

## SECTION 15: FOOD, DIETARY SUPPLEMENTS AND ASSOCIATED HEALTH AND NUTRITION CLAIMS

**Question 46:** Do you agree CAP has correctly reflected the requirements of Articles 8(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, and 10(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 and 28 (transitional measures) of the NHCR in CAP's proposed rules 15.1.1 and 15.1.2? If your answer is no, please explain why.

### **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]

<i>Responses received in favour of CAP's proposal from:</i>	<i>Summaries of significant points:</i>	<i>CAP's evaluation of those points and action points:</i>
Advertising Association; ASDA; An organisation; Charity Law Association	<b>1.1</b> Agree that CAP's proposed rules 15.1, 15.1.1 and 15.2 correctly reflect the requirements in Articles 8(1), 10(1), 13, 14 and 28. Those respondents did not identify any changes from the present to the proposed rules that would amount to a significant change in advertising policy and practice, apart from those highlighted in the consultation document.	<b>1.1</b> N/A
British Nutrition Foundation	<b>1.2</b> Respondent agrees. In terms of nutrition claims there are currently ongoing discussions at the EC regarding changes and additions to the Annex, so it will be important to keep abreast of these developments to make sure the code remains up to date.	<b>1.2</b> CAP agrees. CAP understands the list of permitted nutrition claims in the proposed Code is likely to be out of date soon after publication of the new Code. In light of that and the need for users of the Code to access the guidance note to view the 'conditions of use' to make the relevant claim, CAP considers the list of nutrition claims should be removed from the Code and placed in guidance document only.
Nestle	<b>1.3</b> The transitional period for health claims applies to health claims made before <u>1 July 2007</u> (not 19 Jan 2007 as stated in your proposed code) Also please note that a transitional period also exists for products bearing trademarks or brand names existing before 1 Jan 2005 which do not comply with the NHCR but may be marketed until	<b>1.3</b> CAP considers it is unrealistic for the Code to reflect every type of health claim, transitional period and authorisation process. CAP considers this amended paragraph sufficient:  Depending on the nature of the claim EC

	<p>19 Jan 2022 (this is not recognised in the proposed code).</p> <p>15.1.2 'contains' claims apply to named nutrient or other substance - we believe this is not limited to just vitamins or minerals (as indicated in the proposed code).</p>	<p>Regulation 1924/2006 contains a number of complex transitional periods, including those for health claims which are still being assessed for adoption to the EU list of permitted health claims (and which comply with existing national provisions), and for trademarks or brand names in use prior to 1 January 2005. There is no transition period for reduction of disease risk claims, which are prohibited until authorised. CAP advises advertising industry stakeholders to take advice on the effect of the Regulation.</p> <p>CAP agrees. CAP proposes addition of: contains [name of nutrient or other substance] to the guidance. (see also response to 1.2).</p>
<p><i>Responses received against CAP's proposal:</i></p> <p>Charity Law Association</p>	<p><i>Summaries of significant points:</i></p> <p><b>1.4</b> Respondent considers it is unclear whether it adequately conveys that holding documentary evidence and presenting clearly and without exaggeration are not exhaustive requirements but are requirements in addition to the other requirements necessary before Health Claims can be made. It may be helpful to link back to the FSA in the code and encourage marketers to contact them for advice and guidance.</p>	<p><i>CAP's evaluation of those points and action points:</i></p> <p><b>1.4</b> CAP considers the reference to the NHCR and the FSA guidance stated in the background to the section is adequate. Marketers are still required to hold proof to substantiate the claims they make in marketing communications. Conditions of use for nutrition and health claims will be made clear. In most cases it will be adequate to provide evidence showing the product in question meets the criteria attached to the claim. CAP considers this amendment makes that clear:</p> <p><b>15.1</b> Marketing communications that contain nutrition or health claims must be supported by</p>

		documentary evidence to show they meet the conditions of use associated with the relevant claim, as specified by the European Commission. Claims must be presented clearly and without exaggeration.
Danone	<p><b>1.5</b></p> <p>Respondent disagrees. While Article 8.1 is reflected accurately with reference to the use of nutrition claims that would have the <i>same meaning</i> to consumers being permitted (Rule 15.1.1, Article 10 is not reflected with similar accuracy. Danone believes that alternative wordings to the claims authorised under Article 13 and Article 14 of the NHCR 1924/2006 should be permitted provided that consumers understand the claim and are not mislead.</p>	<p><b>1.5</b></p> <p>CAP agrees. CAP proposes this amendment to reflect Article 10(3):</p> <p><b>15.2</b></p> <p>References to general benefits of a nutrient or food for overall good health or health-related well-being are acceptable only if accompanied by a relevant authorised claim.</p> <p>Additionally the Code explicitly states:</p> <p>Authorised health claims in the Community Register or claims that would have the same meaning for consumers may be used in marketing communications. [Web link to Community Register]</p> <p>Permitted nutrition claims, or claims that would have the same meaning for consumers, ...</p>
Food Standards Agency; (& British Retail Consortium Consumer Policy Group)	<p><b>1.6</b></p> <p>The codes state that “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”. It is unclear what is meant by ‘claims filed with the Home Authority’ as there is no requirement for this under Regulation (EC) 1924/2006, although claim applications must be</p>	<p><b>1.6</b></p> <p>CAP agrees. Claims that require authorisation must be submitted to the Food Standards Agency, i.e. the UK Competent Authority. CAP considers it is unrealistic for the Code to reflect every type of health claim, transitional period and authorisation process. CAP considers this amended paragraph is sufficient:</p> <p>Depending on the nature of the claim EC</p>

	<p>made via the relevant National Competent Authority.</p> <p>This rule doesn't seem to capture all the different types of claims and associated transition periods. For example, claims referring to the role of a nutrient in growth, development and functions of the body can continue to be used during the transition period regardless of whether an application has been made, whereas disease risk reduction claims cannot be made until they have been authorised. Perhaps this paragraph is not necessary at all since the previous paragraph refers to transition periods?</p>	<p>Regulation 1924/2006 contains a number of complex transitional periods, including those for health claims which are still being assessed for adoption to the EU list of permitted health claims (and which comply with existing national provisions), and for trademarks or brand names in use prior to 1 January 2005. There is no transition period for reduction of disease risk claims, which are prohibited until authorised. CAP advises advertising industry stakeholders to take advice on the effect of the Regulation.</p> <p>Additionally, the 'Background' to the proposed Food, Dietary Supplements and Associated Health and Nutrition claims' states: 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: <a href="http://www.food.gov.uk">www.food.gov.uk</a>.</p>
Nestle	<p><b>1.7</b> We understand the transitional period for health claims applies to health claims made before 1 July 2007 (not 19 Jan 2007 as stated in your proposed code) Also please note that a transitional period</p>	<p><b>1.7</b> CAP agrees. See CAP's response to 1.6</p>

	also exists for products bearing trademarks or brand names existing before 1 Jan 2005 which do not comply with the NHCR but may be marketed until 19 Jan 2022 (this is not recognised in the proposed code).	
Sainsburys (& British Retail Consortium Consumer Policy Group)	<p><b>1.8</b></p> <p>Respondent considers the NHCR allows the use of any claim likely to have the same meaning in addition to the wording specified in the Annex to the legislation. It's important that this is reflected in the CAP Code. Providing a few examples would be useful, e.g. 'reduced energy' or equivalent wording such as 'reduced calories' or 'less calories'.</p>	<p><b>1.8</b></p> <p>CAP agrees. CAP understands the NHCR will not control the exact wording of health claims covered by Article 13 and Article 14, therefore CAP considers a similar flexibility can be applied to those health claims. CAP proposes the amend rule 15.1.1 accordingly:</p> <p><b>15.1.1</b> Only 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.</p> <p>Authorised health claims in the Community Register or claims that would have the same meaning may be used in marketing communications.</p> <p>Depending on the nature of the claim EC Regulation 1924/2006 contains a number of complex transitional periods, including those for health claims which are still being assessed for adoption to the EU list of permitted health claims (and which comply with existing national provisions), and for trademarks or brand names in use prior to 1 January 2005.</p>

	<p>The Code cannot go beyond the requirements in the NHCR. Marketers have to be able to prove (they are not required to hold documentary evidence) that their product contains the quantity of vitamin or mineral or substance specified under the 'conditions of use' of an approved article 13 claim.</p>	<p>There is no transition period for reduction of disease risk claims, which are prohibited until authorised. CAP advises advertising industry stakeholders to take advice on the effect of the Regulation.</p> <p>CAP agrees. CAP considers its proposed rule adequately addresses that point:</p> <p><b>15.1</b> Marketing communications that contain nutrition or health claims must be supported by documentary evidence to show they meet the conditions of use associated with the relevant claim, as specified by the European Commission. Claims must be presented clearly and without exaggeration.</p>
Proprietary Association Great Britain	<p><b>1.9</b></p> <p>"Marketing communications that feature health claims filed with the relevant Home Authority and awaiting authorisation, may be used with particular care."</p> <p>The reference to Home Authority is likely to cause confusion. Food manufacturers seek advice from their Trading Standards Departments under the Home Authority Principle. PAGB recommends amending this to "...health claims awaiting authorisation may be used..." Unsure as to why these require "particular care"? At present, all claims are awaiting sign off from the EC and presumably all require equal care.</p>	<p><b>1.9</b></p> <p>CAP agrees. See CAP's response to <b>1.6</b></p>

**Question 47: Do you agree CAP has correctly reflected the requirements of Article 3(b) nutrition and health claims shall not (b) give rise to doubt about the safety and/or the nutritional adequacy of other foods; of the NHCR in proposed rule 15.6 and 15.6.5**

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

**If your answer is no, please explain why.**

<i>Responses received in favour of CAP's proposal from:</i>	<i>Summaries of significant points:</i>	<i>CAP's evaluation of those points and action points:</i>
Advertising Association; ASDA; An organisation; Charity Law Association; Proprietary Association of Great Britain;	<p><b>2.1</b></p> <p>Respondents agree that CAP's proposed rules 15.6 and 15.6.5 correctly reflect the requirements in Article 3(b). Those respondents did not identify any changes from the present to the proposed rules that would amount to a significant change in advertising policy and practice, apart from those highlighted in the consultation document.</p>	<p><b>2.1</b></p> <p>N/A</p>
British Retail Consortium Consumer Policy Group	<p><b>2.2</b></p> <p>Respondent considers reference to the approval by the Commission should be removed. The Commission has the responsibility of proposing legislation but they cannot approve it. This is the role of Council and Parliament.</p>	<p><b>2.2</b></p> <p>CAP considers it is unrealistic for the Code to reflect every type of health claim, transitional period and authorisation process. CAP considers this general reference to approval is adequate, given stakeholders are advised to seek advice on the effect of the NHCR.</p>
British Nutrition	<b>2.3</b>	<b>2.3</b>



