

## CAP Code Review Consultation: Response from Abortion Rights

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### Question 9

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

### Response to Question 9

Abortion Rights wish to propose the addition of a new Rule (to be numbered as appropriate) which would ensure that pregnancy counselling services do not mislead vulnerable women by omitting to mention if abortion services are not offered.

Pregnancy counselling services which do not refer women for abortions, and which may be opposed to abortion, operate widely in the UK. Such services are not subject to Department of Health standards for providing accurate information on all three pregnancy outcomes (abortion, parenthood and parenthood ending in adoption). The Department of Health advises potential users of such services: "There are a number of organisations advertised in phone directories and on the internet offering free pregnancy testing and counselling. Some of these organisations do not refer women for termination of pregnancy. We would advise women to check this before making an appointment"<sup>1</sup>.

On this issue, the Report of the House of Commons Science and Technology Committee on the Scientific Developments Relating to the Abortion Act 1967 has recommended: 'to ensure that no patients are misled, we ... recommend that the Government consider ways of ensuring that all those claiming to offer pregnancy counselling services ... indicate clearly in their advertising that they do not support referral for abortion.'

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<sup>1</sup> UK Department of Health, 'Register of Pregnancy Advice Bureaux', [http://www.dh.gov.uk/en/Policyandguidance/Healthandsocialcaretopics/Sexualhealth/Sexualhealthgeneralinformation/DH\\_4063860](http://www.dh.gov.uk/en/Policyandguidance/Healthandsocialcaretopics/Sexualhealth/Sexualhealthgeneralinformation/DH_4063860)

The BCAP code Review proposes a new Rule (11.11) covering this point for broadcast advertising. We strongly believe that this should be extended to be clearly included in the revised CAP Code, therefore ensuring that printed advertisements, posters, websites and all advertisements on non-broadcast media will meet the same criteria.

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## **Advertising Association**

### **RESPONSE OF THE ADVERTISING ASSOCIATION TO THE CAP CODE CONSULTATION ADDENDUM – SCHARR REVIEW**

The Advertising Association is the only body representing all sides of the advertising and promotional marketing industries, worth £18.6 billion in 2008. Its membership represents advertisers, agencies, media and support services in the UK. Further information about the Advertising Association is available at: <http://www.adassoc.org.uk/>

The Advertising Association is a member organization of CAP. The Advertising Association supports the conclusions arrived at by CAP in respect of the SchARR Review and the analysis that supports them. The Advertising Association has responded to Question 75 accordingly.

#### **Question 75**

Given CAP's policy consideration, do you agree that the evidence contained in the SchARR Review does not merit a change to CAP's alcohol content or scheduling rules? If your answer is no, please explain why you consider the SchARR Review does merit a change to CAP's alcohol advertising content or scheduling rules.

Yes. The Advertising Association agrees that the evidence contained within the SchARR Review does not merit a change to CAP's rules on the content and scheduling of alcohol advertisements.

## **Advertising Association**

### **RESPONSE OF THE ADVERTISING ASSOCIATION TO THE CONSULTATION ON THE PROPOSED CAP CODE “THE UK CODE OF NON-BROADCAST ADVERTISING, SALES PROMOTION AND DIRECT MARKETING”**

The Advertising Association is a federation of trade bodies and organizations representing the advertising and promotional marketing industries, including advertisers, agencies, the media and support services in the UK. It is the only body that speaks for all sides of an industry that was worth around £19 billion in 2007.

The Advertising Association is a member organization of CAP. The Advertising Association is fully supportive of the proposals made by the Committee in its consultation paper and the rationale behind them. The Advertising Association has responded to the questions posed in the CAP consultation paper accordingly.

19 June 2009

## **Section 1: Compliance**

### **Question 1**

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

## **Section 2: Recognition of marketing communications**

### **Question 2**

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

## **Section 3: Misleading**

### **Clarity of qualifications**

### Question 3

Do you agree that rule 3.10 should be included in the Code? If your answer is no, please explain why. [Yes](#).

### Exaggerated performance

#### Question 4

Do you agree that rule 3.11 should be included in the Code? If your answer is no, please explain why. [Yes](#).

### Restrictions on availability

#### Question 5

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

### Testimonials

#### Question 6

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

### Additional rights provided by guarantees

#### Question 7

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

### The unavoidable cost of responding

#### Question 8

Given CAP's policy consideration, do you agree that marketing communications should not describe items as "free" if the consumer has to pay for packaging? If your answer is no, please explain why. [Yes](#).

### Other questions

#### Question 9

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

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

consideration? [No](#).

iii) Do you have other comments on this section? [Yes](#)

#### Typos etc

Location: Title of Section

Proposal: Replace "**MISLEADING**" with "**Misleading**"

Rationale: Consistency with the other twenty titles of sections.

Location: Rule 3.4.5

Proposal: Consider replacing "likely to reasonably expect" with "likely reasonably to expect"

Rationale: Clarity - avoids split infinitive

Location: Rule 3.4.6

Proposal: Replace "(see 3.55)." with "(see Rule 3.55)."

Rationale: Consistency

Location: Rule 3.18, second sentence

Proposal: Consider spelling out and providing definition of "VAT" at start of Section 3 (Misleading).

Rationale: Utility for non-UK readers of Code

Location: Rule 3.25.3

Proposal: Replace "been reduced." with "been reduced."

Rationale: Formatting

Location: Rule 3.40

Proposal: Replace "recommended retail price (RRP) if the RRP does" with "recommended retail price if the latter does"

Rationale: Clarity. If the above approach is adopted there is no need to provide the acronym RRP, which is used only once in the Code

## **Section 4: Harm and Offence**

### **Flashing images**

#### **Question 10**

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

### **Other Questions**

#### **Question 11**

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Harm and Offence rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? [No](#).

iii) Do you have other comments on this section? [No](#).

## Section 5: Children

### Promotions that contain a direct exhortation to buy a product

#### Question 12

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

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

#### Question 13

Given CAP's policy consideration, do you agree that rule 5.5 should be included in the Code? If your answer is no, please explain why. [Yes](#).

### Other questions

#### Question 14

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Children rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? [No](#).

iii) Do you have other comments on this section? [Yes](#).

#### Typos etc

Location: Rule 5.1

Proposal: Replace "moral harm:" with "moral harm. Consequently:"

Rationale: Clarity/consistency/logic – currently the sub-rules that stem from Rule 5.1, lack a logical introduction

Location: Rule 5.2

Proposal: Replace "of experience:" with "of experience. Consequently"

Rationale: Clarity/consistency/logic – currently the sub-rules that stem from Rule 5.2, lack a logical introduction

Location: Rule 5.2.4

Proposal: Replace "costly products" with "costly products."

Rationale: Consistency

Location: Rule 5.6.1

Proposal: Consider replacing "and a parent's, or other adult's, authority" with "and the authority of a parent or other adult"

Rationale: Clarity

## Section 6: Privacy

### Question 15

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Privacy rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? [No](#).

iii) Do you have other comments on this section? [No](#).

## **Section 7: Political Advertisements**

### **Question 16**

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Political Advertisements rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? [No](#).

iii) Do you have other comments on this section? [Yes](#).

Typos etc

Location: Title

Proposal: Replace "TPolitical" with "Political"

Rationale: Typo

## **Section 8: Sales Promotions**

### **Withholding prizes**

#### **Question 17**

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

### **Promotions directed at children; the need for a closing date**

#### **Question 18**

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

### **Prizes and Gifts**

#### **Question 19**

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



### Question 20

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

### Significant conditions exception: limited by time or space

### Question 21

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

### Distinction between prizes and gifts: a significant proportion

### Question 22

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

### Supervising Prize Draws

### Question 23

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

### Auditing instant-win promotions

### Question 24

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

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

### Judging of prize promotions

### Question 25

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

### Receipt of prizes: time

### Question 26

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

## Appeal to children

### Question 27

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

## Other questions

### Question 28

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Sales Promotions rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? [No](#).

iii) Do you have other comments on this section? [Yes](#).

## Typos etc

Location: Rule 8.12

Proposal: Replace "in 8.9," with "in rule 8.9"

Rationale: Consistency

Location: Rule 8.15.1

Proposal: Replace "equivalents." with "equivalents thereof."

Rationale: Clarity

Location: Rule 8.16

Proposal: Replace "with 9.3 and refund money in accordance with 9.4." with "with rule 9.3 and refund money in accordance with rule 9.4"

Rationale: Consistency

Location: Rule 8.17.1

Proposal: Replace "consumers' decision or understanding about the promotion" with "consumer's decisions or understanding about the promotion"

Rationale: Clarity - plural of "decision" necessary

Location: Rule 18.9, third sentence

Proposal: Replace "significant proportion and" with "significant proportion of consumers and"

Rationale: Consistency, clarity

Location: Rule 8.28

Proposal: Replace "to 8.17, prize" with "to rule 8.17, prize"

Rationale: Consistency

Location: Rule 8.33.1

Proposal: Replace "the ASA" with "the ASA"

Rationale: Formatting

Location: Rule 8.33.2

Proposal: Replace "and objectives," with "and objectives"

Rationale: Unnecessary punctuation

## Section 9: Distance Selling

### Personal visits

#### Question 29

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

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

#### Question 30

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

### Other questions

#### Question 31

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

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? [No](#).

iii) Do you have other comments on this section? [Yes](#).

#### Typos etc

Location: Principle, third paragraph

Proposal: Replace "the DM Code" with "the Direct Marketing Code"

Rationale: Clarity

Location: Rule 9.1.1, third sentence

Proposal: Replace "(and see 9.2.4)" with "(and see rule 9.2.4)"

Rationale: Consistency

Location: Rule 9.1.5

Proposal: Replace "(see 9.3)" with "(see rule 9.3)"

Rationale: Consistency

Location: Rule 9.1.6

Proposal: Replace "(see 42.6)" with "(see rule 42.6)"

Rationale: Consistency

Location: Rule 9.2.1, first sentence

Proposal: Replace "(see 9.5)." with "(see rule 9.5)."

Rationale: Consistency

Location: Rule 9.2.2

Proposal: Replace "(though see 9.1.9 for substitute goods)" with "(though see rule 9.1.9 for

substitute goods)”  
Rationale: Consistency

Location: Rule 9.4.3, first sentence  
Proposal: Replace “listed in 9.5.” with “listed in rule 9.5.”  
Rationale: Consistency

Location: Rule 9.4.3, third sentence  
Proposal: Replace “was delivered.” with “was delivered”  
Rationale: Consistency (unnecessary punctuation)

Location: Rule 9.5.1  
Proposal: Replace “if 9.1.6 has” with “if rule 9.1.6 has”  
Rationale: Consistency

Location: Rule 9.8  
Proposal: Replace “with clauses 8.14 and 9.4.1.” with “with rules 8.1.4 and 9.4.1.”  
Rationale: Consistency

## **Section 10: Database practice**

### **Collection of data from children**

#### **Question 32**

Given CAP’s policy consideration, do you agree that rules 10.15 and 10.16 should be included in the Code? If your answer is no, please explain why. [Yes](#).

### **Explicit consent of consumers: Bluetooth**

#### **Question 33**

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

### **Other questions**

#### **Question 34**

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Database Practice rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? [No](#).

iii) Do you have other comments on this section? [Yes](#).

#### **Typos etc**

Location: Principle  
Proposal: Replace “may rest directly not with marketers but with data controllers.” With “may rest with data controllers and not directly with marketers.”

