-regulation through Codes of Practice for the pharmaceutical industry, administered by trade associations. The MHRA as Licensing Authority has a statutory duty on behalf of Ministers to consider breaches of The Medicines Act 1968 and Regulations on the promotion of medicines. Please see: www.mhra.gov.uk

European Medicines Agency (EMA)

- 12.11** The EMA is a European body; its main responsibility is the protection and promotion of public and animal health, through the evaluation and supervision of medicines for human and veterinary use. One of its responsibilities is the scientific evaluation of applications for European marketing authorisation for medicinal products (centralised procedure). Under the centralised procedure, companies submit a single marketing authorisation application to the EMA. Once granted by the European Commission, a centralised (or 'Community') marketing authorisation is valid in all European Union (EU) and EEA-EFTA states (Iceland, Liechtenstein and Norway). Please see:

www.ema.europa.eu/home.htm

Prescription Medicines Code of Practice Authority (PMCPA)

- 12.12** The Prescription Medicines Code of Practice Authority (PMCPA) administers The Association of the British Pharmaceutical Industry's (ABPI) Code of Practice at arm's length from the ABPI. Please see: www.pmcpa.org.uk/
- 12.13** Bodies that play a part in regulating a marketing communication of relevance to this section but are not conferred with legal functions to do so include: Proprietary Association of Great Britain, www.pagb.co.uk; Cosmetics, Toiletries and Perfumery's Association, www.thefactsabout.co.uk; Association of the British Pharmaceutical Industry: (www.abpi.org.uk); Association of British Healthcare Industries: (www.abhi.org.uk); Independent Healthcare Advisory Services: (www.independenthealthcare.org.uk/joomla/index.php).

Meeting the need to regulate non-broadcast marketing communications for products and services that fall within this section

- 12.14** The Code includes general rules that marketing communications must not mislead, harm or offend. In the case of medicines, the Medicines (Advertising) Regulations 1994 (as amended) include provisions that ensure the audience is not misled or harmed by marketing communications for those products. Additionally, there is a need to ensure advertising for this sector operates on a level playing field and the safety and efficacy of products are maintained at a high level.

- 12.15** Both the present and proposed CAP rules on Medicines, Medical Devices, Treatments, and Health principally reflect the law. The Medicines (Advertising) Regulations 1994 as amended set out practices that are prohibited in marketing communications for medicinal products. Those practices are addressed by these rules: 12.2, 12.5, 12.9, 12.10, 12.13, 12.14, 12.15, 12.16, 12.17 and 12.18.

Proposed substantive changes

New Rules

Traditional Herbal Medicinal Products

- 12.16** 'Registered traditional herbal medicines' are required to meet specific standards of safety and quality⁸. To obtain a marketing authorisation, 'Licensed herbal medicines' are also required to meet standards of safety and quality, but they must also demonstrate efficacy (or effectiveness) borne out through clinical trials. (Please see the MHRA's guide to 'Placing a herbal medicine on the UK market' for more information about the different regulatory status of those herbal medicines⁹.) To reflect that difference in requirements and to ensure that consumers are not misled, CAP proposes:

12.20

Marketers of traditional herbal medicines may advertise for the indications listed in the product's summary of product characteristics. Marketing communications for products that hold a Traditional Herbal Medicines Registration must not imply that registration is based upon clinical trials.

Question 37

Given CAP's policy consideration, do you agree that rule 12.20 should be included in the Code? If your answer is no, please explain why.

Revised Rules

Medicinal claims

- 12.17** The present CAP Codes restrict medicinal claims to marketing communications for products that are 'licenced' under the Medicines Act 1968 only. However, marketing communications for medical devices that contain medicinal substances that act on the body in a manner ancillary to the device may also make medicinal claims. Importantly, those products are not granted 'authorisation' by the MHRA and therefore by the letter of the present CAP rule 50.11, marketing communications for those products may not make medicinal claims. CAP considers that is an unintended and unwarranted restriction and, having taken advice from the MHRA, propose to revise existing rule 50.11.

⁸ As required by the European Directive on Traditional Herbal Medicinal Products (2004/24/EC).

⁹

<http://www.mhra.gov.uk/Howweregulate/Medicines/Herbalandhomoeopathicmedicines/Herbalmedicines/PlacingaherbalmedicineontheUKmarket/index.htm>

12.18 CAP's proposed rule is:

12.1

Objective claims made about health-related or beauty products must be backed by evidence, if relevant consisting of trials conducted on people. If relevant, the rules in this Section apply to claims for products for animals. Substantiation will be assessed on the basis of the available scientific knowledge.

Medicinal claims may be made for a medicinal product that is licensed by the MHRA or EMEA, or a medical device that contains medicinal substances that act on the body in a manner ancillary to the device only. A medicinal claim is a claim that a substance or combination of substances can be used with a view to making a medical diagnosis or can treat or prevent disease, including an injury, ailment or adverse condition, whether of body or mind, in humans beings by restoring, correcting or modifying physiological functions by exertion of a pharmacological, immunological or metabolic action.

Question 38

Given CAP's policy consideration, do you agree that rule 12.1 should be included in the proposed CAP Code? If your answer is no, please explain why.

Deleted Rules

12.19 None.

Other Questions

Question 39

i) Taking into account CAP's general policy objectives, do you agree that CAP's rules, included in the proposed Medicines, Treatments, Devices and Health Section are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Medicines, Treatments, Devices and Health rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 – Section 13

Weight Control and Slimming

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

The law

Foods Intended for Use in Energy Restricted Diets for Weight Reduction Regulations 1997 (as amended)

- 13.1 The Regulations govern foods intended for use in energy-restricted diets for weight reduction. Regulation 4 includes provisions on advertising.
- 13.2 See the full text of the regulations at:
www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=Foods+Intended+for+Use+in+Energy+Restricted+Diets+for+Weight+Reduction+Regulations+1997+&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=2871712&PageNumber=1&SortAlpha=0
- 13.3 The Food for Particular Nutritional Uses (Miscellaneous Amendments) (England) Regulations 2007 (**regulation 3(2)**) has amended the Foods Intended for Use in Energy Restricted Diets for Weight Reduction Regulations 1997 (as amended), removing the prohibition on selling certain foods where the labelling, advertising or presentation of that food refers to a reduction in the sense of hunger or an increase in the sense of satiety.

Food Safety Act 1990

- 13.4 The Act provides the framework for all food legislation in Great Britain – similar legislation applies in Northern Ireland.
- 13.5 See the text of the regulations, including provisions relating to advertising at:
www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=Food+Safety+Act+1990+&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=1695410&PageNumber=1&SortAlpha=0

(EC) Regulation 1924/2006 on Nutrition and Health claims made on Foods (NHCR)

- 13.6 The NHCR is the first piece of specific legislation to deal with nutrition and health claims made on foods and seeks in much more specific terms to protect consumers from misleading, false or ambiguous claims. It harmonises legislation across the European Community making it easier to trade and aids food business operators in complying with the law. The NHCR includes many general and specific provisions that are directly relevant to marketing communications that include nutrition or health claims made on foods.
- 13.7 See the text of the NHCR at: eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_012/l_01220070118en00030018.pdf

Changes to this section of the CAP Code

EC Regulation 1924/2006 on Nutrition and Health Claims Made of Foods (NHCR)

- 13.8** Earlier this year, CAP introduced changes to its Code as a result of the NHCR. Changes were considered necessary to ensure the present Code does not conflict with the NHCR. CAP did not consult on those changes, preferring to publish its amendments as soon as possible to help the advertising industry to comply with the new legal provisions. Because they reflect the law, CAP's revised rules came into immediate effect on 19 January 2009.
- 13.9** BCAP has consulted on proposed amendments to the equivalent rules in its broadcast Codes but it did not have the time to announce the outcome of its consultation before the publication of this consultation document. If the outcome of that consultation merits a change to CAP's rules, CAP has undertaken to reflect those changes to its present and proposed Code.
- 13.10** Further details on BCAP's consultation on the Regulation of Nutrition and Health Claims made on Foods in Television and Radio Advertisements and changes to the CAP Code to take account of the NHCR can be found here:
www.cap.org.uk/cap/news_events/news/2008/Nutrition+and+Health+Claims+Regulation.htm

Meeting the need to regulate marketing communications for products and services that fall within this section

- 13.11** Marketing communications for weight control and slimming products have the potential to harm, mislead or be irresponsible. The Weight Control and Slimming rules ensure that claims in marketing communications do not mislead and claims made on foods are in line with the law. Marketing communications must be responsible and avoid the potential for harm by not appealing particularly to under 18s and people that are underweight or regard being underweight as desirable. The ban on targeting the obese (unless the advertised product is provided under suitably qualified medical supervision) compliments CAP's policy that marketing communications should not discourage essential treatment for conditions for which medical supervision should be sought, for example, by offering treatment for such conditions (see rule 12.2).
- 13.12** Rule 13.10.1 derives from the NHCR and rule 13.7 from the Foods Intended for Use in Energy Restricted Diets for Weight Reduction Regulations 1997 (as amended).
- 13.13** Because they could be relevant for marketing communications for slimming or weight control products, the rules on those products cross-refer the reader to section 12, Medicines, treatments, devices and health and section 15, Food, dietary supplements and associated health or nutrition claims.

Proposed substantive changes

New rules

- 13.14** None.

Revised rules

Targeting the obese

- 13.15** People who are obese, which the Code defines as people with a body mass index of 30 or above, might have other chronic conditions such as diabetes or coronary heart disease, which would render some slimming or weight control products and services unsuitable for them. In recognition of that fact, the present Code (rule 51.2) states that only treatments for obesity under suitably qualified supervision

may be advertised to the public. That policy ensures that people who respond to those marketing communications are appropriately assessed to gauge their suitability for the treatment at each stage of the treatment and thereby avoid, as far as possible, the potential for harm. In keeping with that policy, CAP proposes to allow marketing communications for non-prescription medicines that are indicated for obesity and that require the involvement of a pharmacist in the sale or supply of the medicine to target people who are obese.

13.16 CAP's proposed rule is:

13.2

Obesity in adults is defined by a Body Mass Index (BMI) of more than 30 kg/m². Obesity is frequently associated with a medical condition and a treatment for it must not be advertised to the public unless it is to be used under suitably qualified supervision. Marketing communications for non-prescription medicines that are indicated for obesity and that require the involvement of a pharmacist in the sale or supply of the medicine may nevertheless be advertised to the public.

Question 40

Given CAP's policy consideration, do you agree it is justified to allow marketing communications for non-prescription medicines that are indicated for obesity and that require the involvement of a pharmacist in the sale or supply of the medicine to target people who are obese? If your answer is no, please explain why?

Loss of weight or fat from specific parts of the body

13.17 The present Code (rule 51.9) states that marketing communications should not state that weight or fat can be lost from specific parts of the body. CAP considers that rule unjustifiably and possibly unintentionally restricts marketing communications for surgical clinics, establishments and the like that can remove fat from specific parts of the body from making those claims. CAP proposes to exempt those advertisers from the ban on marketing communications making claims about loss of weight or fat from specific parts of the body but it proposes to prohibit those advertisers from making claims about the amount of weight that can be lost. CAP considers amount of weight loss claims by those advertisers have the clear potential to be irresponsible.

13.18 CAP's proposed rule is:

13.9

Marketing communications must not contain claims that people can lose precise amounts of weight within a stated period or, except for marketing communications for surgical clinics, establishments and the like that comply with rule 12.3, that weight or fat can be lost from specific parts of the body.

13.9.1

Marketing communications for surgical clinics, establishments and the like that comply with rule 12.3 must not refer to the amount of weight that can be lost.

13.19 For readers' ease of reference, rule 12.3 states:

12.3

Marketers offering individual treatments, especially those that are physically invasive, may be asked by the media and the ASA to provide full details together with information about those who supervise and administer them. Practitioners must have relevant and recognised qualifications. Marketers should encourage consumers to take independent medical advice before committing themselves to significant treatments, including those that are physically invasive.

- 13.20** CAP considers the new restriction protects consumers and those advertisers whose reputation is put at risk by unscrupulous competitors.

Question 41

Given CAP's policy consideration, do you agree that marketing communications for surgical clinics, establishments and the like that can remove fat from specific parts of the body may make claims about losing weight or fat from specific parts of the body but that those advertisers must not refer to the amount of weight that can be lost? If your answer is no, please explain why?

Deleted rules

- 13.21** None

Other

Very Low-Calorie Diets (VLCDs)

- 13.22** The present Code states that marketers of VLCDs must have regard to the COMA report "The Use of Very Low Energy Diets" (1987). CAP understands that that report has been superseded by 'Obesity: the prevention, identification, assessment and management of overweight and obesity in adults and children (2006)¹⁰ published by the National Institute for Health and Clinical Excellence. CAP proposes to update the Code accordingly to ensuring the rule is relevant. The proposal does not change advertising policy and practice.
- 13.23** CAP's proposed rule is:

13.7

Marketers promoting Very Low Calorie Diets or other diets that fall below 800 kilo-calories a day must do so only for short-term use and must encourage users to take medical advice before embarking on them. Marketers should refer to the Guidance on "Obesity: the prevention, identification, assessment and management of overweight and obesity in adults and children" (2006) published by the National Institute for Health and Clinical Excellence.

Question 42

Given CAP's policy consideration, do you agree that rule 13.7 should reference 'Obesity: the prevention, identification, assessment and management of overweight and obesity in adults and children' (2006) published by the National Institute for Health and Clinical Excellence' and not Government COMA Report No.31, The Use of Very Low Calorie Diets? If your answer is no, please explain why?

¹⁰ <http://www.nice.org.uk/CG043>

Other questions

Question 43

i) Taking into account CAP's general policy objectives, do you agree that CAP's rules, included in the proposed Weight Control and Slimming Section are necessary and easily understandable? If your answer is no, please explain why?

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Weight Control and Slimming rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 – Section 14

Financial products

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

The law

Financial Services and Markets Act 2000 (FSMA) and Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (FPO) (as amended)

- 14.1** FSMA sets out the regulatory objectives of the Financial Services Authority (FSA); requires firms to be authorised to conduct regulated activities; and makes it a criminal offence to issue a financial promotion in the United Kingdom unless it is issued or approved by an authorised person or exempt by virtue of a provision of the Financial Services and Markets Act (Financial Promotion) Order 2005 (FPO) (as amended).
- 14.2** See the full text of FSMA at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=2927341
- 14.3** See the full text of the FPO at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=2308487
- 14.4** The FSA's Full Handbook includes several sourcebooks that set out requirements for different forms of financial advertising, such as the Conduct of Business Sourcebook (COBS), the New Insurance Conduct of Business Sourcebook (ICOBS) and the Mortgages and Home Finance: Conduct of Business sourcebook (MCOB). The Full Handbook may be found at:

fsahandbook.info/FSA/html/handbook/

Consumer Credit Act 1974 (as amended) and Consumer Credit (Advertisements) Regulations 2004 (as amended)

- 14.5** The Consumer Credit Act 1974 (as amended) and the Consumer Credit (Advertisements) Regulations 2004 (as amended) cover unsecured lending, other forms of secured lending and some other credit activities.
- 14.6** The Consumer Credit Act 1974 may be found at:
www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=436428
- 14.7** The Consumer Credit (Advertisements) Regulations 2004 (as amended) may be found at:
www.statutelaw.gov.uk/content.aspx?activeTextDocId=922823
- 14.8** The Consumer Credit Act 2006, which amended the 1974 Act, may be found at:
www.statutelaw.gov.uk/content.aspx?activeTextDocId=2459360

Insolvency Act 1986

- 14.9** This Act consolidates enactments relating to company insolvency and winding up. It introduced the Individual Voluntary Arrangement (IVA).
- 14.10** The Insolvency Act may be found at:
- www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=2519933

Banking Codes

- 14.11** The Banking Code is published by the British Bankers' Association (BBA), the Building Societies Association (BSA) and the Association for Payment Clearing Services (APACS). The Business Banking Code is published by the BBA and APACS. These two codes govern current accounts, savings accounts and deposit accounts (where capital is not subject to market risk), including cash and ISAs and cash deposit Child Trust Funds, and payment services, including foreign-exchange services, plastic cards, loans and overdrafts. The Codes require that all advertising and promotional material issued by institutions that subscribe to the Codes is 'clear, fair, reasonable and not misleading'.
- 14.12** The Banking Code may be found at:
- www.bankingcode.org.uk/pdfdocs/PERSONAL_CODE_2008.PDF
- 14.13** The Business Banking Code may be found at:
- www.bankingcode.org.uk/pdfdocs/BUSINESS_CODE_2008.PDF

Relevant regulatory bodies

Financial Services Authority (FSA)

- 14.14** The FSA is the regulator for the financial services industry and regulates conduct of business, including advertising, for investment products, including structured deposits where capital is subject to market risk. It also regulates the advertising of insurance, including the activities of insurance intermediaries (for example motor, home and travel insurers). It is responsible for the regulation of most first-charge mortgage lending and selling.
- 14.15** More information on the FSA can be found here: www.fsa.gov.uk/

Office of Fair Trading (OFT)

- 14.16** The OFT is the UK's consumer and competition authority. It regulates credit advertising, including advertisements for credit, hire and brokerage.
- 14.17** More information on the OFT can be found here: www.oft.gov.uk/

Banking Code Standards Board (BCSB)

- 14.18** The BCSB monitors and enforces the Banking Codes. Under an arrangement with the FSA, the BCSB monitors compliance with most of the applicable COBS rules by firms that subscribe to the Banking Codes.
- 14.19** More information on the BCSB can be found here: www.bankingcode.org.uk/

Meeting the need to ensure that financial advertising does not mislead

- 14.20** The present CAP Code section on financial products was revised extensively in CAP's last Code Review in 2002, to take account of FSMA and the expanded remit of the FSA under the terms of that Act. It has since been revised to take account of the Consumer Credit (Advertisements) Regulations 2004, the FPO and further expansions of the FSA's remit with regard to mortgage lending and insurance.
- 14.21** The CAP Code's rules on financial products cover financial marketing communications that are not regulated by the FSA, the OFT or other government bodies or agencies. The general clauses of the CAP Code regulate 'non-technical' aspects of all financial marketing communications, including those that are regulated by the FSA and the OFT. The ASA refers complaints about the technical elements of FSA-regulated products to the FSA or, in the case of complaints about advertisements for deposit-taking services, to the BCSB. Complaints about OFT-regulated products are referred to the complainant's local trading standards department. The CAP Code regulates both technical and non-technical elements of marketing communications for IVAs, which are not regulated by the OFT, although the debt management companies that often facilitate them are.
- 14.22** The CAP Code's rules on financial products serve to ensure that marketing communications for financial products that are not regulated by the FSA or the OFT are held to the same standard as those that are. The rules draw on certain key principles from the COBS.

Proposed substantive changes

New rules

- 14.23** None.

Revised rules

Individual Voluntary Arrangements (IVAs)

- 14.24** Rule 53.1 in the present CAP Code states:

The OFT will continue to regulate other consumer loans under the Consumer Credit Act 1974 (as amended). The rules that follow apply to financial marketing communications that are not regulated by the FSA or OFT.

- 14.25** CAP notes that, while debt management companies are regulated by the OFT, IVAs are not. In early 2007, the ASA adjudicated on a series of marketing communications for IVAs, including a press

advertisement.¹¹ To ensure that marketers are aware that technical and non-technical elements of IVA marketing communications are regulated by the ASA and to help draw attention to the available statutory guidance on debt advice, CAP proposes the following wording, which is underlined for the benefit of the reader of this document only :

Background

The Office of Fair Trading (OFT) regulates other consumer loans under the Consumer Credit Act 1974 (as amended) and the Consumer Credit (Advertisements) Regulations 2004 (as amended). Debt management companies must ensure they comply with the Guidance for Debt Management Companies published by the OFT.

The rules that follow apply to financial marketing communications that are not regulated by the FSA or the OFT and to marketing communications for debt advice.

Question 44

Given CAP's policy consideration, do you agree that the underlined wording should be included in the Background to CAP's rules on Financial products? If your answer is no, please explain why.

Other questions

Question 45

i) Taking into account CAP's policy consideration, do you agree that CAP's rules on financial products are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

11 www.asa.org.uk/asa/adjudications/Public/TF_ADJ_42374.htm

Part 2 – Section 15

Food, Dietary supplements and Associated Health and Nutrition claims

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

The law

(EC) Regulation 1924/2006 on Nutrition and Health claims made on Foods (NHCR)

- 15.1** This is the first piece of specific legislation to deal with nutrition and health claims made on foods, and seeks in much more specific terms to protect consumers from misleading, false or ambiguous claims. It harmonises legislation across the European Community making it easier to trade and aids food business operators in complying with the law. The NHCR includes many general and specific provisions that are directly relevant to marketing communications for foods that include nutrition or health claims.
- 15.2** See the full text of the NHCR at:

http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_012/l_01220070118en00030018.pdf

Consumer Protection from Unfair Trading Practices Regulations 2008 (CPRs)

- 15.3** The CPRs prohibit unfair trading practices and identify misleading and aggressive practices as forms of unfair practice. Because they are a trading practice, marketing communications are subject to the CPRs. The CPRs sets out in schedule 1 a list of commercial practices that are in all circumstances considered unfair; it includes practice 28:
- Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.
- 15.4** Other legislation that is relevant to this section includes: Food Standards Act 1999 (Section 6); Food Safety Act 1990 (as amended) s.15 and 16 and Schedule 1; Food Labelling Regulations (1996) as amended (regulations 40-46).

Other relevant regulatory bodies

Food Standards Agency (FSA)

- 15.5** The Food Standards Agency is an independent government department set up by an Act of Parliament in 2000 to protect the public's health and consumer interests in relation to food.
- 15.6** Please see: www.food.gov.uk

European Food Safety Authority (EFSA)

- 15.7** EFSA's role is to assess and communicate on all risks associated with the food chain and a large part of their work is undertaken in response to specific requests for scientific advice. Requests for scientific assessments are received from the European Commission, the European Parliament and EU Member States. EFSA also undertakes scientific work on its own initiative. Please see:

www.efsa.europa.eu/EFSA/efsa_locale-1178620753812_home.htm

Recent changes to this section of the CAP Code

Food marketing communications and children

- 15.8** In 2008, CAP introduced new rules on food marketing communications in general and food marketing communications targeted directly at children in particular.
- 15.9** Those changes took account of clear socio-political concerns about the marketing of food to children and to pre-school and primary school children in particular. CAP considered proportionate restrictions to the content of food marketing communications generally were justified and, in keeping with changes to the BCAP Radio Advertising Code, introduced robust new rules on diet and lifestyle, ensuring that marketing communications do not undermine progress towards national dietary improvement. In addition, it added specific prohibitions on the use of celebrities, licensed characters and promotions in food marketing communications targeted directly at pre-school and primary school children. Those restrictions do not apply to marketing communications for fresh fruit and fresh vegetables. This is an exception that takes account of the Government's concern with the under-consumption of those food categories.
- 15.10** CAP noted: the overwhelming and explicit political impetus to tackle TV food advertising to children; the role that dedicated TV programmes and TV channels played in justifying the scheduling restrictions on TV HFSS food (i.e foods that are high in fat, salt or sugar) advertisements; the audio-visual impact of television and its place in the family home; the significant spend on TV food advertising and the comprehensive qualitative and quantitative research that had supported Ofcom's decision to intervene in TV HFSS food advertisements. Those factors are not relevant to non-broadcast marketing communications and do not, in themselves, justify equivalent restrictions in other media.
- 15.11** CAP's announcement of the new non-broadcast food rules can be found at:
- www.cap.org.uk/cap/news_events/news/2007/New+food+rules+for+nonbroadcast+ads.htm
- 15.12** The non-broadcast food advertising rules that were introduced in 2007 are reflected, in full or in part, in the following rules which form part of CAP's proposed Code: 15.12, 15.17, 15.17.1, 15.17.2, 15.17.3, 15.5, 15.14, 15.15, 15.15.1, 15.15.2, 15.15.3, 15.15.4, 15.16, 15.13.