Foundation	Respondent agrees and suggests It may also be useful to include the requirements of article 3(c) (nutrition and health claims shall not encourage or condone excess consumption of a food) if this is not already covered in the code.	CAP considers proposed rule <b>15.4</b> adequately caters for the British Nutrition Foundation concerns.  “Marketing communications must not condone or encourage excessive consumption of a food.”
<i>Responses received against CAP’s proposal:</i>	<i>Summaries of significant points:</i>  <b>2.4</b> N/A	<i>CAP’s evaluation of those points and action points:</i>  <b>2.4</b> N/A
<p><b>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.</b></p> <p><b>15.3</b> Comparative nutrition claims must show any differences between a product bearing a Permitted Nutrition Claim and foods of the same category.</p> <p><b>15.3.2</b> 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.</p>		
<i>Responses received in favour of CAP’s proposal from:</i>  Advertising Association; ASDA; An organisation; Charity Law Association; Proprietary	<i>Summaries of significant points:</i>  <b>3.1</b> Respondents agree that CAP’s proposed rules 15.3 and 15.3.2 correctly reflect the requirements in Article 9. Those respondents did not identify any changes from the present to the proposed rules that would amount to a significant change in	<i>CAP’s evaluation of those points and action points:</i>  <b>3.1</b> N/A

Association of Great Britain;	advertising policy and practice, apart from those highlighted in the consultation document.	
British Retail Consortium Consumer Policy Group	<b>3.2</b> Respondent considers the requirements under article 9 have not been reflected; however the provisions reflect the interpretation under FSA and Commission guidance. We are satisfied with this.	<b>3.2</b> NA
British Nutrition Foundation	<b>3.3</b> Respondent agrees and considers it may also be useful to clarify 15.3 by adding 'taking into consideration a range of foods of that category' as stated in Article 9 of the NHCR.	<p><b>3.3</b> CAP agrees. CAP considers amended rule 15.3 more closely reflects Article 9 of the NHCR.</p> <p><i>Article 9</i> <b>Comparative claims</b></p> <p>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.</p> <p>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.</p> <p><b>15.3</b> Comparative nutrition claims must compare the difference in the claimed nutrient to a range of foods of the same category which do not have a composition which allows them to bear a nutrition claim.</p> <p><b>15.3.1</b></p>

		<p>A marketing communication may use one product as the sole reference for comparison only if that product is representative of the products in its category.</p> <p><b>15.3.2</b></p> <p>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.</p>
<p><i>Responses received against CAP's proposal:</i></p> <p>Food Standards Agency</p>	<p><i>Summaries of significant points:</i></p> <p><b>3.4</b></p> <p>The codes state that “comparative nutrition claims must show any differences between a product bearing a permitted nutrition claim and foods of the same category”. This doesn’t quite reflect Article 9 of Regulation (EC) 1924/2006 accurately, which says that the comparison should relate to a range of foods of the same category. For example, if a particular product claims to be “reduced fat”, it should be reduced (i.e. 30% less) compared to a range of other products of the same category. It is not necessary for other differences between the products to be stated, only the difference in the claimed nutrient. In fact, it may be misleading to make certain comparisons and thus be prohibited under Regulation (EC) 1924/2006.</p>	<p><i>CAP's evaluation of those points and action points:</i></p> <p><b>3.4</b></p> <p>CAP agrees. See CAP's response to <b>3.3</b></p>

<p>An organisation requesting confidentiality</p>	<p><b>3.5</b></p> <p>“Comparative nutrition claims must show any differences between a product bearing a Permitted Nutrition Claim and foods of the same category.”</p> <p>We are unsure if that statement is intended to reflect Article 9(2) of the NHCR. Article 9(2) is, at best, ill-defined; at worst, incomprehensible. The Commission has also issued some guidance in this area, the upshot of which is reasonable, but it is difficult to see how it relates to the specific wording of Article 9(2) rather than providing a different or additional requirement.</p> <p>You have our sympathy in attempting to transpose the NHCR’s requirements on comparative nutrition claims into the code in a meaningful and user-friendly way. Nevertheless, we feel obliged to point out that we do not understand the draft rule and we are not confident that it is consistent with the Regulation. For example, the draft rule states “a product bearing a permitted nutrition claim”; Article 9(2) effectively refers to comparators “which do not have a composition which allows them to bear a claim.” Does the product need to “bear” a claim or does it (or the comparator) just need to be capable of bearing a claim? The rule describes “a claim”; to which claim does this refer? The comparative nutrition claim; any nutrition claim; or a particular nutrition claim? We would happily be corrected but, so far as we are aware, there are no easy, definitive or even confident answers to these questions. We believe, however, that both the ASA and the industry will struggle to interpret 15.3 as it</p>	<p><b>3.5</b></p> <p>CAP agrees. See CAP’s response to <b>3.3</b></p>
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	<p>has currently been drafted and we would prefer to avoid seeing an ambiguous rule written into the code. One alternative might be to replace 15.3 with a more general statement of the principle which we believe underlies 9(2): what the Commission's guidance describes as "significant comparison"; for example: "To make a comparative nutrition claim between a product and a comparator, the absolute amount of the relevant nutrient or energy in the product undergoing comparison must be significant." This would prevent the situation where a reduced fat claim is made about bread in the event that the product is 30% lower in fat than standard bread. Although technically accurate that claim would be meaningless because there is no significant fat component in bread and hence no significant fat reduction in the diet. Perhaps this specific situation has some overlap with the more general wording in the first statement of draft rule 15.2 and a suitable amendment to that statement (making it more specific; see response to Q55) might suffice?</p>	
Mars	<p><b>3.6</b> Article 9.1 of the Regulation states "...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". It does not expressly state where the percentage/value information must appear.</p> <p>In comparison, the amendments to the Codes require that "The difference in the quantity of a</p>	<p><b>3.6</b> CAP disagrees. CAP considers this is a matter of ensuring consumers are not misled (a central principle of the NHCR) and has enough information to qualify the comparison. CAP considers the difference in the quantity of the nutrient must be stated in the marketing communication.</p> <p><i>Article 9</i> <b>Comparative claims</b></p>

	<p>nutrient or energy value must be stated <b>in the marketing communication/in the advertisement</b> and must relate to the same quantity of food."</p> <p>Therefore, we propose deleting the words in bold to accurately reflect the wording of the Regulation.</p>	<p>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 <u>shall be stated</u> and the comparison shall relate to the same quantity of food.</p>
Danone	<p><b>3.7</b></p> <p>Do not agree with Rule 15.3 which reads "<i>Comparative nutrition claims must show any differences between a product bearing a Permitted Nutrition Claim and food of the same category.</i>" It is not a requirement of Article 9 of the NHCR 1924/2006 to <i>show any differences</i> between the comparable products. This Rule goes beyond the requirements of Article 9 by seemingly requesting the advertiser to declare any other compositional differences between the products in question. Article 9 only requests that the advertiser when making a comparative claim:</p> <ul style="list-style-type: none"> <li>• Considers a range of foods within the category for comparing the particular nutrient and/or energy value to, i.e. the advertiser could take the average amount of a nutrient and/or energy value from the foods within the same category to compare their products nutrient and/or energy value to;</li> <li>• The advertiser must state this difference in their advertising;</li> <li>• The comparison must be between the same quantity of product; and</li> <li>• The comparison cannot be made to other</li> </ul>	<p><b>3.7</b></p> <p>CAP Agrees. See CAP's response to <b>3.3</b></p>

	products which also have the capacity to bear that claim.	
Kraft	<p><b>3.8</b> A clear alignment with EU Guidance is necessary in this area, which allows comparison between <i>foods that are similar in terms of nutritional content</i>, rather than restricting the comparison to foods within the same category.</p> <p>This approach would provide greater clarity to advertisers, as neither the EU Regulation nor the CAP/BCAP codes provide a definition of food categories.</p>	<p><b>3.8</b> CAP has reflected the requirements of the NHCR as closely as possible. The Code must reflect the law. Article 9 explicitly requires comparisons to be made with foods of the same category (<a href="http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_012/l_01220070118en00030018.pdf">http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_012/l_01220070118en00030018.pdf</a>)</p> <p>The FSA guidance also provides a helpful interpretation of Article 9 and how it could be applied in practice given the lack of established food categories.</p>
<p><b>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.</b></p> <p><b>15.3.1</b> An advertisement may use one product as the sole reference for comparison only if that product is representative of the products in its category.</p>		
<p><i>Responses received in favour of CAP's proposal from:</i></p> <p>Advertising Association; ASDA; Alliance Boots; An organisation; Charity Law Association;</p>	<p><i>Summaries of significant points:</i></p> <p><b>4.1</b> Respondents consider proposed rule 15.3.1 adequately reflects the requirements of Article 9.</p>	<p><i>CAP's evaluation of those points and action points:</i></p> <p><b>4.1</b> N/A</p>

Proprietary Association of Great Britain		
<i>Responses received against CAP's proposal:</i>  British Nutrition Foundation	<i>Summaries of significant points:</i>  <b>4.2</b> Respondent disagrees. Article 9 of the regulation does not refer to the use of a sole product, but to a range of products within a category.	<i>CAP's evaluation of those points and action points:</i>  <b>4.2</b> CAP considers the guidance produced by the European Commission, refers to the acceptability of a single reference product, if its representative of that category of products. <a href="http://ec.europa.eu/food/food/labellingnutrition/claims/guidance_claim_14-12-07.pdf">http://ec.europa.eu/food/food/labellingnutrition/claims/guidance_claim_14-12-07.pdf</a> (paragraph 11.2.2)
<b>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.</b> 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		
<i>Responses received in favour of CAP's proposal from:</i>  Advertising Association; ASDA; An organisation; Charity Law	<i>Summaries of significant points:</i>  <b>5.1</b> Respondents consider proposed rule 15.6.1 adequately reflects the requirements of Article 12(a) of the NHCR.	<i>CAP's evaluation of those points and action points:</i>  <b>5.1</b> N/A