Rationale: Clarity

Location: Definitions

Proposal/observation: Note that the full meaning of SMS and MMS is provided in Definitions of the Database Practice section, but not in paragraph (a) of the Introduction to the Code. Consideration could be given to spelling out what SMS and MMS stand for in paragraph (a) of the Introduction to the CAP Code.

Rationale: Utility

Location: Rule 10.4.2

Proposal: Replace “(see 10.13)” with “(see rule 10.13)”

Rationale: Consistency

Location: Rule 10.4.4

Proposal: Replace “them (see 10.5) or” with “them (see rule 10.5) or”

Rationale: Consistency

Location: Rule 10.4.4

Proposal: Replace “them (see 10.9.3).” with “them (see rule 10.9.3)”

Rationale: Consistency

Location: Rule 10.14, second sentence

Proposal: Replace “with 10.4.5 and 10.5 and offer opt-outs in line with 10.13.3.” with “with rules 10.4.5 and 10.5 and offer opt-outs in line with rule 10.13.3”

Rationale: Consistency

Location: Text above Rule 10.15

Proposal: Replace “(Please see the Children Section)” with “Please see Section 5 (Children)”

Rationale: Consistency

## Section 11: Environmental Claims

### Question 35

Given CAP’s policy consideration, do you agree that rule 11.7 should be included in the Code? If your answer is no, please explain why. [Yes](#).

### Other questions

### Question 36

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? [No](#).

iii) Do you have other comments on this section? [Yes](#).

### Typos etc

Location: Principle

Proposal: Replace “by DEFRA and BERR.” with “by the Department for Environment, Food &

Rural Affairs and the Department for Business, Enterprise & Regulatory Reform.”

Rationale: Government Departments change name, but Department documents published often retain the original name until such time as they may be amended. Since the consultation was launched DBERR has become the Department for Business, Innovation & Skills. Within a relatively short period of time, readers of the Code may not recall what for what the acronym “BERR” stood for, whereas giving the full name of the Department at the time the Green Claims Code was published should assist those seeking to find it online or elsewhere.

## **Section 12: Medicines, Treatments, Devices and Health**

### **Traditional Herbal Medicinal Products**

#### **Question 37**

Given CAP’s policy consideration, do you agree that rule 12.20 should be included in the Code? If your answer is no, please explain why. [Yes](#).

### **Medicinal claims**

#### **Question 38**

Given CAP’s policy consideration, do you agree that rule 12.1 should be included in the proposed CAP Code? If your answer is no, please explain why. [Yes](#).

### **Other questions**

#### **Question 39**

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Medicines, Treatments, Devices and Health rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? [No](#).

iii) Do you have other comments on this section? [Yes](#).

#### **Typos etc**

Location: Principle, first sentence

Proposal: Replace “the necessary high level of scrutiny.” with “the high level of scrutiny they deserve.”

Rationale: Clarity

Location: Background, first paragraph

Proposal: Replace “Conditions and Use” with “Conditions; and, Use”

Rationale: Consistency

Location: Background, second paragraph

Proposal: Consider according Definition status to this paragraph

Rationale: Utility, consistency

Location: Rule 12.1, second paragraph, second sentence

Proposal: Replace “humans beings” with “human beings”

Rationale: Clarity

Location: Rule 12.2, first paragraph, fourth sentence  
Proposal: Replace “(See also **12.11**)” with “(See also rule 12.11)”  
Rationale: Consistency, formatting

Location: Rule 12.2, second paragraph  
Proposal: Replace “action and has” with “action; and, has”  
Rationale: Consistency, clarity

Location: Rule 12.6  
Proposal: Replace “malformations” with “malformations.”  
Rationale: Consistency – necessary punctuation

Location: Rule 12.9  
Proposal: Replace “is guaranteed to work, absolutely safe or without side-effects.” with “is: guaranteed to work; absolutely safe; or, without side-effects.”  
Rationale: Clarity

Location: Rule 12.11, second sentence  
Proposal: Consider replacing “the product’s summary of product characteristics.” with “the accompanying summary of product characteristics.”  
Rationale: Clarity

Location: Rule 12.11, third sentence  
Proposal: Replace “breach 12.2.” with “breach rule 12.2.”  
Rationale: Consistency

Location: Rule 12.20, first sentence  
Proposal: Replace “the product’s summary of product characteristics.” with “the accompany summary of product characteristics.”  
Rationale: Clarity

## **Section 13: Weight Control and Slimming**

### **Targeting the obese**

#### **Question 40**

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

### **Loss of weight or fat from specific parts of the body**

#### **Question 41**

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

## Very Low-Calorie Diets (VLCDs)

### Question 42

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

## Other questions

### Question 43

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Weight Control and Slimming rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? [No](#).

iii) Do you have other comments on this section? [Yes](#)

### Typos etc

Location: Principle

Proposal: Replace "the necessary high level of scrutiny." with "the high level of scrutiny they deserve."

Rationale: Clarity

Location: Definition, second sentence

Proposal: Replace existing sentence with "If applicable, they must comply with Section 12 (Medicines, Treatments, Devices and Health) and Section 15 (Food, Dietary Supplements and Associated Health and Nutrition Claims)."

Rationale: Consistency. Please also note the discrepancy between the title of Section 12 in the opening contents page and in the actual section itself.

Location: Rules 13.2, 13.3 and 13.10

Proposal: Give serious consideration to moving the definitions of BMI, obesity, underweight and overweight from the above three Rules into the "Definitions" at the start of Section 13.

Rationale: Consistency, utility, logic

Location: Rule 13.10, third sentence

Proposal: Consider avoiding the concept "normally overweight" by deleting "normally"

Rationale: Lack of clarity as to meaning of "normally" in this context. Consider using BMI reference value for overweight as comparator.

Location: Rule 13.11, second sentence

Proposal: Consider replacing "or inch reduction." with "or girth reduction."

Rationale: Clarity – Use of the term "inch reduction" is not very clear. An alternative may be "girth reduction" as proposed above or alternatively (and less body part-specific) "or reduction of adiposity".

## Section 14: Financial products



#### Question 44

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

#### Other questions

#### Question 45

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

#### Typos etc

Location: Background, first paragraph, second sentence

Proposal: Replace "deposit taking" with "deposit-taking"

Rationale: Standard form. With the prospect of the successful passage of the draft Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2009 (SI No. 2009/1342) it may also be worth making reference here to "sale and rent back agreements"

Rationale: Clarity.

Location: Rule 14.2

Proposal: Replace "contract is entered" with "contract can be entered"

Rationale: Clarity

## Section 15: Food, Dietary supplements and Associated Health and Nutrition claims

### Permitted nutrition and health claims

#### Question 46

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

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

#### Question 47

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

### Comparative nutrition claims

#### 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. [Yes](#).

### Comparison with one product

#### 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. [Yes](#).

### Prohibitions

#### 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. [Yes](#).

#### 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. [Yes](#).

#### 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. [Yes](#).

### The use of health professionals

#### 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. [Yes](#).

### Food labelling Regulations (1996) (FLRs)

#### 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. [Yes](#).

#### 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. [Yes](#).

## Infant and follow-on formulae

### Question 56

- i) Do you agree CAP has correctly reflected the requirements of Regulation 21(a) of the Infant Formula and Follow-on Formula Regulations 2007 (as amended) in CAP's proposed rule 15.11? If your answer is no, please explain why. [Yes](#).
- ii) Do you agree CAP has correctly reflected the requirements of Regulation 19 of the Infant Formula and Follow-on Formula Regulations 2007 (as amended) in CAP's proposed rule 15.11.1? If your answer is no, please explain why. [Yes](#).
- iii) Do you consider CAP has correctly reflected the relevant provisions of the Infant Formula and Follow-on Formula Regulations 2007 (as amended) in the proposed CAP Code? If your answer is no, please explain why. [Yes](#).

## Other questions

### Question 57

- i) Taking into account CAP's general policy objectives, do you agree that CAP's rules, included in the proposed Food, Dietary supplements and Associated Health and Nutrition claims Section are necessary and easily understandable? If your answer is no, please explain why? [Yes](#).
- 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? [No](#).
- iii) Do you have other comments on this section? [Yes](#).

## Typos etc

Location: Background, first paragraph, first sentence

Proposal: Change order of references to legislation as follows in order to avoid useful but odd location of reference to Schedule 6: "These rules must be read in conjunction with the relevant legislation including Regulation (EC) No 1924/2006 on Nutrition and Health Claims made on Foods, the Food Safety Act 1990 and the Food Labelling Regulations 1996 (as amended) – especially Schedule 6 thereof."

Rationale: As set out in proposal. Does EC stand for "European Community"? If so, is it worthwhile to clarify this?

Location: Background, second paragraph, third sentence

Proposal: Replace "No 1924 on" with "No 1924/2006"

Rationale: Incomplete reference to Statutory Instrument designation

Location: Background, fourth paragraph

Proposal: Replace existing paragraph with "These rules should be read in conjunction with other rules in this Code, especially Section 5 (Children), Section 12 (Medicines, Treatments, Devices and Health), Section 13 (Weight Control and Slimming) and the CAP Help Notes on 'Food and Soft Drink Product Marketing Advertisements and Children' and 'Criteria for Nutrition Claims'."

Rationale: Consistency and accuracy of Section numbers and names and Help Notes.

Location: text beneath Heading

Proposal: Standardise name/format/reference to Help Note with that contained in Background,

fourth paragraph  
Rationale: Consistency

Location: Introduction to Rule 15.11

Proposal: Replace “the Infant Formula and Follow-on Formula Regulations 2007” with “the Infant Formula and Follow-on Formula (England) Regulations 2007, the Infant Formula and Follow-on Formula Regulations (Northern Ireland) 2007, the Infant Formula and Follow-on Formula (Scotland) Regulations 2007, the Infant Formula and Follow-on Formula (Wales) Regulations 2007 (all as amended)”

Rationale: Reflects the fact (a) that the devolved administrations all have their own set of Regulations and (b) that they have all been amended subsequently

## **Section 16: Gambling**

### **Consistency: principle**

#### **Question 58**

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

### **Consistency: rules**

#### **Question 59**

Given CAP’s policy consideration, do you agree that the rules included in the Lottery Section of the Code are in line with CAP’s general policy objectives (see Part 1 (4) of this consultation document) and should be applied to marketing communications for the National Lottery as they presently are to marketing communications for other lotteries? If your answer is no, please explain why and, if relevant, please identify those rules that should not be applied to marketing communications for the National Lottery. [Yes](#).

### **Participating in a lottery in a working environment**

#### **Question 60**

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

### **Other questions**

#### **Question 61**

i) Taking into account CAP’s policy consideration, do you agree that CAP’s rules on Gambling and Lotteries are necessary and easily understandable? If your answer is no, please explain why? [Yes](#).

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? [No](#).

iii) Do you have other comments on this Section? [Yes](#).

### Typos etc

Location: Rule 16.3.13

Proposal: Replace “prize gaming (at a non-licensed family entertainment centre or at a traveling fair) or” with “prize gaming [at a non-licensed family entertainment centre or at a traveling fair] or”

Rationale: Consistency with earlier use of parentheses in Rule 16.3.13, clarity

Location: Rule 16.3.15

Proposal: Replace “by age.” with “by age”

Rationale: Consistency of punctuation

Location: Rule 17.3, second sentence

Proposal: Replace “may however refer” with “may, however, refer”

Rationale: Clarity, necessary punctuation

Location: Rule 17.10

Proposal: Replace “that solitary gambling is preferable to social gambling.” with “that participating in a lottery alone is preferable to doing so with others.”