EC Regulation 1924/2006 on Nutrition and Health Claims Made of Foods (NHCR)

- 15.13** Early in 2009, CAP introduced changes to the CAP Code as a result of the NHCR. Changes were considered necessary to ensure the present Code does not conflict with the NHCR. CAP did not consult on those changes, preferring to publish its amendments as soon as possible to help the advertising industry to comply with the new legal provisions. Because they reflect the law, CAP's revised rules came into immediate effect on 19 January 2009.
- 15.14** BCAP has consulted on proposed amendments to the equivalent rules in its broadcast Codes¹² but it did not have the time to announce the outcome of its consultation before the publication of this consultation document. If the outcome of that consultation merits a change to CAP's rules, CAP has undertaken to reflect those changes to its present and proposed Code.

Regulating non-broadcast marketing communications for food and soft drink products

¹² www.cap.org.uk/cap/news_events/news/2008/Nutrition+and+Health+Claims+Regulation.htm

- 15.15** Public health policy increasingly emphasises good dietary behaviour and an active lifestyle as a means of promoting health. Commercial product advertising cannot reasonably be expected to perform the same role as education and public information in promoting a varied and balanced diet but should not, as a general principle, undermine progress towards national dietary improvement by misleading or confusing consumers or by setting a bad example, especially to children.
- 15.16** The present food rules and the proposed food rules reflect that principle through rules that cover food marketing communications in general and food marketing communications directly targeted at children in particular.
- 15.17** The proposed rules ensure that marketing communications for food and drink products do not encourage poor nutritional habits or unhealthy lifestyles, especially in children, and they help stakeholders to comply with food law, including the NHCR.

Proposed Substantive changes

New rules

EC Regulation 1924/2006 on Nutrition and Health Claims made on Foods (NHCR)

- 15.18** The NHCR came into force in July 2007. It is the first piece of specific legislation that seeks to protect consumers from misleading or false nutrition and health claims. It makes it easier to identify nutrition and health claims that can justifiably be used on a specific food product.
- 15.19** Article 1 of the NHCR states that the Regulation applies to foods, including supplements, sold directly to the consumer and to foods intended for supply to restaurants, hospitals, schools, canteens and other mass caterers. The NHCR applies to food ready for consumption in accordance with manufacturers' instructions and to claims made in commercial context only; that obviously includes non-broadcast marketing communications.
- 15.20** In keeping with its general policy objectives, CAP proposes to reflect some of the general and specific provisions of the NHCR that are directly relevant to marketing communications to help advertising stakeholders to comply with the Code's general requirement that marketing communications must comply with the law. In some cases CAP has proposed a rule based on one or more provisions of the Regulation and added commentary to support its proposed rule. A copy of the NHCR can be found at:
- [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1924R\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1924R(01):EN:NOT)
- 15.21** A copy of the Food Standards Agency's Guidance to Compliance with EC Regulation 1924/2006 on Nutrition and Health Claims Made on Foods can be found at:

www.food.gov.uk/multimedia/pdfs/ec19242006complianceguide.pdf

Permitted nutrition and health claims

- 15.22** The NHCR states:

Nutrition claims

Article 8

Specific conditions

1. Nutrition claims shall only be permitted if they are listed in the Annex and are in conformity with the conditions set out in this Regulation.

Health claims

Article 10

Specific conditions

1. Health claims shall be prohibited unless they comply with the general requirements in Chapter II and the specific requirements in this Chapter and are authorised in accordance with this Regulation and included in the lists of authorised claims provided for in Articles 13 and 14.

15.23 The NHCR provides a number of complex transitional measures (*Article 28 (1, 2, 3, 4, 5 & 6)*) for products, labels, nutrition claims, health claims, trade marks and brand names. The CAP Code cannot provide detailed rules on those transitional measures and therefore CAP advises advertising industry stakeholders to take advice on the effect of the NHCR on their products and associated health claims.

15.24 To reflect Articles 8(1), 10(1) and 28 of NHCR, CAP's proposed TV and radio rules are:

15.1

Marketers must hold documentary evidence for any claim that their food product benefits health. Claims must be presented clearly and without exaggeration.

15.1.1

Only Permitted Nutrition Claims listed in the Annex of EC Regulation 1924/2006 on Nutrition and Health Claims Made on Foods may be used in marketing communications.

Authorised health claims in the Community Register may be used in marketing communications. [Web link to Community Register]

Transitional periods apply, including those for certain health claims in use before 19 January 2007 for which an application for authorisation has been submitted and nutrition claims in use in the EU before 1 January 2006. CAP advises advertising industry stakeholders to take advice on the effect of the Regulation.

Marketing communications that feature health claims filed with the relevant Home Authority and awaiting authorisation, may be used with particular care. They must comply with all relevant rules.

15.1.2

These nutrition claims, or claims that would have the same meaning for consumers, must comply with the criteria in the annex of EC Regulation 1924/2006 Nutrition and Health Claims made on Foods:

Low energy, energy-reduced, energy-free, low fat, fat-free, low saturated fat, saturated fat-free, low sugars, sugars-free, with no added sugars, low sodium, low salt, very low sodium, very low salt, sodium-free, salt-free, source of fibre, high fibre, source of protein, high protein, source of [name of vitamin], high in [name of vitamin], contains [name of vitamin], source of [name of mineral], high in [name of mineral], contains [name of mineral], increased [name of nutrient], reduced [name of nutrient], light, lite, naturally and natural. More nutrition claims may be added to the list at a later date.

The Annex provisions can be found at: [link to CAP help note]

Question 46

Do you agree CAP has correctly reflected the requirements of Articles 8(1), 10(1) and 28 of the NHCR in CAP's proposed rules 15.1.1 and 15.1.2? If your answer is no, please explain why.

Give rise to doubt the safety or nutritional adequacy of another product

15.25 The NHCR states:

Article 3

General principles for all claims

Nutrition and health claims may be used in the labelling, presentation and advertising of foods placed on the market in the Community only if they comply with the provisions of this Regulation. Without prejudice to Directives 2000/13/EC and 84/450/EEC, the use of nutrition and health claims shall not:

(b) give rise to doubt about the safety and/or the nutritional adequacy of other foods;

15.26 To reflect that Article, CAP's proposed rule is:

15.6

These are not acceptable in marketing communications for products within the remit of this Section:

15.6.5

Claims of a nutrition or health benefit that gives rise to doubt the safety or nutritional adequacy of another product

Question 47

Do you agree CAP has correctly reflected the requirements of Article 3(b) of the NHCR in proposed rule 15.6 and 15.6.5? If your answer is no, please explain why.

Comparative nutrition claims

15.27 The NHCR states:

Article 9

Comparative claims

1. Without prejudice to Directive 84/450/EEC, a comparison may only be made between foods of the same category, taking into consideration a range of foods of that category. The difference in the quantity of a nutrient and/or the energy value shall be stated and the comparison shall relate to the same quantity of food.

2. Comparative nutrition claims shall compare the composition of the food in question with a range of foods of the same category, which do not have a composition which allows them to bear a claim, including foods of other brands.

15.28 To reflect that Article, CAP's proposed rule is:

15.3

Comparative nutrition claims must show any differences between a product bearing a Permitted Nutrition Claim and foods of the same category.

15.3.2

The difference in the quantity of a nutrient or energy value must be stated in the marketing communication and must relate to the same quantity of food.

Question 48

Do you agree CAP has correctly reflected the requirements of Article 9 of the NHCR in proposed rules 15.3 and 15.3.2? If your answer is no, please explain why.

Comparison with one product

- 15.29** The European Commission has published guidance¹³ on certain provisions in the NHCR and its scope. It states that one product may be used as a sole reference for comparison if it is representative of the products within its category. Specifically:

II.2.2. Reference product

... Provided that it is thus representative of the products of its category, a specific branded product may be used as a term for comparison. In other words, if a specific branded product has a composition which is representative of the market, the name of the product itself can provide the reference for comparison when it is followed by the claim "light". For example, "X light", when X is the standard product, provides the information on the reference product.

- 15.30** To reflect the European Commissions' guidance on the NHCR, CAP's proposed rule is:

15.3.1

An advertisement may use one product as the sole reference for comparison only if that product is representative of the products in its category.

Question 49

Do you agree CAP has correctly reflected the requirements of Article 9 of the NHCR and the European Commissions' guidance in proposed rule 15.3.1? If your answer is no, please explain why.

Prohibitions

- 15.31** The NHCR states:

Article 12

Restrictions on the use of certain health claims

The following health claims shall not be allowed:

claims which suggest that health could be affected by not consuming the food;

¹³ http://ec.europa.eu/food/food/labellingnutrition/claims/guidance_claim_14-12-07.pdf

15.32 To reflect that Article, CAP's proposed rule is:

15.6

These are not acceptable in marketing communications for products within the remit of this Section:

15.6.1

Claims that state or imply health could be affected by not consuming a food.

Question 50

Do you agree CAP has correctly reflected the requirements of Article 12(a) of the NHCR in proposed rule 15.6 and 15.6.1? If your answer is no, please explain why.

15.33 The NHCR states:

Article 3

General principles for all claims

Nutrition and health claims may be used in the labelling, presentation and advertising of foods placed on the market in the Community only if they comply with the provisions of this Regulation. Without prejudice to Directives 2000/13/EC and 84/450/EEC, the use of nutrition and health claims shall not:

(e) refer to changes in bodily functions which could give rise to or exploit fear in the consumer, either textually or through pictorial, graphic or symbolic representations.

15.34 To reflect that Article, CAP's proposed rule is:

15.6

These are not acceptable in marketing communications for products within the remit of this Section:

15.6.4

References to changes in bodily functions that could give rise to or exploit fear in the audience.

Question 51

Do you agree CAP has correctly reflected the requirements of Article 3(e) of the NHCR in proposed rule 15.6 and 15.6.4? If your answer is no, please explain why.

15.35 The NHCR states:

Article 12

Restrictions on the use of certain health claims

The following health claims shall not be allowed:

(b) claims which make reference to the rate or amount of weight loss;

15.36 To reflect that Article, CAP's proposed rule is:

15.6

These are not acceptable in marketing communications for products within the remit of this Section:

15.6.6

Health claims that refer to a rate or amount of weight loss.

Question 52

Do you agree CAP has correctly reflected the requirements of Article 12(b) of the NHCR in proposed rule 15.6 and 15.6.6? If your answer is no, please explain why.

The use of health professionals

15.37 The NHCR states:

Article 12

Restrictions on the use of certain health claims

The following health claims shall not be allowed:

(c) claims which make reference to recommendations of individual doctors or health professionals and other associations not referred to in Article 11.

Article 11

National associations of medical, nutrition or dietetic professionals and health-related charities

In the absence of specific Community rules concerning recommendations of or endorsements by national associations of medical, nutrition or dietetic professionals and health-related charities, relevant national rules may apply in compliance with the provisions of the Treaty.

15.38 To reflect Article 11 and 12(c), CAP's proposed rule is:**15.6**

These are not acceptable in marketing communications for products within the remit of this Section:

15.6.3

Health claims that refer to the recommendation of an individual health professional. Health claims that refer to the recommendation of an association are acceptable only if that association is a health-related charity or a national representative body of medicine, nutrition or dietetics

Question 53

Do you agree CAP has correctly reflected the requirements of Article 12(c) and Article 11 in proposed rule 15.6 and 15.6.3? If your answer is no, please explain why.

Food labelling Regulations (1996) (FLRs)

15.39 The Food Labelling Regulations (1996) state:

Schedule 6

Claims

Part 1 (Prohibited Claims)

A claim that a food has the property of preventing treating or curing a human disease or any reference to such a property.

15.40 The NHCR states:

Article 14

Reduction of disease risk claims and claims referring to children's development and health

1. Notwithstanding Article 2(1)(b) of Directive 2000/13/EC, reduction of disease risk claims and claims referring to children's development and health may be made where they have been authorised in accordance with the procedure laid down in Articles 15, 16, 17 and 19 of this Regulation for inclusion in a Community list of such permitted claims together with all the necessary conditions for the use of these claims.

2. In addition to the general requirements laid down in this Regulation and the specific requirements of paragraph 1, for reduction of disease risk claims the labelling or, if no such labelling exists, the presentation or advertising shall also bear a statement indicating that the disease to which the claim is referring has multiple risk factors and that altering one of these risk factors may or may not have a beneficial effect.

15.41 To reflect the requirements of Article 14 of the NHCR and Schedule 6 Part 1(2) of the FLRs, CAP's proposed rule is:

15.6

These are not acceptable in marketing communications for products within the remit of this Section:

15.6.2

Claims that state or imply a food prevents, treats or cures human disease. Reduction-of-disease-risk claims are acceptable if authorised by the European Commission.

Question 54

Do you agree CAP has correctly reflected the requirements of Article 14 of the NHCR and Schedule 6 Part 1(2) of the FLRs in CAP's proposed rule 15.6 and 15.6.2? If your answer is no, please explain why.

Question 55

Do you agree that CAP has correctly reflected the relevant provisions of Regulation (EC) 1924/2006 on Nutrition and Health Claims on Foods in the proposed CAP Code? If your answer is no, please explain why.

- 15.42** The present CAP Code does not include a rule specific to the advertising of infant or follow-on formula. The Infant Formula and Follow-on Formula Regulations 2007 (as amended)¹⁴ implement Directive 2006/141/EC on infant formulae and follow-on formulae. The Regulations prohibit the advertising of infant formula (except in scientific publications or for the purposes of trade prior to retail). Of particular importance to the CAP Code, the Directive regulates labelling and restricts advertising and presentation of infant and follow-on formula so as not to discourage breastfeeding.
- 15.43** In keeping with its general policy objectives, CAP proposes to reflect the central provisions of the Regulations that are directly relevant to marketing communications to help stakeholders to comply with the Code's general requirement that marketing communications must comply with the law.
- 15.44** The Infant Formula and Follow-on Formula Regulations (2007) (amended) state:

Avoidance of the risk of confusion between infant formula and follow-on formula

19. Infant formula and follow-on formula shall be labelled in such a way that it enables consumers to make a clear distinction between such products so as to avoid any risk of confusion between infant formula and follow on formula.

Presentation (infant formula and follow-on formula)

20.—(1) The provisions of regulations 17(1)(e), (2), (3) and (4) and 19 shall also apply in relation to the presentation of an infant formula.

(2) The provisions of regulations 18(2) and 19 shall also apply in relation to the presentation of a follow-on formula.

(3) For the purposes of this regulation “presentation” includes the shape, appearance or packaging of the products concerned, the packaging materials used, the way in which they are arranged and the setting in which they are displayed.

Restrictions on advertising infant formula

21.—(1) No person shall advertise infant formula—

except—

in a scientific publication, or

for the purposes of trade prior to the retail stage, in a publication of which the intended readership is other than the general public; or

unless the advertisement complies with the provisions of regulation 17(1)(e), (2), (3) and (4), regulation 19 and paragraph (2) and (3).

(2) Advertisements for infant formula shall only contain information of a scientific and factual nature.

(3) Information in advertisements for infant formula shall not imply or create a belief that bottle-feeding is equivalent or superior to breast feeding.

- 15.45** Regulation 21(1)(b) explains that advertisements must comply with Regulation 19 (amongst others). CAP considers a fundamental aspect of the Infant Formula and Follow-on Formula Regulations 2007 (as amended) is the need to ensure marketing communications for infant formula and follow-on formula are clearly differentiated. It proposes to make that provision explicit in its Code.
- 15.46** To reflect regulations 19, 20 and 21 of the Infant and Follow-on Formula Regulations (2007) (as amended), CAP's proposed rule are:

¹⁴ www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3435319

15.11

Except for those in a scientific publication or, for the purposes of trade before the retail stage, a publication of which the intended readers are not the general public, marketing communications for infant formula are prohibited.

15.11.1

Marketing communications must not confuse between infant formula and follow-on formula.

Question 56

i) Do you agree CAP has correctly reflected the requirements of Regulation 21(a) of the Infant Formula and Follow-on Formula Regulations 2007 (as amended) in CAP's proposed rule 15.11? If your answer is no, please explain why.

ii) Do you agree CAP has correctly reflected the requirements of Regulation 19 of the Infant Formula and Follow-on Formula Regulations 2007 (as amended) in CAP's proposed rule 15.11.1? If your answer is no, please explain why.

iii) Do you consider CAP has correctly reflected the relevant provisions of the Infant Formula and Follow-on Formula Regulations 2007 (as amended) in the proposed CAP Code? If your answer is no, please explain why.

Revised rules

15.47 None.

Deleted rules

15.48 None

Other Questions**Question 57**

i) Taking into account CAP's general policy objectives, do you agree that CAP's rules, included in the proposed Food, Dietary supplements and Associated Health and Nutrition claims Section are necessary and easily understandable? If your answer is no, please explain why?

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 – Section 16

Gambling

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

The law

Gambling Act 2005

16.1 The Gambling Act entered fully into force in September 2007. The Act replaced most existing gambling law with a new regulatory system governing all gambling in Great Britain, defined as betting, gaming and lotteries except the National Lottery and spread betting. The Act includes provisions on gambling advertising. To deal with new practices, the Act introduces a broad legal definition of advertising covering remote gambling (e.g. phone, Internet) and non-remote gambling (i.e. face to face) and marketing arrangements such as brand-sharing. Because the new advertising provisions apply equally to all industry sectors, some sectors now have more scope to advertise than before September 2007, particularly British licensed casinos and betting.

16.2 Section 1 of the Act states its licensing objectives:

preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime,

ensuring that gambling is conducted in a fair and open way, and

protecting children and other vulnerable persons from being harmed or exploited by gambling.

16.3 See the full text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=1419110

National Lottery etc Act 1993

16.4 The National Lottery etc Act established the National Lottery. Section 4 of the Act states the overriding duties of the Secretary of State and Director General. The most relevant provision is:

The Secretary of State and (subject to any directions he may be given by the Secretary of State under section 11) the Director General shall each exercise his functions under this Part in the manner he considers the most likely to secure—

that the National Lottery is run, and every lottery that forms part of it is promoted, with all due propriety, and

that the interests of every participant in a lottery that forms part of the National Lottery are protected.

16.5 See the full text of the Act at:

www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=2459584

16.6 Financial Services and Markets Act 2000 (FSMA) and Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (FPO) (as amended)

16.7 FSMA sets out the statutory powers of the Financial Services Authority (FSA) and, together with the FPO (as amended), sets out the regulatory framework for financial products, services and markets in the UK. Section 22 (1) of FSMA defines 'regulated activities':

1. An activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and—

a. relates to an investment of a specified kind; or

b. in the case of an activity of a kind which is also specified for the purposes of this paragraph, is carried on in relation to property of any kind.

16.8 Schedule 2 Section 19 of FSMA lists contracts for differences as one of 'the matters with respect to which provision may be made under section 22(1) [of FSMA] in respect of activities' and defines contracts for differences as:

19 Rights under—

a. contract for differences; or

b. any other contract the purpose or pretended purpose of which is to secure a profit or avoid a loss by reference to fluctuations in—

i) the value or price of property of any description; or

ii) an index or other factor designated for that purpose in the contract.

16.9 A 'spread bet' is a contract for differences that is a gaming contract, as defined in the glossary to the FSA Handbook.

16.10 See the full text of FSMA at:

www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=2927341

16.11 The FSA Conduct of Business Sourcebook may be found at:

fsahandbook.info/FSA/html/handbook/COBS

16.12 The FPO may be found at:

www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=2308487

Other relevant regulatory bodies

Gambling Commission

16.13 The Gambling Commission was set up under the Gambling Act 2005 and was formally established in October 2005. It took over the role previously played by the Gaming Board for Great Britain in regulating casinos, bingo, gaming machines and lotteries and also has responsibility for the regulation of betting and remote gambling, as well as helping to protect children and vulnerable people from being harmed or exploited by gambling. The Commission advises local and central government on issues related to gambling. It is a Non-Departmental Public Body, sponsored by the Department for Culture, Media and Sport (DCMS), that operates at arm's length from government and its advice is independent. The Commission's work is funded mainly by licence fees from the gambling industry.