Association; Proprietary Association of Great Britain; British Nutrition Foundation;		
<i>Responses received against CAP's proposal:</i>	<i>Summaries of significant points:</i>  <b>5.2</b> NA	<i>CAP's evaluation of those points and action points:</i>  <b>5.2</b> N/A
<p><b>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.</b></p> <p>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</p>		
<i>Responses received in favour of CAP's proposal from:</i>  Advertising Association; ASDA; An organisation; Charity Law Association; Proprietary Association of Great	<i>Summaries of significant points:</i>  <b>5.3</b> Respondents consider proposed rule 15.6.4 adequately reflects the requirements of Article 3(e) of the NHCR.	<i>CAP's evaluation of those points and action points:</i>  <b>5.3</b> N/A

Britain;		
British Nutrition Foundation	<p><b>5.4</b> Agree the rule reflects the relevant article of the NHCR. However, it may be difficult to define which references will 'give rise to or exploit fear in the audience' and the ASA may wish to include examples of this in any guidance documentation provided.</p>	<p><b>5.4</b> CAP considers this reference is similar to an existing rule in the medicines section of the Code, which refers to 'fear and anxiety'. Stakeholders and the ASA are used to interpreting this requirement and CAP considers it will not cause difficulty.</p> <p><b>50.14</b> Marketers must not use fear or anxiety to promote medicines or recovery from illness and should not suggest that using or avoiding a product can affect normal good health.</p>
<i>Responses received against CAP's proposal:</i>	<p><i>Summaries of significant points:</i></p> <p><b>5.5</b> N/A</p>	<p><i>CAP's evaluation of those points and action points:</i></p> <p><b>5.5</b> N/A</p>
<p><b>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.</b></p> <p>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.</p>		
<i>Responses received in favour of CAP's proposal from:</i>	<i>Summaries of significant points:</i>	<i>CAP's evaluation of those points and action points:</i>

Advertising Association; ASDA; An organisation; British Heart Foundation; Charity Law Association; Proprietary Association of Great Britain; Cambridge Manufacturing Company Ltd;	<b>6.1</b> Respondents consider proposed rule 15.6.6 adequately reflects Article 12(b) of the NHCR.	<b>6.1</b> N/A
Lighterlife;	<b>6.2</b> The ASA should liaise with the Local Trading Standards Office of the company, whose advertising it is scrutinising. We feel this TSO involvement is necessary as they are the enforcement agency in charge of the correct implementation of the Nutrition and Health Claims Regulation. As a legitimate and responsible company, we liaise on a permanent basis with our TSO, to ensure that we comply with all applicable rules, including those on rate or amount of weight loss claims.	<b>6.2</b> CAP understands this is not a comment on the proposed rules, but on their application by the ASA.
<i>Responses received against CAP's proposal:</i>  Sainsbury's	<i>Summaries of significant points:</i>  <b>6.3</b> Respondent disagrees. The Food Standards Agency Guidance states the interpretation of this	<i>CAP's evaluation of those points and action points:</i>  <b>6.3</b> CAP has reflected the letter of the NHCR. The independent ASA Council is experienced in

	<p>provision is not that straightforward. We believe that the provisions in the Codes should reflect that reference to terms such as 'rapid' or 'fast' could in certain circumstances be used.</p>	<p>interpreting advertisements and administering the Codes and will apply the letter as well as the spirit of the rule.</p> <p>CAP considers the FSA Guidance is helpful and stakeholders are advised to consult it, however, it does not bind the ASA Council or CAP Compliance and Monitoring team.</p> <p>The existing rules on slimming and weight loss have been easily interpreted and applied over many years by stakeholders. The ASA and CAP/BCAP have an established position on 'rapid' and 'fast' weight loss claims for a variety of slimming and weight loss products, including foodstuffs. Additionally, the ASA and CAP are experienced in assessing the context of marketing communications and have on numerous occasions adjudicated on before and after photographs that depict a rate or amount of weight loss that is not compatible with good medical or nutritional practice.</p>
British Retail Consortium Consumer Policy Group	<p><b>6.4</b></p> <p>Respondent disagrees. The proposed wording in this paragraph suggests that all claims related to the rate and amount of weight loss are banned, when as highlighted in the FSA guidance on the Regulation it is not so straightforward.</p> <p>We believe that the provisions in the Codes should reflect that reference to terms such as 'rapid' or 'fast' could be used. FSA guidance (Question 36):</p>	<p><b>6.4</b></p> <p>See CAP's response to <b>6.3</b></p>

<http://www.food.gov.uk/foodindustry/guidancenotes/foodguid/192420006complianceguide>

**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.**

**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

<i>Responses received in favour of CAP's proposal from:</i>	<i>Summaries of significant points:</i>	<i>CAP's evaluation of those points and action points:</i>
Advertising Association; ASDA; An organisation; Charity Law Association; Proprietary Association of Great Britain;	<b>7.1</b> Respondents agree proposed rule 15.6.3 adequately reflects Article 12(c) and Article 11 of the NHCR.	<b>7.1</b> N/A
British Nutrition Foundation	<b>7.2</b> Respondent agrees, but considers, it may be useful to provide a list of bodies from whom a recommendation would be acceptable to avoid	<b>7.2</b> CAP considers including an exhaustive, up to date list in the Codes is impractical. The onus is on marketers to ensure appropriate bodies are

	inappropriate organisations being referenced.	used in their marketing communications. Article 11 allows, but does not directly control, the use of endorsements by national associations of medical, nutrition or dietetic professionals and health-related charities. Instead these are to be controlled by national rules. However, it is important to note that any health claims, whether expressed or implied, linked to the recommendation or endorsement will be controlled by the NHCR and so must be authorised and listed or be based on authorised and listed claims.
<p><i>Responses received against CAP's proposal:</i></p> <p>Food Standards Agency</p>	<p><i>Summaries of significant points:</i></p> <p><b>7.3</b> The codes state that “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”. This doesn’t seem entirely compatible with Regulation (EC) 1924/2006. The Regulation only controls recommendations by medical, nutrition or dietetic associations and health-related charities, but does not prohibit recommendations by any other associations. In fact, Article 11 of the Regulation doesn’t introduce any new controls on recommendations by health-related associations or charities but instead says that national rules apply.</p>	<p><i>CAP's evaluation of those points and action points:</i></p> <p><b>7.3</b> CAP considers its Code must reflect the relevant provisions of the NHCR that are likely to impact marketing communications. The regulation does not explicitly stop non-health related charities etc endorsing food products, nor do CAP's proposed rules. CAP considers any <u>health claims</u>, whether expressed or implied, linked to the recommendation or endorsement will be controlled by the NHCR and so must be authorised and listed or based on relevant authorised and listed claims.</p>

	<p>There are no specific national rules in place in the UK so we are looking at updating our guidance to the Regulation to include a section on this. It is likely to reflect the requirements of Regulation (EC) 1924/2006 and not put additional requirements in place – that is dependent on a public consultation.</p>	
National Heart Forum	<p><b>7.4</b></p> <p>There are no ‘relevant national rules’ that currently apply in the UK and the proposed revision to the CAP Code might be construed as such. In the interests of public protection, it is vital that any claims or information presented to consumers should be free of commercial bias and guaranteed to be of the highest scientific quality. We are concerned that the wording of 15.6.3 is open to interpretation and could encourage the creation of ‘health-related charities’ or ‘national representative bodies’ for the purpose of fronting commercially-motivated recommendations in marketing communications.</p> <p>It should be the Food Standards Agency in consultation with the Scientific Advisory Committee on Nutrition that should – as the appropriate, competent authorities – determine rules around such endorsements. This should not be determined by CAP.</p>	<p><b>7.4</b></p> <p>See CAP’s response to <b>7.3</b>.</p> <p>CAP has reflected the text of the NHCR. The Code must not allow practices that are explicitly prohibited by the NHCR and must not unduly restrict the use of nutrition or health claims that are permitted by the NHCR. Neither CAP nor the ASA have any remit over the creation of health-related charities or national representative bodies.</p> <p>CAP understands a key principle of the NHCR is to protect consumers from misleading or false nutrition or health claims. The CAP Code has numerous existing rules that are intended to protect the audience from misleading, offensive or harmful marketing communications. CAP considers the Code has an established, clear position on consumer protection particularly misleadingness. The FSA has produced guidance on this area and stakeholders are advised to consult it. However they are reminded it does not bind the ASA.</p> <p>CAP has taken advice from the Food Standards Agency in drafting the rules that reflect Article 11 and 12(c) of the NHCR. CAP has no remit over</p>

		<p>the creation of health-related charities or national representative bodies, however, any health claims, whether expressed or implied, linked to the recommendation or endorsement will be controlled by the NHCR and so must be authorised and listed or refer to relevant authorised and listed claims.</p> <p>CAP is not determining the rules around endorsements; it is simply reflecting the letter of the law.</p>
<p><b>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.</b></p> <p><b>15.6</b> These are not acceptable in marketing communications for products within the remit of this Section:</p> <p><b>15.6.2</b> 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</p>		
<i>Responses received in favour of CAP's proposal from:</i>	<i>Summaries of significant points:</i>	<i>CAP's evaluation of those points and action points:</i>
Advertising Association; ASDA; Proprietary Association of Great Britain	<b>8.1</b> Respondents agree proposed rule 15.6.2 adequately reflects Article 14 of the NHCR and Schedule 6 Part 1(2) of the FLRs.	<b>8.1</b> N/A
Charity Law	<b>8.2</b>	<b>8.2</b>



Association;	<p>Rule 15.6.2 – There is a grey area which proves problematic for Health Charities around the issue of whether the mere presence of a health charity's logo is by its nature an implied disease-reduction claim – we understand that it is for national regulators to clarify this and it may be worth following up with the FSA to establish their position. If there is no clarity then this would mean that logos could not go on food packaging unless authorised by the European Commission which we do not believe is what was intended.</p>	<p>CAP considers its Code must reflect the law. CAP has taken advice from the Food Standards Agency in drafting the rules that reflect Article 11 and 12(c) of the NHCR. CAP has no remit over the creation of health-related charities or national representative bodies, however, any health claims, whether expressed or implied, linked to the recommendation or endorsement will be controlled by the NHCR and so must be authorised and listed or based on relevant authorised and listed claims.</p> <p>Separately, trademarks (and brand names) are subject to a transitional period (art. 28). The CAP Code does not apply to packaging and this section clearly advises advertising stakeholders to seek advice on the effect of the NHCR.</p>
British Nutrition Foundation	<p><b>8.3</b> Respondent agrees, although it would be useful to add that the food or drink in question must comply with the conditions of use specified for that health claim.</p>	<p><b>8.3</b> CAP agrees. See CAP's response to <b>1.8</b></p>
<i>Responses received against CAP's proposal:</i>	<p><i>Summaries of significant points:</i></p> <p><b>8.4</b></p>	<p><i>CAP's evaluation of those points and action points:</i></p> <p><b>8.4</b> N/A</p>
<p><b>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.</b></p>		