Rationale: Sense (in a dedicated Section on Lotteries)

Location: Rule 17.14

Proposal: Replace “aged below under 16 years” with “aged under 16 years”

Rationale: Sense

Location: Rule 17.17

Proposal: Consider replacing “about gambling or luck.” with “about chance or luck.”

Rationale: Sense (in a dedicated Section on Lotteries)

Location: Rules 17.1 – 17.9

Proposal / observation: All these Rules share the same opening stem “Marketing communications must not”. Give consideration to simplifying the structure here by having Rule 17.1 as “Marketing communications must not:” and then having sub-rules flowing from that. A similar approach could be adopted towards Rules 17.11 – 17.14 where the stem is “Marketing communications for lotteries”. Rules 17.7 and 17.8 also share that stem. Were Rule 17.15 and 17.16 moved to the end of the Section, then it would be possible to have a longer run of rules sharing the same stem.

## **Section 18: Alcohol**

### **Alcoholic strength**

#### **Question 62**

Given CAP’s policy consideration, do you agree that rule 18.9 should be included in the Code? If your answer is no, please explain why. [Yes](#).

### **Provision for low-alcohol drinks**

#### **Question 63**

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

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

## Question 64

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

## Other questions

### Question 65

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Alcohol rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that you believe should be retained or otherwise given dedicated consideration? [No](#).

iii) Do you have other comments on this section? [Yes](#).

### Typos etc

Location: Rule 18.14, third sentence

Proposal: Replace "(see 18.16)" with "(see rule 18.16)"

Rationale: Consistency

## Section 19: Motoring

### The legal requirements of the Highway Code

#### Question 66

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

### Prices in motoring marketing communications

#### Question 67

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

## Other questions

### Question 68

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

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

retained or otherwise given dedicated consideration? [No](#).

iii) Do you have other comments on this section? [Yes](#).

#### Typos etc

Location: Rule 19.2, third sentence

Proposal: Replace "Vehicle's capabilities may" with "The capabilities of the vehicle advertised may"

Rationale: Clarity

Location: Rule 19.4, second sentence

Proposal: Replace "about a vehicle's performance," with "about the performance of a vehicle,"

Rationale: Clarity

## **Section 20: Employment, Homework Schemes and Business Opportunities**

### **Employment businesses**

#### **Question 69**

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

### **Required information in marketing communications for homework schemes**

#### **Question 70**

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

### **Vocational training and instruction courses**

#### **Question 71**

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

### **Other Questions**

#### **Question 72**

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Employment, Homework Schemes and Business Opportunities rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? [No](#).

iii) Do you have other comments on this section? [Yes](#).

#### Typos etc

Location: Rule 20.3, second sentence

Proposal: Replace “if its name does not disclose that it is.” with “if this is not apparent from its name alone.”

Rationale: Clarity

## **Section 21: Tobacco, Rolling Papers and Filters**

### **Question 73**

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Tobacco, Rolling Papers and Filters rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? [No](#).

iii) Do you have other comments on this section? [Yes](#)

#### Typos etc

Location: Rule 21.3.5

Proposal: Replace “well known” with “well-known”

Rationale: Necessary punctuation

Location: Rule 21.6, second sentence

Proposal: Replace “anti-drug message” with “anti-drugs message”

Rationale: Standard form

## **Section 22: Other comments**

### **Question 74**

Do you have other comments or observations on CAP's proposed Code that you would like CAP to take into account in its evaluation of consultation responses? [Yes](#).

#### Typos etc

Location: page 95, Contents page, Specific Category Sections

Proposal: Replace “Medicines, medical devices, health-related products and beauty products” with “Medicines, Treatments, Devices and Health”

Rationale: Consistency - this appears to be actual title of Section 12 (see page 143 of consultation document). Note also the different use of capital letters between the Contents page and the actual Section titles.

Location: page 98, paragraph (k)

Proposal: Replace “In assessing” with “in assessing”

Rationale: Consistency

Location: page 178, paragraph (a)

Proposal: Delete reference to “industry policy making”



Rationale: The scope of ASBOF's role is narrower than the current version of the sentence would otherwise suggest.

Location: page 183, History of self-regulation, third paragraph

Proposal: Replace "bench mark" with "benchmark"

Rationale: Standard form

# Code Review Consultation – Addendum (ScHARR Review)

## Response from Alcohol Concern to the Committee of Advertising Practice

July 2009



## Alcohol Concern

Alcohol Concern is the national agency on alcohol misuse campaigning for effective alcohol policy and improved services for people whose lives are affected by alcohol-related problems.

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Alcohol Concern is a registered charity no. 291705 and a company limited by guarantee registered in London no. 1908221.

## CAP Code Review Consultation Addendum – SchARR Review

The Independent Review of the Effects of Alcohol Pricing and Promotion published by the School of Health and Related Research at the University of Sheffield (SchARR).

### **1.About Alcohol Concern**

**1.1** Alcohol Concern is the national agency on alcohol misuse campaigning for effective alcohol policy and improved services for people whose lives are affected by alcohol-related problems.

**1.2** Alcohol Concern is a membership body working at a national level to influence alcohol policy and champion best practice locally. We support professionals and organisations by providing expertise, information and guidance. We are a challenging voice to the drinks industry and promote public awareness of alcohol issues.

### **2. Introduction**

**2.1** Alcohol Concern welcomes the opportunity to comment on the Addendum to the CAP Code review. Alcohol Concern has also contributed to the submission by the Alcohol Health Alliance, of which we are a member.

**2.2** We have made recommendations for the tightening of the content rules of the Code in our response to the main part of the consultation. The following represents our concerns largely with regard to the placement of non-broadcast alcohol advertising and cinema advertising (covered by the non-broadcast rules). These are particularly in relation to the exposure of alcohol advertising to those who are not legally old enough purchase alcohol.

**2.3** We have considered the evidence included in 'The Independent Review of the Effects of Alcohol Pricing and Promotion', conducted by the School of

Health and Related Research, University of Sheffield and published by the Department of Health on 3<sup>rd</sup> December 2008. We do not agree that this evidence does not merit a change to CAP's advertising content or scheduling rules.

**2.4** We are concerned that there is evidence on the potential impact of restrictions on the placement of broadcast alcohol advertisements beyond that which has been provided by SchARR, for example evidence which has been published since the publication of 'The Independent Review of the Effects of Alcohol Pricing and Promotion.' We consider it appropriate, given the scale of the Committee's review of the Code, that all available evidence should be considered before the Committee reaches this significant decision.

**2.5** We also consider that CAP should give consideration to EU examples of country-wide restrictions on the placement of alcohol advertisements.

### **3.The SchARR Review**

**3.1** Q. 168 - Given CAP's policy consideration, do you agree that the evidence contained in the SchARR Review does not merit a change to CAP's alcohol advertising content or scheduling rules? If your answer is no, please explain why you consider the SchARR Review does merit a change to CAP's alcohol advertising content or scheduling rules.

**3.2** Alcohol Concern does not agree with the conclusion of CAP that the evidence contained in the SchARR Review does not merit a change to CAP's alcohol advertising content or scheduling rules. We believe that changes are necessary to the rules, based on the evidence presented in the SchARR Review (and elsewhere). We are convinced that the SchARR Review offers persuasive evidence to further strengthen the alcohol advertising rules, particularly in order to protect young people.

**3.3** Alcohol Concern would particularly like the Committee to note Evidence Statement 5 of the SchARR Review, which states that 'there is conclusive evidence

of a small but consistent association of advertising with consumption at a population level. There is also evidence of small but consistent effects of advertising on consumption of alcohol by young people at an individual level'. Alcohol Concern believes that the conclusion of the Committee that the 'ScHARR review does not offer persuasive evidence' is based too narrowly on Evidence Statement 6, which calls for further research and methodological developments. While we agree that both of these would be helpful to further understand this complicated issue, the evidence already presented is of acceptable significance to merit a change to CAP's current rules.

**3.4** Alcohol Concern would like to further point to Evidence Statement 8 which we feel is not reflected in the Committee's conclusion that no change to the rules is merited. Evidence Statement 8 maintains that 'there is consistent evidence that exposure to outdoor advertising, or advertisements in magazines and newspapers may increase the likelihood of young people starting to drink, the amount they drink, and the amount they drink on any one occasion.' They also note that 'there is a consistent picture from findings from various print-based media of an association between increased awareness and increased consumption. Through high exposure to positive recurring messages over time young people have their attitudes or beliefs shaped and reinforced.'

**3.5** The ScHARR review considered ten studies (mostly from the US) which met the inclusion criteria, most examining either magazines or billboards and were individual studies – there were no systematic reviews available. The study by Dring and Hope in 2001 suggested that 'there is some evidence that exposure to advertising extends beyond their explicitly intended audience to younger, under age children. The primary effect for these appears to be on the initiation of drinking. Once drinking has been initiated, exposure to advertisements raises brand awareness and several studies also indicate an effect on the volume and frequency of drinking'.<sup>2</sup> Ellinson et al (2005) examined exposure of 12-13 year olds to magazine alcohol advertisements and found this was predictive of drinking frequency two years later.<sup>3</sup>

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<sup>2</sup> Dring and Hope (2001) in ScHARR, University of Sheffield (2008) pp. 84

<sup>3</sup> Ellinson et al (2005) in ScHARR, University of Sheffield (2008) pp. 84

**3.6** The ScHARR authors also note that ‘consumer studies also provide increasing evidence that exposure to alcohol advertisements increases initiation of alcohol use amongst adolescents. These can be ranged alongside evidence from econometric studies with a majority finding a positive association between the volume of advertising and drinking behaviour and outcomes’.

**3.7** Such conclusions should be understood in the context of young people’s drinking in the UK, which continues to be a significant problem. There has been a 57% increase in alcohol-related deaths amongst young people aged 15-34 between 1991 and 2006/7.<sup>4</sup> Accidents, suicide and violence are significant causes of death in the 16-25 age groups, and alcohol is often implicated in all three.<sup>5</sup> The European School Survey Project on Alcohol and Drugs 2007<sup>6</sup>, published in March 2009, showed that 15 and 16 year olds in the UK had the third highest level of alcohol consumption on the last drinking day of all countries surveyed, behind the Isle of Man and Denmark (the latter in fact having limited comparability). The UK also had the third highest level of youngsters having reported being drunk in the past 12 months and the third highest level of youngsters having reported being drunk in the past 30 days. The UK, importantly, also recorded the third highest rate of youngsters experiencing problems associated with alcohol use, such as individual problems, relationship problems, sexual problems and delinquency. Yet at the same time, youngsters in the UK were more likely than those in any other country to expect positive consequences as a result of their alcohol consumption. Alcohol Concern believes that the disparity between teenagers’ expectations surrounding the experience of drinking alcohol and the reality may in part be attributed to the comparatively low level of restriction of alcohol advertising in the UK - advertising which of course conveys only positive messages about drinking. As shall be mentioned later, all European countries, except for the UK, have a ban on one form or another of one or more types of alcohol advertising.