- 16.14** Under the Gambling Act, CAP and BCAP, the ASA, the Gambling Commission, Ofcom and the Secretary of State (DCMS) share responsibility for the regulation of gambling advertising. The Gambling Commission may issue code of practice provisions on non-broadcast advertising in consultation with CAP, the Secretary of State, the gambling industry, problem gambling experts and HM Commissioners for Revenue and Customs. The Commission asked CAP to perform that function in line with its commitment to better regulation principles and to ensure consistency with the broadcast advertising rules.
- 16.15** The Gambling Commission can choose to include other provisions on non-broadcast advertising in its codes of practice. Ultimately, the Secretary of State has a reserve power to make regulations on non-broadcast advertising.
- 16.16** More information on the Gambling Commission can be found here:
- www.gamblingcommission.gov.uk/Client/index.asp

National Lottery Commission

- 16.17** The National Lottery Commission regulates the National Lottery and enforces the National Lottery Advertising and Sales Promotion Code of Practice, which states that it should be applied in conjunction with industry regulations, particularly those issued by the ASA and CAP.
- 16.18** More information on the National Lottery Commission can be found here:
- www.natlotcomm.gov.uk/CLIENT/index.asp

Financial Services Authority (FSA)

- 16.19** Spread betting is regulated by the FSA and may be advertised as an investment activity under FSMA, the FPO and in accordance with the FSA Handbook.
- 16.20** More information on the FSA can be found here:
- www.fsa.gov.uk/
- 16.21** Readers should note that gambling advertisements are also subject to the Gambling Industry Code for Socially Responsible Advertising, which the industry imposed on itself voluntarily.
- 16.22** Read more at the Gambling Commission's website here:
- www.gamblingcommission.gov.uk/Client/mediadetail.asp?mediaid=190

Recent changes to this section of the CAP Code

- 16.23** In September 2006, CAP and its sister body BCAP closed their consultation on the regulation of non-broadcast and broadcast gambling advertising, which considered changes to the rules on gambling advertising in the light of the Gambling Act. Full details of the consultation can be found here:
- www.cap.org.uk/cap/Consultations/closed/gambling_consultation/

Meeting the need to ensure that children and the vulnerable are not harmed or exploited by marketing communications for gambling products and services and that the National Lottery is promoted with all due propriety

- 16.24** At present, non-broadcast marketing communications for gambling products and services are regulated by general and specific CAP rules that ensure children and vulnerable persons are not harmed or exploited. The rules put into place key general principles on social responsibility. Further, they seek to prevent advertising from exploiting children by restricting the placement of marketing communications and prohibiting certain types of content in gambling marketing communications to minimise their appeal to younger people. Similarly, they seek to protect the vulnerable by prohibiting approaches that target financial or psychological vulnerabilities associated with problem gambling.
- 16.25** CAP aims to maintain that approach and those rules in its proposed Code but it proposes to create a separate, dedicated section for all lottery marketing communications, which, with one exception, includes all the rules that presently apply to society and local authority lotteries ('SLA lotteries').
- 16.26** The National Lottery is not presently subject to dedicated CAP advertising rules. However, marketing communications for the National Lottery are subject to the general provisions of the CAP Code, including the clause on social responsibility that ultimately informs the social responsibility provisions in the Gambling section of the Code.
- 16.27** The recent CAP Gambling Advertising Consultation¹⁵ ensured that all gambling rules, including those that apply to SLA lotteries, secure the objectives set out in the Gambling Act 2005.¹⁶

Proposed substantive changes

Background

- 16.28** In their 2006 consultation on gambling advertisements, CAP and BCAP proposed that the UK National Lottery should be regulated under the proposed non-broadcast and broadcast gambling advertising rules, which included exceptions for lottery advertisements. The vast majority of respondents agreed. Those responses came from a broad range of stakeholders including media owners and related bodies and marketers (the 'advertising industry'), gambling advertisers (the 'gambling industry') and faith entities. Significant points raised in favour of the proposal to include the National Lottery in the proposed gambling rules were: there was a proposal to move regulation of the National Lottery from the National Lottery Commission (NLC) to the Gambling Commission (GC), which government eventually rejected because of the National Lottery's special role; there is no reason why that reasoning should extend to advertising regulation; consumers are best served by one set of rules and one regulator to which to complain; the good causes that benefit from National Lottery sales do not negate any risks the National Lottery may carry for children, young persons and vulnerable adults; those risks are greater for scratch cards, which provide instant gratification; the objectives in the proposed CAP and BCAP rules are just as pertinent to the National Lottery as to other operators.
- 16.29** Significant points in opposition to the proposal to include the National Lottery in the proposed gambling rules were: there is regulatory demarcation between the National Lottery and other gambling operators in the form of the NLC and the GC; the National Lottery was intended by Parliament to have a special national status and major fundraising role; the National Lottery operator is also regulated by the NLC under the National Lottery Code of Practice and could be subject to double regulation if two detailed sets of sector-specific rules were applied by two different bodies; the rationale for the proposed gambling rules reflects the licensing objectives of the Gambling Act, which do not apply to the National Lottery.
- 16.30** CAP and BCAP acknowledged the backing for the proposal to include the National Lottery within the CAP and BCAP gambling rules. But they were mindful of the unique status of the National Lottery, which continues to be subject to specific regulation administered by the NLC, as highlighted in the NLC's consultation response. CAP and BCAP accepted that implementation of the Gambling Act provides no explicit public policy mandate to include the National Lottery in the proposed gambling

¹⁵ www.cap.org.uk/cap/Consultations/closed/gambling_consultation/

¹⁶ www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=1419110

rules. On balance, CAP and BCAP decided to exclude the National Lottery from the new CAP and BCAP gambling rules.

- 16.31** However, that decision meant the CAP Code continued to maintain rules for SLA lotteries while the National Lottery was regulated by general provisions only. CAP considered that, in the event of a complaint to the ASA about the content of a non-broadcast National Lottery marketing communication, the ASA would likely be informed by the same principles as informed the rules that applied to gambling products (including SLA lotteries) in determining whether the marketing communication was socially responsible. That the Code was not explicit on that point was potentially unhelpful to marketers.
- 16.32** Moreover, the gambling rules were specific on the age of appeal and the age at which persons might feature in a marketing communication for a gambling product, including an SLA lottery. Those specific requirements would not so readily apply outside the scope of the gambling advertising rules. CAP considered that, if the National Lottery was subject to a lesser degree of restriction than other lotteries, that could result in an inconsistency in regulation that was not readily justified by the National Lottery's special status. Because the Better Regulation principles require that regulation should be consistent, CAP determined to maintain dialogue with the NLC about how the National Lottery is regulated under the CAP Code, mindful of the special status of the National Lottery.
- 16.33** CAP has since held discussions with the NLC and other relevant public bodies with a view to ensuring that regulation of lottery advertising is consistent. The proposal takes into account those bodies' views but it does not necessarily imply their endorsement.

New rules

The National Lottery

Consistency: principle

- 16.34** CAP proposes to create a dedicated lottery advertising section, which would include rules that have applied to marketing communications for SLA lotteries since September 2007 and would, for the first time, apply to marketing communications for the National Lottery. CAP considers the Better Regulations' requirement for consistency (where justified), the broadly equivalent risks posed by all lotteries and the benefits of a single body of rules for the public and for the advertising industry are central to its proposal. CAP is not aware of any legal or significant regulatory obstacle to its proposal.

Question 58

Given CAP's policy consideration, do you agree in principle that National Lottery and society and local authority marketing communications should be regulated by the same rules? If your answer is no, please explain why.

Consistency: rules

- 16.35** The policy and the drafting of the rules on gambling marketing communications, including SLA lottery marketing communications, have recently been subject to public consultation and, with the exception of the rule that prevents condoning or featuring gambling in a working environment (see 'Deleted rules') CAP is not aware of evidence that would merit a change to those rules. CAP considers that rules included in the Lottery Section of the Code are in line with CAP's general policy objectives (see Part 1 (iv) of this consultation document) and should be applied to marketing communications for the National Lottery as they presently are to marketing communications for other lotteries.

Question 59

Given CAP's policy consideration, do you agree that the rules included in the Lottery Section of the Code are in line with CAP's general policy objectives (see Part 1 (4) of this consultation

document) and should be applied to marketing communications for the National Lottery as they presently are to marketing communications for other lotteries? If your answer is no, please explain why and, if relevant, please identify those rules that should not be applied to marketing communications for the National Lottery.

Revised rules

- 16.36** CAP proposes not to change or replace an existing Gambling rule to the extent that that change amounts to new advertising policy and practice, except insofar as lottery marketing communications would, as CAP has proposed, now be regulated by separate rules as detailed above.

Deleted rules

Participating in a lottery in a working environment

- 16.37** Presently, the CAP rules prohibit marketing communications for SLA lotteries that condone or feature gambling in a working environment. National Lottery marketing communications are not subject to the same restriction. CAP acknowledges that lottery syndicates have been operated by groups of colleagues in working environments for many years without apparent detriment and considers that it would be disproportionate to restrict SLA lottery marketing communications from referring to that commonly accepted practice. CAP proposes that not only National Lottery marketing communications but all lottery marketing communications should be able to condone or feature participation in a working environment.

Question 60

Given CAP's policy consideration, do you agree that lottery marketing communications should be able to feature participation in a lottery in a working environment? If your answer is no, please explain why.

Other questions

Question 61

- i) Taking into account CAP's policy consideration, do you agree that CAP's rules on Gambling and Lotteries are necessary and easily understandable? If your answer is no, please explain why?
- ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration?
- iii) Do you have other comments on this Section?

Part 2 - Section 17

Lotteries

Please read the proposed rules for this Code section before responding to the questions set out in Section 16 above. [To see the proposed rules, please click here.](#)

- 17.1** CAP's proposal to establish a dedicated section on lottery advertising is discussed in section 17, Gambling, of this consultation document.

Part 2 – Section 18

Alcohol

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

The law

(EC) Regulation on Nutrition and Health claims made on Foods 1924/2006

- 18.1** This is the first piece of specific legislation to deal with nutrition and health claims and seeks in much more specific terms to protect consumers from: misleading, false or ambiguous claims. It harmonises legislation across the European Community making it easier to trade and aids food business operators in complying with the law. It contains specific provisions relating to health and nutrition claims for alcohol products, see Article 4(3) states:

Beverages containing more than 1,2 % by volume of alcohol shall not bear health claims.

As far as nutrition claims are concerned, only nutrition claims referring to low alcohol levels, or the reduction of the alcohol content, or the reduction of the energy content for beverages containing more than 1,2 % by volume of alcohol, shall be permitted.

- 18.2** Please see:

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1924R\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1924R(01):EN:NOT)

Other relevant regulatory bodies

- 18.3** Bodies that play a part in regulating a marketing communication or a product or service of relevance to this section but that are not conferred with legal functions to do so include: The Portman Group (www.portman-group.org.uk).

Recent changes to this section of the CAP Code

- 18.4** In March 2004, the Government's Alcohol Harm Reduction Strategy recommended that Ofcom should oversee a review of the TV rules for alcohol advertisements. In parallel with Ofcom's consultation, CAP reviewed its own alcohol rules, which were subsequently strengthened and came into force on 1 January 2005:

http://www.cap.org.uk/cap/news_events/news/2005/Time+please.htm

- 18.5** In January 2009, CAP amended its Code to reflect the requirements of the Nutrition and Health Claims Regulation. CAP did not consult on those changes but undertook to take into account any changes made as a result of the BCAP consultation that closed on 16 February 2009. BCAP has not had the time to announce the outcome of that consultation and the new rules before the publication of this consultation document. The BCAP consultation can be found here:

www.cap.org.uk/cap/Consultations/closed/BCAP_Nutrition_and_Health_Claims/

Meeting the need to regulate marketing communications for alcohol

- 18.6** CAP's proposed approach mirrors the present one: to include rules that ensure marketing communications for alcoholic drinks should not be targeted at children or young persons and should not imply, condone or encourage immoderate, irresponsible or anti-social drinking.
- 18.7** Code provision 18.16 approximates legal provisions in the (EC) Regulation on Nutrition and Health claims made on Foods 1924/2006. Code provisions 18.3, 18.4, 18.5, 18.11, 18.14 and 18.17 result from CAP's consideration, in 2004, of its rules for alcohol.

'Safe, Sensible, Social – Consultation on further action'

- 18.8** The Department of Health's *Safe, Sensible, Social* consultation called on CAP to take into account the findings of the Sheffield University study into the relationship between the price, promotion and alcohol-related harm as part of the CAP Code Review¹⁷.
- 18.9** In October 2008, CAP wrote to the Secretary of State for Culture Media and Sport to make clear that the Sheffield University study would be announced too late for CAP to consider as part of the Code Review¹⁸. CAP undertook to review those findings at the earliest possible opportunity in 2009 to consider whether the present non-broadcast alcohol rules remain proportionate. The Government endorsed that approach.

On 29 May 2009, CAP issued an addendum to the Code Review consultation which contained its assessment of the SchARR Review, including a question for consultees to consider. The closing date for responses to this addendum is 10 July 2009. The addendum can be found [here](#).

Proposed substantive changes

New rules

- 18.10** None.

Revised rules

Alcoholic strength

- 18.11** The CAP Code presently states:

56.10 Marketing communications may give factual information about:

b) the alcoholic strength of a drink or make factual strength comparisons with other products but must not otherwise suggest that a drink may be preferred because of its high alcohol content or intoxicating effect. Drinks may be presented as preferable because of low or lower strength.

- 18.12** That rule allows a marketing communication for an alcoholic drink that has a 'lower' alcohol content to state that that drink may be preferred because of its alcohol content and undue emphasis may be placed on its alcoholic strength.

¹⁷ [Safe. Sensible. Social. Consultation on further action – Page 15](#)

¹⁸ www.cap.org.uk/cap/news_events/news/2008/More+research+to+come+on+food+and+alcohol+advertising.htm

- 18.13** CAP considers that preferential advertising of 'lower' alcoholic drinks could result in the preferential promotion of intoxicating beverages. CAP is concerned that advocating swapping higher-strength alcoholic drinks for lower-strength alcoholic drinks could add confusion, especially in relation to drinking and driving, if a 'lower-strength' alcoholic drink is advertised as being responsible.
- 18.14** CAP proposes to revise that rule to provide an exception for low-alcohol drinks only; those that are defined as containing between 0.5% and 1.2% alcohol.
- 18.15** CAP proposes this wording:

18.9

Marketing communications may give factual information about the alcoholic strength of a drink or make factual strength comparisons with other products but must not otherwise imply that a drink may be preferred because of its alcohol content or intoxicating effect. Low-alcohol drinks may be presented as preferable because of their low alcoholic strength.

Question 62

Given CAP's policy consideration, do you agree that rule 18.9 should be included in the Code? If your answer is no, please explain why.

Deleted rules

Provision for low-alcohol drinks

- 18.16** Presently, the CAP Code alcohol rules are applied to marketing communications for alcohol products containing alcohol strength above 1.2% only. CAP has considered whether that distinction is appropriate given that low-alcohol drinks may not be sold to persons under 18¹⁹.
- 18.17** The Code presently states:

56.15

Low alcohol drinks are those that contain between 0.5% - 1.2% alcohol by volume. Marketers should ensure that low alcohol drinks are not promoted in a way that encourages their inappropriate consumption and should not depict activities that require complete sobriety.

- 18.18** CAP considered that encouraging 'inappropriate consumption' might, in practice, amount to encouraging underage consumption or linking an age-restricted product with, for example, daring or aggression. CAP also considered 'activities that require complete sobriety' might, in practice, amount to preventing a link with working on dangerous machinery. Given that such depictions in marketing communications for alcohol are explicitly prohibited by the Alcohol rules, CAP proposes to delete rule 56.15 and apply all the Alcohol rules to low-alcohol drinks but to exempt them from the rule preventing preference based on alcoholic strength.

Question 63

i) Given CAP's policy consideration, do you agree that CAP rule 56.15 should not be included in the present Code? If your answer is no, please explain why.

ii) Given CAP's policy consideration, do you agree that, with the exception of the rule that prevents preference based on alcoholic strength, marketing communications for low-alcohol drinks should be subject to all the Alcohol rules? If your answer is no, please explain why.

¹⁹ Section 146 of the Licensing Act 2003 states: '(1) A person commits an offence if he sells alcohol to an individual aged under 18.' Section 146 applies to all strengths and types of alcohol.

Other

18.19 The present CAP Code states:

56.14

Marketing communications should not depict activities or locations in which drinking alcohol would be unsafe or unwise [...]

18.20 In practice, this rule prevents marketing communications from implying that it is acceptable to drink alcohol prior to or at the same time as carrying out physical activities or being in a location in which drinking alcohol would be unsafe or unwise.

18.21 CAP proposes to clarify this interpretation and does not consider this to constitute a change in advertising policy and practice.

18.22 CAP proposes this wording:

18.12

Marketing communications must not link alcohol with activities or locations in which drinking would be unsafe or unwise.

Marketing communications must not link alcohol with the use of potentially dangerous machinery or driving. Marketing communications may feature sporting and other physical activities (subject to other rules in this Section, for example appeal to under 18s or link with daring or aggression) but must not imply that those activities have been undertaken after the consumption of alcohol.

Question 64

Given CAP's policy consideration, do you agree that rule 18.12 should be included in the Code? If your answer is no please explain why

Other questions

Question 65

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Alcohol Section, are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Alcohol rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 – Section 19

Motoring

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

Meeting the need to ensure that motoring marketing communications are responsible

- 19.1** Marketing communications for motor vehicles, fuel or accessories have the potential to cause harm by condoning or encouraging anti-social, dangerous or otherwise irresponsible behaviour or to mislead by, for example, making unsubstantiated environmental claims. The present and proposed CAP rules regulate motoring marketing communications by preventing unacceptable references and creative treatments. The proposed Principle makes clear the need for those marketing communications to comply with rules on Environmental Claims.

Proposed substantive changes

New Rules

- 19.2** None.

Revised Rules

The legal requirements of the Highway Code

- 19.3** The present CAP Code states:

48.4

Vehicles should not be depicted in dangerous or unwise situations in a way that might encourage or condone irresponsible driving. Their capabilities may be demonstrated on a track or circuit provided it is clearly not in use as a public highway.

- 19.4** CAP proposes to add to that rule the requirement that motoring marketing communications must not condone or encourage a driving practice that could be emulated if it were likely to breach a legal requirement of the Highway Code.
- 19.5** CAP considers that, if it condoned or encouraged a driving practice that would be likely to breach a legal requirement of the Highway Code, a marketing communication would be socially irresponsible by condoning or encouraging an action that would break the law and potentially put road-users at risk. By adding it to the rule, CAP considers that its proposed requirement would help marketers identify which driving practices would, beyond doubt, be unsuitable for them to condone or encourage in their marketing communications.
- 19.6** For the sake of clarity, the proposed rule would not prohibit a marketing communication *featuring* a driving practice that might breach the legal requirements of the Highway Code but would prohibit that marketing communication from *condoning or encouraging* motorists to emulate it. As such, the proposed rule would not prevent, for example, a marketing communication from depicting a car driving on the left side of the road because that marketing communication was created in continental Europe.
- 19.7** For those reasons, CAP proposes this rule:

19.2

Marketing communications must not condone or encourage unsafe or irresponsible driving. If it could be emulated, marketing communications must not depict a driving practice that is likely to condone or encourage a breach of those rules of the Highway Code that are legal requirements if that driving practice seems to take place on a public road or in a public space. Vehicles' capabilities may be demonstrated on a track or circuit if it is obviously not in use as a public highway.

Question 66

Given its policy consideration, do you agree with CAP's proposal to include rule 19.2 in the Code? If your answer is no, please explain why.

Deleted Rules**Prices in motoring marketing communications**

19.8 The present CAP Code states:

48.7

Prices quoted should correspond to the vehicles illustrated. For example, it is not acceptable to feature only a top-of-the-range model alongside the starting price for that range.

19.9 CAP considers its proposal not to include that rule in the Code would not constitute a change in advertising policy and practice. A marketing communication that quoted a price different to that of the depicted vehicle would be misleading and in breach of these proposed rules in the Prices part of the Misleading section:

3.1

Marketing communications must not materially mislead.

3.3

Marketing communications must not mislead the consumer by omitting material information. They must not mislead by hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner.

Material information is information that the consumer needs to make informed decisions about whether or how to buy a product. Whether the omission or presentation of material information is likely to mislead the consumer depends on the context, the medium and, if the medium of the marketing communication is constrained by time or space, the measures that the marketer takes to make that information available to the consumer by other means.

3.17

Price statements must not mislead by omission, undue emphasis or distortion. They must relate to the product featured in the marketing communication.

Question 67

Given its policy consideration, do you agree with CAP's proposal not to include present rule 48.7 in the Code? If your answer is no, please explain why.

Other questions

Question 68

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Motoring section, are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Motoring rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 – Section 20

Employment, Homework Schemes and Business Opportunities

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

The law

Conduct of Employment Agencies and Businesses Regulations 2003 (as amended)

- 20.1** The Regulations govern the conduct of the private recruitment industry and establish a framework of minimum standards that both work-seekers and hirers are entitled to expect.
- 20.2** See the text of the Regulations here:
www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=870918

Other relevant regulatory bodies

- 20.3** Bodies that play a part in regulating a marketing communication of relevance to this section but that are not conferred with legal functions to do so include Direct Selling Association (www.dsa.org.uk).

Meeting the need to ensure that marketing communications for employment, homework schemes and business opportunities do not mislead or exploit the vulnerable

- 20.4** Marketing communications for employment, homework schemes and business opportunities have the potential to mislead and to take advantage of consumers' vulnerabilities, especially in a time of high unemployment. The present and proposed Codes ensure that the nature and identity of the marketer is clear to the consumer and that marketing communications do not mislead consumers by, for example, omitting significant conditions or exaggerating earning potential.
- 20.5** CAP considers the rules afford protection to consumers and to businesses, the reputations of which are placed at risk by unscrupulous competitors.

Proposed substantive changes

New rules

- 20.6** None.

Revised rules

Employment businesses

20.7 The CAP Code presently states:

52.3

An employment agency must make clear in marketing communications its full name and contact details and, if the name does not disclose that fact, that it is an employment agency.

20.8 The Conduct of Employment Agencies and Businesses Regulations 2003 states:

27(1) Every advertisement issued or caused to be issued by an agency or employment business shall mention in either audibly spoken words or easily legible characters the full name of the agency or employment business, and whether the services it advertises are those of an agency or an employment business, as the case may be.

20.9 The present rule, in line with the Regulations, requires marketing communications by an employment agency to include its full name and the fact that it is an employment agency. The present rule does not, however, stipulate a comparable requirement for marketing communications by employment businesses. CAP proposes to extend the requirements of the rule to cover marketing communications by employment businesses.

20.10 CAP understands that employment agencies are defined under law as businesses of providing services (whether by the provision of information or otherwise) for the purpose of finding workers employment with employers or of supplying employers with workers for employment by them. That means that the definition of employment agencies has a wide scope, covering, for example, recruitment agencies and specialist agencies. CAP also understands that employment businesses are defined as businesses of supplying people in the employment of the person carrying on a business, to act for, and under the control of, other people in any capacity. That covers the hiring of workers on a temporary basis ('temping').

20.11 CAP is aware of public concern about marketing communications by talent and model agencies; CAP's proposal to extend the scope of the present rule to cover marketing communications by employment businesses would therefore help reduce the risks of consumers being misled by marketing communications placed by those agencies.

20.12 Because it considers the policy underpinning the rule is equally relevant to employment agencies and employment businesses, CAP proposes this rule:

20.3

Employment agencies and employment businesses must make clear in their marketing communications their full names and contact details. Marketing communications should state that the marketer is an employment agency or an employment business if its name does not disclose that it is.

Question 69

Given its policy consideration, do you agree with CAP's proposal to extend the requirements of the present rule on marketing communications by employment agencies to cover marketing communications by employment businesses? If your answer is no, please explain why.

Required information in marketing communications for homework schemes

20.13 The present CAP Code states:

52.4

Marketing communications for homework schemes requiring participants to make articles, perform services or offer facilities at or from home should contain:

h information on whether the marketers will buy back any products made

i any limitations or conditions that might influence consumers prior to their decision to participate.

Marketers may include that information in follow-up literature made available to all consumers before commitment but the initial marketing communication should state if a financial outlay is required.

20.14 CAP proposes largely to retain the requirements of the present rule. Nevertheless, CAP's proposed rule 20.5 would require h) and i) of present rule 52.4, information which under the present rule may be included in follow-up literature, to be included in all marketing communications for homework schemes. CAP considers that that information is material to a consumer's decision to participate in a scheme or to apply for more information. CAP's proposal compliments the over-arching principle that marketing communications must not mislead by omission and must include any significant conditions that might affect consumers' decisions.

20.15 CAP proposes these rules to replace present rules 52.4h) and i):

Homework schemes

20.5

Marketing communications for homework schemes must state:

20.5.1

limitations or conditions that might influence consumers before their decision to participate

20.5.2

whether the marketers will buy any products made

20.5.3

if a financial outlay is, or might be, required.

Question 70

Given its policy consideration, do you agree with CAP's proposal to require all marketing communications for homework schemes to include limitations or conditions that might influence consumers before their decision to participate and to state whether the marketers will buy any products made? If your answer is no, please explain why.

Vocational training and instruction courses

20.16 The present CAP Code states:

52.6

Marketing communications for vocational training and other instruction courses should make no promises of employment unless it is guaranteed. The duration of the course and the level of attainment needed to embark on it should be made clear.