<i>Responses received in favour of CAP's proposal from:</i>	<i>Summaries of significant points:</i>	<i>CAP's evaluation of those points and action points:</i>
Advertising Association; ASDA; An organisation;	<b>9.1</b> Respondents consider CAP has reflected the relevant provisions of the NHCR in the proposed Food, Dietary Supplements and Associated health and Nutrition Claims.	<b>9.1</b> N/A
Bayer; Vifor Pharma Potters; Wyeth Consumer Healthcare	<b>9.2</b> Respondents note the CAP Code has been updated to take account of the NHCR and fully supports the proposals to:  1. make it clear the target groups only apply to claims which are relevant to people who would otherwise have a sup-optimal intake of that nutrient. That allows for the possibility of the European Commission approving claims relating to a higher intake of a particular nutrient for a particular function.  2. permit claims that a food supplement can elevate mood or enhance normal performance if they are approved by the European Commission.	<b>9.2</b> CAP welcomes the comments from Bayer, Vifor Pharma Potters and Wyeth Consumer Healthcare.  CAP considers it unrealistic to reflect every type of acceptable health claim and detail the particular authorisation processes attached to them in the Code. Therefore, it considers the paragraph on transitional periods adequately covers the complex situation surrounding health claims and asks stakeholders to take advice on the effect of the NHCR. The CAP Code cannot reflect every requirement of the NHCR.  CAP understands in some cases the general population is the target group for some dietary supplements, which would allow advertisements for those supplements to make claims for general nutritional benefit.  CAP understands almost all vitamin and mineral claims have now been assessed by EFSA and

		<p>they have found many claims appropriate for the <u>general population</u>. The Commission may impose some conditions of use for claims before they are finally authorised.</p> <p>CAP considers:</p> <ul style="list-style-type: none"> <li>• the general misleading provisions (supported by amended rules 15.7 and 15.8);</li> <li>• the requirement that nutrition and health claims must be used in accordance with their conditions of use as set out by the European Commission and;</li> <li>• <u>all</u> nutrition and health claims are now regulated under the provisions of Regulation 1924/2006.</li> </ul> <p>are sufficient measures to protect the audience from misleading claims, whilst ensuring compliance with the NHCR.</p> <p>CAP's new revised rules on vitamin, mineral and food supplements are as follows:</p> <p><b>Food Supplements and other Vitamins and Minerals</b></p> <p>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.</p> <p><b>15.7</b> Nutrition and health claims for food</p>
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Vifor Pharma Potters	<p><b>9.3</b> Respondent supports proposals to extend list of target groups to whom vitamins and minerals can be advertised. The list is now much more closely aligned to current research and offers far more scope to enable companies to target supplements to those who are most likely to benefit.</p>	<p><b>9.3</b> See CAP's response to <b>9.2</b></p>
Food Standards Agency	<p><b>9.4</b> Respondent notes that the codes state that</p>	<p><b>9.4</b> All marketing communications are required to</p>

	<p>“licensed characters and celebrities popular with children may present factual and relevant generic statements about nutrition, safety, education or similar”. If characters or celebrities present statements about the nutritional or health benefits of a food within its advertising, and these fall within the scope of Regulation (EC) 1924/2006, they will need to comply with the Regulation.</p>	<p>comply with the law (rule 1.1). Additionally, the Food, Food Supplements and Associated Health and Nutrition Claims section makes explicit references to the NHCR and FSA Guidance on the NHCR in relation to nutrition and health claims in marketing communications. CAP considers this measure is adequate.</p>
British Nutrition Foundation	<p><b>9.5</b> Respondent agrees on the whole, but, work is still in progress on this regulation, particularly on the nutrient profiles that foods and drinks must comply with in order to make a nutrition or health claim. It will be important to update the code to take any major changes into account in future.</p> <p>No mention is currently made of the nutrient profiles which are currently under development at the EC, and these may be important to include once they have been finalised.</p>	<p><b>9.5</b> CAP understands the NHCR has numerous transitional periods, which cannot be reflected in the Codes. CAP advises stakeholders to seek advice on the effect of the NHCR.</p> <p>CAP understands under the transitional arrangements in the NHCR, marketers are not required to comply with the requirements associated with nutrient profiles until 2 years after their introduction. The European Commission has missed its deadline to establish nutrient profiles (19 January 2010). When nutrient profiles have been established, CAP and BCAP will update the Codes accordingly.</p>
Proprietary Association of Great Britain	<p><b>9.6</b> Respondent agrees and suggests rule 15.8 requires a minor amend.</p> <p>“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</p>	<p><b>9.6</b> CAP considers the new regime of nutrition and health claims is adequately regulated by the general misleading provisions and the need to hold evidence to support claims; the requirement that nutrition and health claims must be used in accordance with their conditions of use as set out by the European Commission and that all nutrition and health claims will be regulated under the</p>

	<p>not be encouraged to swap a healthy diet for supplementation. <u>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.</u> 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.”</p> <p>The underlined text prohibits vitamin and mineral supplements from implying they can elevate mood or enhance normal performance. This should apply equally to all food supplement ingredients.</p>	<p>provisions of regulation 1924/2006</p> <p>See CAP’s response to <b>9.2</b></p>
British Retail Consortium Consumer Policy Group	<p><b>9.7</b></p> <p>Respondent considers the references to the FSA guidance in the document should be removed and the specific sections of that document referred to in each of the relevant sections of the Codes.</p> <p>It is crucial that the Codes are kept up-to-date. This is especially relevant in relation to claims since many issues in the Nutrition and Health Claims Regulation are still being discussed; e.g. positive list of health claims, final list of nutrition claims,</p>	<p><b>9.7</b></p> <p>CAP understands the FSA Guidance is in the process of being revised and will shortly be consulted on. CAP considers referencing particular sections of the guidance is not overly helpful given several section of the guidance apply.</p> <p>CAP agrees. CAP has reflected the general principles of the NHCR which shouldn’t change in future. The list of nutrition claims will now sit in guidance, which can be easily amended as and when necessary.</p>

	<p>amendments to the criteria of certain nutrition claims and nutrient profiles to establish the foods that can bear claims.</p> <p>Furthermore, where the Codes use a defined term such as food product, low alcohol etc., it is clear that the definitions have to be the same as those in the nutrition and health claims Regulation.</p> <p>While the Code explains the nutrition claims that can be used and the conditions for using these claims, little mentioned is given to health claims. Paragraph 15.1.1 states that authorised claims in the Community Register may be used in marketing communications. This could be interpreted to mean that only health claims that are authorised and included in the registered can be used, which is incorrect, e.g. article 10.3 health claims do not need to be neither authorise nor included in the register. The Code should clearly cover the provisions under Nutrition and Health Claims Regulation applicable to all the different types of health claims.</p>	<p>ASA and CAP will apply the same definitions as the law when necessary.</p> <p>CAP agrees. CAP understands the NHCR will not control the exact wording of health claims covered by Article 13 and Article 14, therefore CAP considers a similar flexibility can be applied to those health claims. CAP proposes the amend rule 15.1.1 accordingly:</p> <p><b>15.1.1</b></p> <p>Marketing communications that contain nutrition or health claims must be supported by documentary evidence to show they meet the conditions of use associated with the relevant claim, as specified by the European Commission. Claims must be presented clearly and without exaggeration.</p>
Which?	<p><b>9.8</b></p> <p>Respondent supports the inclusion of the provisions of the Regulation within the review of the CAP and BCAP Codes as they are a legal requirement. Respondent acknowledges the complex transition periods and lack of established nutrient profiles. They consider that makes it</p>	<p><b>9.8</b></p> <p>CAP welcomes the comments from Which? and agrees, this section must reflect the law. However, the Codes are not a replacement for relevant legislation and stakeholders are advised to seek advice on the effect of NHCR.</p>

	<p>difficult to be categorical within the Codes at this stage and means that they may need to be updated again shortly to reflect the legal situation. Respondent therefore agrees with the proposed wording which advises advertising industry stakeholders to take advice on the effect of the Regulation on their products and associated health claims.</p>	
	<p>Respondent is concerned that no reference is made to Articles 4, 5, 6 and 7 and believes that these also need to be addressed. Article 4 establishes conditions for the use of nutrition and health claims in the form of nutrient profiles.</p>	<p>CAP will amend the Code when Nutrient Profiles are established. CAP understands the deadline set out in Article 4(1) of the NHCR regarding nutrient profiles has lapsed. CAP will reflect European nutrient profiles once they have been established.</p>
	<p>Article 5 establishes general conditions i.e. the conditions that have to be met for health and nutrition claims to be permitted (e.g. that the nutrient or other substance for which the claim is made is contained in the final product in a significant quantity or is in a form that is available to be used by the body).</p>	<p>CAP considers this requirement is reflected in rule:</p> <p><b>15.1</b> Marketing communications that contain nutrition or health claims must be supported by documentary evidence to show they meet the conditions of use associated with the relevant claim, as specified by the European Commission. Claims must be presented clearly and without exaggeration.</p>
	<p>Article 6 explains the level of scientific substantiation required for nutrition and health claims.</p>	<p>Neither CAP nor the ASA will review the scientific evidence to support nutrition or health claims. That function falls within the remit of EFSA.</p>
	<p>Article 7 requires nutrition information to be provided if a nutrition or health claim is made.</p>	<p>CAP considers Article 7 applies to labelling and packaging only. That is not within the remit of the CAP Code. CAP refers stakeholders the FSA</p>



		guidance (page 26): <a href="http://www.food.gov.uk/foodindustry/guidancenotes/foodguid/192420006complianceguide">http://www.food.gov.uk/foodindustry/guidancenotes/foodguid/192420006complianceguide</a>
Responses received against CAP's proposal:  Food Standards Agency; An organisation requesting confidentiality ; Health Food Manufacturers Association	Summaries of significant points:  <b>9.9</b> The codes state that “if a food product is a good source of certain nutrients that does not justify a generalised claim of a wider nutritional benefit”. Whilst true that the presence of a particular nutrient does not necessarily justify a claim about the food's nutritional benefit, if a health claim for that nutrient has been authorised it can be used on any food meeting the conditions of use (and the nutrient profile, once agreed). This could be reflected by amending the rule to say that a wider claim is not <i>necessarily</i> justified.	CAP's evaluation of those points and action points:  <b>9.9</b> (see also CAP's response to 1.5) CAP agrees. CAP proposes to reflect the requirements of Article 10(3): <a href="http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_012/l_01220070118en00030018.pdf">http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_012/l_01220070118en00030018.pdf</a>  CAP proposes:  <b>15.2</b> References to general benefits of a nutrient or food for overall good health or health-related well-being are acceptable only if accompanied by a relevant authorised claim.
An organisation requesting confidentiality	<b>9.10</b> Respondent considers claims about the presence, absence or reduced content of a nutrient are nutrition claims controlled by a positive list within the annex of the NHCR, which in itself ensures the benefits are significant and real, otherwise EFSA and the Commission would not have included them within the annex. Therefore this statement is all but redundant as that particular responsibility no longer rests with the advertiser (there is one situation where it might still be relevant; see response to	<b>9.10</b> CAP agrees. CAP proposes:  <b>15.2</b> References to general benefits of a nutrient or food for overall good health or health-related well-being are acceptable only if accompanied by a relevant authorised claim.