#### **4. Further evidence**

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<sup>4</sup> Department for Children, Schools and Families (2008) Youth Alcohol Action Plan

<sup>5</sup> Acheson, D. (1998) Independent inquiry into inequalities in health report

<sup>6</sup> Hibell et al (2009) ‘The 2007 ESPAD Report: Substance Use Among Students in 35 European Countries’

**4.1** A further study published since the ScHARR Review was conducted by Anderson, Bruijn, Angus, Gordon & Hastings and published in *Alcohol and Alcoholism* in January 2009. 'Impact of Alcohol Advertising and Media Exposure on Adolescent Alcohol Use: A Systematic Review of Longitudinal Studies'<sup>7</sup> reviewed 13 studies that measured exposure to advertising and promotion. Twelve of the thirteen studies concluded an impact of exposure on subsequent alcohol use, including initiation of drinking and heavier drinking among existing drinkers. The authors also noted a 'dose relation response' – the greater the exposure to advertising, the greater the impact. While they recognise, with which Alcohol Concern would of course agree, that alcohol advertising is simply 'one of the many factors that have the potential to encourage youth drinking', they conclude that 'alcohol advertising and promotion increases the likelihood that adolescents will start to use alcohol, and to drink more if they are already using alcohol'.

**4.2** In an article published in *The Lancet*<sup>8</sup> in June 2009, Anderson, Chisholm & Fuhr drew on a substantive evidence base of systematic reviews and meta-analyses in order to assess the evidence for the effectiveness of policies and programmes to reduce harms caused by alcohol. In the target area of marketing alcoholic beverages, they note that 'the effects of exposure seem cumulative and, in markets with greater availability of alcohol advertising, young people are likely to continue to increase their drinking as they move into their mid-20s, whereas drinking decreases at an earlier age in people who are less exposed to it.' They go on to conclude that 'policies that regulate the environment in which alcohol is marketed (economic and physical availability and commercial communications) are effective in reducing alcohol-related harm.'

**4.3** The Science Group of the European Alcohol and Health Forum adopted the report of its dedicated working group on the issue of alcohol marketing in February 2009<sup>9</sup>. They concluded that although not all studies found an impact for all types of marketing exposures, 'the overall description of the studies found consistent

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<sup>7</sup> Anderson et al (2009) *Alcohol and Alcoholism Online*, January 2009, pp.1-15

<sup>8</sup> Anderson et al (2009) *The Lancet*, Vol 373, pp 2234-46

<sup>9</sup> Science Group of the European Alcohol and Health Forum (2009) 'Does marketing communication impact on the volume and patterns of consumption of alcohol beverages, especially by young people? – A review of longitudinal studies.'



evidence to demonstrate an impact of alcohol advertising on the uptake of drinking among non-drinking young people and increased consumption among their drinking peers.’

**4.4** The above evidence having been taken into account, Alcohol Concern believes that the current CAP code should be modified. The CAP Code states that ‘no medium should be used to advertise alcoholic drinks if more than 25% of its audience is under 18 years of age’. We believe that 10% is a more appropriate percentage in this case and will reduce the number of children exposed to alcohol advertising.

## **5. International examples**

**5.1** Alcohol Concern believes that CAP should give consideration to international examples of restrictions on the placement of alcohol advertisements.

**5.2** In his paper, ‘Is it time to ban alcohol advertising?’<sup>10</sup>, World Health Organisation consultant Peter Anderson notes that all European countries, except for the UK, have a ban on one form or another of one or more types of advertising. He claims that since advertising commonly crosses country borders, ‘there is an argument to approximate advertising rules across Europe banning alcohol advertising targeted to young people, a highly cost effective measure to reduce harmful alcohol use’.

## **6. Advertising in cinemas**

**6.1** Alcohol Concern has specific concerns in relation the appearance of alcohol advertisements in films with a rating of 15 or under showing in cinemas, which falls

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<sup>10</sup> Anderson, P. (2009) Clinical Medicine, Journal of the Royal College of Physicians, Vol. 9, No. 2., pp. 121-124.

under the non-broadcast CAP's remit. We believe that this issue should be included in the current review of the Code, this issue having been brought to our attention by concerned members of the public. The CAP Code states that 'no medium should be used to advertise alcoholic drinks if more than 25% of its audience is under 18 years of age'. However, this approach does not protect children, because the actual number of children watching a film may be high. A film which is not specifically designed for children is still likely to have a high number of underage viewers who are then exposed to alcohol advertising, despite their consisting of less than 25% of the total viewing population.

**6.2** In order to investigate this more fully, we have obtained viewing figures, advertisement information and an audience demographic for The Dark Knight, a 12A rated film released in 2008. This film featured alcohol advertisements as it was not on the 'proscribed list' of the Cinema Advertising Association due to its expected audience profile, based on research on the previous Batman film. However, the rules further states that no advertising reel can carry more than 40% alcohol advertising by duration. We were alerted by a concerned member of the public with regard to a particular screening of this film and we copied into correspondence from the CAA which revealed that this particular reel approached 45% alcohol advertising. This consisted of nine alcohol advertisements and ten non-alcohol advertisements. We consider this unacceptable for a 12A film. We were further concerned to learn from the CAA that there are no sanctions for such breaches, which is worrying as it is clear that this system of self-regulation is ineffective. While we understand this particular matter is not under the remit of the CAP and is imposed on the CAA members by themselves, we consider that it deserves the attention of the CAP when they are reviewing the Code.

**6.3** Alcohol Concern has been informed by Digital Cinema Media that Dark Knight accrued 12,219,894 admissions and we have been supplied with an audience profile by the CAA. The ASA informs us that the percentage of the audience under 18 was 21%. Therefore the film does not breach the CAP rule that a medium must not be used to advertise alcohol drinks if more than 25% of the audience is under 18. However, the information from the CAA informs us that 12% of the audience were aged 7 – 14, therefore in actual viewing figures, over 1.4 million children of this age

category viewed the film. We were unable to ascertain from the CAA what percentage of the audience were aged 15-18, however it is safe to assume that this number increases significantly if all under 18 year olds are considered.

**6.4** The 25% criterion is therefore quite inadequate in terms of protecting minors from alcohol advertising in cinemas. Furthermore, the current rule does not chime with the World Health Organisation's European Charter on Alcohol which states that 'all children and adolescents have the right to grow up in an environment protected from the negative consequences of alcohol consumption and, to the extent possible, from the promotion of alcoholic beverages.'<sup>11</sup>

## **7. Public-health-based messages**

7. Alcohol Concern further recommends that public-health-based messages should be included in 1/6<sup>th</sup> of advertising. This technique is referred to by the SchARR authors as 'counter advertising', defined as 'actions involving the use of advertising-styled messages about the risks or negative consequences of drinking'. Therefore, 1/6<sup>th</sup> of the advertising space for any print advertisement would need to be dedicated to a public health message. The same rule would apply in relation to broadcast time for cinema advertisements. This would possibly a) reduce alcohol advertising expenditure by 1/6<sup>th</sup> and b) reduce consumption through the effect of the message. While the SchARR review concluded that there is limited evidence of the effect of such a measure on consumption outcomes, they did model the effect of a reduction in advertising by 1/6<sup>th</sup> across both broadcast and non-broadcast media. Results varied, finding changes in overall consumption to decrease by between 0.2% and 2.2% with the financial value of the harm avoided over ten years estimated to be between £390m and £3.9bn. In terms of deaths avoided, the lower estimate is of 7 per year and the higher estimate is of 119 per year. Alcohol Concern recommends the requirement for public-health-based messages to be included in 1/6<sup>th</sup> of advertising under the CAP Code, with further research conducted into the impact of

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<sup>11</sup> World Health Organisation European Charter on Alcohol (1995)

the content of public health messages in order to determine the most effective solutions.

## Code Review Consultation – Addendum (ScHARR Review)

### Response from Alcohol Concern to the Committee of Advertising Practice

July 2009



## Alcohol Concern

Alcohol Concern is the national agency on alcohol misuse campaigning for effective alcohol policy and improved services for people whose lives are affected by alcohol-related problems.

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## CAP Code Review Consultation Addendum – SchARR Review

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**1.3** Alcohol Concern is a membership body working at a national level to influence alcohol policy and champion best practice locally. We support professionals and organisations by providing expertise, information and guidance. We are a challenging voice to the drinks industry and promote public awareness of alcohol issues.

### **3. Introduction**

**3.1** Alcohol Concern welcomes the opportunity to comment on the Addendum to the CAP Code review. Alcohol Concern has also contributed to the submission by the Alcohol Health Alliance, of which we are a member.

**3.2** We have made recommendations for the tightening of the content rules of the Code in our response to the main part of the consultation. The following represents our concerns largely with regard to the placement of non-broadcast alcohol advertising and cinema advertising (covered by the non-broadcast rules). These are particularly in relation to the exposure of alcohol advertising to those who are not legally old enough purchase alcohol.

**3.3** We have considered the evidence included in 'The Independent Review of the Effects of Alcohol Pricing and Promotion', conducted by the School of

Health and Related Research, University of Sheffield and published by the Department of Health on 3<sup>rd</sup> December 2008. We do not agree that this evidence does not merit a change to CAP's advertising content or scheduling rules.

**3.4** We are concerned that there is evidence on the potential impact of restrictions on the placement of broadcast alcohol advertisements beyond that which has been provided by SchARR, for example evidence which has been published since the publication of 'The Independent Review of the Effects of Alcohol Pricing and Promotion.' We consider it appropriate, given the scale of the Committee's review of the Code, that all available evidence should be considered before the Committee reaches this significant decision.

**3.5** We also consider that CAP should give consideration to EU examples of country-wide restrictions on the placement of alcohol advertisements.

### **3.The SchARR Review**

**3.1** Q. 168 - Given CAP's policy consideration, do you agree that the evidence contained in the SchARR Review does not merit a change to CAP's alcohol advertising content or scheduling rules? If your answer is no, please explain why you consider the SchARR Review does merit a change to CAP's alcohol advertising content or scheduling rules.

**3.2** Alcohol Concern does not agree with the conclusion of CAP that the evidence contained in the SchARR Review does not merit a change to CAP's alcohol advertising content or scheduling rules. We believe that changes are necessary to the rules, based on the evidence presented in the SchARR Review (and elsewhere). We are convinced that the SchARR Review offers persuasive evidence to further strengthen the alcohol advertising rules, particularly in order to protect young people.

**3.3** Alcohol Concern would particularly like the Committee to note Evidence Statement 5 of the SchARR Review, which states that 'there is conclusive evidence

of a small but consistent association of advertising with consumption at a population level. There is also evidence of small but consistent effects of advertising on consumption of alcohol by young people at an individual level'. Alcohol Concern believes that the conclusion of the Committee that the 'ScHARR review does not offer persuasive evidence' is based too narrowly on Evidence Statement 6, which calls for further research and methodological developments. While we agree that both of these would be helpful to further understand this complicated issue, the evidence already presented is of acceptable significance to merit a change to CAP's current rules.

**3.4** Alcohol Concern would like to further point to Evidence Statement 8 which we feel is not reflected in the Committee's conclusion that no change to the rules is merited. Evidence Statement 8 maintains that 'there is consistent evidence that exposure to outdoor advertising, or advertisements in magazines and newspapers may increase the likelihood of young people starting to drink, the amount they drink, and the amount they drink on any one occasion.' They also note that 'there is a consistent picture from findings from various print-based media of an association between increased awareness and increased consumption. Through high exposure to positive recurring messages over time young people have their attitudes or beliefs shaped and reinforced.'