20.17 CAP considers that that rule suggests it is only the duration of the course, and the level of attainment needed to embark on it, that is material to a consumer's decision to respond to a marketing communication for vocational training and another instruction course. CAP considers there could be other significant conditions, such as where a course is held, that might affect a consumer's decision to respond to those marketing communications.

20.18 CAP proposes this rule:

20.9

Marketing communications for vocational training or other instruction courses must not give a misleading impression about the potential for employment that might follow.

Marketing communications must make clear significant conditions for acceptance onto vocational training or other instruction courses, such as the level of attainment, and significant conditions likely to affect a consumer's decision to embark on a course, such as the cost or the duration of a course.

Question 71

Given its policy consideration, do you agree with CAP's proposal to require marketing communications for vocational training and other instruction courses to make clear significant conditions for acceptance and significant conditions likely to affect a consumer's decision to embark on a course? If your answer is no, please explain why.

Deleted rules

20.19 None.

Other Questions

Question 72

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Employment, Homework Schemes and Business Opportunities section, are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Employment, Homework Schemes and Business Opportunities rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 – Section 21

Tobacco, Rolling Papers and Filters

Please read the proposed rules for this Code section before responding to the questions below.
[To see the proposed rules, please click here.](#)

Background

The law

Tobacco Advertising and Promotion Act 2002

- 21.1 The Act prohibits the publication or causing the publication of a marketing communication that has the purpose or effect of promoting a tobacco product. The Act does not apply to television or radio advertisements.
- 21.2 See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=1757331

Meeting the need to ensure that marketing communications for rolling papers and filters are responsible and that marketing communications for tobacco products are prevented

- 21.3 Marketing communications for rolling papers and filters have the potential to indirectly promote tobacco products, which may not be advertised to the public. CAP's present rules prevent marketing communications for rolling papers and filters from encouraging consumers to start smoking or encouraging smokers to smoke more. That general rule is strengthened by restrictions that prevent marketing communications from exploiting the vulnerable, including rules that prevent appeal of advertising content to children and young adults. CAP's approach ensures that marketing communications for rolling papers and filters are responsible and provide a high level of protection for consumers. CAP proposes to maintain that approach in the proposed Code.

Proposed substantive changes

- 21.4 None.

Questions

Question 73

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Tobacco, Rolling Papers and Filters section, are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Tobacco, Rolling Papers and Filters rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

Other comments

Question 74

Do you have other comments or observations on CAP's proposed Code that you would like CAP to take into account in its evaluation of consultation responses?

The proposed CAP Code:

The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing

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How the system works

History of self-regulation

Introduction

This twelfth edition of the Code comes into force on X. It replaces all previous editions.

As well as this Code, non-broadcast marketing communications are subject to legislation. See www.asa.org.uk or www.cap.org.uk for a non-exhaustive list.

The Code applies to:

- a) advertisements in newspapers, magazines, brochures, leaflets, circulars, mailings, e-mails, text transmissions (including SMS and MMS), fax transmissions, catalogues, follow-up literature and other electronic or printed material
- b) posters and other promotional media in public places, including moving images
- c) cinema, video and DVD advertisements
- d) advertisements in non-broadcast electronic media, including but not limited to: online advertisements in paid-for space (including banner or pop-up advertisements and online video advertisements); paid-for search listings; preferential listings on price comparison sites; viral advertisements (see 'These definitions apply to the Code (l)'); in-game advertisements; commercial classified advertisements; advergames that feature in display advertisements; advertisements transmitted by Bluetooth; advertisements distributed through web widgets and online sales promotions and prize promotions
- e) marketing databases containing consumers' personal information
- f) sales promotions in non-broadcast media
- g) advertorials (See 'These definitions apply to the Code (k)').

The Code does not apply to:

- a) broadcast advertisements. (The BCAP Code sets out the rules that govern broadcast advertisements on any television channel or radio station licensed by Ofcom)
- b) the operation of premium-rate services, which are the responsibility of PhonepayPlus; marketing communications that promote those services are subject to PhonepayPlus regulation and to the CAP Code or the BCAP Code. All marketing communications for premium-rate services are subject to the rules that cover non-operational elements of communications, for example serious or widespread offence, social responsibility and the truthfulness of claims that do not relate to specific characteristics of a premium-rate service
- c) marketing communications in foreign media. Direct marketing communications that originate outside the United Kingdom and sales promotions and advertisements in paid-for space that are published on non-UK-registered websites, if targeted at UK consumers, are subject to the jurisdiction of the relevant authority in the country from which they originate if that authority operates a suitable cross-border complaint system. If it does not, the ASA will take what action it can. Most members of the European Union, and many non-European countries, have a self-regulatory organisation that is a member of the European Advertising Standards Alliance (EASA). EASA co-ordinates the cross-border complaints system for its members (which include the ASA)
- d) claims, in marketing communications in media addressed only to medical, dental, veterinary or allied practitioners, that relate to those practitioners' expertise
- e) classified private advertisements, including those appearing online
- f) statutory, public, police and other official notices or information, but not marketing communications, produced by public authorities and the like

- g) works of art exhibited in public or private
- h) private correspondence, including correspondence between organisations and their customers about existing relationships or past purchases
- i) live oral communications, including telephone calls and announcements or direct approaches from street marketers
- j) press releases and other public relations material not covered by ('The Code applies to')
- k) editorial content, for example of the media or of books and 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 or a sales promotion or are visible in a marketing communication
- o) point-of-sale displays, except those covered by the sales promotion rules or the rolling paper and filter rules
- p) political advertisements as defined in Section 7
- q) website content not covered by ('The Code applies to (d)'), including (but not limited to) editorial content, news or public relations material, corporate reports and natural listings on a search engine or a price comparison site
- r) sponsorship; marketing communications that refer to sponsorship are covered by the Code
- s) customer charters and codes of practice.

These definitions apply to the Code:

- a) a product encompasses goods, services, ideas, causes, opportunities, prizes or gifts
- b) a consumer is anyone who is likely to see a given marketing communication, whether in the course of business or not
- c) the United Kingdom covers the Isle of Man and the Channel Islands
- d) a claim can be implied or direct, written, spoken or visual; the name of a product can constitute a claim
- e) the Code is divided into numbered rules
- f) a marketing communication includes all forms of communication listed in ('The Code applies to')
- g) a marketer includes an advertiser, promoter or direct marketer
- h) a supplier is anyone who supplies a product that is sold by a distance-selling marketing communication (and can be the marketer)
- i) a child is anyone under 16
- j) a corporate subscriber includes corporate bodies such as limited companies in the UK, limited liability partnerships in England, Wales and Northern Ireland or any partnerships in Scotland. It also includes schools, hospitals, Government departments or agencies and other public bodies. It does not include sole traders or non-limited liability partnerships in England, Wales and Northern Ireland. See rule 10.14
- k) An advertorial is an advertisement feature, announcement or promotion, the content of which is controlled by the marketer, not the publisher, that is disseminated in exchange for a payment or other reciprocal arrangement

l) A viral advertisement is an e-mail, text or other non-broadcast marketing communication designed to stimulate significant circulation by recipients to generate commercial or reputational benefit to the marketer. Viral advertisements are usually put into circulation (“seeded”) by the marketer with a request, either explicit or implicit, for the message to be forwarded to others. Sometimes they include a video clip or a link to website material or are part of a sales promotion campaign.

These criteria apply to the Code:

- a) the ASA Council’s interpretation of the Code is final
- b) if it is not clear whether a communication falls within the remit of the Code, the ASA will be more likely to apply the Code if the material complained about is in paid-for space
- c) compliance with the Code is assessed according to the marketing communication’s probable impact when taken as a whole and in context. That will depend on the medium in which the marketing communication appeared, the audience and its likely response, the nature of the product and any material distributed to consumers
- d) the Non-broadcast ASA Council will have regard to decisions made by the Broadcast ASA Council under the BCAP Code and, similarly, the Broadcast ASA Council will have regard to decisions made by the Non-broadcast ASA Council under the CAP Code. Factors that help to determine whether an ASA adjudication is likely to apply across media include, but are not limited to, the characteristics of the medium, how the advertisement is targeted, the context in which a claim is made and the extent to which the relevant CAP Code provisions correspond to those in the BCAP Code
- e) the Code does not have the force of law and its interpretation will reflect its flexibility. The Code operates alongside the law; the Courts may make rulings on matters covered by the Code
- f) an indication of the statutory rules governing marketing communications is given on www.cap.org.uk; professional advice should be taken about their application
- g) no spoken or written communication from the ASA or CAP should be understood as containing legal advice
- h) the Code is primarily concerned with the content of advertisements, promotions and direct marketing communications and not with terms of business or products. Some rules, however, go beyond content, for example those that cover the administration of sales promotions, the suitability of promotional items, the delivery of products ordered through an advertisement and the use of personal information in direct marketing. Editorial content is specifically excluded from the remit of the Code (see ‘The Code does not apply to (k)’ although it might be a factor in determining the context in which a marketing communication is judged (see ‘These criteria apply to the Code (c)’)
- i) the Code makes due allowance for public sensitivities but will not be used by the ASA to diminish freedom of speech unjustifiably
- j) the ASA does not arbitrate between conflicting ideologies
- k) In assessing compliance with the Code, the ASA may take account of honest market practices and the general principle of good faith in the traders’ field of activity.

General rules

Annex 1 - Section 1

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Compliance

Principle

The central principle of all marketing communications is that they should be legal, decent, honest and truthful. All marketing communications should be prepared with a sense of responsibility to consumers and society and should reflect the spirit, not merely the letter, of the Code.

Background

Marketers should use the ASA website, www.asa.org.uk, or the CAP website, www.cap.org.uk, to inform themselves of recent ASA adjudications, the latest text of the Code and CAP guidance on the Code.

The fact that a marketing communication complies with the Code does not guarantee that every publisher will accept it. Media owners can refuse space to marketing communications that break the Code and are not obliged to publish every marketing communication offered to them.

The ASA/CAP self-regulatory system is recognised by the Government, Office of Fair Trading and the Courts as one of the “established means” of consumer protection in non-broadcast marketing communications. Any matter that principally concerns a legal dispute will normally need to be resolved through law enforcement agencies or the Courts.

The ASA and CAP will treat in confidence any genuinely private or secret material supplied unless the Courts or officials acting within their statutory powers compel its disclosure.

Rules

1.1

Marketing communications should be legal, decent, honest and truthful.

1.2

Marketing communications must reflect the spirit, not merely the letter, of the Code.

1.3

Marketing communications must be prepared with a sense of responsibility to consumers and to society.

1.4

Marketers must comply with all general rules and with relevant sector-specific rules.

1.5

No marketing communication should bring advertising into disrepute.

1.6

Marketing communications must respect the principles of fair competition generally accepted in business.

1.7

Any unreasonable delay in responding to the ASA's enquiries will normally be considered a breach of the Code.

1.7.1

The full name and geographical business address of the marketer must be given to the ASA or CAP without delay if requested.

1.8

Marketing communications must comply with the Code. Primary responsibility for observing the Code falls on marketers. Others involved in preparing or publishing marketing communications, such as agencies, publishers and other service suppliers, also accept an obligation to abide by the Code.

1.9

Marketers should deal fairly with consumers.

Legality

1.10

Marketers have primary responsibility for ensuring that their marketing communications are legal. Marketing communications should comply with the law and should not incite anyone to break it.

1.10.1

Marketers must not state or imply that a product can legally be sold if it cannot.

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Recognition of Marketing Communications

Rules

2.1

Marketing communications must be obviously identifiable as such.

2.2

Unsolicited e-mail marketing communications must be obviously identifiable as marketing communications without the need to open them (see also rule 10.13.3).

2.3

Marketing communications must not falsely claim or imply that the marketer is acting as a consumer or for purposes outside its trade, business, craft or profession; marketing communications must make clear their commercial intent, if that is not obvious from the context.

2.4

Marketers and publishers should make clear that advertorials are marketing communications, for example by heading them "advertisement feature".

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MISLEADING

Principle

The ASA will take the Consumer Protection from Unfair Trading Regulations 2008 into account when it adjudicates on complaints about advertisements that are alleged to be misleading. See Appendix 1 for more information about those Regulations.

The ASA will take into account the impression created by marketing communications as well as specific claims. It will adjudicate on the basis of the likely effect on consumers, not the marketer's intentions.

Other Sections of the Code contain product-specific or audience-specific rules that are intended to protect consumers from misleading marketing communications. For example, the Children and Medicines Sections of the Code contain rules that apply, as well as the general rules, to marketing communications that fall under those Sections.

Rules

General

3.1

Marketing communications must not materially mislead.

3.2

Obvious exaggerations ("puffery") and claims that the consumer is unlikely to take literally are allowed provided they do not affect the accuracy or perception of the marketing communication in a material way.

3.3

Marketing communications must not mislead the consumer by omitting material information. They must not mislead by hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner.

Material information is information that the consumer needs to make informed decisions about whether or how to buy a product. Whether the omission or presentation of material information is likely to mislead the consumer depends on the context, the medium and, if the medium of the marketing communication is constrained by time or space, the measures that the marketer takes to make that information available to the consumer by other means.

3.4

For marketing communications that quote prices for advertised products, material information [for the purposes of 3.3] includes:

3.4.1

the main characteristics of the product

3.4.2

the identity (for example, a trading name) and geographical address of the marketer and any other trader on whose behalf the marketer is acting

3.4.3

the price of the advertised product, including taxes, or, if the nature of the product is such that the price cannot be calculated in advance, the manner in which the price is calculated

3.4.4

delivery charges

3.4.5

the arrangements for payment, delivery, performance or complaint handling, if those differ from the arrangements that consumers are likely to reasonably expect

3.4.6

that consumers have the right to withdraw or cancel, if they have that right (see 3.55).

Cross-reference: If the marketing communication encourages a consumer to buy a product through a distance-selling mechanism, please refer to Section 9, Distance selling.

3.5

Marketing communications must make clear the identity of the marketer if the marketing communication would otherwise mislead.

Cross-reference: Some marketing communications must include the marketer's identity and contact details. Marketing communications that fall under the Distance Selling, Database Practice or Employment Sections of the Code must comply with the more detailed rules in those Sections.

Marketers should note the law requires marketers to identify themselves in some marketing communications. Marketers should take legal advice.

3.6

Subjective claims must not mislead the consumer; marketing communications must not imply that expressions of opinion are objective claims.

Substantiation

3.7

Before distributing or submitting a marketing communication for publication, marketers must hold documentary evidence to prove claims that consumers are likely to regard as objective. The ASA may regard claims as misleading in the absence of adequate substantiation.

3.8

Claims for the content of non-fiction publications should not exaggerate the value, accuracy, scientific validity or practical usefulness of the product. Marketers must ensure that claims that have not been independently substantiated but are based merely on the content of a publication do not mislead consumers.

Cross-reference: CAP has published a Help Note on the Marketing of Publications.

Qualification

3.9

Marketing communications must make important limitations and qualifications clear. Qualifications may clarify but must not contradict the claims that they qualify.

Cross-reference: CAP has published a Help Note on Claims that Require Qualification.

3.10

Qualifications must be clear to consumers who see or hear the marketing communication only once.

Exaggeration

3.11

Marketing communications must not exaggerate the capability or performance of a product; claims must be based on normal use.

3.12

Marketing communications must not present rights given to consumers in law as a distinctive feature of the marketer's offer.

3.13

Marketing communications must not suggest that their claims are universally accepted if a significant division of informed or scientific opinion exists.

Prohibited claims

These rules apply regardless of any substantiation presented in support of the claims:

3.14

Marketing communications must not claim that products can facilitate winning in games of chance.

3.15

Marketing communications must not explicitly claim that the advertiser's job or livelihood is in jeopardy if the consumer does not buy the advertised product.

3.16

No marketing communication may promote a pyramid promotional scheme. Pyramid promotional schemes are those in which consumers pay for the opportunity to receive payments derived primarily from the introduction of other consumers into the scheme, not from the sale or consumption of products.

Prices

Principle

Price statements in marketing communications should take account of the Department for Business, Enterprise and Regulatory Reform's (BERR's) Pricing Practices Guide.

Definition

Price statements include statements about the manner in which the price will be calculated as well as definite prices.

3.17

Price statements must not mislead by omission, undue emphasis or distortion. They must relate to the product featured in the marketing communication.

3.18

Quoted prices must include non-optional taxes, duties, fees and charges that apply to all or most buyers. VAT-exclusive prices may be given only if all or most consumers pay no VAT or can recover VAT; marketing

communications that quote VAT-exclusive prices must prominently state the amount or rate of VAT payable if some consumers are likely to pay VAT.

3.19

If a tax, duty, fee or charge cannot be calculated in advance, for example, because it depends on the consumer's circumstances, the marketing communication must make clear that it is excluded from the advertised price and state how it is calculated.

3.20

Marketing communications that state prices must also state applicable delivery, freight or postal charges or, if those cannot reasonably be calculated in advance, state that such charges are payable.

3.21

If the price of one product depends on another, marketing communications must make clear the extent of the commitment the consumer must make to obtain the advertised price.

3.22

Price claims such as "up to" and "from" must not exaggerate the availability or amount of benefits likely to be obtained by the consumer.

Free

Principle

Marketing communications must not describe a product as "free", "gratis", "without charge" or similar if the consumer has to pay anything other than the unavoidable cost of responding and collecting or paying for delivery of the item.

3.23

Marketing communications must make clear the extent of the commitment the consumer must make to take advantage of a "free" offer.

3.24

Marketing communications must not describe items as "free" if:

3.24.1

the consumer has to pay for packing, packaging, handling or administration

3.24.2

the price of a product that the consumer must buy to take advantage of the offer, or the cost of response, has been inflated to recover the cost of supplying the “free” item or

3.25.3

the quality of the product that the consumer must buy has been reduced.

Cross-reference: CAP and BCAP have published joint Guidance on the use of “free”.

3.25

Marketers must not describe an element of a package as “free” if that element is included in the package price.

3.26

Marketers must not use the term “free trial” to describe “satisfaction or your money back” offers or offers for which a non-refundable purchase is required.

Availability

3.27

Marketers must make a reasonable estimate of demand for advertised products.

3.28

Marketing communications that quote a price for a featured product must state any reasonable grounds the marketer has for believing that it might not be able to supply the advertised (or an equivalent) product at the advertised price within a reasonable period and in reasonable quantities. In particular:

3.28.1

if estimated demand exceeds supply, marketing communications must make clear that stock is limited

3.28.2

if the marketer does not intend to fulfil orders, for example, because the purpose of the marketing communication is to assess potential demand, the marketing communication must make that clear

3.28.3

marketing communications must state restrictions on the availability of products, for example, geographical restrictions or age limits.

3.29

Marketers must monitor stocks. If a product becomes unavailable, marketers must, whenever possible, withdraw or amend marketing communications that feature that product.

3.30

Marketers must not use the technique of switch selling, in which their sales staff decline to show the advertised product, refuse to take orders for it or to deliver it within a reasonable time or demonstrate a defective sample of it to promote a different product.

3.31

Marketing communications must not falsely claim that the marketer is about to cease trading or move premises. They must not falsely state that a product, or the terms on which it is offered, will be available only for a very limited time to deprive consumers of the time or opportunity to make an informed choice.

3.32

Marketing communications must not mislead the consumer about market conditions or the possibility of finding the product elsewhere to induce consumers to buy the product at conditions less favourable than normal market conditions.

Comparisons

Principle

The ASA will consider unqualified superlative claims as comparative claims against all competing products. Superiority claims must be supported by evidence unless they are obvious puffery (that is, claims that consumers are unlikely to take literally). Objective superiority claims must make clear the aspect of the product or the advertiser's performance that is claimed to be superior. Subjective superiority claims such as "the best" are unlikely to be justified.

Comparisons with Identifiable Competitors

3.33

Marketing communications that include a comparison with an identifiable competitor must not mislead, or be likely to mislead, the consumer about either the advertised product or the competing product.

3.34

They must compare products meeting the same need or intended for the same purpose.

3.35

They must objectively compare one or more material, relevant, verifiable and representative feature of those products.

3.36

They must not create confusion between the marketer and its competitors or between the marketer's product, trade mark, trade name or other distinguishing mark and that of a competitor.

3.37

Certain EU agricultural products and foods are, because of their unique geographical area and method of production, given special protection by being registered as having a "designation of origin". Products with a designation of origin must be compared only with other products with the same designation.

Other comparisons

3.38

Marketing communications that include a comparison with an unidentifiable competitor must not mislead, or be likely to mislead, the consumer. The elements of the comparison must not be selected to give the marketer an unrepresentative advantage.

Price comparisons

3.39

Marketing communications that include a price comparison must state the basis of the comparison. Comparisons with a competitor price must be with the price for an identical or substantially equivalent product and must explain significant differences between the products. If the competitor offers more than one similar product, marketers should compare their price with the price for the competitor's product that is most similar to the advertised product.

Cross-reference: CAP has published a Help Note on Retailers' Price Comparisons and a Help Note on Lowest Price Claims and Price Promises.

3.40

Marketing communications may compare a price with a recommended retail price (RRP) if the RRP does not differ significantly from the price at which the product is generally sold.

Imitation and Denigration

3.41

Marketing communications must not mislead the consumer about who manufactures the product.

3.42

Marketing communications must not discredit or denigrate another product, marketer, trade mark, trade name or other distinguishing mark.

3.43

Marketing communications must not take unfair advantage of the reputation of a competitor's trade mark, trade name or other distinguishing mark or of the designation of origin of a competing product.

3.44

Marketing communications must not present a product as an imitation or replica of a product with a protected trade mark or trade name.

Endorsements and Testimonials

3.45

Marketers must hold documentary evidence that a testimonial or endorsement used in a marketing communication is genuine, unless it is obviously fictitious, and hold contact details for the person who, or organisation that, gives it.

3.46

Testimonials must relate to the advertised product.

3.47

Claims that are likely to be interpreted as factual and appear in a testimonial must not mislead the consumer.

3.48

Marketing communications must not feature a testimonial without permission. If they are genuine statements taken from a published source, quotations from publications and references to a test, trial, professional endorsement, research facility or professional journal may be acceptable without express permission.

3.49

Marketers must not refer in a marketing communication to advice received from CAP or imply endorsement by the ASA or CAP.

3.50

Marketing communications must not display a trust mark, quality mark or equivalent without the necessary authorisation. Marketing communications must not claim that the marketer (or any other entity referred to),

the marketing communication or the advertised product has been approved, endorsed or authorised by any public or other body if it has not or without complying with the terms of the approval, endorsement or authorisation.

3.51

Marketing communications must not falsely claim that the marketer, or other entity referred to in the marketing communication, is a signatory to a code of conduct. They must not falsely claim that a code of conduct has an endorsement from a public or other body.

3.52

Marketing communications must not use the Royal Arms or Emblems without prior permission from the Lord Chamberlain's office. References to a Royal Warrant should be checked with the Royal Warrant Holders' Association.

Guarantees and After-sales Service

Definition

In the rules below, "guarantee" includes warranties, after-sales service agreements, care packages and similar products.

3.53

Marketing communications must not use the word "guarantee" in a way that could cause confusion about a consumer's rights.

3.54

Marketing communications must make clear each significant limitation to an advertised guarantee (of the type that has implications for a consumer's rights). Marketers must supply the full terms before the consumer is subject to the guarantee.