	Q48 about 15.3) so we recommend that you delete it or in some way combine it with draft rule 15.3.	
Sainsbury's	<p><b>9.11</b> Respondent considers many of the provisions contained within the legislation are still to be enacted and are subject to long transition periods; some as long as 15 years. Therefore it is important that the Codes are kept up-to-date.</p> <p>Whilst the Code explains the nutrition claims that can be used and the conditions for using these claims, the treatment of health claims is much sparser. Paragraph 15.1.1 states that authorised claims states that authorised claims in the Community Register may be used in marketing communications. Whilst this is true it is only part of the story for example, Article 10.3 health claims do not need to be authorised or included in the register. The Code should clearly cover the provisions under Nutrition and Health Claims Regulation applicable to all the different types of health claims.</p> <p>The Codes use a number of terms which have a defined meaning such as food product, low alcohol etc., it is clear that the definitions have to be the</p>	<p><b>9.11</b> CAP considers it is unrealistic for the Code to reflect every type of health claim, transitional period and authorisation process. CAP considers this amended paragraph sufficient:</p> <p>Depending on the nature of the claim EC Regulation 1924/2006 contains a number of complex transitional periods, including those for nutrition claims in use in the EU before 1 January 2006 and certain health claims for which an application for authorisation has been submitted, if necessary. CAP advises advertising industry stakeholders to take advice on the effect of the Regulation.</p> <p>Marketers are advised to seek advice on the effect of the NHCR. The Codes cannot be a replacement for relevant legislation.</p> <p>ASA and CAP will apply the same definitions as the law where necessary.</p>

	same as those in the Nutrition and Health Claims Regulation.	
<p><b>Question 56:</b></p> <p>i) <b>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.</b></p> <p><b>15.11</b> 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.</p> <p>ii) <b>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.</b></p> <p><b>15.11.1</b> Marketing communications must not confuse between infant formula and follow-on formula.</p> <p>iii) <b>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.</b></p>		
<p><i>Responses received in favour of CAP's proposal from:</i></p> <p>Advertising Association; ASDA</p>	<p><i>Summaries of significant points:</i></p> <p><b>10.1</b> Respondents agree that CAP's proposed rules 15.11 and 15.11.1 correctly reflect the requirements in Regulation 19 of the Infant Formula and Follow-on Formula Regulations 2007 (amended). They consider the relevant provisions</p>	<p><i>CAP's evaluation of those points and action points:</i></p> <p><b>10.1</b> N/A</p>

	have been reflected in the Code.	
Food Standards Agency	<p><b>10.2</b></p> <p>Respondent supports the decision to reflect the infant formula and follow-on formula Regulations 2007 in the codes and in particular to explicitly mention that the advertising of infant formula is prohibited and that advertisements should not confuse between infant formula and follow-on formula. The rules governing the advertising of infant formula and follow-on formula are, however, more extensive than reflected in the amended codes. As currently drafted the text of the codes does not explicitly mention these or make reference to the fact that the Regulations put in place additional controls on the advertising of infant and follow-on formula. These are important controls that both broadcasters and advertisers should be aware of. We would like to see these controls reflected in the codes.</p> <p>The codes refer to The Infant Formula and Follow-on Formula Regulations 2007. These Regulations have now been amended by The Infant Formula and Follow-on Formula (England) (amendment) Regulations 2008. Reference to these Regulations should therefore read “The Infant Formula and Follow-on Formula (England) Regulations 2007, as amended” with equivalent parallel Regulations in Scotland, Wales and Northern Ireland<sup>1</sup></p>	<p><b>10.2</b></p> <p>The CAP Code cannot reflect every requirement of law. Marketers have primary responsibility for ensuring their marketing communications are legal. The CAP Code is not a replacement for legislation.</p> <p>CAP notes the FSA’s comments. CAP has not been made aware of any significant differences between the Regulations that apply to England, Scotland, Wales and Northern Ireland. The list of legislation that applies to all advertising does include the regulations that apply to Scotland, Wales and Northern Ireland and will be amended accordingly.</p>

<sup>1</sup> The Infant Formula and Follow-on Formula (Scotland) Regulations 2007 as amended by the Infant Formula and Follow-on Formula (Scotland) Amendment Regulations 2008 (SSI 2008/322).

Department of Health	<p><b>10.3</b></p> <p>The FSA will respond on proposed rules on advertising on infant formula and follow on formula and compliance with relevant EU and domestic legislation. However, DH is of the view that any advertising rules must reflect both the spirit and the letter of any EU or domestic legislation in order to provide the strongest possible protection for infants and their mothers.</p>	<p><b>10.3</b></p> <p>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) prohibit the advertising of infant formula (except in scientific publications or for the purposes of trade before retail). The Regulations are intended to prevent breastfeeding from being discouraged. In keeping with its general policy objectives and to help media owners and advertisers to comply with the Code's general requirement that marketing communications must comply with the law, CAP proposes to reflect the key provisions of the Regulations that are directly relevant to marketing communications. The proposed rules reflect the requirements of regulations 19, 20 and 21 <a href="http://www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3435319">http://www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3435319</a></p> <p>CAP considers a fundamental aspect of the Infant Formula and Follow-on Formula Regulations 2007 (as amended) is the need to ensure advertisements for infant formula and follow-on formula are differentiated clearly. It proposes to</p>
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The Infant Formula and Follow-on Formula (Wales) Regulations 2007 as amended by the Infant Formula and Follow-on Formula (Amendment) (Wales) Regulations 2008 (SI 2008/W.228).

The Infant Formula and Follow-on Formula Regulations (Northern Ireland) 2007 as amended by the Infant Formula and Follow-on Formula (Amendment) Regulations (Northern Ireland) 2008 (SR 2008/405).

		<p>make that provision explicit in its Code.</p> <p>The CAP Code cannot realistically reflect every requirement of law. Stakeholders are required to consult specific legislation that is relevant to their marketing communications. CAP considers the reference to 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 and the principle and rules of the compliance section sufficiently address the DH's concerns.</p> <p><b>Principle</b></p> <p>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.</p> <p><b>Rules</b></p> <p><b>1.1</b></p> <p>Marketing communications should be legal, decent, honest and truthful.</p> <p><b>1.2</b></p> <p>Marketing communications must reflect the spirit, not merely the letter, of the Code.</p> <p><b>1.3</b></p>
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		<p><u>Legality</u></p> <p><b>1.10</b> 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.</p> <p><b>1.10.1</b> Marketers must not state or imply that a product can legally be sold if it cannot.</p>
<p><i>Responses received against CAP's proposal:</i></p> <p>Breastfeeding Manifesto Coalition; National Heart Forum</p>	<p><i>Summaries of significant points:</i></p> <p><b>10.4</b> Welcome proposed rule 15.11.1. This is essential to avoid potential risks to infant health resulting from use of an age-inappropriate product, but also to ensure that advertising of follow-on formula is not used to promote infant formula.</p> <p>However, in order to truly avoid any confusion rule 15.11.1 needs to go further and ban the advertising of follow on formula completely. If the advertisement of follow on formula continues the confusion between infant formula and follow-on formula is unavoidable due to the intrinsic similarity between the two products. Indeed, before the adoption of the International Code, all formula milks were known simply as 'infant formula' and</p>	<p><i>CAP's evaluation of those points and action points:</i></p> <p><b>10.4</b> CAP considers this is not a comment on the proposed rules but the legislation that controls the marketing of infant and follow-on formula. The CAP Code reflects the relevant provisions of the Infant Formula and Follow-on Formula Regulations 2007 and stakeholders are advised their advertisements must comply with the law.</p> <p>(See also CAP's response to <b>10.3</b>)</p> <p>CAP has not seen persuasive evidence that would result in the CAP Code banning advertisements for follow-on formula. The Department of Health has requested "that any advertising rules must reflect both the spirit and the letter of any EU or domestic legislation in</p>