**3.5** The ScHARR review considered ten studies (mostly from the US) which met the inclusion criteria, most examining either magazines or billboards and were individual studies – there were no systematic reviews available. The study by Dring and Hope in 2001 suggested that 'there is some evidence that exposure to advertising extends beyond their explicitly intended audience to younger, under age children. The primary effect for these appears to be on the initiation of drinking. Once drinking has been initiated, exposure to advertisements raises brand awareness and several studies also indicate an effect on the volume and frequency of drinking'.<sup>12</sup> Ellinson et al (2005) examined exposure of 12-13 year olds to magazine alcohol advertisements and found this was predictive of drinking frequency two years later.<sup>13</sup>

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<sup>12</sup> Dring and Hope (2001) in ScHARR, University of Sheffield (2008) pp. 84

<sup>13</sup> Ellinson et al (2005) in ScHARR, University of Sheffield (2008) pp. 84



**3.6** The ScHARR authors also note that ‘consumer studies also provide increasing evidence that exposure to alcohol advertisements increases initiation of alcohol use amongst adolescents. These can be ranged alongside evidence from econometric studies with a majority finding a positive association between the volume of advertising and drinking behaviour and outcomes’.

**3.7** Such conclusions should be understood in the context of young people’s drinking in the UK, which continues to be a significant problem. There has been a 57% increase in alcohol-related deaths amongst young people aged 15-34 between 1991 and 2006/7.<sup>14</sup> Accidents, suicide and violence are significant causes of death in the 16-25 age groups, and alcohol is often implicated in all three.<sup>15</sup> The European School Survey Project on Alcohol and Drugs 2007<sup>16</sup>, published in March 2009, showed that 15 and 16 year olds in the UK had the third highest level of alcohol consumption on the last drinking day of all countries surveyed, behind the Isle of Man and Denmark (the latter in fact having limited comparability). The UK also had the third highest level of youngsters having reported being drunk in the past 12 months and the third highest level of youngsters having reported being drunk in the past 30 days. The UK, importantly, also recorded the third highest rate of youngsters experiencing problems associated with alcohol use, such as individual problems, relationship problems, sexual problems and delinquency. Yet at the same time, youngsters in the UK were more likely than those in any other country to expect positive consequences as a result of their alcohol consumption. Alcohol Concern believes that the disparity between teenagers’ expectations surrounding the experience of drinking alcohol and the reality may in part be attributed to the comparatively low level of restriction of alcohol advertising in the UK - advertising which of course conveys only positive messages about drinking. As shall be mentioned later, all European countries, except for the UK, have a ban on one form or another of one or more types of alcohol advertising.

## **5. Further evidence**

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<sup>14</sup> Department for Children, Schools and Families (2008) Youth Alcohol Action Plan

<sup>15</sup> Acheson, D. (1998) Independent inquiry into inequalities in health report

<sup>16</sup> Hibell et al (2009) ‘The 2007 ESPAD Report: Substance Use Among Students in 35 European Countries’

**4.1** A further study published since the ScHARR Review was conducted by Anderson, Bruijn, Angus, Gordon & Hastings and published in *Alcohol and Alcoholism* in January 2009. 'Impact of Alcohol Advertising and Media Exposure on Adolescent Alcohol Use: A Systematic Review of Longitudinal Studies'<sup>17</sup> reviewed 13 studies that measured exposure to advertising and promotion. Twelve of the thirteen studies concluded an impact of exposure on subsequent alcohol use, including initiation of drinking and heavier drinking among existing drinkers. The authors also noted a 'dose relation response' – the greater the exposure to advertising, the greater the impact. While they recognise, with which Alcohol Concern would of course agree, that alcohol advertising is simply 'one of the many factors that have the potential to encourage youth drinking', they conclude that 'alcohol advertising and promotion increases the likelihood that adolescents will start to use alcohol, and to drink more if they are already using alcohol'.

**4.2** In an article published in *The Lancet*<sup>18</sup> in June 2009, Anderson, Chisholm & Fuhr drew on a substantive evidence base of systematic reviews and meta-analyses in order to assess the evidence for the effectiveness of policies and programmes to reduce harms caused by alcohol. In the target area of marketing alcoholic beverages, they note that 'the effects of exposure seem cumulative and, in markets with greater availability of alcohol advertising, young people are likely to continue to increase their drinking as they move into their mid-20s, whereas drinking decreases at an earlier age in people who are less exposed to it.' They go on to conclude that 'policies that regulate the environment in which alcohol is marketed (economic and physical availability and commercial communications) are effective in reducing alcohol-related harm.'

**4.3** The Science Group of the European Alcohol and Health Forum adopted the report of its dedicated working group on the issue of alcohol marketing in February 2009<sup>19</sup>. They concluded that although not all studies found an impact for all types of marketing exposures, 'the overall description of the studies found consistent

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<sup>17</sup> Anderson et al (2009) *Alcohol and Alcoholism Online*, January 2009, pp.1-15

<sup>18</sup> Anderson et al (2009) *The Lancet*, Vol 373, pp 2234-46

<sup>19</sup> Science Group of the European Alcohol and Health Forum (2009) 'Does marketing communication impact on the volume and patterns of consumption of alcohol beverages, especially by young people? – A review of longitudinal studies.'

evidence to demonstrate an impact of alcohol advertising on the uptake of drinking among non-drinking young people and increased consumption among their drinking peers.'

**4.4** The above evidence having been taken into account, Alcohol Concern believes that the current CAP code should be modified. The CAP Code states that 'no medium should be used to advertise alcoholic drinks if more than 25% of its audience is under 18 years of age'. We believe that 10% is a more appropriate percentage in this case and will reduce the number of children exposed to alcohol advertising.

## **5. International examples**

**5.1** Alcohol Concern believes that CAP should give consideration to international examples of restrictions on the placement of alcohol advertisements.

**5.2** In his paper, 'Is it time to ban alcohol advertising?',<sup>20</sup> World Health Organisation consultant Peter Anderson notes that all European countries, except for the UK, have a ban on one form or another of one or more types of advertising. He claims that since advertising commonly crosses country borders, 'there is an argument to approximate advertising rules across Europe banning alcohol advertising targeted to young people, a highly cost effective measure to reduce harmful alcohol use'.

## **6. Advertising in cinemas**

**6.1** Alcohol Concern has specific concerns in relation the appearance of alcohol advertisements in films with a rating of 15 or under showing in cinemas, which falls

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<sup>20</sup> Anderson, P. (2009) Clinical Medicine, Journal of the Royal College of Physicians, Vol. 9, No. 2., pp. 121-124.

under the non-broadcast CAP's remit. We believe that this issue should be included in the current review of the Code, this issue having been brought to our attention by concerned members of the public. The CAP Code states that 'no medium should be used to advertise alcoholic drinks if more than 25% of its audience is under 18 years of age'. However, this approach does not protect children, because the actual number of children watching a film may be high. A film which is not specifically designed for children is still likely to have a high number of underage viewers who are then exposed to alcohol advertising, despite their consisting of less than 25% of the total viewing population.

**6.2** In order to investigate this more fully, we have obtained viewing figures, advertisement information and an audience demographic for The Dark Knight, a 12A rated film released in 2008. This film featured alcohol advertisements as it was not on the 'proscribed list' of the Cinema Advertising Association due to its expected audience profile, based on research on the previous Batman film. However, the rules further states that no advertising reel can carry more than 40% alcohol advertising by duration. We were alerted by a concerned member of the public with regard to a particular screening of this film and we copied into correspondence from the CAA which revealed that this particular reel approached 45% alcohol advertising. This consisted of nine alcohol advertisements and ten non-alcohol advertisements. We consider this unacceptable for a 12A film. We were further concerned to learn from the CAA that there are no sanctions for such breaches, which is worrying as it is clear that this system of self-regulation is ineffective. While we understand this particular matter is not under the remit of the CAP and is imposed on the CAA members by themselves, we consider that it deserves the attention of the CAP when they are reviewing the Code.

**6.3** Alcohol Concern has been informed by Digital Cinema Media that Dark Knight accrued 12,219,894 admissions and we have been supplied with an audience profile by the CAA. The ASA informs us that the percentage of the audience under 18 was 21%. Therefore the film does not breach the CAP rule that a medium must not be used to advertise alcohol drinks if more than 25% of the audience is under 18. However, the information from the CAA informs us that 12% of the audience were aged 7 – 14, therefore in actual viewing figures, over 1.4 million children of this age

category viewed the film. We were unable to ascertain from the CAA what percentage of the audience were aged 15-18, however it is safe to assume that this number increases significantly if all under 18 year olds are considered.

**6.4** The 25% criterion is therefore quite inadequate in terms of protecting minors from alcohol advertising in cinemas. Furthermore, the current rule does not chime with the World Health Organisation's European Charter on Alcohol which states that 'all children and adolescents have the right to grow up in an environment protected from the negative consequences of alcohol consumption and, to the extent possible, from the promotion of alcoholic beverages.'<sup>21</sup>

## **7. Public-health-based messages**

7. Alcohol Concern further recommends that public-health-based messages should be included in 1/6<sup>th</sup> of advertising. This technique is referred to by the SchARR authors as 'counter advertising', defined as 'actions involving the use of advertising-styled messages about the risks or negative consequences of drinking'. Therefore, 1/6<sup>th</sup> of the advertising space for any print advertisement would need to be dedicated to a public health message. The same rule would apply in relation to broadcast time for cinema advertisements. This would possibly a) reduce alcohol advertising expenditure by 1/6<sup>th</sup> and b) reduce consumption through the effect of the message. While the SchARR review concluded that there is limited evidence of the effect of such a measure on consumption outcomes, they did model the effect of a reduction in advertising by 1/6<sup>th</sup> across both broadcast and non-broadcast media. Results varied, finding changes in overall consumption to decrease by between 0.2% and 2.2% with the financial value of the harm avoided over ten years estimated to be between £390m and £3.9bn. In terms of deaths avoided, the lower estimate is of 7 per year and the higher estimate is of 119 per year. Alcohol Concern recommends the requirement for public-health-based messages to be included in 1/6<sup>th</sup> of advertising under the CAP Code, with further research conducted into the impact of

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<sup>21</sup> World Health Organisation European Charter on Alcohol (1995)

the content of public health messages in order to determine the most effective solutions.



## The CAP Code Review Consultation on the proposed CAP Code The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing- Addendum

### **1. The Alcohol Health Alliance UK**

The Alliance is a group of 24 organisations whose mission is to reduce the damage caused to health by alcohol misuse and who are working together to:

- Highlight the rising levels of alcohol-related health harm
- Propose evidence-based solutions to reduce this harm
- Influence decision makers to take positive action to address the damage caused by alcohol misuse

While coalitions have previously been formed on specific topics in the medical field, notably tobacco control, this is the first time that a group has existed specifically to co-ordinate campaigning on alcohol, bringing together medical bodies, patient representatives and alcohol health campaigners.

### **2. Members of the Alliance**

Academy of Medical Royal Colleges, Action on Addiction, Alcohol and Health Research Trust, Alcohol Concern, Alcohol Focus Scotland, British Association for the Study of the Liver, British Liver Trust, British Society of Gastroenterology, College of Emergency Medicine, Faculty of Occupational Medicine, Faculty of Dental Surgery, Faculty of Public Health, Institute of Alcohol Studies, Medical Council on Alcohol, National Addiction Centre, National Organisation on Fetal Alcohol Syndrome, Royal College of General Practitioners, Royal College of Nursing, Royal College of Physicians Edinburgh, Royal College of Physicians London, Royal College of Physicians and Surgeons, Glasgow, Royal College of Psychiatrists, Royal College of Surgeons London, Royal Pharmaceutical Society, Scottish Intercollegiate Group on Alcohol.