3.55

Marketers must promptly refund consumers who make valid claims under an advertised money-back guarantee.

3.56

Marketing communications must not falsely claim or imply that after-sales service is available in an EEA member state in which the advertised product is not sold.

3.57

If a marketing communication in a language other than English offers after-sales service but the after-sales service is not available in the language of the marketing communication, the marketer must explain that to the consumer before the contract is concluded.

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Harm and Offence

Principle

Marketers should take account of the prevailing standards and the context in which a marketing communication is likely to appear to minimise the risk of causing harm or serious or widespread offence.

Rules

4.1

Marketing communications must not contain anything that is likely to cause serious or widespread offence. Particular care must be taken to avoid causing offence on the grounds of race, religion, gender, sexual orientation, disability or age. Compliance will be judged on the context, medium, audience, product and prevailing standards.

Marketing communications may be distasteful without necessarily breaching this rule. Marketers are urged to consider public sensitivities before using potentially offensive material.

The fact that a product is offensive to some people is not grounds for finding a marketing communication in breach of the Code.

4.2

Marketing communications must not cause fear or distress without justifiable reason; if it can be justified, the fear or distress should not be excessive. Marketers must not use a shocking claim or image merely to attract attention.

4.3

References to anyone who is dead must be handled with particular care to avoid causing offence or distress.

4.4

Marketing communications must contain nothing that is likely to condone or encourage violence or anti-social behaviour.

4.5

Marketing communications, especially those addressed to or depicting a child, must not condone or encourage an unsafe practice (see Section 12).

4.6

Marketing communications must not encourage consumers to drink and drive. Marketing communications must, where relevant, include a prominent warning on the dangers of drinking and driving and must not suggest that the effects of drinking alcohol can be masked.

4.7

Marketers must take particular care not to include in their marketing communications visual effects or techniques that are likely to adversely affect members of the public with photosensitive epilepsy.

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Children

Principle

Care should be taken when featuring or addressing children in marketing communications.

The way in which children perceive and react to marketing communications is influenced by their age, experience and the context in which the message is delivered. Marketing communications that are acceptable for young teenagers will not necessarily be acceptable for younger children. The ASA will take those factors into account when assessing whether a marketing communication complies with the Code.

Definition

For the purposes of the Code, a child is someone under 16.

Rules

Harm

5.1

Marketing communications addressed to, targeted directly at or featuring children must contain nothing that is likely to result in their physical, mental or moral harm:

5.1.1

children must not be encouraged to enter strange places or talk to strangers

5.1.2

children must not be shown in hazardous situations or behaving dangerously except to promote safety. Children must not be shown unattended in street scenes unless they are old enough to take responsibility for their own safety. Pedestrians and cyclists must be seen to observe the Highway Code

5.1.3

children must not be shown using or in close proximity to dangerous substances or equipment without direct adult supervision

5.1.4

children must not be encouraged to copy practices that might be unsafe for a child

5.1.5

distance selling marketers must take care when using youth media not to promote products that are unsuitable for children.

Credulity and unfair pressure

5.2

Marketing communications addressed to, targeted directly at or featuring children must not exploit their credulity, loyalty, vulnerability or lack of experience:

5.2.1

children must not be made to feel inferior or unpopular for not buying the advertised product

5.2.2

children must not be made to feel that they are lacking in courage, duty or loyalty if they do not buy or do not encourage others to buy a product

5.2.3

it must be made easy for children to judge the size, characteristics and performance of advertised products and to distinguish between real-life situations and fantasy

5.2.4

adult permission must be obtained before children are committed to buying complex or costly products

5.3

Marketing communications addressed to or targeted directly at children:

5.3.1

must not exaggerate what is attainable by an ordinary child using the product being marketed

5.3.2

must not exploit children's susceptibility to charitable appeals and must explain the extent to which their participation will help in any charity-linked promotions.

Direct exhortation and parental authority

5.4

Marketing communications addressed to or targeted directly at children:

5.4.1

must not actively encourage children to make a nuisance of themselves to parents or others and must not undermine parental authority

5.4.2

must not include a direct exhortation to children to buy an advertised product or persuade their parents or other adults to buy an advertised product for them.

5.5

Marketing communications that contain a direct exhortation to buy a product via a direct-response mechanism must not be directly targeted at children. For a definition of "direct-response mechanism", see the Distance Selling Section (Section 9).

Promotions

5.6

Promotions addressed to or targeted directly at children:

5.6.1

must make clear that adult permission is required if a prize or an incentive might cause conflict between a child's desire and a parent's, or other adult's, authority

5.6.2

must contain a prominent closing date if applicable

5.6.3

must not exaggerate the value of a prize or the chances of winning it.

5.7

Promotions that contain a direct exhortation to buy a product must not be addressed to or directly targeted at children.

See the Sales Promotions Section (Section 8).

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Privacy

Principle

Individuals should be protected from unwarranted infringements of privacy.

Rules

6.1

Marketers must not unfairly portray or refer to anyone in an adverse or offensive way unless that person has given the marketer written permission to allow it. Marketers are urged to obtain written permission before:

6.1.1

referring to or portraying a member of the public or his or her identifiable possession; the use of a crowd scene or a general public location may be acceptable without permission

6.1.2

referring to a person with a public profile; references that accurately reflect the contents of a book, an article or a film might be acceptable without permission

6.1.3

implying any personal approval of the advertised product; marketers should recognise that those who do not want to be associated with the product could have a legal claim.

Prior permission might not be needed if the marketing communication contains nothing that is inconsistent with the position or views of the featured person.

6.2

Members of the Royal Family should not normally be shown or mentioned in a marketing communication without their prior permission but an incidental reference unconnected with the advertised product, or a reference to material such as a book, article or film about a member of the Royal Family, may be acceptable.

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Political Advertisements

Rules

7.1

Marketing communications, whenever published or distributed, whose principal function is to influence voters in a local, regional, national or international election or referendum are exempt from the Code.

7.2

Marketing communications by central or local government, as distinct from those concerning party policy, are subject to the Code.

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Sales Promotions

Principle

The sales promotion rules apply to consumer and trade promotions, incentive schemes and the promotional elements of sponsorships; they regulate the nature and administration of promotions.

Promoters should take legal advice before embarking on promotions with prizes, including competitions, prize draws, instant-win offers and premium promotions, to ensure that the mechanisms involved do not make them unlawful lotteries (see the Gambling Act 2005 for Great Britain and the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 (as amended) for Northern Ireland).

Promoters should comply with all other relevant legislation, including data protection legislation for which guidance is available from the Information Commissioner's Office.

The sales promotion rules must be read in conjunction with all other parts of the Code, including the rules relevant to Alcohol and Children sections.

Definition

A sales promotion can provide an incentive for the consumer to buy by using a range of added direct or indirect benefits, usually on a temporary basis, to make the product more attractive. A non-exhaustive list of sales promotions includes: buy-one-get-one-free offers, money-off offers, premium offers, text-to-wins, instant-wins, competitions and prize draws. The rules do not apply to routine, non-promotional, distribution of products or product extensions, for example one-off editorial supplements (in printed or electronic form) to newspapers or magazines.

Rules

8.1

Promoters are responsible for all aspects and all stages of their promotions.

8.2

Promoters must conduct their promotions equitably, promptly and efficiently and be seen to deal fairly and honourably with participants and potential participants. Promoters must avoid causing unnecessary disappointment.

Protection of consumers, safety and suitability

8.3

Promoters must do everything reasonable to ensure that their promotions, including product samples, are safe and cause no harm to consumers or their property. Literature accompanying promotional items must give any necessary warnings and safety advice.

8.4

Alcoholic drinks must not feature in promotions directed at people under 18. Alcohol must not be available on promotion to anyone under 18.

8.5

Promotions must not be socially undesirable to the audience addressed by encouraging excessive consumption or irresponsible use.

8.6

Promoters must do everything reasonable to ensure that unsuitable or irresponsible material does not reach consumers or other recipients.

8.7

No promotion or promotional item should cause serious or widespread offence to consumers.

Children

(See Section 5 - Children)

8.8

Special care should be taken with promotions addressed to children or if products or items intended for adults might fall into the hands of children.

Availability

8.9

Promoters must be able to demonstrate that they have made a reasonable estimate of the likely response and that they were capable of meeting that response.

8.10

Phrases such as "subject to availability" do not relieve promoters of their obligation to do everything reasonable to avoid disappointing participants.

8.11

Promoters must not encourage the consumer to make a purchase or series of purchases as a precondition to applying for promotional items if the number of those items is limited.

8.12

If, having made a reasonable estimate as in 8.9, it is unable to supply demand for a promotional offer because of an unexpectedly high response or some other unanticipated factor outside its control, the promoter must ensure relevant communication with applicants and consumers and offer a refund or a substitute product in accordance with rule 9.4.

8.13

If a prize promotion is widely advertised, the promoter must ensure the widespread availability of the requisite forms and any goods needed to establish proof of purchase.

Administration

8.14

Promoters must ensure that their promotions are conducted under proper supervision and make adequate resources available to administer them. Promoters, agencies and intermediaries should not give consumers justifiable grounds for complaint.

8.15

Promoters must allow adequate time for each phase of the promotion: notifying the trade, distributing the goods, issuing rules if relevant, collecting wrappers and the like and judging and announcing results.

8.15.1

Promoters must award the prizes as described in their marketing communications or reasonable equivalents.

8.16

Promoters must normally fulfil applications within 30 days in accordance with 9.3 and refund money in accordance with 9.4.

Significant conditions for promotions

(Please see the Children Section, the Prize Promotions sub-section and the CAP Help Note on Promotions with Prizes)

8.17

Before purchase or, if no purchase is required, before or at the time of entry or application, promoters must communicate all applicable significant conditions. Significant conditions include:

8.17.1

How to participate

How to participate, including significant conditions and costs, and other major factors reasonably likely to influence consumers' decision or understanding about the promotion

8.17.2

Free-entry route explanation

Any free-entry route should be explained clearly and prominently

8.17.3

Start date

The start date, if applicable

8.17.4

Closing date

8.17.4.a

A prominent closing date, if applicable, for purchases and submissions of entries or claims. Closing dates are not always necessary, for example: comparisons that refer to a special offer (whether the promoter's previous offer or a competitor's offer) if the offer is and is stated to be "subject to availability"; promotions limited only by the availability of promotional packs (gifts with a purchase, extra-volume packs and reduced-price packs) and loyalty schemes run on an open-ended basis

8.17.4.b

Unless the promotional pack includes the promotional item or prize and the only limit is the availability of that pack, prize promotions and promotions addressed to or targeted at children always need a closing date

8.17.4.c

Promoters must be able to demonstrate that the absence of a closing date will not disadvantage consumers

8.17.4.d

Promoters must state if the deadline for responding to undated promotional material will be calculated from the date the material was received by consumers

8.17.4.e

Unless circumstances outside the reasonable control of the promoter make it unavoidable, closing dates must not be changed. If they are changed, promoters must do everything reasonable to ensure that consumers who participated within the original terms are not disadvantaged

8.17.5

Proof of purchase

Any proof of purchase requirements

8.17.6

Prizes and gifts

Promoters must specify the number and nature of prizes or gifts, if applicable. If the exact number cannot be predetermined, a reasonable estimate of the number and a statement of their nature should be made. Promoters must:

8.17.6.a

distinguish those prizes that could be won, including estimated prize funds, from those prizes that will be won by someone by the end of the promotional period and

8.17.6.b

state whether prizes are to be awarded in instalments or are to be shared among recipients

8.17.7

Restrictions

Geographical, personal or technological restrictions such as location, age or the need to access the Internet. Promoters must state any need to obtain permission to enter from an adult or employer

8.17.8

Availability

The availability of promotional packs if it is not obvious; for example, if promotional packs could become unavailable before the stated closing date of the offer

8.17.9

Promoter's name and address

Unless it is obvious from the context or entry into an advertised promotion is only through a dedicated website containing that information in an easily found format, the promoter's full name and correspondence address must be stated.

8.18

Marketing communications that include a promotion and are significantly limited by time or space must include as much information about significant conditions as practicable and must direct consumers clearly to an easily-accessible alternative source where all the significant conditions of the promotion are prominently stated. Participants should be able to retain those conditions or easily access them throughout the promotion.

Prize promotions

(see CAP Help Note on Promotions with Prizes)

8.19

Promoters must not claim that consumers have won a prize if they have not. The distinction between prizes and gifts must always be clear: items offered to a significant proportion of consumers in a promotion should be described as gifts, not prizes. If a promotion offers a gift to a significant proportion and a prize to those who win, special care is needed to avoid confusing the two: the promotion must, for example, state clearly that consumers "qualify" for the gift but have merely an opportunity to win the prize. If a promotion includes, in a list of prizes, a gift for which consumers have qualified, the promoter must distinguish clearly between the two.

8.20

Promoters must not exaggerate consumers' chances of winning prizes. They must not include a consumer who has been awarded a gift in a list of prize winners.

8.21

Promoters must not claim or imply that consumers are luckier than they are. They must not use terms such as "finalist" or "final stage" in a way that implies that consumers have progressed, by chance or skill, to an advanced stage of a promotion if they have not.

8.21.1

Promoters must not falsely claim or imply that the consumer has already won, will win or will on doing a particular act win a prize (or other equivalent benefit) if the consumer must incur a cost to claim the prize (or other equivalent benefit) or if the prize (or other equivalent benefit) does not exist.

8.22

Promoters must not claim that consumers must respond by a specified date or within a specified time if they need not.

8.23

Promoters must avoid complex rules and only exceptionally supplement conditions of entry with extra rules. If extra rules cannot be avoided, promoters must tell participants how to obtain them; the rules must contain nothing that could reasonably have influenced consumers against buying or participating.

8.24

Promoters of prize draws must ensure that prizes are awarded in accordance with the laws of chance and, unless winners are selected by a verifiably random computer process, under the supervision of an independent observer.

8.25

Participants in instant-win promotions must get their winnings at once or know immediately what they have won and how to claim without delay, cost or administrative barriers. Instant-win tickets, prizes, tokens or numbers must be allocated by a process that has been verified by a suitable independent party to be secure, fair and random, and that can be, and for national promotions must be, independently audited.

8.26

In competitions, if the selection of a winning entry is open to subjective interpretation, an independent judge, or a panel that includes at least one member who is demonstrably independent, especially from the competition's promoters and intermediaries and from the pool of entrants from which the eventual winner is picked, must be appointed. Those appointed to act as judges should be competent to judge the competition and their full names must be made available on request.

8.27

Withholding prizes is justified only if participants have not met criteria set out clearly in the rules of the promotion.

8.28

Participants must be able to retain conditions or easily access them throughout the promotion. In addition to 8.17, prize promotions must specify before or at the time of entry:

8.28.1

any restriction on the number of entries

8.28.2

whether a cash alternative may be substituted for any prize

8.28.3

if more than 30 days after the closing date, the date by which prizewinners will receive their prizes

8.28.4

how and when winners will be notified of results

8.28.5

how and when information about winners and results will be made available. Promoters must either publish or make available on request the name and county of major prizewinners and, if applicable, their winning entries. Prizewinners must not be compromised by the publication of excessive personal information

8.28.6

in a competition, the criteria and mechanism for judging entries (for example, the most apt and original tiebreaker)

8.28.7

if relevant, who owns the copyright of the entries

8.28.8

if applicable, how the promoter will return entries

8.28.9

any intention to use winners in post-event publicity.

Front-page flashes

(see CAP Help Note on Front-page Flashes)

8.29

Publishers announcing reader promotions on the front page or cover must ensure that consumers know whether they are expected to buy subsequent editions of the publication. Major conditions that might reasonably influence consumers significantly in their decision to buy must appear on the front page or cover.

Trade incentives

8.30

Incentive schemes must be designed and implemented to take account of the interests of everyone involved and must not compromise the obligation of employees to give honest advice to consumers.

8.31

If they intend to ask for help from, or offer incentives to, another company's employees, promoters must require those employees to obtain their employer's permission before participating. Promoters must observe any procedures established by companies for their employees, including any rules for participating in promotions.

8.32

Incentive schemes and relevant promotions must make clear if a tax liability might arise.

Charity-linked promotions

8.33

Promotions run by third parties (for example commercial companies) claiming that participation will benefit a registered charity or cause must:

8.33.1

name each charity or cause that will benefit and be able to show the ASA or CAP the formal agreement with those benefiting from the promotion

8.33.2

if it is not a registered charity, define its nature and objectives,

8.33.3

specify exactly what will be gained by the named charity or cause and state the basis on which the contribution will be calculated

8.33.4

state if the promoter has imposed a limit on its contributions

8.33.5

not impose a cut-off point for contributions by consumers if an amount is stated for each purchase. If a target total is stated, extra money collected should be given to the named charity or cause on the same basis as contributions below that level

8.33.6

be able to show that targets set are realistic

8.33.7

not exaggerate the benefit to the charity or cause derived from individual purchases of the promoted product

8.33.8

if asked, make available to consumers a current or final total of contributions made

8.33.9

not directly encourage children to buy, or exhort children to persuade an adult to buy for them, a product that promotes charitable purposes.

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Distance Selling

Principle

The rules in this Section must be read in conjunction with the general rules, sales promotion rules and those in other Sections of this Code.

The use of personal information to target advertisements is subject to legislation and marketers are advised to seek legal advice to ensure they comply with the relevant laws.

The Direct Marketing Association (DMA) requires its members to observe the DM Code of Practice, which covers some practices that are not covered in the CAP Code.

Definition

The rules in this Section apply to marketing communications that are sent directly to individual consumers. They do not cover telemarketing, because live oral communications are outside the remit of the CAP Code.

Distance Selling

Principle

Most distance selling contracts are subject to the Consumer Protection (Distance Selling) Regulations 2000 (as amended). These rules complement those Regulations and do not replace them.

These rules must be read in conjunction with other rules in this Code, especially rules 3.27 – 3.31 (Availability).

Definition

Distance selling marketing communications are marketing communications that promote specific goods or services and include direct response mechanisms that allow readers to place orders without face-to-face contact with the marketer.

Rules

9.1

Distance selling marketing communications must include:

9.1.1

for those communications that require payment before products are received and have written response mechanisms (for example by post, fax or e-mail), the full name and geographical address of the marketer (and the supplier if different) outside the coupon or other response mechanism so that it can be retained by consumers. A separate address for orders may also be given; it need not

be a full address but could, for example, be a Freepost address or a PO Box number. Communications containing a telephone response mechanism only need merely state the full name and telephone number but consumers calling the number must be told the geographical address (and see 9.2.4). Communications that do not require payment before products are received must state the full name of the marketer (and the supplier if different)

9.1.2

the main characteristics of the product

9.1.3

the price, including any VAT or other taxes payable (see ["prices" Section of the general rules]), and payment arrangements

9.1.4

the amount and number of any delivery charge

9.1.5

the estimated delivery or performance time (see 9.3) and arrangements

9.1.6

a statement that, unless inapplicable (see 42.6), consumers have the right to cancel orders for products. Marketers of services must state that the right to cancel will be lost once services have begun with the consumer's agreement, if they want to limit consumers' cancellation rights in that way. They must, however, make it clear when the services will begin

9.1.7

any telephone, postal or other communication charge calculated at higher than the standard rate (for example, if a premium-rate call is required)

9.1.8

any other limitation on the offer (for example period of availability) and any other condition that affects its validity

9.1.9

a statement on whether the marketer intends to provide substitute products (of equivalent quality and price) if those ordered are unavailable and one that it will meet the cost of returning substitute products on cancellation

9.1.10

if goods are supplied or services performed permanently or recurrently, the minimum duration of open-ended contracts.

9.2

At the latest by the time that goods are delivered or services begin, marketers must give consumers written information on:

9.2.1

how to exercise their right to cancel, unless inapplicable (see 9.5). Marketers must allow at least seven clear working days after delivery (or after the conclusion of service contracts) for consumers to cancel

9.2.2

for goods, whether the consumer has to return the goods to the suppliers on cancellation and, if so, who is to bear the cost of return or recovery of the goods (though see 9.1.9 for substitute goods)

9.2.3

any other guarantees and after-sales services

9.2.4

the full geographical address of the suppliers for any consumer complaints

9.2.5

the conditions that apply to the cancellation of any open-ended contract.

9.3

Marketers must fulfil orders within 30 clear days from the day consumers send their order unless they meet one of these criteria and state the longer delivery time in the marketing communication: a longer delivery time might be given for products such as plants and made-to-measure products; marketers might make clear that they intend not to begin production unless they receive enough responses or the consumer orders a series of products to be sent at regular intervals after the first 30 days.

9.4

Marketers must refund money promptly (and at the latest within 30 days of notice of cancellation being given) if:

9.4.1

consumers have not received products within the specified period. If they prefer to wait, consumers must be given a firm dispatch date or fortnightly progress reports. Alternatively marketers may, if asked or if stated before purchase, provide a substitute of equivalent quality and price

9.4.2

products are returned because they are damaged when received, are faulty or are not as described; if so, the marketer must bear the cost of transit in both directions

9.4.3

consumers cancel within seven clear working days after delivery, unless the product is listed in 9.5. Consumers should assume they may try out products, except for audio or video recordings or computer software, but should take reasonable care of them before they are returned. Consumers must return the product and, unless the product is a substitute product sent instead of the ordered

product, the marketer may require the consumer to pay the costs of doing so providing the marketer made that clear at the latest at the time the product was delivered.

9.4.4

an unconditional money-back guarantee is given and the products are returned within a reasonable period

9.4.5

products that have been returned are not received back, provided consumers can produce proof of posting.

9.5

If all contractual obligations to consumers are met, marketers do not have to provide a refund on:

9.5.1

services that have already begun, if 9.1.6 has been complied with

9.5.2

products the price of which depends on financial market fluctuations that are outside the control of the supplier

9.5.3

perishable, personalised or made-to-measure products

9.5.4

audio or video recordings or computer software if unsealed by the consumer

9.5.5

newspapers, periodicals or magazines

9.5.6

betting, gaming or lottery services.

9.6

Marketers should take particular care when packaging products that might fall into the hands of children.

9.7

Marketers must not falsely imply that consumers have already ordered the marketed product by including in marketing material an invoice or similar document that seeks payment.

9.8

Marketers should not ask consumers to pay for or return unsolicited products, except for substitute products supplied in conformity with clauses 8.12 and 9.4.1.

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Database Practice

(See also CAP Help Notes on Mobile Marketing and Viral Marketing)

Principle

Marketers must comply with all relevant data protection legislation. Guidance on that legislation is available from the Information Commissioner's Office. Although data protection legislation has a wide application, these rules relate only to databases used for direct marketing purposes. The rules should be observed in conjunction with the legislation; they do not replace it.

Responsibility for complying with the database practice rules may rest directly not with marketers but with data controllers. Those responsible are expected to comply.

Definitions

A "data controller" is an entity that determines the purposes for which, and the manner in which, personal information is to be processed. It may be an individual or an organisation and the processing may be carried out jointly or in common with other persons or organisations.

A "Preference Service" is a service that, to reduce unsolicited contact, enables consumers and businesses to have their names and contact details in the UK removed from or added to lists that are used by the direct marketing industry.