	<p>manufacturers commonly marketed them for different stages of a baby's development, normally differentiated by a number – 1, 2 or 3 depending on the age of the baby. 'Follow-on formula' is a name which emerged in the early 1980s to replace the 3<sup>rd</sup> stage formulas. However, since it continues to replace the milk component of the diet for babies over 6 months of age, it is clearly a breastmilk substitute and essentially performs the same function as normal infant formula.</p> <p>A survey carried out in 2005 by MORI on behalf of UNICEF UK and the National Childbirth Trust found that 60% of the 1000 new mothers and pregnant women interviewed said that they had seen or heard advertising for infant formula in the previous 12 months (the majority on TV or in magazines). Given that advertising outside the health care system is prohibited under the existing Regulations and straightforward advertising for infant formula inside the health care system (permitted by current regulations) is now rare, the advertisements in question must have been for follow-on formula.</p> <p>A similar survey carried out in 2005 by NOP for the Department of Health found that 39% of the 2000 new mothers and pregnant women interviewed had seen adverts for infant formula, with another 7% saying that they had seen adverts for formula milk but did not know what type of milk was being advertised. A quarter of interviewees thought that</p>	<p>order to provide the strongest possible protection for infants and their mothers." CAP considers the Code and its application by the ASA is sufficient.</p> <p>The ASA is experienced in judging the context of advertisements particularly in light of the fact there are no specific rules on advertisements for infant and follow-on formula in the present Codes. The ASA has investigated a number of complaints where they consider the advertisement did not make sufficiently clear the product being advertised was follow-on formula and not for infants under 6 months, or that formula was equal or superior to breastmilk.</p> <p>CAP and BCAP will consider the findings of the Food Standards Agency review into the controls on Infant formula and follow-on formula, published too late to be taken into account in this Review:  <a href="http://www.food.gov.uk/healthiereating/nutcomms/infformreview/">http://www.food.gov.uk/healthiereating/nutcomms/infformreview/</a></p>
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	there was no difference between infant and follow-on formula, with a further 16% saying that they did not know. This is evidence that confusion between the two products exists in the UK.	
Baby Feeding Law Group	<p><b>10.5</b> Respondent considers the B/CAP Advertising Codes should reflect more closely the 'International Code of Marketing of Breast milk Substitutes'.</p> <p>Respondent considers a ban on any promotion of brands associated with infant formula milk, including direct marketing, care lines and proprietary ingredient blends.</p> <p>Respondent refers to the failings of the UK government to bring the Regulations into line with the International Code of Breast Milk Substitutes and subsequent resolutions of the World Health Assembly there are huge discrepancies between the Regulations and the Guidance. Respondent considers B/CAP should voluntarily extend the ban on advertising infant formula to follow-on formula.</p> <p>Respondent is pleased that the Codes will include a specific reference to the Regulations, however considers there should be reference to FSA guidance document also. The guidance notes reflect the FSA's view on how the regulations should be interpreted and were produced to provide advice on legal requirements of the Regulations.</p>	<p><b>10.5</b> CAP considers this is not a comment on the proposed rules but the legislation that controls the marketing of infant and follow-on formula. The CAP Code reflects the relevant provisions of the Infant Formula and Follow-on Formula Regulations 2007 and stakeholders are advised their advertisements must comply with the law.</p> <p>CAP will consider the FSA's review and reconsider referencing the document: <a href="http://www.food.gov.uk/healthiereating/nutcomms/informreview/">http://www.food.gov.uk/healthiereating/nutcomms/informreview/</a></p>

<p><b>Question 57:</b></p> <p>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?</p> <p>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?</p> <p>iii) Do you have other comments on this section?</p>		
<i>Responses received from:</i>	<i>Summaries of significant points:</i>	<i>CAP's evaluation of those points and action points:</i>
Advertising Association; ASDA; An organisation; Proprietary Association of Great Britain; British Nutrition Foundation	<p><b>11.1</b></p> <p>Respondents consider the CAP rules included in the proposed Food, Food Supplements and Associated Health and Nutrition claims section are necessary and easily understandable. Those respondents did not identify any changes from the present to the proposed rules that would amount to a significant change in advertising policy and practice, apart from those highlighted in the consultation document.</p>	<p><b>11.1</b></p> <p>N/A</p>
Alliance Boots;	<p><b>11.2</b></p> <p>Respondent considers the proposed rule changes in this section are a brave attempt to reflect the high volume of change that is going on in this area. However what they succeed in doing is indicating how difficult it is to draft rules to reflect law in a way</p>	<p><b>11.2</b></p> <p>CAP considers users of the Code require more detailed guidance than basic principles. The NHCR imposes specific requirements on advertising stakeholders and CAP considers those requirements must be reflected in the Code</p>

	<p>that will be useable for a long time to come. In fact some of the rules proposed in particular 15.11 do not follow our understanding of the legal requirements and the same could be said with some of the other detail within the sections.</p> <p>We strongly suggest that this section is either completely revamped and again written in a principle based way which avoids the need to deal with the detail or removed completely as the matters which the area seeks to control are covered by the existing regulatory framework, which it would be better if CAP sought to compliment, rather than attempting to apply rules which at this current moment in time are undergoing a rapid rate of change.</p>	<p>to help stakeholders ensure their marketing communications comply with the law. CAP has had an overwhelming response from stakeholders to reflect the requirements of the NHCR, and to aid users, has chosen to reflect the relevant provisions.</p>
British Retail Consortium Consumer Policy Group	<p><b>11.3</b></p> <p>The NHCR is a complex piece of legislation. Not only does it introduce new criteria and conditions for the use of health claims, but many of the provisions of the Regulation apply at different times. We believe it is imperative that all the different transitional periods, some of which are up to 15 years long, are somehow accurately reflected in the Code.</p> <p>While it is very important that the body of the Regulation is correctly interpreted into the Code, we would at all cost like to try to avoid unnecessary restrictions or challenges because the legal transitional periods have not been taken into</p>	<p><b>11.3</b></p> <p>CAP considers it is unrealistic for the Code to reflect every type of health claim, transitional period and authorisation process. The CAP ode is not a replacement for relevant legislation and marketers are advised to seek advice on the effect of the NHCR and comply with the law.</p> <p>CAP considers this is not a comment on the proposed rules but their application. As transitional periods apply to various elements of a specific product (claims in use before certain dates, trademarks, brand names etc) it is</p>

	account.	impossible for the Codes to reflect product specific transitional periods.
Cambridge Manufacturing Company	<p><b>11.4</b></p> <p>Respondent considers while CHWP agrees that rules 15.6 and 15.6.6 are a correct interpretation of the requirements of the NHCR, they question why these rules apply to food products but not equally to non-food products such as slimming clubs. The purpose and advertised intent of food products is the same as for non-food products, and so the fact that the rules do not apply to both equally, gives the non-food products a commercial advantage over food products. CHWP sees no reason why the same rules should not be applied to all weight loss products/programmes equally.</p>	<p><b>11.4</b></p> <p>CAP considers the same principles apply to all weight loss products. For example, any claims must be supported by sufficient evidence etc. CAP has reflected the relevant provisions of the NHCR - a maximum harmonisation measure.</p>
Direct Marketing Association	<p><b>11.5</b></p> <p>Following the implementation of the CPRs, it is a prohibited practice to make a direct exhortation to children to buy or persuade a parent or guardian to buy on their behalf an advertised product or service. Although 15.17.2 states: 'Marketing communications addressed to children must not urge children to buy or persuade others to buy...', the DMA believe that the wording should reflect that contained in the CPRs.</p>	<p><b>11.5</b></p> <p>The CAP Children's section contains a relevant rule on direct exhortation. Additionally the Food section refers readers to the Children's section of the Code. CAP considers the requirement of the CPR's that prohibits a marketing communication containing a direct exhortation to buy a product is caught by the children's rules and the rules in the food section. CAP considers no further amendment is necessary.</p> <p><b>5.4</b></p> <p>Marketing communications addressed to or targeted directly at children:</p> <p><b>5.4.1</b></p>

		<p>must not actively encourage children to make a nuisance of themselves to parents or others and must not undermine parental authority</p> <p><b>5.4.2</b> 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.</p> <p><b>5.5</b> 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).</p> <p><b>Proposed rule: 15.17.2</b> 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.</p>
Food Standards Agency; Sainsbury's	<p><b>11.6</b> Those sections of the codes on Food, Dietary Supplements and Associated Health and Nutrition Claims state, in several places, that “references to food apply also to soft drinks”. Regulation (EC)</p>	<p><b>11.6</b> CAP considers the intention is clear given the code only differentiates between soft drinks and alcoholic drinks. Juice, tea, coffee, milk, water etc would all be considered soft drinks under the</p>

	1924/2006 applies to all food and drink, including juice, tea, coffee, milk, water etc. Referring only to soft drinks may lead people to think that the rules do not apply to other drinks – if this is what was intended then the codes are not entirely consistent with the Regulation.	CAP Code.
Health Food Manufacturers' Association	<p><b>11.7</b> Respondent considers, use of the term 'Dietary Supplements' in the header and throughout the section is not correct from a legislative viewpoint and may cause confusion.</p> <p>The use of the term 'dietary supplement' is not in accord with relevant UK/EU legislation relating to 'food supplements'; EC Directive 2002/46/EC and The Food Supplements Regulations 2003. The term 'dietetic/dietary' is reserved for certain foods for particular nutritional uses (ref FLR Schedule 8 Part 1). HFMA would consider that the term 'dietary supplement' should be replaced by 'food supplement'</p>	<p><b>11.7</b> CAP agrees. CAP proposes:</p> <p><b>Vitamins, Minerals and other Food Supplements</b></p>
Nestle UK Ltd	<p><b>11.8</b> 'contains' claims apply to named nutrient or other substance - respondent considers this is not limited to just vitamins or minerals (as indicated in the proposed code).</p>	<p><b>11.8</b> CAP agrees. CAP proposes addition of: contains [name of nutrient or other substance] to the guidance. CAP understands the list of permitted nutrition claims in the proposed Code is likely to be out of date soon after publication of the new Code. In light of that and the need for users of the Code to access the guidance note to view the 'conditions of use' to make the relevant claim, CAP considers the list of nutrition claims should be removed from the Code and placed in the</p>

		guidance document only.
Sainsbury's	<p><b>11.9</b> Although the Nutrition and Health Claims Legislation is a complex piece of legislation which came in to force in July 2007 many of the provisions contained within the legislation are still to be enacted and are subject to long transition periods; some as long as 15 years. Respondent considers that should be accurately reflected in the Code.</p> <p>Additionally the Food Standards Agency and indeed the Commission are revising their guidance as the practicalities of the legislation become apparent.</p> <p>Some of the rules in 15.11 do not follow our understanding of the legal requirements. It is suggested this section be written in a principle based manner or removed completely on the grounds the area it seeks to control is covered by the existing regulatory framework and this is an area of rapid change.</p>	<p><b>11.9</b> CAP considers it is unrealistic for the Code to reflect every type of health claim, transitional period and authorisation process.</p> <p>The CAP Code is not a replacement for relevant legislation and marketers are advised to seek advice on the effect of the NHCR and marketing communications must comply with the law.</p> <p>CAP considers the reference in the 'background' of this section to the Food Standards Agency Guidance document is adequate. In addition the Code clearly states "CAP advises advertising stakeholders to take advice on the effect of the Regulation".</p> <p><b>Infant and Follow-on Formula</b> 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.</p> <p><b>15.11</b> 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.</p> <p><b>15.11.1</b> Marketing communications must not</p>