### **3. Introduction**

The Alliance welcomes the opportunity to comment on Addendum to the CAP Code review.

### **4. The ScHARR Review**

4.1 Question 168 - Given CAP's policy consideration, do you agree that the evidence contained in the ScHARR Review does not merit a change to CAP's alcohol advertising content or scheduling rules? If your answer is no, please explain why you consider the ScHARR Review does merit a change to CAP's alcohol advertising content or scheduling rules

4.2 The Alliance does not agree with the conclusion of the CAP that the evidence contained in the ScHARR review does not merit a change to CAP's alcohol advertising content and scheduling rules. We believe that changes are necessary because the evidence in the

ScHARR review and from other sources show that there is a link between exposure to alcohol advertising and drinking behaviour, and more worryingly an impact upon young people. Evidence statement 5 states ‘There is conclusive evidence of a small but consistent association of advertising with consumption at a population level. There is also evidence of small but consistent effects of advertising on consumption of alcohol by young people at an individual level’<sup>22</sup>. It can therefore be argued from this statement that a dose response relationship exists, the greater the exposure to advertising the greater the impact. It is true that no one has specifically studied the impact of a reduction in volume on subsequent drinking, but, given the dose response relationship, it can be reasonable argued that less exposure means less drinking.

4.3 It seems to us that the CAP Committee’s conclusion that the ScHARR review does not provide strong enough evidence to merit a change in the rules is based on a narrow reading of evidence statement 6 which calls for the need for further research and methodological development. There is a need to gather more the evidence into the issues we agree, but this should not detract from the fact that evidence presented in the ScHARR review, which is in some ways more robust than the accepted evidence base for the impact of smoking advertising, demonstrates the need for tighter regulation of the placement of non-broadcast advertising<sup>23</sup>.

4.4 The conclusions of the CAP not fully reflect the ScHARR evidence statements 8 which states that ‘There is consistent evidence to suggest that exposure to outdoor advertising, or advertisements in magazines and newspapers may increase the likelihood of young people starting to drink, the amount they drink, and the amount they drink on any one occasion. Further research is required on whether what young people say they are going to do at a particular point in time translates into actual subsequent behaviour’.

## 5. Further evidence

There is now growing evidence which concurs with ScHARR findings that exposure of young people to alcohol marketing has an impact on consumption/ drinking initiation by young people.

5.1 A recent systematic review of longitudinal studies by Anderson et al found ‘consistent evidence to link alcohol advertising with the up take of drinking among non-drinking young people, and increased consumption among their drinking peers’<sup>24</sup>.

5.2 The Science Committee of the European Commission recently reviewed all the evidence and found that<sup>25</sup>;

*“Despite the above methodological concerns and despite the fact that not all studies found an impact for all the individual marketing exposures studied, nevertheless, the overall description of the studies found consistent evidence to demonstrate an impact of alcohol*

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<sup>22</sup> Meier P, et al, 2008, ‘The independent review of the effects of alcohol pricing and promotion. Summary of evidence to accompany report on phase 1: Systematic Reviews. School of Health and Related Research, University of Sheffield.

<sup>23</sup> Ibid 1

<sup>24</sup> Anderson, P et al, 2009, ‘ Impact of Alcohol Advertising and Media Exposure on Adolescent Alcohol Use: A Systematic Review of Longitudinal Studies’, Alcohol and Alcoholism, pp1-15,

<sup>25</sup> Science Group of the European Alcohol and Health Forum, 2008 . Does marketingcommunication impact on the volume and patterns of consumption of alcoholic beverages, especially by young people? - a review of longitudinal studies.



*advertising on the uptake of drinking among non-drinking young people, and increased consumption among their drinking peers.*

*This finding is all the more striking, given that only a small part of a total marketing strategy has been studied, and is corroborated by the results of the other methodologies, including qualitative, econometric, cross-sectional and experimental studies. It should be stressed that the studies come from countries with a long history of advertising and with relatively high levels of alcohol consumption, and it is difficult to speculate the size of the impact of marketing in cultures with either a short history of advertising or low alcohol consumption.”*

The only main difference between the opinion and the ScHARR review is that the opinion had more longitudinal studies available at the time of the review (13 studies). Also, when you review these studies, the evidence base seems more robust than the accepted evidence base for the impact of smoking advertising and food advertising.

5.3 A recent article published by Anderson, Chisholm and Fuhr drew on a substantive evidence base of systematic reviews and meta-analyses in order to assess the evidence for the effectiveness of policies and programmes to reduce harms caused by alcohol. In the target area of marketing alcoholic beverages, they note that ‘the effects of exposure seem cumulative and, in markets with greater availability of alcohol advertising, young people are likely to continue to increase their drinking as they move into their mid-20s, whereas drinking decreases at an earlier age in people who are less exposed to it.’ They go on to conclude that ‘policies that regulate the environment in which alcohol is marketed (economic and physical availability and commercial communications) are effective in reducing alcohol-related harm<sup>26</sup>’.

These studies comprised normal alcohol advertising compliant with all the content regulations and guidelines, the problem is not only that of inappropriate content, but of the exposure of children and young people to normal alcohol advertising. The codes have to deal better with the volume and content issues. A stepwise approach to regulation of marketing might be the following:

	<b>Regulation of Marketing</b>
CORE	Regulation of all marketing including sponsorship Content restricted with no lifestyle ads Bans on sponsorship Placement restricted by volume and media (e.g. no electronic media)
EXPANDED	No pricing promotions or discounts No promotions using competitions, gifts
OPTIMAL	Restrictions on packaging and product design Ban advertising of corporate philanthropy Ban on all forms of product marketing

<sup>26</sup> Anderson et al, 2009, ‘Effectiveness and cost-effectiveness of policies and programmes to reduce the harm caused by alcohol’, Lancet, 373: 2234–46

5.4 The existing regulations on the exposure of children to alcohol marketing are inadequate. The CAP code states ‘no medium should be used to advertise alcoholic drinks if more than 25% of its audience is under 18 years of age’. Around a quarter of the UK population are under 18, and this regulation allows a 12 year old child to be exposed to exactly the same amount of marketing as a 24 year old. We believe that 5% or at the very least 10% is more appropriate in this case and will reduce the number of children exposed to alcohol advertising. The World Health Organization’s European Charter on Alcohol states that: “All children and adolescents have the right to grow up in an environment protected from the negative consequences of alcohol consumption and, to the extent possible, from the promotion of alcoholic beverages.”<sup>27</sup>

## **6. International evidence**

The Alliance believes that BCAP should give consideration to international examples of restrictions on the placement of broadcast alcohol advertisements.

6.1 A study of 24 European countries found that they all had at least one regulation that covers alcohol advertising and marketing, with 49 statutory and 27 non statutory regulations overall. In all countries except the UK there was a ban on at least one or more types of advertising<sup>28</sup>. There are clear differences between European countries’ laws, regulations and administrative restrictions on alcohol advertising. In terms of EU-wide legislation, the Television Without Frontiers Directive (TWF) has been incorporated into national laws. This was designed to harmonize regulations that cross border transmissions would not contravene national regulations.

## **7. Public Health Messaging**

The Alliance further recommends that public-health-based messages should be included in 1/6<sup>th</sup> of advertising. This technique is referred to by the ScHARR authors as ‘counter advertising’, defined as ‘actions involving the use of advertising-styled messages about the risks or negative consequences of drinking’. Therefore, 1/6<sup>th</sup> of the advertising space for any print advertisement would need to be dedicated to a public health message. This would possibly a) reduce alcohol advertising expenditure by 1/6<sup>th</sup> and b) reduce consumption through the effect of the message. While the ScHARR review concluded that there is limited evidence of the effect of such a measure on consumption outcomes, they did model the effect of a reduction in advertising by 1/6<sup>th</sup> across both broadcast and non-broadcast media. Results varied, finding changes in overall consumption to decrease by between 0.2% and 2.2% with the financial value of the harm avoided over ten years estimated to be between £390m and £3.9bn. In terms of deaths avoided, the lower estimate is of 7 per year and the higher estimate is of 119 per year. The Alliance recommends the requirement for public-health-based messages to be included in 1/6<sup>th</sup> of advertising under the CAP Code, with further research conducted into the impact of the content of public health messages in order to determine the most effective solutions.

## **8. Composition of the CAP Committee**

According to the ASA the CAP Committee is made up of: Advertising Association • Cinema Advertising Association • Clearcast • Direct Marketing Association • Direct Selling Association • Directory and Database Publishers Association • Incorporated Society of British Advertisers • Institute of Practitioners in Advertising • Institute of Sales Promotion • Internet Advertising Bureau • Mail Order Traders Association • Mobile Broadband Group •

<sup>27</sup> 1 World Health Organisation European Charter on Alcohol (1995)-  
[http://www.euro.who.int/Document/EUR\\_ICP\\_ALDT\\_94\\_03\\_CN01.pdf](http://www.euro.who.int/Document/EUR_ICP_ALDT_94_03_CN01.pdf)

<sup>28</sup> [http://www.stap.nl/content/bestanden/elsa\\_2\\_r\\_on\\_regulation.pdf](http://www.stap.nl/content/bestanden/elsa_2_r_on_regulation.pdf)

Mobile Marketing Association • Newspaper Publishers Association • Newspaper Society • Outdoor Advertising Association • Periodical Publishers Association • Proprietary Association of Great Britain • Radio Advertising Clearance Centre • Royal Mail • Scottish Daily Newspaper Society • Scottish Newspaper Publishers Association.

We have been unable to obtain the names of individual members.

Given the impact of alcohol misuse on health in the UK, the fact that marketing encourages young people to start drinking and increases their consumption of alcohol, the Alliance feels that decisions on marketing regulation are too important to be left to a group comprising entirely of industry representatives. The Government must review the structure of marketing regulation in the UK – decisions should be made by a transparently accountable public body with strong representation from the health community.

# **The CAP Code Review Consultation on the proposed CAP Code The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing**

1. The Alcohol Health Alliance UK is a group of 24 organisations whose mission is to reduce the damage caused to health by alcohol misuse and who are working together to:

- Highlight the rising levels of alcohol-related health harm
- Propose evidence-based solutions to reduce this harm
- Influence decision makers to take positive action to address the damage caused by alcohol misuse

While coalitions have previously been formed on specific topics in the medical field, notably tobacco control, this is the first time that a group has existed specifically to co-ordinate campaigning on alcohol, bringing together medical bodies, patient representatives and alcohol health campaigners.

2. Members of the Alliance:

Academy of Medical Royal Colleges, Action on Addiction, Alcohol and Health Research Trust, Alcohol Concern, Alcohol Focus Scotland, British Association for the Study of the Liver, British Liver Trust, British Society of Gastroenterology, College of Emergency Medicine, Faculty of Occupational Medicine, Faculty of Dental Surgery, Faculty of Public Health, Institute of Alcohol Studies, Medical Council on Alcohol, National Addiction Centre, National Organisation on Fetal Alcohol Syndrome, Royal College of General Practitioners, Royal College of Nursing, Royal College of Physicians Edinburgh, Royal College of Physicians London, Royal College of Physicians and Surgeons, Glasgow, Royal College of Psychiatrists, Royal College of Surgeons London, Royal Pharmaceutical Society, Scottish Intercollegiate Group on Alcohol.