Electronic mail in this Section encompasses e-mail, Short Message Service (SMS), Multimedia Messaging Service (MMS) and other data transfer methods.

Rules

10.1

Personal information must always be held securely and must be safeguarded against unauthorised use, disclosure, alteration or destruction.

10.2

Any proposed transfer of a database to a country outside the European Economic Area must be made only if that country ensures an adequate level of protection for the rights and freedoms of consumers in relation to the processing of personal information or if contractual arrangements provide that protection.

10.3

Marketers must do everything reasonable to ensure that, if asked in writing, consumers or the ASA (with consent of the consumer concerned) are given available information on the nature of a consumer's personal information and from where it has been obtained.

10.4

Marketers must not make persistent and unwanted marketing communications by telephone, fax, e-mail or other remote media. To avoid making persistent and unwanted marketing communications, marketers must do everything reasonable to ensure that:

10.4.1

marketing communications are suitable for those they target

10.4.2

marketing communications are not sent unsolicited to consumers if explicit consent is required (see 10.13)

10.4.3

anyone who has been notified to them as dead is not mailed again and the notifier is referred to the relevant Preference Service

10.4.4

marketing communications are not sent to consumers who have asked not to receive them (see 10.5) or, if relevant, who have not had the opportunity to object to receiving them (see 10.9.3). Those consumers should be identifiable

10.4.5

databases are accurate and up-to-date and that reasonable requests for corrections to personal information are effected within 60 days.

10.5

Consumers are entitled to have their personal information suppressed. Marketers must ensure that, before use, databases have been run against relevant suppression files within a suitable period. Marketers must hold limited information, for suppression purposes only, to ensure that no other marketing communications are sent as a result of information about those consumers being re-obtained through a third party.

10.6

Marketing communications sent by electronic mail (but not those sent by Bluetooth technology) must contain the marketer's full name and a valid address, for example an e-mail address or a SMS short code to which recipients can send opt-out requests.

10.7

Fax and non-live-sound automated-call marketing communications must contain the marketer's full name and a valid address or freephone number to which recipients can send opt-out requests.

10.8

Marketers are permitted, subject to database rights, to use published information that is generally available if the consumer concerned is not listed on a relevant suppression file.

10.9

Unless it is obvious from the context, or if they already know, consumers must be informed in a clear and understandable manner and at the time personal information is collected:

10.9.1

who is collecting it (and the representative for data protection queries, if different)

10.9.2

why it is being collected

10.9.3

if the marketer intends to disclose the information to third parties, including associated but legally separate companies, or put the information to a use significantly different from that for which it is being provided; if so, an opportunity to prevent that from happening must be given.

10.10

The extent and detail of personal information held for any purpose must be adequate and relevant and should not be excessive for that purpose.

10.11

Personal information must not be kept for longer than is necessary for the purpose for which it was originally obtained.

10.12

If after collection they decide to use personal information for a purpose significantly different from that originally communicated, marketers should first get the explicit consent of consumers. Significantly different purposes include:

10.12.1

the disclosure of personal information to third parties for direct marketing purposes

10.12.2

the use or disclosure of personal information for any purpose substantially different from that which consumers could reasonably have foreseen and to which they might have objected.

10.13

The explicit consent of consumers is required before:

10.13.1

processing sensitive personal data, including information on racial or ethnic origin, political opinion or religious or other similar beliefs, trade union membership, physical or mental health, sex life, criminal record or allegation of criminal activity

10.13.2

sending marketing communications by fax

10.13.3

sending marketing communications by electronic mail (excluding by Bluetooth technology) but marketers may send unsolicited marketing about their similar products to those whose data they have obtained during, or in negotiations for, a sale. Data marketers must, however, tell those consumers they may opt-out of receiving future marketing communications both when they collect the data and at every subsequent occasion they send out marketing communications. Marketers must give consumers a simple means to do so

10.13.4

sending non-live-sound marketing communications by automated calling systems.

10.14

Explicit consent is not required when marketing business products by fax or by electronic mail to corporate subscribers (see 'Introduction - These definitions apply: j)'), including to their named employees. Marketers must nevertheless comply with 10.4.5 and 10.5 and offer opt-outs in line with 10.13.3.

Children

(Please see the Children Section)

10.15

Marketers must not knowingly collect from children under 12 personal information about those children for marketing purposes without first obtaining the consent of the child's parent or guardian.

10.16

Marketers must not knowingly collect personal information about other people from children under 16.

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Environmental Claims

Principle

Marketers should take account of Government guidance including the Green Claims Code published by DEFRA and BERR.

Rules

11.1

The basis of environmental claims must be clear. Unqualified claims could mislead if they omit significant information.

11.2

The meaning of all terms used in marketing communications must be clear to consumers.

11.3

Absolute claims must be supported by a high level of substantiation. Comparative claims such as “greener” or “friendlier” can be justified, for example, if the advertised product provides a total environmental benefit over that of the marketer’s previous product or competitor products and the basis of the comparison is clear.

11.4

Marketers must base environmental claims on the full life cycle of the advertised product, unless the marketing communication states otherwise, and must make clear the limits of the life cycle. If a general claim cannot be justified, a more limited claim about specific aspects of a product might be justifiable. Marketers must ensure claims that are based on only part of the advertised product’s life cycle do not mislead consumers about the product’s total environmental impact.

11.5

Marketers must not suggest that their claims are universally accepted if a significant division of informed or scientific opinion exists.

11.6

If a product has never had a demonstrably adverse effect on the environment, marketing communications must not imply that the formulation has changed to improve the product in the way claimed. Marketers may,

however, claim that a product has always been designed in a way that omits an ingredient or process known to harm the environment.

11.7

Marketing communications must not mislead consumers about the environmental benefit that a product offers; for example, by highlighting the absence of an environmentally damaging ingredient if that ingredient is not usually found in competing products or by highlighting an environmental benefit that results from a legal obligation if competing products are subject to that legal obligation.

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Rules for specific categories

Annex 1 – Section 12

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Medicines, Treatments, Devices and Health

Principle

The rules in this Section are designed to ensure that marketing communications for medicines, medical devices, treatments, health-related products and beauty products receive the necessary high level of scrutiny. The rules apply to marketing communications and not the products, which are regulated by health regulators such as the Medicines and Healthcare products Regulatory Agency (MHRA), www.mhra.gov.uk, the European Medicines Agency (EMA), www.ema.europa.eu/ and the Department of Health, www.dh.gov.uk. Marketing communications for those products must comply with the rules and professional codes of conduct of relevant professional bodies.

Background

For more information, see CAP Help Notes, especially those on: Substantiation for Health, Beauty and Slimming Claims; Health, Beauty and Slimming Advertisements that Refer to Medical Conditions and Use of Experts by the ASA and CAP.

For the purposes of this Code, “licence” includes certificate, authorisation or registration.

Rules

12.1

Objective claims made about health-related or beauty products must be backed by evidence, if relevant consisting of trials conducted on people. If relevant, the rules in this Section apply to claims for products for animals. Substantiation will be assessed on the basis of the available scientific knowledge.

Medicinal claims may be made for a medicinal product that is licensed by the MHRA or EMA, or a medical device that contains medicinal substances that act on the body in a manner ancillary to the device only. A medicinal claim is a claim that a substance or combination of substances can be used with a view to making a medical diagnosis or can treat or prevent disease, including an injury, ailment or adverse condition, whether of body or mind, in human beings by restoring, correcting or modifying physiological functions by exertion of a pharmacological, immunological or metabolic action.

12.2

Marketers must not discourage essential treatment for conditions for which medical supervision should be sought. For example, they must not offer specific advice on, diagnosis of or treatment for such conditions unless that advice, diagnosis or treatment is conducted under the supervision of a suitably qualified health professional. Accurate and responsible general information about such conditions may, however, be offered. (See also 12.11)

Health professionals will be deemed suitably qualified only if they can provide suitable credentials, for example, evidence of: relevant professional expertise or qualifications; systems for regular review of members' skills and competencies and suitable professional indemnity insurance covering all services provided; accreditation by a professional or regulatory body that has systems for dealing with complaints and taking disciplinary action and has registration based on minimum standards for training and qualifications.

12.3

Marketers offering individual treatments, especially those that are physically invasive, may be asked by the media and the ASA to provide full details together with information about those who supervise and administer them. Practitioners must have relevant and recognised qualifications. Marketers should encourage consumers to take independent medical advice before committing themselves to significant treatments, including those that are physically invasive.

12.4

Marketers must not confuse consumers by using unfamiliar scientific words for common conditions.

12.5

Marketers inviting consumers to diagnose their minor ailments must not make claims that might lead to a mistaken diagnosis.

12.6

Marketers should not falsely claim that a product is able to cure illness, dysfunction or malformations

12.7

References to the relief of symptoms or the superficial signs of ageing are acceptable if they can be substantiated. Unqualified claims such as "cure" and "rejuvenation" are not generally acceptable, especially for cosmetic products.

12.8

Marketers must hold proof before claiming or implying that a minor addiction or a bad habit can be treated without effort from those suffering.

12.9

Marketers must not encourage consumers to use a product to excess and must hold proof before suggesting their product or therapy is guaranteed to work, absolutely safe or without side-effects.

12.10

Marketing communications must not suggest that any product is safe or effective merely because it is "natural" or that it is generally safer because it omits an ingredient in common use.

Medicines

The Medicines Act 1968 and secondary legislation issued under it, as well as Regulations implementing European Community Directive 2001/83/EC on the Community Code relating to medicinal products for human use, govern the advertising and promotion of medicines and the conditions of ill-health that medicines may be offered to treat. Guidance on the relevant legislation is available from the MHRA.

For more information on medicinal products and medical devices, go to: www.mhra.gov.uk. For more information on medical treatments, go to: www.healthcarecommission.org.uk.

12.11

Medicines must have a licence from the MHRA before they are marketed. Marketing communications for medicines must conform with the licence and the product's summary of product characteristics. For the avoidance of doubt, by conforming with the product's indicated use, a marketing communication would not breach 12.2.

Marketing communications must not suggest that a product is "special" or "different" because it has been granted a licence by the MHRA.

12.12

Prescription-only medicines or medical treatments may not be advertised to the public.

12.12

Marketing communications for a medicinal product must include the name of the product, an indication of what it is for, text such as "Always read the label" and the common name of the sole active ingredient, if it contains only one.

Marketing communications for a traditional herbal medicinal product or a homeopathic medicinal product must include mandatory information, which can be found in the MHRA's The Blue Guide: Advertising and Promotion of Medicines in the UK at www.mhra.gov.uk.

12.13

Marketers must not use fear or anxiety to promote a medicine or a recovery from illness and must not suggest that using or avoiding a product can affect normal health.

12.14

Illustrations of the effect or action of a product should be accurate.

12.15

Marketing communications for a medicine must not be addressed to children.

12.16

Marketers must not suggest that a medicinal product is either a food or a cosmetic.

12.17

Marketers must not use health professionals or celebrities to endorse medicines.

12.18

Marketing communications for a medicine may not claim that its effects are as good as or better than those of another identifiable product.

12.19

Homeopathic medicinal products must be registered in the UK. Any product information given in the marketing communication should be confined to what appears on the label. Marketing communications must include a warning to consult a doctor if symptoms persist. Marketing communications for an unlicensed product must not make a medicinal or therapeutic claim or refer to an ailment unless authorised by the MHRA to do so.

12.20

Marketers of traditional herbal medicines may advertise for the indications listed in the product's summary of product characteristics. Marketing communications for products that hold a Traditional Herbal Medicines Registration must not imply that registration is based upon clinical trials.

Cosmetics

12.21

Claims made about the action that a cosmetic has on or in the skin should distinguish between the composition of the product and any effects brought about by the way in which it is applied, such as massage. Scientific evidence must also make that distinction.

12.21.1

Some cosmetics have an effect on the type of skin changes that are caused by environmental factors. Marketing communications for them may therefore refer to temporarily preventing, delaying or masking premature ageing.

Hair and scalp

12.22

Marketers must be able to provide scientific evidence, if relevant consisting of trials conducted on people, for any claim that their product or therapy can prevent baldness or slow it down, arrest or reverse hair loss,

stimulate or improve hair growth, nourish hair roots, strengthen the hair or improve its health as distinct from its appearance.

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Weight Control and Slimming

(see CAP Slimming Guidelines for Press Advertisements)

Principle

The rules in this Section are designed to ensure that marketing communications for slimming and weight control products receive the necessary high level of scrutiny.

Definition

This Section applies to marketing communications for weight control and slimming foodstuffs, aids (including exercise products that make weight-loss or slimming claims), clinics and other establishments, diets, medicines, treatments and the like. If applicable, they must comply with Section 12, Medicines, Medical Devices, Health-related Products and Beauty Products, and Section 15, Food, Dietary Supplements and Associated Health and Nutrition Claims.

Rules

13.1

A weight-reduction regime in which the intake of energy is lower than its output is the most common self-treatment for achieving weight reduction. Any claim made for the effectiveness or action of a weight-reduction method or product must be backed, if applicable, by rigorous trials on people; testimonials that are not supported by trials do not constitute substantiation.

13.2

Obesity in adults is defined by a Body Mass Index (BMI) of more than 30 kg/m². Obesity is frequently associated with a medical condition and a treatment for it must not be advertised to the public unless it is to be used under suitably qualified supervision. Marketing communications for non-prescription medicines that are indicated for the treatment of obesity and that require the involvement of a pharmacist in the sale or supply of the medicine may nevertheless be advertised to the public.

13.3

Marketing communications for any weight-reduction regime or establishment must neither be directed at nor contain anything that is likely to appeal particularly to people who are under 18 or those for whom weight reduction would produce a potentially harmful body weight (BMI of less than 18.5 kg/m²). Those marketing communications must not suggest that being underweight is desirable or acceptable.

13.4

Before they make claims for a weight-reduction aid or regimen, marketers must show that weight-reduction is achieved by loss of body fat. Combining a diet with an unproven weight-reduction method does not justify making weight-reduction claims for that method.

13.5

Marketers must be able to show that their diet plans are nutritionally well-balanced (except for producing a deficit of energy) and that must be assessed in relation to the category of person who would use them.

13.6

Vitamins and minerals do not contribute to weight reduction but may be offered to slimmers as a safeguard against any shortfall in recommended intake when dieting.

13.7

Marketers promoting Very Low Calorie Diets or other diets that fall below 800 kilo-calories a day must do so only for short-term use and must encourage users to take medical advice before embarking on them. Marketers should refer to the Guidance on "Obesity: the prevention, identification, assessment and management of overweight and obesity in adults and children" (2006) published by the National Institute for Health and Clinical Excellence.

13.8

Marketing communications for diet aids must make clear how they work. Prominence must be given to the role of the diet and marketing communications must not give the impression that dieters cannot fail or can eat as much as they like and still lose weight.

13.9

Marketing communications must not contain claims that people can lose precise amounts of weight within a stated period or, except for marketing communications for surgical clinics, establishments and the like that comply with rule 12.3, that weight or fat can be lost from specific parts of the body.

13.9.1

Marketing communications for surgical clinics, establishments and the like that comply with rule 12.3 must not refer to the amount of weight that can be lost.

13.10

Claims that an individual has lost an exact amount of weight must be compatible with good medical and nutritional practice. Those claims must state the period involved and must not be based on unrepresentative experiences. For those who are normally overweight, a rate of weight loss greater than 2 lbs (just under 1 kg) a week is unlikely to be compatible with good medical and nutritional practice. For those who are obese, a rate of weight loss greater than 2 lbs a week in the early stages of dieting could be compatible with good medical and nutritional practice.

13.10.1

Health claims in marketing communications for food products that refer to a rate or amount of weight loss are not permitted.

13.11

Resistance and aerobic exercise can improve muscular condition and tone and that can improve body shape and posture. Marketers must be able to substantiate any claim that such methods used alone or in conjunction with a diet plan can lead to weight or inch reduction. Marketing communications for intensive exercise programmes should encourage users to check with a doctor before starting.

13.12

Short-term loss of girth may be achieved by wearing a tight-fitting garment. That loss must not be portrayed as permanent or confused with weight or fat reduction.

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Financial Products

Background

Marketers must have regard to the financial promotion restriction in Section 21 of the Financial Services and Markets Act 2000 and in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (as amended), as reflected in the rules and guidance issued and enforced by the Financial Services Authority (FSA). The scope of that legislation, rules and guidance extends to marketing communications for: investments and investment advice; deposit taking (for example banking); home finance transactions (regulated mortgages, home purchase plans and home finance plans); general insurance and pure protection policies (for example term assurance). The FSA is responsible for the regulation of first-charge mortgage lending and selling, as well as certain secured loans and the activities of insurance intermediaries. The FSA does not provide pre-publication advice on proposed financial marketing communications; technical guidance is available on specific matters or rule interpretation only. For more information, contact the FSA (see www.fsa.gov.uk). The Office of Fair Trading (OFT) regulates other consumer loans under the Consumer Credit Act 1974 (as amended) and the Consumer Credit (Advertisements) Regulations 2004 (as amended). Debt management companies must ensure they comply with the Guidance for Debt Management Companies published by the OFT.

The rules that follow apply to financial marketing communications that are not regulated by the FSA or the OFT and to marketing communications for debt advice. All financial marketing communications are, however, subject to Code rules that cover non-technical elements of communications, for example serious or widespread offence, social responsibility and the truthfulness of claims that do not relate to specific characteristics of financial products.

Rules

14.1

Offers of financial products must be set out in a way that allows them to be understood easily by the audience being addressed. Marketers must ensure that they do not take advantage of consumers' inexperience or credulity.

14.2

Marketing communications should state the nature of the contract being offered, any limitation, expense, penalty or charge and the terms of withdrawal. Alternatively, if a marketing communication is short or general in its content, free material explaining the offer must be made readily available to consumers before a binding contract is entered into.

14.3

The basis used to calculate any rate of interest, forecast or projection must be apparent immediately.

14.4

Marketing communications must make clear that the value of investments is variable and, unless guaranteed, can go down as well as up. If the value of the investment is guaranteed, the marketing communication must explain the guarantee.

14.5

Marketing communications should make clear that past performance or experience does not necessarily give a guide for the future; if they are used in marketing communications, examples of past performance or experience should not be unrepresentative.

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Food, Dietary Supplements and Associated Health and Nutrition Claims

Principle

Public health policy increasingly emphasises good dietary behaviour and an active lifestyle as a means of promoting health. Commercial product advertising cannot reasonably be expected to perform the same role as education and public information in promoting a varied and balanced diet but should not undermine progress towards national dietary improvement by misleading or confusing consumers.

Background

These rules must be read in conjunction with the relevant legislation including the Food Safety Act 1990, the Food Labelling Regulations 1996 (as amended) - especially Schedule 6 and Regulation (EC) No 1924/2006 on Nutrition and Health Claims made on Foods.

Regulation (EC) No 1924/2006 on Nutrition and Health Claims made on Foods is complex and mandatory and seeks to protect consumers from misleading or false claims. Transitional periods apply and CAP advises advertising industry stakeholders to take advice on the effect of that Regulation. Advertising industry stakeholders might find the Guidance to Compliance with European Regulation (EC) No 1924 on Nutrition and Health Claims Made on Foods published by the Food Standards Agency useful: www.food.gov.uk.

References to food apply also to soft drink products.

These rules should be read in conjunction with other rules in this Code, especially Section 12 (Children), Section 15 (Medicines, Treatments, Devices and Health), Section 16 (Weight Control) and the Help Notes on Food and Soft Drink Products and Children and Criteria for Nutrition Claims.

Rules

General

15.1

Marketers must hold documentary evidence for any claim that their food product benefits health. Claims must be presented clearly and without exaggeration.

15.1.1

Only Permitted Nutrition Claims listed in the Annex of EC Regulation 1924/2006 on Nutrition and Health Claims Made on Foods may be used in marketing communications.

Authorised health claims in the Community Register may be used in marketing communications.
[Web link to Community Register]

Transitional periods apply, including those for certain health claims in use before 19 January 2007 for which an application for authorisation has been submitted and nutrition claims in use in the EU before 1 January 2006. CAP advises advertising industry stakeholders to take advice on the effect of the Regulation.

Marketing communications that feature health claims filed with the relevant Home Authority and awaiting authorisation, may be used with particular care. They must comply with all relevant rules.

15.1.2

These nutrition claims, or claims that would have the same meaning for consumers, must comply with the criteria in the annex of EC Regulation 1924/2006 Nutrition and Health Claims made on Foods:

Low energy, energy-reduced, energy-free, low fat, fat-free, low saturated fat, saturated fat-free, low sugars, sugars-free, with no added sugars, low sodium, low salt, very low sodium, very low salt, sodium-free, salt-free, source of fibre, high fibre, source of protein, high protein, source of [name of vitamin], high in [name of vitamin], contains [name of vitamin], source of [name of mineral], high in [name of mineral], contains [name of mineral], increased [name of nutrient], reduced [name of nutrient], light, lite, naturally and natural. More nutrition claims may be added to the list at a later date.

The Annex provisions can be found at: [\[link to CAP help note\]](#)

15.2

Claims for the presence, absence or reduced content of a nutrient in a product must be able to show a beneficial nutritional or physiological effect and should be considered in the context of a balanced diet or lifestyle or both. If a food product is a good source of certain nutrients that does not justify a generalised claim of a wider nutritional benefit.

15.3

Comparative nutrition claims must show any differences between a product bearing a Permitted Nutrition Claim and foods of the same category.

15.3.1

An advertisement may use one product as the sole reference for comparison only if that product is representative of the products in its category.

15.3.2

The difference in the quantity of a nutrient or energy value must be stated in the marketing communication and must relate to the same quantity of food.

15.4

Marketing communications must not condone or encourage excessive consumption of a food.

15.5

Marketing communications must not condone or encourage damaging oral health care practices, especially in children.

15.6

These are not acceptable in marketing communications for products within the remit of this Section:

15.6.1

Claims that state or imply health could be affected by not consuming a food

15.6.2

Claims that state or imply a food prevents, treats or cures human disease. Reduction-of-disease-risk claims are acceptable if authorised by the European Commission

15.6.3

Health claims that refer to the recommendation of an individual health professional. Health claims that refer to the recommendation of an association are acceptable only if that association is a health-related charity or a national representative body of medicine, nutrition or dietetics

15.6.4

References to changes in bodily functions that could give rise to or exploit fear in the audience

15.6.5

Claims of a nutrition or health benefit that gives rise to doubt the safety or nutritional adequacy of another product

15.6.6

Health claims that refer to a rate or amount of weight loss.

Dietary Supplements and other Vitamins and Minerals

CAP advises marketers to ensure that claims made for dietary supplements and other vitamins and minerals are in line with the requirements of Regulation (EC) No 1924/2006 on Nutrition and Health Claims made on Foods.

15.7

Marketers must hold documentary evidence for any claim that their vitamin or mineral product or other dietary supplement benefits health.

15.8

A well-balanced diet should provide the vitamins and minerals needed each day by a normal, healthy individual. Marketers must not state or imply that a balanced or varied diet cannot provide enough nutrients in general and individuals should not be encouraged to swap a healthy diet for supplementation. Marketers may offer vitamin and mineral supplements to certain groups as a safeguard to help maintain good health but must not, unless the claims are authorised by the European Commission, imply they can be used to elevate mood or enhance normal performance. Claims about a higher vitamin or mineral intake for a specific function are permitted if authorised by the European Commission. Without well-established proof, no marketing communication must suggest that a widespread vitamin or mineral deficiency exists.