		<p>confuse between infant formula and follow-on formula.</p> <p>CAP considers the proposed rules on infant formula and follow-on formula reflect the most relevant provisions of advertising such products to the public. CAP has referenced the pertinent Regulation and stakeholders are reminded the Code is not a replacement for relevant legislation. CAP considers users of the Code require more detailed guidance than basic principles. The NHCR imposes specific requirements on advertising stakeholders and CAP considers those requirements must be reflected in the Code to help stakeholders ensure their marketing communications comply with the law. CAP has had an overwhelming response from stakeholders to reflect the requirements of the NHCR, and to aid users, has chosen to reflect the relevant provisions.</p>
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Department of Health	<p><b>11.10</b></p> <p>The Food Standards Agency will be commenting on compliance with EU regulations on dietary supplements and the use of nutrition and health claims.</p> <p>In the overview document BCAP and CAP state that <i>“new strict rules governing food and soft drink advertising to children ..... came into force in 2007. BCAP and CAP propose to maintain those restrictions”</i>. The BCAP and CAP rules differ in that BCAP uses the nutrient profile model developed by the Food Standards Agency to identify healthier foods that can be advertised to children using certain techniques eg cartoons, celebrities, whereas the CAP rules for non-broadcast media apply to all food except fruit and vegetables. This has meant that many companies who have reformulated products to be able to advertise them on TV using techniques that appeal to children are unable to do so in other media.</p> <p>There should be consistency between advertising rules for all media and for advertisers to be able to advertise healthier food to children in a way that will appeal to them. We are disappointed that CAP has not reconsidered the use of a tool to differentiate between healthier and less healthy food at this stage and would like to suggest that this is reviewed in 2010, at the same time that Ofcom reviews the impact of TV advertising restrictions.</p>	<p><b>11.10</b></p> <p>CAP refers readers to its published opinion regarding the difference between the TV, Radio and Non-broadcast rules when CAP and BCAP launched the food advertising to children restrictions in 2007.</p> <p>TV: <a href="http://www.ofcom.org.uk/consult/condocs/foodads_new/bcap.pdf">http://www.ofcom.org.uk/consult/condocs/foodads_new/bcap.pdf</a></p> <p>Radio: <a href="http://www.cap.org.uk/Media-Centre/2007/Radio-advertising-food-rules-announced.aspx">http://www.cap.org.uk/Media-Centre/2007/Radio-advertising-food-rules-announced.aspx</a></p> <p>Non-broadcast: <a href="http://www.cap.org.uk/Media-Centre/2007/New-food-rules-for-nonbroadcast-ads.aspx">http://www.cap.org.uk/Media-Centre/2007/New-food-rules-for-nonbroadcast-ads.aspx</a></p> <p>Research conducted for Ofcom by Professor Livingstone concluded that TV advertising, combined with TV viewing in general, has a modest effect on children’s food preferences. BCAP and Ofcom considered that to impose the same level of restrictions on radio was disproportionate given the difference in audience and ability to target children through that medium.</p> <p>(For BCAP’s response to the Department of Health on the radio restrictions, please see BCAP’s evaluation of its Food, Dietary Supplements and Associated Health and Nutrition</p>
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		<p>claims Section.)</p> <p>Mindful of the ‘Principles of Good Regulation’, CAP considers it is not proportionate for those corresponding constraints to be the same restraints, given the real and significant differences between TV and other media.</p> <p>Additionally taking into consideration the work being carried out in Europe on establishing nutrient profiles, it would be impractical and confusing to stakeholders to introduce a new regime for non-broadcast media, when a European nutrient profiling model is in the process of being developed.</p> <p>a) Research CAP noted that Ofcom had relied significantly on research undertaken by Professor Livingstone. That research concluded that television advertising combined with the effect of television viewing in general has a modest direct effect on children’s food preferences. CAP considered that combination is simply not relevant to other media.</p> <p>b) The effectiveness of television advertising CAP noted Ofcom’s consideration that, within the category of display advertising, television advertising is regarded as one of the most effective media. CAP considered “effective” to mean primarily, but not exclusively, causing a “lift</p>
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		<p>in product purchase”, which might, for food advertising, reflect a successful and legitimate attempt by advertisers to affect children’s food preferences. Perhaps for this reason and because of its place in the family home, the TV Code contains stricter rules than the radio Code or the non-broadcast code for products such as alcohol, psychic services, premium rate adult services etc.</p> <p>c) Dedicated children’s television programmes and channels</p> <p>Television provides dedicated children’s channels and programming slots that attract an almost exclusive or disproportionately high child audience. Ofcom considered that children’s television airtime is a particularly important time of day for younger children to be exposed to food advertisements. CAP considered that non-broadcast media does not provide a meaningful equivalent to children’s television airtime.</p> <p>CAP created supplementary rules to protect further what the Government recognises as the most vulnerable age group – primary school children. Those rules ban the use of celebrities licensed characters and promotional offers in food or drink advertisements directly targeted at primary school and pre-school children. CAP specifically excluded fresh fruit and vegetables from those restrictions. CAP has not seen</p>
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		<p>persuasive evidence that children are harmed by non-broadcast advertising for food. CAP is also concerned to protect and promote a variety of different media available to different sections of society. With this in mind, CAP decided not to impose specific volume restrictions on food and drink advertisements targeted at children.</p> <p>Nevertheless, that does not preclude CAP or BCAP from proposing changes to the rules if evidence received at a later stage, seems to warrant it; BCAP also looks forward to Ofcom's final review of the HFSS product TV advertising restrictions in 2010. If, in light of Ofcom's final review, it concludes major changes to the HFSS product TV advertising rules are required, BCAP will then consider the case for conducting another consultation. CAP will also consider the extent to which a change to its Code is necessary.</p>
Healthspan Limited	<p><b>11.11</b> Respondent disagrees with rule 15.8. The Governments NDNS Survey found an 85% deficiency in adults and the role of supplementation needs to be formally recognised. Considers if one of the groups that marketers can target is "people who eat nutritionally inadequate meals" then those 85% of adults are in the majority. Surely it is better to ask the marketer to exclude a well balanced diet from the marketing communication.</p> <p>Considers the relevant groups are not clear.</p>	<p><b>11.11</b> See CAP's response to <b>9.2</b></p>

Food Standards Agency	<p><b>11.12</b></p> <p>The rules on non-broadcast food marketing to children were introduced by CAP in July 2007 in response to the Government's concern about the marketing of food to children.</p> <p>BCAP introduced new radio rules on food advertisements in general and food advertisements targeted directly at children in particular on 17 September 2007. In October 2008, the Department of Health published a report on the changes in food and drink advertising to children<sup>2</sup> which showed that TV is the only medium to have seen consistent annual reductions in child-themed ad-spend since 2003. Healthy Weight, Healthy Lives includes a specific commitment to rebalance marketing, promotion, advertising and point of sale placement, by reducing the exposure of children to the promotion of foods that are high in fat, salt or sugar and increasing their exposure to the promotion of healthier options.</p> <p>We not aware of any evidence to demonstrate whether the current CAP non-broadcast rules have resulted in a reduction in exposure of children to the advertising of 'less healthy' foods. Similarly, we are not aware of any evidence to demonstrate whether the BCAP radio rules have resulted in a reduction in exposure of children to the advertising</p>	<p><b>11.12</b></p> <p>See CAP's response to <b>11.10</b></p> <p>CAP created supplementary rules in 2007 to protect further what the Government recognises as the most vulnerable age group – primary school children. Those rules ban the use of celebrities licensed characters and promotional offers in food or drink advertisements directly targeted at primary school and pre-school children. CAP specifically excluded fresh fruit and vegetables from those restrictions.</p> <p>CAP has not seen persuasive evidence that children are harmed by non-broadcast advertising for food. CAP is also concerned to protect and promote a variety of different media available to different sections of society. With this in mind, CAP decided not to impose specific volume restrictions on food and drink advertisements targeted at children. CAP is mindful of the Better Regulation Principles and particularly that regulation should be proportionate transparent and targeted where it is needed.</p> <p>CAP considers changing the way children choose and consume food is one part of the much wider Government initiative to reduce childhood obesity, a project which touches all aspects of children's lives including education, parenting and physical activity. The Government will review the</p>
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<sup>2</sup>Changes in the nature and balance of food and drink advertising and promotion to children, from January 2003 to December 2007. *Department of Health, October 2008.* [http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_089129](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_089129)

	<p>of 'less healthy' foods. We consider that the impact of the codes mentioned above, specifically to assess the impact of the rules to protect children from the advertising of 'less healthy' foods, should be reviewed.</p>	<p>effectiveness of all those measures, including a change in the nature and balance of food and drink promotion to children, after ten years</p> <p>Nevertheless, that does not preclude CAP or BCAP from proposing changes to the rules if evidence received at a later stage, seems to warrant it; BCAP also looks forward to Ofcom's final review of the HFSS product TV advertising restrictions in 2010. If, in light of Ofcom's final review, it concludes major changes to the HFSS product TV advertising rules are required, BCAP will then consider the case for conducting another consultation. CAP will also consider the extent to which a change to its Code is necessary.</p>
Which?	<p><b>11.13</b></p> <p>Respondent acknowledges the amount of work CAP has carried out in the recent years on introducing new rules, however they consider the rules must go further.</p>	<p><b>11.13</b></p> <p>See CAP's response to <b>11.10</b>.</p>
	<p>The range of creative techniques that are subject to restrictions is very limited, as with BCAP.</p>	<p>CAP and BCAP placed restrictions on those techniques that research showed were designed to emotionally engage young children. We considered in that way, the rules were targeted, proportionate, practical, supported by research and in line with the objective stated by the Secretary of State for Culture, Media and Sport and with the Government's health and child protection objectives that focus on protecting</p>

(& British Heart Foundation)		primary school aged children.
	<p><b>11.14</b> Concerned that the changes made to align the two Codes have also resulted in some of the more specific provisions being removed. Reference to encouraging eating or drinking at or near bed time, to eat frequently throughout the day or to replace main meals with confectionery or snack products is now covered under the broader requirement that 'Marketing communications must not condone or encourage poor nutritional habits or an unhealthy lifestyle in children'.</p> <p>In addition, changes made to restrictions covering the use of licensed characters and celebrities seem to have weakened the Code, rather than strengthened it. For example 'Licensed characters and celebrities popular with children may present factual and relevant generic statements about nutrition, safety, education or similar' has been introduced which seems open to misuse.</p>	<p><b>11.14</b> CAP considers the harm the deleted rule seeks to prevent is adequately catered for by rule:</p> <p><b>15.12</b> Marketing communications must not condone or encourage poor nutritional habits or an unhealthy lifestyle in children. CAP considers there is no gap in the protection afforded by the rules.</p> <p>This is <u>not</u> a change in advertising policy and practice. The guidance note that was introduced at the same time as the restrictions in 2007 (<a href="http://copyadvice.co.uk/Ad-Advice/Help-Notes/Food-or-soft-drink-product-advertisements-and-children.aspx">http://copyadvice.co.uk/Ad-Advice/Help-Notes/Food-or-soft-drink-product-advertisements-and-children.aspx</a>) clearly states on page 5:</p> <p>(4) Celebrities and characters well-known to children may present factual and relevant generic statements about nutrition, safety, education and the like.</p> <p>The intention being to allow for healthy messages to be marketed to children using a technique proven appealing to them. The ASA has no record of misuse of this exception to the rule. CAP considers it was a significant exception that should form part of the Code given the possible benefit of healthy messages directed at children.</p>