3. Introduction

The Alliance welcomes the opportunity to comment on Committee's review of the advertising Code and will also submit to the Broadcast Committee's review of the advertising Code.

## **Section 18: Alcohol**

### **Alcoholic strength**

#### **Question 62**

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

#### **18.9**

We agree that rule 18.9 should be included in the code

### **Provision for low-alcohol drinks**

#### **Question 63**

i) Given CAP's policy consideration, do you agree that CAP rule 56.15 should not be included in

the present Code? If your answer is no, please explain why.

*Yes we agree that CAP rule 56.15 should not be included in the present code.*

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

We agree that all alcohol rules should be applied to low-alcohol drinks, other than the rule which allows implication of preference based on alcoholic strength. This will allow the promotion of low-alcohol drinks based on their strength and encourage interest among consumers in these drinks. Low-alcohol drinks should be clearly defined as those containing between 0.5% and 1.2% alcohol.

#### **Question 64**

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

While we believe that new rule 18.12 is preferable to current Rule 56.14, being broader in scope, we do not believe that 18.12, in its current draft is appropriate. We suggest:

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

*Marketing communications must not link alcohol with the use of potentially dangerous machinery or driving. Marketing communications may not feature sporting or other physical activities.*

There should be no link made whatsoever between alcohol and sporting activity, even if it is not implied that those activities have taken place after the consumption of alcohol. For example, the rule as proposed allows for the consumption of alcohol after sport or physical activity which we would argue could create a misleading impression that alcohol is an appropriate beverage for hydration.

#### **Other questions**

#### **Question 65**

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

*We agree that the rules included in the proposed alcohol section are absolutely necessary in the absence of statutory regulation but they need to be made more understandable.*

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

**18.10 - Marketing communications that include a sales promotion must not imply, condone or encourage excessive consumption of alcohol.**

We believe that proposed rule 18.10 should be amended to read:

Marketing communication must not include sales promotion information, The advertising of alcohol sales promotions Marketing communication must not include sales promotion information, The advertising of alcohol sales promotions implicitly encourages higher sales and therefore greater consumption by the individual. At the very least, it promotes the message that it is desirable to buy, and therefore consume, large quantities of alcohol. There should be no promotion of alcohol which is

being sold at a discount as part of a multi-buy promotion.

**18.15** - *Marketing communications must not be directed at people under 18 through the selection of media or the context in which they appear. No medium should be used to advertise alcoholic drinks if more than 25% of its audience is under 18 years of age.*

Around a quarter of the UK population are under 18, and this regulation allows a 12 year old child to be exposed to exactly the same amount of marketing as a 24 year old. The concept is flawed and does not protect children adequately. We believe that the proposed rule 18.15 should be tightened and be amended to read:

*Marketing communications must not be directed at people under 18 through the selection of media or the context in which they appear. No medium should be used to advertise alcoholic drinks if more than 10% of its audience is under 18 years of age.*

iii) Do you have other comments on this section?

## Section 22: Other comments

### Question 74

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

The exposure of young people to alcohol marketing has very clearly been shown to have similar same deleterious effects as the marketing of cigarettes. The Science Committee of the European Commission recently reviewed all the evidence and found that<sup>29</sup>;

*“Despite the above methodological concerns and despite the fact that not all studies found an impact for all the individual marketing exposures studied, nevertheless, the overall description of the studies found consistent evidence to demonstrate an impact of alcohol advertising on the uptake of drinking among non-drinking young people, and increased consumption among their drinking peers.*

*This finding is all the more striking, given that only a small part of a total marketing strategy has been studied, and is corroborated by the results of the other methodologies, including qualitative, econometric, cross-sectional and experimental studies. It should be stressed that the studies come from countries with a long history of advertising and with relatively high levels of alcohol consumption, and it is difficult to speculate the size of the impact of marketing in cultures with either a short history of advertising or low alcohol consumption.”*

These studies comprised normal alcohol advertising compliant with all the content regulations and guidelines, the problem is not only that of inappropriate content, but of the exposure of children and young people to normal alcohol advertising. The codes have to deal better with the volume and content issues. A stepwise approach to regulation of marketing might be the following:

	Regulation of Marketing
CORE	Regulation of all marketing including sponsorship Content restricted with no lifestyle ads

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<sup>29</sup> Science Group of the European Alcohol and Health Forum. Does marketing communication impact on the volume and patterns of consumption of alcoholic beverages, especially by young people? - a review of longitudinal studies. 2009.

	<p>Bans on sponsorship</p> <p>Placement restricted by volume and media (e.g. no electronic media)</p>
EXPANDED	<p>No pricing promotions or discounts</p> <p>No promotions using competitions, gifts</p>
OPTIMAL	<p>Restrictions on packaging and product design</p> <p>Ban advertising of corporate philanthropy</p> <p>Ban on all forms of product marketing</p>

## ***General***

The CAP and BCAP Codes on advertising do provide a useful source of guidance about how advertising is to be approached, what needs to be considered and how the Committee on Advertising Practices values of legal, decent, honest and truthful are to be delivered. We strongly support those principles and, as do most advertisers, seek to ensure that the advertising we create and use is neither misleading nor likely to cause harm to consumers. Having had the opportunity to consider these two rather large Consultation Documents we have to say that the Consultation is somewhat overly complex, focused on making detailed changes to the existing Codes rather than standing back and asking whether or not the Codes are fit for purpose in a somewhat more rapidly moving world than the last time the Codes were reviewed.

This is particularly important as one of the reasons given for reviewing the Codes is an attempt to make them consistent with the requirements under the Consumer Protection from Unfair Trading Regulations and other changes to legal approach. The law in this area is now far more principle based than its predecessors. That has the advantage of being flexible, allowing innovation and not restricting approach in the prescriptive way that earlier regulation has done. However what we face with the Codes as currently drafted is that we now have a freedom of approach in the regulatory arena that is being restricted by prescription in the self-regulation arena. That cannot be right.

The law is quite clear in that it is now an offence to mislead consumers and it is that objective that the Code seeks to support. However by the use of the detailed provisions the Codes go far beyond legal obligation. It is our view that the Codes should not be used as regulatory documents, which they are often referred to as, but as guidance as to how the compliance objective of not misleading customers can be achieved. We would therefore submit that there is no longer a need for the immense detail that these Codes contain and certainly no need to repeat detailed legislation. If there is a need for that detail it is in order to assist and inform how compliance can be achieved, it should not be regarded as the only way of delivering that compliance as it so often is. We would therefore question whether or not in fact we do need two Codes as the principles of misleadingness apply equally whether the media is broadcast, print or SMS text. In fact the Code Consultation itself suggests that the CAP Code at least is media neutral. We cannot see why the BCAP Code needs to be any different. Indeed given that the Code seeks to be “established means” then it is vitally important that there is no difference between these Codes. Compliance with the law should not be subject to different interpretations in different locations. The Code as drafted gold plates in many areas the legal requirement and steps should be taken to ensure that the Code is consistent with the law, OFT guidance and interpretation of the law by enforcers and it should not go beyond legal requirement. There is a very real danger if it does that it adds cost to business which is neither needed or welcome.

One other area of concern with this review is that the big problems that occur with ASA complaints are around the investigation process which seems to be inconsistently interpreted particularly where regard is had by investigators to help notes which are often issued without stakeholder consultation and applied by the Investigation Team as if they are law. The Code review seems to make no effort to look at the investigation processes or the appeal mechanisms that exist for resolving problems when they do occur. In fact an investigation is required to apply a one size fits all approach, which has little or no regard to the media the advertising status or the damage and harm that may or may not be caused by the advertising. We would therefore seriously suggest that the appeals process and investigation mechanisms need to be looked at as part of this process. It is important whether it is self-regulation or regulation that rules are applied consistently so that compliance is easier to achieve.



At the moment there is little or no transparency about the investigation process and paradoxically it is the process in which the person being investigated has less opportunity to comment and debate the issues being raised than occurs in the criminal investigation field. Given the Codes seek to be established means it is important that the application of these Codes is consistent, so that there is a consistency with the law and the application of the Codes allowing businesses to apply them with some degree of certainty.

In general we support the idea of a self-regulatory framework where it adds value to the advertising process and clearly these Codes add value in the areas of taste and decency. What we do not support is the application of a self-regulatory Code in a way that adds to the burden with which we have to operate and does so in a way which is both inconsistent and opaque. We would therefore suggest that these Codes need a significant rethink against the modern regulatory background

### CAP Code

Without prejudice to our general views stated above we would make the following comments on the questions raised in the Consultation. Given that the Code is seeking to ensure that the requirements of the Consumer Protection from Unfair Trading Practices Regulations are delivered in the UK and that those provision are an implementation of an EU maximum harmonisation directive it should be made clear in the first section of the Code that the objective of the Code is to assist compliance with those Regulations and that the Code in the areas covered by the Consumer Protection from Unfair Trading Practices Regulations provides nothing more than guidance as to how the objectives of the Regulations can be achieved. It should not be presented as definitive interpretation of the law. One further comment would be that there has been no further clarification of which sorts of advertising are caught given the lack of consistency of approach when investigations are carried out clarification that in-store advertising is not within the scope of the Codes would be beneficial.

### General

Question 2 - we do not believe that the detail provided for is necessary unless it is intended to be guidance to statutory provisions. Given the flexibility of the statutory provision we should be careful to ensure that guidance does not go beyond that permitted by the law.

Question 3 - the information in Section 3 in general sets down the legal position with regard to the CPRs and BPRs and to that extent they are helpful. However the amendment proposed by Rule 3.10 is gold plating and in practical terms would be difficult to comply with as it will be difficult to know which advertising has only been seen once and which has been seen multiple times.

Question 4 - the proposed addition would be acceptable if the Code was merely guidance, however given that this seems to stretch the rules further than is necessary and appears to gold plate the CPR requirements we would suggest that its addition is unnecessary.

Question 5 - the proposal to require advertisers to state in advertising the time period and quantities of product available in advertising goes far beyond the requirement of CPRs and is therefore gold plating which is not required.

Question 7 - we would agree that Rule 17.2 is superfluous and not required in the Code.

Question 8 - the proposed change is prescriptive and goes beyond the requirements in the CPRs and could therefore, if interpreted strictly, lead to a perfectly legal promotion being barred.

Question 9 - the general principles set down in CAP's policy objectives are clear and easy to understand. However the section at times goes beyond legal requirement and creates prescriptive rules which are neither necessary or wanted. If however the Code is to be regarded as guidance as to how advertising compliance should be achieved then there may be justification for helpful comments.

However care should be taken to ensure that we talk about this as one way to comply with the requirements rather than writing rules which you must follow.

Children - the amendment to include “promotions that contain a direct exhortation” to children is again in principle something we would have no objection to. However there is a lack of clarity around what constitutes a direct exhortation.

Sales Promotions - we found this revised section confusing as there was no clarity between what equalled a promotion, what related to a competition and what obligations were required to be delivered in each case.

Question 19 - whilst we can understand the principle that the revised 18.17.6 seeks to address it is something that we foresee great difficulty in delivering in practical terms. It would surely be incorrect to put in an estimate of the total prize the number of prizes capable of being won when in actual fact some of them may not be won by virtue of the promotion not being a success.

Question 20 - for the same reasons we have great difficulty with the proposed amendment to 18.17.6 as we can see no practical way to carry out the estimations required by that course that will be meaningful to customers.