15.9

People who are potentially at risk of deficiency may be safeguarded by vitamin, mineral or dietary supplements. If the claim made for a vitamin or mineral supplement is relevant only to a group who is at risk of inadequate intake, marketing communications must state clearly the group likely to benefit from the supplement. That group might include:

- people who eat nutritionally inadequate meals
- the elderly
- children and adolescents
- convalescents
- athletes in training or others who are physically very active
- women of child-bearing age
- lactating or pregnant women
- people on restricted food or energy diets
- people with Asian ancestry from the Indian sub-continent
- people who smoke
- housebound people.

15.10

Marketing communications for foods must not claim to treat clinical vitamin or mineral deficiency.

Infant and Follow-on Formula

These rules must be read in conjunction with the relevant legislation including the Infant Formula and Follow-on Formula Regulations 2007 and the European Regulation (EC) No 1924/2006 on Nutrition and Health Claims made on Foods.

15.11

Except for those in a scientific publication or, for the purposes of trade before the retail stage, a publication of which the intended readers are not the general public, marketing communications for infant formula are prohibited.

15.11.1

Marketing communications must not confuse between infant formula and follow-on formula.

Food and Soft Drink Product Marketing Communications and Children

See also the Help Note for food or soft drink product advertisements and children.

Diet and lifestyle

15.12

Marketing communications must not condone or encourage poor nutritional habits or an unhealthy lifestyle in children.

15.13

Marketing communications must not disparage good dietary practice or the selection of options, such as fresh fruit and fresh vegetables, that accepted dietary opinion recommends should form part of the average diet.

Promotional offers

15.14

Marketing communications featuring a promotional offer must be prepared with a due sense of responsibility.

15.15

Except those for fresh fruit and fresh vegetables, food product advertisements that are targeted through their content directly at pre-school or primary school children must not include a promotional offer.

15.15.1

Except those for fresh fruit or fresh vegetables, marketing communications must not seem to encourage children to eat or drink a product only to take advantage of a promotional offer: the product should be offered on its merits, with the offer as an added incentive. Marketing communications featuring a promotional offer must ensure a significant presence for the product.

15.15.2

Marketing communications featuring a promotional offer linked to a food product of interest to children must avoid creating a sense of urgency or encouraging the purchase of an excessive quantity for irresponsible consumption.

15.15.3

Marketing communications must not encourage children to eat more than they otherwise would.

15.15.4

Marketing communications for collection-based promotions must not seem to urge children or their parents to buy excessive quantities of food.

Licensed characters and celebrities

15.16

Licensed characters and celebrities popular with children must be used with a due sense of responsibility. Except those for fresh fruit or fresh vegetables, food advertisements that are targeted directly at pre-school or primary school children through their content must not include licensed characters or celebrities popular with children.

For the avoidance of doubt, that prohibition applies to food or drink advertisements only. The prohibition does not apply to advertiser-created equity brand characters (puppets, persons or characters), which may be used by advertisers to sell the products they were designed to sell.

Licensed characters and celebrities popular with children may present factual and relevant generic statements about nutrition, safety, education or similar.

Pressure to purchase

15.17

Although children might be expected to exercise some preference over the food they eat or drink, marketing communications must be prepared with a due sense of responsibility and must not directly advise or ask children to buy or to ask their parents or other adults to make enquiries or purchases for them. (See 5.4.2)

15.17.1

Marketing communications must neither try to sell to children by directly appealing to emotions such as pity, fear or self-confidence nor suggest that having the advertised product somehow confers superiority, for example making a child more confident, clever, popular or successful.

15.17.2

Marketing communications addressed to children must not urge children to buy or persuade others to buy and must avoid high-pressure or hard-sell techniques. Nothing must suggest that children could be bullied, cajoled or otherwise put under pressure to acquire the advertised item.

15.17.3

Products or prices must not be presented in marketing communications in a way that suggests children or their families can easily afford them.

15.18

Marketing communications must not give a misleading impression of the nutritional or health benefit of the product as a whole. Claims referring to children's development and health are acceptable if authorised by the European Commission.

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Gambling

Background

The term “gambling” means gaming and betting, as defined in the Gambling Act 2005, and spread betting. For rules on lottery marketing communications, see Section 17.

The Gambling Act 2005 does not apply outside Great Britain. Specialist legal advice should be sought when considering advertising any gambling product in Northern Ireland or the Channel Islands.

Spread betting may be advertised as an investment under the Financial Services and Markets Act 2000, the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (as amended) and other FSA rules and guidance (see Background, Section 18, Financial products). A “spread bet” is a contract for difference that is a gaming contract, as defined in the glossary to the FSA Handbook.

The rules in this Section apply to marketing communications for “play for money” gambling products and marketing communications for “play for free” gambling products that offer the chance to win a prize or explicitly or implicitly direct the consumer to a “play for money” gambling product, whether on-shore or off-shore.

These rules are not intended to inhibit marketing communications to counter problem gambling that are responsible and unlikely to promote a brand or type of gambling.

Unless they portray or refer to gambling, this Section does not apply to marketing communications for non-gambling leisure events or facilities, for example hotels, cinemas, bowling alleys or ice rinks, that are in the same complex as, but separate from, gambling events or facilities.

For the purposes of this Section, “children” are people of 15 and under and “young persons” are people of 16 or 17.

Rules

16.1

Marketing communications for gambling must be socially responsible, with particular regard to the need to protect children, young persons and other vulnerable persons from being harmed or exploited.

16.2

In line with rule 1.2, the spirit as well as the letter of the rules in this Section apply whether or not a gambling product is shown or referred to.

16.3

Marketing communications:

16.3.1

must not portray, condone or encourage gambling behaviour that is socially irresponsible or could lead to financial, social or emotional harm

16.3.2

must not exploit the susceptibilities, aspirations, credulity, inexperience or lack of knowledge of children, young persons or other vulnerable persons

16.3.3

must not suggest that gambling can provide an escape from personal, professional or educational problems such as loneliness or depression

16.3.4

must not suggest that gambling can be a solution to financial concerns, an alternative to employment or a way to achieve financial security

16.3.5

must not portray gambling as indispensable or as taking priority in life, for example over family, friends or professional or educational commitments

16.3.6

must not suggest that gambling can enhance personal qualities, for example that it can improve self-image or self-esteem, or is a way to gain control, superiority, recognition or admiration

16.3.7

must neither suggest peer pressure to gamble nor disparage abstention

16.3.8

must not link gambling to seduction, sexual success or enhanced attractiveness

16.3.9

must not portray gambling in a context of toughness or link it to resilience or recklessness

16.3.10

must not suggest gambling is a rite of passage

16.3.11

must not suggest that solitary gambling is preferable to social gambling

16.3.12

must not be likely to be of particular appeal to children or young persons, especially by reflecting or being associated with youth culture

16.3.13

must not be directed at those aged below 18 years (or 16 years for football pools, equal-chance gaming [under a prize gaming permit or at a licensed family entertainment centre], prize gaming (at a non-licensed family entertainment centre or at a travelling fair) or Category D gaming machines) through the selection of media or context in which they appear

16.3.14

must not include a child or a young person. No-one who is, or seems to be, under 25 years old may be featured gambling or playing a significant role. No-one may behave in an adolescent, juvenile or loutish way

16.3.15

for family entertainment centres, travelling fairs, horse racecourses and dog race tracks, and for non-gambling leisure facilities that incidentally refer to separate gambling facilities, for example as part of a list of facilities on a cruise ship, may include children or young persons provided they are accompanied by an adult and are socialising responsibly in areas that the Gambling Act 2005 does not restrict by age.

16.3.16

must not exploit cultural beliefs or traditions about gambling or luck

16.3.17

for events or facilities that can be accessed only by entering gambling premises must make that condition clear

16.3.18

must not condone or encourage criminal or anti-social behaviour

16.3.19

must not condone or feature gambling in a working environment. An exception exists for licensed gambling premises.

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Lotteries

Principles

The rules in this section are designed to ensure that marketing communications for lotteries are socially responsible, with particular regard to the need to protect children, young persons under 18s and other vulnerable persons from being harmed or exploited by advertising that features or promotes lotteries.

This section applies to marketing communications for lottery products that are licensed and regulated by the Gambling Commission, the National Lottery Commission, or in the case of small society lotteries, registered with local authorities in England and Wales or licensing boards in Scotland.

The UK National Lottery may be advertised under The National Lottery etc Act 1993 and The National Lottery Regulations 1994 (as amended). Marketing communications for the UK National Lottery are also subject to the National Lottery Advertising and Sales Promotion Code of Practice, approved by the National Lottery Commission.

Rules

17.1

Marketing communications must not portray, condone or encourage gambling behaviour that is socially irresponsible or could lead to financial, social or emotional harm.

17.2

Marketing communications must not suggest that participating in a lottery can provide an escape from personal, professional or educational problems such as loneliness or depression.

17.3

Marketing communications must not suggest that participating in a lottery can be a solution to financial concerns, an alternative to employment or a way to achieve financial security. Advertisers may however refer to other benefits of winning a prize.

17.4

Marketing communications must not portray participating in a lottery as indispensable or as taking priority in life, for example over family, friends or professional or educational commitments.

17.5

Marketing communications must neither suggest peer pressure to participate nor disparage abstention.

17.6

Marketing communications must not suggest that participating in a lottery can enhance personal qualities, for example that it can improve self-image or self-esteem, or is a way to gain control, superiority, recognition or admiration.

17.7

Marketing communications must not link participating in a lottery to seduction, sexual success or enhanced attractiveness.

17.8

Marketing communications must not portray participation in a context of toughness or link it to resilience or recklessness.

17.9

Marketing communications must not suggest participation is a rite of passage.

17.10

Marketing communications must not suggest that solitary gambling is preferable to social gambling.

17.11

Marketing communications for lotteries that can be participated in only by entering gambling premises must make that condition clear.

17.12 Marketing communications for lotteries must not exploit the susceptibilities, aspirations, credulity, inexperience or lack of knowledge of children, young persons or other vulnerable persons.

17.13

Marketing communications for lotteries must not be likely to be of particular appeal to children or young persons, especially by reflecting or being associated with youth culture.

17.14

Marketing communications for lotteries should not be directed at those aged below under 16 years through the selection of media or context in which they appear.

17.15

Marketing communications for a lottery product may include children or young persons. No-one who is, or seems to be, under 25 years old may be featured gambling or playing a significant role.

17.16

Marketing communications that exclusively feature the good causes that benefit from a lottery and include no explicit encouragement to buy a lottery product may include children or young persons in a significant role.

17.17

Marketing communications for lotteries must not exploit cultural beliefs or traditions about gambling or luck.

17.18

Marketing communications for lotteries must not condone or encourage criminal or anti-social behaviour.

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Alcohol

Principle

Marketing communications for alcoholic drinks should not be targeted at children or young persons and should not imply, condone or encourage immoderate, irresponsible or anti-social drinking.

The spirit as well as the letter of the rules in this section applies.

Definition

The rules in this section apply to marketing communications for alcoholic drinks and to marketing communications for promotions of alcoholic drinks. Alcoholic drinks are defined as drinks containing at least 1.2% alcohol; low-alcohol drinks are defined as drinks containing between 0.5% and 1.2% alcohol.

Where stated, exceptions are made for low-alcohol drinks. But, if a marketing communication for a low-alcohol drink could be considered to promote a stronger alcoholic drink or if the drink's low-alcohol content is not stated clearly in the advertisement, all the rules in this section apply.

If a soft drink is promoted as a mixer, the rules in this section apply in full.

These rules are not intended to inhibit responsible marketing communications that are intended to counter problem drinking or tell consumers about alcohol-related health or safety themes. Those marketing communications should not be likely to promote an alcohol product or brand.

Rules

18.1

Marketing communications must be socially responsible and must contain nothing that is likely to lead people to adopt styles of drinking that are unwise. For example, they should not encourage excessive drinking. Care should be taken not to exploit the young, the immature or those who are mentally or socially vulnerable.

18.2

Marketing communications must not claim or imply that alcohol can enhance confidence or popularity.

18.3

Marketing communications must not imply that drinking alcohol is a key component of the success of a personal relationship or social event. The consumption of alcohol may be portrayed as sociable or thirst-quenching.

18.4

Drinking alcohol must not be portrayed as a challenge. Marketing communications must neither show, imply, encourage or refer to aggression or unruly, irresponsible or anti-social behaviour nor link alcohol with brave, tough or daring people or behaviour.

18.5

Marketing communications must neither link alcohol with seduction, sexual activity or sexual success nor imply that alcohol can enhance attractiveness.

18.6

Marketing communications must not imply that alcohol might be indispensable or take priority in life or that drinking alcohol can overcome boredom, loneliness or other problems.

18.7

Marketing communications must not imply that alcohol has therapeutic qualities. Alcohol must not be portrayed as capable of changing mood, physical condition or behaviour or as a source of nourishment. Marketing communications must not imply that alcohol can enhance mental or physical capabilities, for example by contributing to professional or sporting achievements.

18.8

Marketing communications must not link alcohol to illicit drugs.

18.9

Marketing communications may give factual information about the alcoholic strength of a drink or make a factual strength comparison with another product but, except for low-alcohol drinks, which may be presented as preferable because of their low alcoholic strength, must not otherwise imply that a drink may be preferred because of its alcohol content or intoxicating effect.

18.10

Marketing communications that include a sales promotion must not imply, condone or encourage excessive consumption of alcohol.

18.11

Marketing communications must not feature alcohol being handled or served irresponsibly.

18.12

Marketing communications must not link alcohol with activities or locations in which drinking would be unsafe or unwise.

Marketing communications must not link alcohol with the use of potentially dangerous machinery or driving. Marketing communications may feature sporting and other physical activities (subject to other rules in this Section, for example appeal to under 18s or link with daring or aggression) but must not imply that those activities have been undertaken after the consumption of alcohol.

18.13

Only in exceptional circumstances may marketing communications feature alcohol being drunk by anyone in their working environment.

18.14

Marketing communications must not be likely to appeal particularly to children or young persons, especially by reflecting or being associated with youth culture. They should not feature or portray real or fictitious characters who are likely to appeal particularly to people under 18 in a way that might encourage the young to drink. People shown drinking or playing a significant role (see 18.16) should not be shown behaving in an adolescent or juvenile manner.

18.15

Marketing communications must not be directed at people under 18 through the selection of media or the context in which they appear. No medium should be used to advertise alcoholic drinks if more than 25% of its audience is under 18 years of age.

18.16

People shown drinking or playing a significant role must neither be nor seem to be under 25. People under 25 may be shown in marketing communications, for example in the context of family celebrations, but must be obviously not drinking.

18.17

Marketing communications may give factual information about product contents, including comparisons, but must not make any health, fitness or weight-control claims.

The only permitted nutrition claims are “low-alcohol”, “reduced alcohol” and “reduced energy”.

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Motoring

Principle

Marketing communications should not harm consumers by condoning or encouraging unsafe or inconsiderate driving practices. If they make environmental claims, marketing communications for motor vehicles, fuel or accessories should comply with the rules on Environmental Claims.

Rules

19.1

Marketing communications for motor vehicles, fuel or accessories must not depict or refer to practices that condone or encourage anti-social behaviour.

19.2

Marketing communications must not condone or encourage unsafe or irresponsible driving. If it could be emulated, marketing communications must not depict a driving practice that is likely to condone or encourage a breach of those rules of the Highway Code that are legal requirements if that driving practice seems to take place on a public road or in a public space. Vehicles' capabilities may be demonstrated on a track or circuit if it is obviously not in use as a public highway.

19.3

Marketing communications must not depict speed in a way that might encourage motorists to drive irresponsibly or to break the law.

To avoid the implication of irresponsible driving through excessive speed, care must be taken in the style of presentation of marketing communications. Particular care must be taken in, for example, cinema commercials and in marketing communications that appear in electronic media to avoid moving images that imply excessive speed. If they are shown in normal driving circumstances on public roads, vehicles must be seen not to exceed UK speed limits.

19.4

Marketers must not make speed or acceleration the main message of their marketing communications. Marketing communications may give general information about a vehicle's performance, such as acceleration and mid-range statistics, braking power, road-holding and top speed.

19.5

Safety claims must not exaggerate the benefit to consumers. Marketers must not make absolute claims about safety unless they hold evidence to substantiate them.

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Employment, Homework Schemes and Business Opportunities

Rules

Employment

20.1

Marketing communications must distinguish clearly between offers of employment and business opportunities. Before publication, media owners normally require marketers' full details and any terms and conditions imposed on respondents.

20.2

Employment marketing communications must relate to genuine vacancies and potential employees must not be asked to pay for information.

Living and working conditions must not be misrepresented. Quoted earnings must be precise; if one has to be made, a forecast must not be unrepresentative. If income is earned from a basic salary and commission, commission only or in some other way, that must be made clear.

Employment agencies and employment businesses

20.3

Employment agencies and employment businesses must make clear in their marketing communications their full names and contact details. Marketing communications should state that the marketer is an employment agency or an employment business if its name does not disclose that it is.

Homework schemes

20.4

Marketing communications for homework schemes must contain no forecast of earnings if the scheme is new. Marketers may state the likely level of earnings only if it can be supported with evidence of the experience of existing homeworkers. Marketers must not exaggerate the support available to homeworkers.

20.5

Marketing communications for homework schemes must state:

20.5.1

limitations or conditions that might influence consumers before their decision to participate

20.5.2

whether the marketers will buy any products made

20.5.3

if a financial outlay is, or might be, required.

20.6

Marketers of homework schemes must include this information in the initial marketing communication or in follow-up literature made available to all consumers before commitment:

20.6.1

the full name and geographical address of the marketer

20.6.2

a clear description of the work

20.6.3

whether participants are self-employed or employed by a business

20.6.4

charges for raw materials, machines, components, administration and the like.

Business opportunities

20.7

Marketing communications for business opportunities must neither contain unrepresentative or overstated earnings figures nor exaggerate the support available to investors.

20.8

Marketers of business opportunities must include in their initial marketing communications or in follow-up literature made available to all consumers before commitment:

20.8.1

the full name and geographical address of the marketer

20.8.2

a clear description of the work involved

20.8.3

a statement of the extent of investors' commitments, including any financial investment or outlay.

Vocational training and instruction courses

20.9

Marketing communications for vocational training or other instruction courses must not give a misleading impression about the potential for employment that might follow.

Marketing communications must make clear significant conditions for acceptance onto vocational training or instruction courses, such as the level of attainment, and significant conditions likely to affect a consumer's decision to embark on a course, such as the cost or the duration of a course.

Employment, homeworking schemes and business opportunities directories

20.10

Marketing communications for the sale of directories giving information about employment, homeworking schemes or business opportunities must state plainly the nature of what is being offered.

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Tobacco, Rolling Papers and Filters

Scope

The Rolling Papers and Filters rules govern the content of marketing communications, including point-of-sale material, for:

- a) rolling papers and filters
- b) any product if the marketing communication concerned features rolling papers, filters or a pack design of a recognisable brand available in the UK
- c) a product displaying the colours, livery, logo or name of a rolling paper or a brand of filter in a way that promotes smoking and not that branded product.

The Rolling Papers and Filters rules do not apply to marketing communications:

- d) addressed to the trade in its professional capacity in media not targeted at the public
- e) for schemes, events or activities sponsored or financially supported by manufacturers or importers, including sports sponsorship, so long as undue emphasis is not placed on the rolling papers or filters as opposed to the scheme, event or activity
- f) on manufacturers' or importers' websites (see Introduction, 'The Code does not apply to' (q)).

Other rules in the CAP Code, such as the sales promotion rules, apply to (d) and (e).

Rules

Tobacco Products

21.1

Tobacco products may not be advertised to the public.

Rolling Papers and Filters

21.2

Marketing communications must neither encourage people to start smoking nor encourage smokers to increase their consumption or smoke to excess.

21.3

Marketing communications must not:

21.3.1

play on the susceptibilities of those who are physically or emotionally vulnerable, especially the young or immature

21.3.2

suggest that smoking is natural, safe, popular, glamorous or aspirational or that it can lead to social, sexual, romantic or business success

21.3.3

suggest that smoking can enhance people's femininity, masculinity or appearance

21.3.4

appeal to the adventurous or rebellious or suggest that it is daring to smoke or that smoking can enhance people's independence

21.3.5

link smoking with people who are well known, wealthy, fashionable, sophisticated or successful or who possess other attributes or qualities that may reasonably be expected to command admiration or encourage emulation

21.3.6

must not suggest that smoking is healthy, can be enjoyed as part of a healthy lifestyle or that it can aid relaxation or concentration.

21.4

Marketing communications must not depict anyone smoking.

21.5

Marketing communications must not be targeted at, or be likely to appeal to, people under 18. Anyone depicted in a marketing communication for rolling papers or filters must be, and be seen to be, over 25. No medium may be used to advertise rolling papers or filters if more than 25% of its audience is or is likely to be males under 18 years of age or females under 24 years of age. No direct marketing communication for rolling papers or filters may be distributed to males under 18 years of age or females under 24 years of age.

21.6

Marketing communications must not condone or encourage the use of illegal drugs. Except in exceptional circumstances, for example in the context of an anti-drug message, any reference to illegal drugs will be regarded as condoning their use.

21.7

Marketing communications must not be sexually titillating.

[Click here to return to this section of the Consultation Document](#)

HOW THE SYSTEM WORKS

The self-regulatory system

a) The self-regulatory system comprises three bodies: the Advertising Standards Authority (ASA), the Advertising Standards Board of Finance (ASBOF) and the Committee of Advertising Practice (CAP). Their work is described below.

b) The strength of the system depends on the long-term commitment of all those involved in advertising, sales promotions and direct marketing. Practitioners in every sphere share an interest in seeing that marketing communications are welcomed and trusted by their audience: unless they are accepted and believed, marketing communications cannot succeed. If they are offensive or misleading, they discredit everyone associated with them and the industry as a whole.

c) The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code) and guidance from CAP on the interpretation of the Code can be found at www.cap.org.uk. The ASA publishes adjudications weekly on www.asa.org.uk.

Copy Advice is a fast, free and confidential CAP service to help marketers to ensure their non-broadcast campaigns comply with the Code. For immediate advice, call 020 7492 2210 from 9.00am to 6.00pm Monday to Friday. Alternatively, e-mail copyadvice@cap.org.uk. The Copy Advice team strives to respond to all enquiries within 24 hours. Visit www.cap.org.uk/copyadvice for information about the service and http://www.cap.org.uk/cap/advice_online/ for comprehensive on-line guidance.

You can register on the CAP website to ensure you are kept up-to-date with the Codes, adjudications, relevant subjects and free seminars.