(& National Heart Forum; Consumer Focus; British Heart Foundation; Sustain – Children’s Food Campaign)	<p><b>11.15</b></p> <p>Respondents consider a differentiation tool is required in the CAP Code. Adopting the Nutrient Profiling Model developed by the Food Standards Agency (FSA) for use by Ofcom to regulate the advertising and promotion of foods to children would also help to ensure that CAP regulation of non-broadcast food marketing to children is consistent with the existing regulation covering broadcast advertising, and would hence promote media neutrality.</p> <p>The Nutrient Profiling Model is scientifically robust and has recently been reviewed by the FSA and found to be fit for its intended purpose.</p>	<p><b>11.15</b></p> <p>Taking into consideration the work being carried out in Europe on establishing nutrient profiles, CAP considers it would be impractical and confusing to stakeholders to introduce a new regime for non-broadcast, when a European model is in the pipeline.</p> <p>See also CAP’s response to <b>11.10</b></p>
(National Heart Forum; Consumer Focus; Children’s Health Groups – joint response (National Children’s Bureau, The Children’s	<p>Respondents consider the CAP Code uses inconsistent definitions of a child. The parts of the current CAP code that refer to the marketing of food to children tend to apply only to young children. However, there is good evidence that older children are also influenced by, and therefore need protection from, marketing of unhealthy</p>	<p>The existing rules do protect all children, defined as persons under the age of 16. The rules ensure that marketing communications do not condone or encourage poor nutritional habits or an unhealthy lifestyle in children. For example, marketing communications should not:</p> <ul style="list-style-type: none"> <li>• encourage excessive consumption or</li> </ul>

<p>Society, British Association for Community Child Health, Alliance for Childhood, Child Growth Foundation, Children's Food Campaign); Sustain – Children's Food Campaign; British Heart Foundation)</p>	<p>foods<sup>3</sup>. While the way in which children understand marketing may change over time, its influence does not. Older children also tend to have poorer diets than young children and are more at risk of obesity, making it even more important that they are protected.</p> <p>Such clauses are inconsistent with the current Ofcom regulations governing broadcast advertising. These define a child as anyone under 16, and have recently been reviewed and found to be working to protect children from unhealthy food marketing in the way that they are intended to.</p>	<p>attitudes associated with poor diets</p> <ul style="list-style-type: none"> <li>• place unfair pressure on children to buy products or ask others to purchase products on their behalf</li> <li>• encourage children to eat or drink a product only to take advantage of a promotional offer.</li> </ul> <p>Ofcom's review of the TV restrictions have not been completed: (<a href="http://www.fhf.org.uk/meetings/2009-02-24_bourton.pdf">http://www.fhf.org.uk/meetings/2009-02-24_bourton.pdf</a>) the final phase of the review commences this year.</p> <p>CAP has created supplementary rules to protect further what the Government recognises as the most vulnerable age group – primary school children. Those rules ban the use of celebrities, licensed characters and promotional offers in food or drink advertisements directly targeted at primary school and pre-school children. Advertisements for fresh fruit and vegetables will be excluded from those restrictions.</p> <p>CAP acknowledges Government's concern that tougher restrictions for television advertising should be complemented by relevant restraints on the promotion of food and drinks in other media. Mindful of the 'Principles of Good Regulation',</p>
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<sup>3</sup> Hastings, G., Stead, M., McDermott, L., Forsyth, A., MacKintosh, A.M., Rayner, M., Godfrey, C., Caraher, M., Angus, K. (2003) *Systematic review of research on the effects of food promotion on children*. London: Food Standard's Agency; Livingstone, S. (2006) *New research on advertising foods to children – an updated review of the literature*. London: Ofcom; Institute of Medicine (2006) *Food marketing to children and youth: threat or opportunity?* Washington, D.C.: The National Academies Press

CAP considers it is not proportionate for those corresponding constraints to be the same restraints, given the real and significant differences between TV and other media.

a) Research

CAP noted that Ofcom had relied significantly on research undertaken by Professor Livingstone. That research concluded that television advertising combined with the effect of television viewing in general has a modest direct effect on children's food preferences. CAP considered that combination is simply not relevant to other media.

b) The effectiveness of television advertising

CAP noted Ofcom's consideration that, within the category of display advertising, television advertising is regarded as one of the most effective media. CAP considered "effective" to mean primarily, but not exclusively, causing a "lift in product purchase", which might, for food advertising, reflect a successful and legitimate attempt by advertisers to affect children's food preferences. Perhaps for this reason and because of its place in the family home, the TV Code contains stricter rules than the radio Code or the non-broadcast code for products such as alcohol, psychic services, premium rate adult services etc.

(& National Heart Forum; Sustain – Children’s Food Campaign)		<p>c) Dedicated children’s television programmes and channels</p> <p>Television provides dedicated children’s channels and programming slots that attract an almost exclusive or disproportionately high child audience. Ofcom considered that children’s television airtime is a particularly important time of day for younger children to be exposed to food advertisements. CAP considered that non-broadcast media does not provide a meaningful equivalent to children’s television airtime.</p>
	Respondent considers the CAP Code must be extended to cover a wider range of promotions;	CAP considers this is not a comment on the proposed rules. The CAP Code is only applicable to marketing communications that fall within its remit.
	<p><b>11.16</b></p> <p>Respondents can see no justification to exclude brand equity characters from the BCAP or CAP rules. The argument that they are ‘qualitatively different’ from celebrities or licensed characters is not supported by any evidence. Brand equity characters are used for promotional effect to children and as such should be within the scope of restrictions applying to HFSS foods advertised in all media.</p>	<p><b>11.16</b></p> <p>CAP considers the use of celebrities and licensed characters and promotions are restricted to marketing communications for fresh fruit and vegetable products when targeting pre-school and primary school children. CAP considers this is in line with the Better Regulation Principles, particularly that the restrictions are proportionate transparent and targeted where needed.</p> <p>CAP considers its reasons for maintaining the exemption for equity brand characters are justified. In 2007 Ofcom agreed with BCAP in their final regulatory statement that the equivalent</p>

		<p>TV and radio rules should include the exemption: <a href="http://www.ofcom.org.uk/consult/condocs/foodads_new/statement/statement.pdf">http://www.ofcom.org.uk/consult/condocs/foodads_new/statement/statement.pdf</a> (paragraphs A1.56-59)</p> <p>Neither CAP nor BCAP has seen persuasive evidence to amend this rule. Nevertheless, that does not preclude CAP or BCAP from proposing changes to the rules if evidence received at a later stage, seems to warrant it; BCAP also looks forward to Ofcom's final review of the HFSS product TV advertising restrictions in 2010. If, in light of Ofcom's final review, it concludes major changes to the HFSS product TV advertising rules are required, BCAP will then consider the case for conducting another consultation. CAP will also consider the extent to which a change to its Code is necessary.</p>
British Heart Foundation	<p><b>11.17</b> Respondent is not aware of any evidence to suggest that non-broadcast methods of marketing are less effective than broadcast marketing and advertising. Therefore, we believe it is logical and right that standards covering non-broadcast marketing should be consistent with, and as strong as, television broadcast regulation and standards.</p> <p>Respondent has recently published two reports examining the way that HFSS foods are marketed via non broadcast media. Our <i>Protecting Children from Unhealthy Food Marketing</i> report argues that</p>	<p><b>11.17</b> See CAP's response to <b>11.10</b> and <b>11.12</b></p> <p>CAP considers this is not a comment on the proposed rules. Neither CAP nor BCAP has seen persuasive evidence to amend this rule. Nevertheless, that does not preclude CAP or</p>

	<p>non broadcast marketing is a growing form of advertising to children and sets out a proposal for a statutory system to regulate non-broadcast food marketing to children<sup>4</sup>. The follow up report, <i>How Parents Are Being Misled</i> highlights the tactics of food companies in marketing unhealthy foods aimed at children to their parents. The tactics employed included using nutrition claims (e.g. 'good source of calcium'); health claims (e.g. 'good for growing kids'); promotions; endorsements; and emotional insight (e.g. tapping into parent's guilt about their busy lifestyles)<sup>5</sup>.</p> <p>Respondent is also aware of a number of pieces of work which are due to be published shortly which may contribute to the evidence base on the impact of advertising, and which should be considered by CAP before the new Code is finalised. These include reports from the Digital Media Group, the Digital Inclusion Task Force, findings from the Department for Children Schools and Families' Commercialisation of Childhood Panel and the European Commission review of the Directive on</p>	<p>BCAP from proposing changes to the rules if evidence received at a later stage, seems to warrant it; BCAP also looks forward to Ofcom's final review of the HFSS product TV advertising restrictions in 2010. If, in light of Ofcom's final review, it concludes major changes to the HFSS product TV advertising rules are required, BCAP will then consider the case for conducting another consultation. CAP will also consider the extent to which a change to its Code is necessary.</p> <p>EC Regulation 1924/2006 on nutrition and health claims prevents the use of misleading, unsubstantiated claims in marketing communications. That piece of legislation is in place today and marketers are required to ensure their marketing communications comply with the law.</p> <p>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</p>
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<sup>4</sup> BHF and CFC (2008) Protecting children from unhealthy food marketing, CFC, London

<sup>5</sup> *How parents are being misled: a campaign report on children's food marketing*, British Heart Foundation, 2008

	<p>Unfair Commercial Practices. It would be useful to know how these are being considered and how they will inform the current review.</p>	<p>communicated separately to this review. CAP has not seen persuasive evidence that children are harmed by non-broadcast advertising for food. However, as an evidence based code-owning body, it must take on board findings of thorough, persuasive evidence and act accordingly.</p>
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