The Advertising Standards Authority (ASA)

a) The ASA was established in 1962 to provide independent scrutiny of the newly created self-regulatory system set up by the industry. Its chief tasks are to promote and enforce high standards in marketing communications, to investigate complaints, to identify and resolve problems through research, to ensure that the system operates in the public interest and to act as the channel for communications with those who have an interest in marketing communication standards.

b) The ASA is a limited company and is independent of both the Government and the marketing business. The Chairman of the ASA is appointed by ASBOF and is unconnected with the marketing business. Most of the 12-member Council appointed by the Chairman to govern the ASA is also unconnected with the marketing business. All Council members sit as individuals and are selected, as far as possible, to reflect a diversity of background and experience. Vacancies for independent members of Council are publicly advertised. Members serve for a maximum of two three-year terms.

c) The ASA investigates complaints from any source against marketing communications in non-broadcast media. Marketers are told the outcome of the ASA Council's rulings and, if necessary, are asked to withdraw or amend their marketing communications. The adjudications reached by the Council are published weekly on www.asa.org.uk. The ASA website contains information about the ASA's procedures for handling complaints about a marketing communication.

d) The ASA gives equal emphasis to conducting a substantial research and monitoring programme by reviewing marketing communications that fall within its scope. Specific media and product categories may be identified for scrutiny. In that way the ASA can identify trends and prevent future problems.

e) Publicising the ASA's policies and actions is essential to sustaining wide acceptance of the system's integrity. A comprehensive programme of seminars and speeches, advertising, e-mail and website updates, briefing notes on a wide range of topics, articles written for professional journals and newspaper, magazine, TV and radio coverage all augment the ASA's extensive media presence.

The Advertising Standards Board of Finance (ASBOF)

- a) The Advertising Standards Board of Finance sets the framework for industry policy making and is responsible for the Committee of Advertising Practice and for funding the self-regulatory system.
- b) The self-regulatory system is funded principally by a levy on advertising and direct marketing expenditure collected by ASBOF. The separation of operation and responsibilities helps to ensure that the independent judgement of the ASA is not compromised.
- c) ASBOF's members are advertisers, promoters and direct marketers, their agencies, the media and the trade and professional organisations of the advertising, sales promotion and direct marketing businesses.

The Committee of Advertising Practice (CAP)

- a) CAP's role is to ensure that marketing communications within the Code's remit that are commissioned, prepared, placed or published in the UK comply with the CAP Code.
- b) CAP co-ordinates the activities of its members to achieve the highest degree of compliance with the Code. It creates, reviews and amends the Code. From time to time, it produces for the industry Help Notes that give detailed guidance on specific sectors or subjects that are covered only generally in the Code. It oversees the sanctions operated by its members. It operates a website, www.cap.org.uk, to provide information and guidance to the industry, including access to Help Notes, Advice Online and relevant Ad Alerts. It convenes ad hoc Working Groups for limited periods to address specific subjects arising out of the self-regulatory process.
- c) The Code establishes a standard against which marketing communications are assessed. Other codes exist in many sectors; many require practitioners to comply with the CAP Code.
- d) The Chairman of CAP works on a part-time basis and is appointed for an agreed period and remunerated by ASBOF.
- e) CAP actively encourages participation in the self-regulatory system. Suggestions for improving Code rules or modifying their application should be sent in writing to the Chairman. If changes are adopted by CAP their introduction is normally deferred for a short time to give marketers an adequate opportunity to amend their marketing communications.

The Copy Advice team

The Copy Advice team gives advice to marketers, their agencies, the media and others on the likely conformity with the Code of marketing communications before they are published or distributed. Also, it checks marketing communications produced by marketers subject to mandatory pre-vetting (for example, those subject to the poster pre-vetting sanction).

Copy advice is free and confidential from competitors. The vast majority of written enquiries are dealt with within 24 hours although lengthy submissions can take longer, especially those that include detailed evidence that needs to be reviewed by external expert consultants. Advice is not binding either on enquirers or on the ASA. Favourable pre-publication advice does not automatically protect marketers from complaints being investigated and upheld by the ASA. It is, however, the best guide to what is likely to comply with the Code.

Online advice is available by accessing the AdviceOnline database on www.cap.org.uk. AdviceOnline is updated regularly by the Copy Advice team.

The Compliance team

The Compliance team ensures that marketing communications comply with the Code to protect consumers and ensure a level playing-field. It enforces ASA adjudications, disseminates any ramifications of them for an industry sector and acts against marketers that persistently break the Code. Exceptionally, if a marketing communication obviously breaches the Code, for example if it contains a claim that is blatantly misleading, the team takes immediate compliance action to stop the marketing communication from reappearing. If it seems necessary to avoid harm, the Executive may take interim action during an ASA investigation (see SANCTIONS).

The team co-ordinates the sanctions operated by the Executive and by CAP members; in particular, it issues Ad Alerts to CAP members, including the media, advising them to withhold their services from non-compliant marketers or deny those marketers access to advertising space.

Information on compliance is available on www.cap.org.uk. Companies that are members of a CAP trade association or professional body can access a database of relevant Ad Alerts on a secure Section of the CAP website.

The Panels

Much of the detailed work of CAP is done by its two Panels. The Sales Promotion and Direct Response Panel concentrates on sales promotions and direct marketing. The General Media Panel concentrates on all other CAP-related and BCAP-related matters. Each Panel is composed of industry experts and one ASA Council member.

The Panels guide the Executive and help the ASA and CAP to produce advice for the industry and to interpret the Code.

The Panels provide a forum to reassess recommendations and advice given by the Executive. The parties to a complaint can request a Panel assessment before the ASA Council has adjudicated; Council will take account of the Panel's opinion. Council's judgement on the interpretation of the Code is, however, final. Anyone directly affected by copy advice given by the Executive on behalf of CAP can ask for it to be considered by the relevant Panel. The Panel Chairmen can reject requests and will do so if it seems that a Panel is being used to hamper the effective running of the self-regulatory system.

The Independent Review Procedure

In exceptional circumstances, the ASA Council can be asked to reconsider its adjudication (including a Council decision not to investigate a complaint). Requests for a review should contain a full statement of the grounds, be in writing and be addressed to the Independent Reviewer of ASA Adjudications, 5th Floor, 21 Berners Street, London, W1T 3LP. They should be sent within 21 days of the date on the ASA's letter of notification of an adjudication. The Independent Reviewer may waive that 21 day time limit if he judges it fair and reasonable to do so.

Requests should come only from the complainant or the marketer. Those from the marketer or from an industry complainant should be signed by the Chairman, Chief Executive or equivalent; requests made only by its solicitor or agency will not be accepted. All dealings with the Independent Reviewer must be in writing.

Requests may be made on two grounds:

- If extra relevant evidence becomes available (an explanation of why it was not submitted previously, in accordance with rule 3.7, will be required).
- If the Council's adjudication or the process by which it was made is substantially flawed.

No review will proceed if the point at issue is the subject of simultaneous or contemplated legal action between anyone directly involved. Requests for review should make plain that no such action is underway or is contemplated.

The ASA will not delay publication of the relevant adjudication pending the outcome of a review save in exceptional circumstances (on the authorisation of the ASA Director General).

The Independent Reviewer will evaluate the substance of the request with advice from two Assessors (except for requests about a Council decision not to investigate a complaint). The two Assessors are the Chairman of ASBOF (or nominee) and the Chairman of the ASA.

If the Independent Reviewer decides not to accept the request (in whole or in part) because he considers that it does not meet either of the two grounds set out above, he will inform the person making the request.

If he decides to accept the request (in whole or in part) he will undertake an investigation, either by himself or with help from the ASA Executive or any other source of help or advice. He will inform the other parties to the Council adjudication or decision that he has accepted a request for review and will invite their comments on the submission made by the party requesting the review. At the end of his investigation, he will make a recommendation to the ASA Council.

The Council's decision on requests for review is final.

The Independent Reviewer will inform all parties of the Council's decision. Adjudications that are revised as a result of a review will be published on www.asa.org.uk.

Administration of the system

a) The ASA and CAP share a joint Executive whose duties are organised to recognise the distinct functions of the two bodies. The Executive carries out the day-to-day work of the system and acts as a channel of communication, ensuring that industry expertise, specialist advice and the decisions of the ASA Council are co-ordinated and disseminated. The ASA Council and CAP form an independent judgement on any matter reported to them after they have considered the Executive's recommendation.

b) Marketers bear principal responsibility for the marketing communications they produce and must be able to prove the truth of their claims to the ASA; they have a duty to make their claims fair and honest and to avoid causing serious or widespread offence. Agencies have an obligation to create marketing communications that are accurate, ethical and neither mislead nor cause serious or widespread offence. Publishers and media owners recognise that they should disseminate only those marketing communications that comply with the Code. That responsibility extends to any other agent involved in producing, placing or publishing marketing communications. They accept the rulings of the ASA Council as binding.

c) The ASA Council judges whether marketing communications breach the Code. Everyone responsible for commissioning, preparing, placing or publishing a marketing communication that breaches the Code is asked to act promptly to amend or withdraw it.

The law

a) Marketers, agencies and publishers have primary responsibility for ensuring that everything they do is legal. Since the Code was first published, the number of laws designed to protect consumers has greatly increased. More than 200 UK statutes, orders and regulations as well as several European laws affect marketing communications here (see www.asa.org.uk or www.cap.org.uk for a non-exhaustive list). The ASA maintains a rapport with those responsible for initiating or administering any law that has a bearing on marketing communications. The system is reinforced by the legal backup provided for the work of the ASA by the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008 (see Introduction).

b) The Code, and the self-regulatory framework that exists to administer it, was designed and has been developed to work within and to complement those legal controls. It provides an alternative, and in some instances the only, means of resolving disputes about marketing communications. It stimulates the adoption of high standards of practice in matters, such as taste and decency, that are extremely difficult to judge in

law but fundamentally affect consumer confidence in marketing communications.

c) Some important aspects are governed by legislation enforced by local authority trading standards and environmental health officers. They include product packaging (except for on-pack promotions), weights and measures, statements on displays at point-of-sale and the safety of products.

d) Many Government agencies administer consumer protection legislation that ranges far wider and deeper than could be enforced through self-regulatory codes of practice. Marketers who break the law risk criminal prosecution or civil action. The Code requires marketers to ensure that all their marketing communications are legal but any matter that principally concerns a legal dispute will normally need to be resolved through law enforcement agencies or the Courts.

Europe

All Member States of the European Union, and many non-EU European countries, have self-regulatory organisations (SROs) that are broadly similar to those in the self-regulatory system in the UK. Together with organisations representing the advertising industry in Europe, those SROs are members of the European Advertising Standards Alliance (EASA), the single voice of the advertising industry in Europe on advertising self-regulation. The ASA is a founder member of EASA. EASA is located in Brussels and meets regularly to co-ordinate the promotion and development of self-regulation at a European level.

Among its wide range of operations, EASA acts as a focal point for cross-border complaints investigated by individual members; consumers need complain only to the SRO in their country, no matter where the marketing communication originated. EASA is a source of information and research on self-regulation. It helps in the development and establishment of SROs in Europe and corresponds internationally.

EASA has published a statement of common principles, the core values that underpin each of its constituent SROs, and recommended standards for operating best practice in self-regulation that all SROs should seek to achieve. Both are available on www.easa-alliance.org.

Information on EASA's objectives, activities and publications, including the Alliance Update and order forms for The Blue Book, which contains an analysis of self-regulation in 24 European countries, is available from the EASA website, www.easa-alliance.org.

SANCTIONS

a) Compliance surveys published periodically by the Executive have demonstrated that the vast majority of marketing communications comply with the Code. By providing advice, guidance or pressure, media owners, agencies and other intermediaries play a crucial role in ensuring compliance. If a marketing communication breaks the Code, the marketer responsible is told to amend or withdraw it. Most willingly undertake to do so. If they do not, the Compliance team will consider the sanctions available to it.

b) The ASA and CAP do not adopt a legalistic attitude towards sanctions and they ensure that sanctions are both proportionate to the nature of the breach and effective. They focus on ensuring that non-compliant marketing communications are amended, withdrawn or stopped as quickly as possible.

c) The ASA and CAP are not restricted to applying sanctions only against marketers that have been subject to a formal investigation. If a marketing communication is obviously misleading or offensive, the ASA and CAP may take compliance action in the absence of complaints or during an investigation (see 'The Compliance team').

Adverse publicity

a) Publicising the ASA's adjudications is essential to sustaining wide acceptance of the system's integrity and the principal sanction available to the ASA is the unwelcome publicity that could result from the adjudications it publishes weekly on www.asa.org.uk. Adverse publicity is damaging to most marketers and

serves to warn the public. Anyone who is interested can access ASA adjudications quickly and easily on the website and can set up a profile-specific account so they are automatically notified by e-mail of relevant adjudications as soon as they are published. ASA adjudications receive a substantial amount of coverage in local, regional, national and international media.

b) An adverse ASA adjudications could have consequences for compliance with other codes or legal requirements. For example, personal data gathered as a result of a misleading marketing communication might not comply with the fair processing requirement in the first data protection principle of the Data Protection Act 1998.

Ad Alerts

CAP may issue Ad Alerts to its members, including the media, advising them to consult the Copy Advice team before accepting advertisements for publication or, in some circumstances, to withhold their services from non-compliant marketers or deny the latter access to advertising space. Ad Alerts are issued at short notice, are carefully targeted for greatest impact, are sent electronically and, once issued, are available on a secure Section of www.cap.org.uk to those who might need to consult them. They contain the name and contact details of the non-compliant marketer, a description of the compliance problem and, if possible, a scanned image of the marketing communication in question. CAP may issue Ad Alerts that cover an entire sector if it perceives a widespread problem.

Trading privileges and recognition

Many CAP trade associations and professional bodies offer their members, and others, recognition and trading privileges, which they may revoke, withdraw or temporarily withhold. For example, agency recognition offered by the print media members of CAP may be withdrawn or the substantial direct mail discounts offered by the Royal Mail on bulk mailings withheld. In exceptional cases of non-compliance, CAP members may expel companies from membership.

Pre-publication vetting

a) The ASA and CAP may require persistent offenders to have some or all of their marketing communications vetted by the CAP Copy Advice team until the ASA and CAP are satisfied that future communications will comply with the Code.

b) The poster industry members of CAP operate a poster pre-vetting sanction to deter abuse of the medium. If the ASA adjudicates against a poster on the grounds of serious or widespread offence or social irresponsibility, the poster advertiser becomes a candidate for mandatory pre-vetting. If they believe that the advertiser either is incapable of complying with the Code or seems to have deliberately flouted the Code with the intention of generating complaints, PR and subsequent notoriety, the poster industry members of CAP and the CAP Executive will compel the advertiser to check future posters with the CAP Copy Advice team for a fixed period (usually two years).

Legal backstop

a) The self-regulatory system is recognised by the Government, the Office of Fair Trading (OFT) and the Courts as one of the “established means” of consumer protection in non-broadcast marketing communications. If certain types of marketing communication, including those that are misleading or contain an impermissible comparison, continue to appear after the ASA Council has ruled against them, the ASA can refer the matter to the OFT for action under the Consumer Protection from Unfair Trading Regulations 2008 or the Business Protection from Misleading Marketing Regulations 2008. The OFT can seek an undertaking that the marketing communication will be stopped from anyone responsible for commissioning, preparing or disseminating it. If that is not given or is not honoured, the OFT can seek an injunction from the Court to prevent its further appearance. Anyone not complying can be found to be in contempt of court and is liable to be penalised.

b) The ASA and CAP maintain a rapport with the OFT and with other bodies that have a responsibility for creating, administering or enforcing laws that have a bearing on marketing communications. If necessary, they may notify those bodies of non-compliant marketers and work with them to ensure that unacceptable marketing communications are amended, withdrawn or stopped.

c) The OFT and other “qualified entities”, such as Trading Standards Authorities, can use the Enterprise Act 2002 Part 8 to enforce consumer protection laws, including the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008. Those regulations provide that, before taking action, qualified entities should have regard to the desirability of encouraging control by the “established means”.

Cross-border marketing communications

a) The Code does not apply to marketing communications in foreign media. If marketing communications appear in media based in countries that have self-regulatory organisations (SROs) that are members of EASA or if direct marketing originates from countries that have SROs that are members of EASA, EASA will co-ordinate cross-border complaints so the SRO in the country of origin of the marketing communication has jurisdiction; consumers need complain only to their SRO. If not, the ASA will take what action it can. The SROs with jurisdiction are formally responsible for applying any sanctions, though the ASA and CAP will, whenever they can, adopt a pragmatic approach to ensure that consumers are protected.

b) The ASA and CAP work increasingly closely with CAP trade associations and professional bodies, Trading Standards officers, Government departments, the OFT and other UK regulators, EASA and overseas SROs and statutory authorities to stop unacceptable marketing communications, especially misleading or offensive mailings sent direct to UK consumers from overseas. That work has achieved some success but the ASA, CAP and other authorities, whether statutory or self-regulatory, experience difficulties in enforcing the Code and laws against companies based overseas. “Qualified entities” can, however, act to ensure compliance with Directive 2005/29/EC “concerning unfair business-to-consumer commercial practices in the internal market” throughout the European Union.

c) To clarify what can and cannot be done, the ASA and CAP have produced a fact sheet, “Overseas Mailings”, to explain how they tackle unacceptable mailings that originate outside the UK and to warn consumers to treat those mailings with the utmost caution. That fact sheet is available on www.cap.org.uk.

HISTORY OF SELF-REGULATION

Self-regulation is nothing new: the Medieval Guilds practised self-regulation in that they inspected markets and measures, judged the quality of merchandise and laid down rules for their trades.

In advertising and marketing, self-regulation can be traced back to the poster industry in the 1880s. The first code of advertising was launched in 1925 by the Association of Publicity Clubs. And systematic scrutiny of advertising claims operated from 1926, when the newly established Advertising Association set up its Advertising Investigation Department to “investigate abuses in advertising and to take remedial action”.

In 1937, the International Chamber of Commerce developed an international code of advertising practice, the first of several international marketing codes that have provided a bench mark for many national systems of self-regulation.

The Committee of Advertising Practice (or the British Code of Advertising Practice Committee, as it then was) came into existence in 1961 and was responsible for the first British Code of Advertising Practice and all subsequent Codes including this one. The Code covered all non-broadcast advertisements and, in 1962, an independent body – the Advertising Standards Authority (ASA) – was established to administer the first Code.

1974 saw the creation of a new, improved funding mechanism for self-regulation in the form of the Advertising Standards Board of Finance (ASBOF). The new system brought an automatic levy of 0.1% on all display advertisements to fund the system. With it came an increased emphasis on public awareness of self-regulation and increased staffing to facilitate pre-vetting and monitoring.

1974 also saw the establishment of the first Code of Sales Promotion Practice – a recognition of the need to expand the role of the system to encompass promotional marketing.

Since 1962, advertising self-regulation has grown in stature. It now has all-party support and enjoys a widespread acceptance of its role in protecting the consumer. That acceptance led to European legislation governing misleading advertising being implemented nationally in 1988 in a way that allowed the ASA to remain the principal regulator for misleading advertisements in non-broadcast media but with statutory reinforcement through the Office of Fair Trading (OFT). It is a measure of the success of that approach that the ASA has referred few advertisers to the OFT.

Nothing better illustrates the maturity of the self-regulatory system than the extension, in 2004, of the ASA's remit to cover broadcast advertisements. Previously, broadcast advertising had been the subject of a separate statutory regime. The change came in 2003, when the Communications Act gave the newly formed Office of Communications (Ofcom) statutory responsibility for broadcasting standards. Using its powers under the Act, Ofcom contracted-out responsibility for advertising standards to the ASA in the guise of a separate, but related, body called ASA (Broadcast) in a partnership often referred to as co-regulation.

As a result, all licensed broadcast services carrying advertisements fall within the extended remit of the self-regulatory system; they include television, radio and teletext services, which were previously regulated by the Independent Television Commission or the Radio Authority. The broadcast self-regulatory system has powers to direct advertisements to be taken off air, amended or re-scheduled and broadcasters fund and use pre-vetting services. The system provides for the ASA to refer to Ofcom any broadcaster that flouts an ASA adjudication or instruction.

A separate body known as the Broadcast Committee of Advertising Practice (BCAP) took over responsibility for the existing television and radio advertising codes. Its members include representatives from the advertising and marketing industry with an interest in broadcast advertising: advertisers, agencies and television and radio broadcasters.

Today, the self-regulatory system covers non-broadcast advertising, sales promotion and many aspects of direct marketing. It is supported by a range of other self-regulatory initiatives by the industry, including the various preference services run by the Direct Marketing Association.

From its limited original remit, the UK system of self-regulation has, with the ASA as its public face, evolved into a comprehensive one-stop shop for regulating marketing communications, both broadcast and non-broadcast.

With a degree of flexibility denied to statutory controls, the self-regulatory system is constantly reviewing both the content of its codes and its remit, recently especially in relation to digital media and the challenges presented by the growth of on-line marketing communications.

The world of advertising and marketing has changed beyond recognition since the inception of the UK self-regulatory system in the early 1960s. Yet the purpose of self-regulation remains as it was in the beginning: to maintain, in the best way possible, the integrity of marketing communications in the interests of both the consumer and business.

Appendix 1

Non-broadcast marketing communications are subject to legislation as well as to this Code. See www.asa.org.uk or www.cap.org.uk for a non-exhaustive list.

The Consumer Protection from Unfair Trading Regulations 2008 (the Regulations)

One important piece of legislation that affects marketing communications is the Consumer Protection from Unfair Trading Regulations 2008 (the Regulations). The Regulations prohibit unfair marketing to consumers, including misleading or aggressive advertising. Whenever it considers complaints that an advertisement misleads consumers or is aggressive or unfair to consumers, the ASA will have regard to the Regulations. That means it will take factors identified in the Regulations into account when it considers whether an advertisement breaches the CAP Code. The notes below summarise those factors.

Code rules that refer to misleading marketing communications should be read, in relation to business-to-consumer marketing communications, in conjunction with these notes.

Consumers

The likely effect of an advertisement is generally considered from the point of view of the average consumer whom it reaches or to whom it is addressed. The average consumer is assumed to be reasonably well-informed, observant and circumspect.

In some circumstances, an advertisement may be considered from the point of view of the average member of a specific group:

- If it is directed to a particular audience group, the advertisement will be considered from the point of view of the average member of that group.
- If it is likely to affect the economic behaviour only of a clearly identifiable group of people who are especially vulnerable, in a way that the advertiser could reasonably foresee, because of mental or physical infirmity, age or credulity, the advertisement will be considered from the point of view of the average member of the affected group.

Unfair advertisements

Advertisements are unfair if they

- are contrary to the requirements of professional diligence and
- are likely to materially distort the economic behaviour of consumers in relation to the advertised goods or services.

“Professional diligence” is the standard of special skill and care that a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and the general principle of good faith in the trader’s field of activity.

Misleading advertisements

Advertisements are misleading if they

- are likely to deceive consumers and
- are likely to cause consumers to take transactional decisions that they would not otherwise have taken.

A “transactional decision” is any decision taken by a consumer, whether it is to act or not act, about whether, how and on what terms to buy, pay in whole or in part for, retain or dispose of a product or whether, how and on what terms to exercise a contractual right in relation to a product.

Advertisements can deceive consumers by ambiguity, through presentation or by omitting important information that consumers need to make an informed transactional decision, as well as by including false information.

Aggressive advertisements

Advertisements are aggressive if, taking all circumstances into account, they

- are likely to significantly impair the average consumer’s freedom of choice through harassment, coercion or undue influence and
- are therefore likely to cause consumers to take transactional decisions they would not otherwise have taken.