Question 21 - we would merely ask is a website an easily accessible source?

Question 24 - we see no need to impose an independent audit requirement on competitions whether national or local. If an independent audit is felt to be necessary this will add significant cost to promotions. Furthermore if the requirement only to do this on national promotions is maintained it will lead to a distortion of promotional activity as it will focus promotional activity on local opportunity. Furthermore it is not clear what equals national in the context of this rule change.

Question 25 - this rule does not aid clarity. It should simply state that a judge should be independent of the competition rather than seeking to require businesses to appoint somebody who is independent from themselves and any of their intermediaries at additional cost. We fully understand and support the need for independence so that competition judging can be above scrutiny. However a rule that imposes a completely separate judge who no doubt would have to be paid for is not helpful and likely to reduce the number of promotions.

Question 28 - this is the role of enforcement to police - Rule 8.4 within the Code seems superfluous. It is already legal to supply alcohol to persons under the age of 18 and it is therefore unlikely that anyone will direct promotion to persons under the age of 18. Rule 8.12 within this section of the Code makes it clear that where a promotion cannot be run an alternative should be provided. This is not always practicable as it often causes supply problems in other areas.

### Distance Selling

Question 29 - we see no need for Rule 42.7 as it merely reflects the legal obligation. Why repeat rules that already exist in law

Question 31 - with the exception of the rules dealing with harm to children this section merely reiterates the rules on distance selling and we therefore see no need for these rules.

### Database Practice

Question 34 - the focus within these rules on particular forms of technology run the risk of being outdated before they are actually implemented. Technology is one area where innovation and change will also always exceed the ability of detailed rules of the type proposed to the Code. We would therefore suggest that consideration be given to simply adopting a principle based approach which

does not seek to exempt or control technologies, merely recognise that where technologies are limited alternative means should be provided for delivering compliance.

#### Medicines, Treatments, Devices & Health

Question 38 - given the section deals with medicines, treatments, devices and health it seems odd that the word beauty is included in the proposed amendment to Rule 12.1. It is not clear why that should be included within this proposed rule.

Question 39 - again much of what is contained within this section could be regarded as superfluous. Medicines and health products is one of the most highly regulated areas and the law on the subject is quite clear. It therefore seem to us that there is no need to overcomplicate an already tightly controlled area with additional rules which go beyond the legal requirement.

#### Weight Control & Slimming

Question 40 - the proposed Rule is helpful as guidance, however a body mass index of 30 is, whilst being an accepted standard, something that needs to be understood by the person using it. Body mass index generally is not a reliable measure of obesity. There are therefore dangers in using this as a requirement upon which to base advertising.

#### Dietary Supplements and Associated Health and Nutrition Claims

Question 57 - 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 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. We would therefore 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.

#### BCAP Code

The BCAP Code is far longer and far more detailed than the CAP Code, something that we find difficult to understand given that they cover the same ground and address the same principles of ensuring that advertising is legal, decent, honest and truthful. The reality of the BCAP Code is that it seeks to revise a great deal of prescriptive detail on how one should comply with the principles of the Codes. Much of this, I have no doubt, is helpful, however it is prescriptive in nature and because of the way the Codes are enforced, frequently makes it inflexible and difficult to use in creating innovative advertising. Furthermore the way in which the Codes are applied is highly restrictive and limiting on broadcast communication. The Broadcast Code is not media neutral as it introduces a different set of controls for radio compared to television and when compared against the CAP Code we would also have different communication needs with press and print advertising. We do not believe that that difference is justifiable in the detailed way that it is set out within the Broadcast Code. In fact we see no need for two approaches and would suggest that a single Code as outlined in our earlier comments at the beginning of this response should be the goal. We fully understand that people working in broadcast media may find it useful to have guidance about the best way to achieve advertising which meets the CAP principles but that is exactly what it should be - guidance - not a set of mandatory rules applied arbitrarily as part of pre-clearance and investigation processes.

The detailed comments we made in response to the questions on the CAP Code stand for this Broadcast Code and we would further state that in many areas the gold plating is considerably thicker

than that created by the CAP Code. Much of the Code merely reiterates the law which in our view is unnecessary and secondly interprets the law in ways which are not consistent with either the law itself or the regulatory body responsible for enforcing it. We therefore believe a great effort should be made to restructure this Code into guidance rather than leave it as a prescriptive set of rules which is restrictive on advertisers, innovative advertising and unhelpful in many cases to consumers by imposing restrictions which limit the effectiveness of the communication.

### Comments On The Rules

Section 3 is misleading as we observed in the CAP Code this set of provisions simply seeks to put into guidance form the requirements set out in the law. However the practical problem we have had with this part of the Code is that the pre-clearance team frequently interpret the rules in a way which goes far beyond either the law or the guidance issued by OFT and other enforcers. This has been in recent times particularly the case with 'from' price offers where they have insisted that at least 10% of the stock should be at the 'from' price, a requirement that is neither in the Code nor in the law. The proposed changes go some way to assisting the understanding of misleading but as with the CAP Code we would strongly suggest that this needs to be regarded as guidance and needs to be delivered in a way which is consistent with the law rather than seeking to replace it with a set of arbitrary controls.

### Food, Dietary Supplements and Associated Health and Nutrition Claims

As we commented in the CAP section, the Nutrition and Health Claims Regulations came into force in June 2007 and whilst we welcome the review of the Code to reflect those changes, they would appear in places to go beyond the requirements of the law in some situations. We have particular concerns about the requirements in 13.7.1 of the old Code which have not been addressed in the review. The requirements of that provision are that vitamins should only be advertised if in the advertisement it is made clear the groups likely to benefit from the supplement. The Code then goes on to indicate a list of certain groups that might be included in such a benefit claim. Our problem is that particularly, with the pre-clearance activity, the people responsible for reviewing this sort of advertising prior to airing apply this list of groups as a definitive requirement and often insist that the vitamins must fit into one of the categories listed within the Code. That is not helpful and in fact makes things very difficult when vitamins are suitable for a wide range of groups and the advisers are reluctant to accept a more generic statement such as "food supplements are not intended to replace a balanced and varied diet". Again the problem is not really with the Code, but with the way it is sometimes arbitrarily applied.

### Medicines, Medical Devices, Treatments and Health

The definition provided in 11.4 is not accurate. It does not reflect the definitions in the Medicines Act or that contained in the Medical Devices Regulations in our view. It may be helpful to include it in the Code from the point of view of providing assistance to people assessing what is a medicinal product, however as it does not accurately reflect the law we would suggest that it is not used.

### General

In closing we would like to reiterate our comments that the one part of the Codes that have not been subject to this review are the investigation and appeal mechanisms. We have serious concerns with those mechanisms as they are not open and transparent nor do they provide us with an opportunity to resolve problems in an effective way.

Dealing first with the investigation process, it is often the case that the interpretation of the Codes is that applied to it by the investigating officer. This at times delivers inconsistent application of the Codes as different individuals seem to have a different approach and a different view. This is further compounded when in fact the view of the investigator from the Advertising Standards Authority is

different from that of the local Enforcement Authority who have provided guidance on what constitutes misleading under the law. The situation should not exist whether there is a discrepancy between these interpretations. This is particularly the case when investigators are using “help notes” to seek to justify their interpretation, often doing so without regard to the legal position or guidance offered by professional regulators responsible for enforcing the law.

When disputes do occur, whilst it is possible on occasions to have a sensible and meaningful debate with individuals, it is not always possible to be certain that those views have been conveyed to the CAP Committee. It is not clear whether or not those views have been properly presented to Council and neither is there a mechanism which permits an advertiser the opportunity to present these views in person to Council so that they can be certain that they have been communicated accurately and effectively.

Last but not least, when things do go wrong there is no effective appeal mechanism against Council’s decisions. Given that the cost of a major advertising campaign is not insignificant it seems remarkable that there is no mechanism for appealing Council’s decision other than to refer it to the Chairman of the ASA who could scarcely be seen as independent in these matters. There should be a proper, independent appeals panel who can consider the issues and rule on them independently from Council. Furthermore that appeals panel should have the ability to award costs where advertisers have been significantly adversely affected because of a wrong decision by Council.

We remain fully committed to supporting the ASA ideals of legal, decent, honest and truthful. However, we feel that the time has come to completely review the Codes and the processes that go with them to ensure that they work in a way that is more in tune with modern marketing and advertising and meets the needs of the industry and the consumers rather than being a burden on the industry that adds little or no value.

The Archbishops' Council of the Church of England is grateful for the opportunity to respond to this wide-ranging consultation. This response has been produced by the Archbishops' Council's Communications Office and the Mission & Public Affairs Council of the Church of England. The Communications Office is responsible for the Church's engagement with media policy issues and is accountable to the General Synod through the Archbishops' Council. The Mission & Public Affairs Council is the body responsible for overseeing research and comment on social and political issues on behalf of the Church. It comprises a representative group of bishops, clergy and lay people with interest and expertise in the relevant areas, and also reports to the General Synod through the Archbishops' Council.

## **Section 5: Children**

### **Promotions that contain a direct exhortation to buy a product**

#### **Question 12**

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

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

#### **Question 13**

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

### **Other questions**

#### **Question 14**

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

**and**

## **Section 8: Sales Promotions**

### **Appeal to children**

#### **Question 27**

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

**The 'Good Childhood' report commissioned by The Children's Society (Penguin, 2009), based on more than 2,500 submissions and a range of qualitative interviews with young people,**

points to the negative effects that media-driven consumerism can have on the overall well-being of children. The report quotes UK studies (Kasser 2002, Nairn and Ormond 2007) to illustrate the pattern explored by Juliet Schor (2004), who concluded that, other things being equal, the more a child is exposed to the media, the more materialistic they become, the worse they relate to their parents, and the worse their mental health. These effects, the Good Childhood report argues, can have a disproportionate effect on children from poorer families.

In 2006, the Archbishop of Canterbury, Dr Rowan Williams, spoke of his concern over the growing commercialisation of childhood, in light of the publication of a report by the independent group Compass. The report suggested that while 70 per cent of 3 year olds recognised the McDonalds logo, only half of that number knew their own surname. He said that “if children grow up in an environment where they think it's acceptable to spend, to encourage others to spend, to be irresponsible about what they have, that's not good news. And it also cripples their own childhood, it limits their own possibilities as children, it fences them in.”

We agree with each of the recommendations made in questions 12-14, and question 27, which together represent a welcome tightening of the rules relating to advertising targeted at young people.

## **Section 12: Medicines, Treatments, Devices and Health**

### **Traditional Herbal Medicinal Products**

#### **Question 37**

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

**We agree with this proposal and are minded to suggest that it could go further; i.e. there is an argument for ensuring that all traditional herbal medicines carry a standard statement that registration as a Traditional Herbal Medicine is not based on clinical trials.**

### **Medicinal claims**

#### **Question 38**

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

**We agree with this proposal.**

## **Section 13: Weight Control and Slimming**

### **Targeting the obese**

#### **Question 40**

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

**This appears to be a reasonable proposal.**

## Loss of weight or fat from specific parts of the body

### Question 41

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

**This appears to be a reasonable proposal.**

## Very Low-Calorie Diets (VLCDs)

### Question 42

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

**We agree with this proposal.**

## Section 16: Gambling

### Consistency: principle

#### Question 58

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

**We see no objection to the regulation of marketing communications for the National Lottery and SLA lotteries by the same rules.**

### Consistency: rules

#### Question 59

Given CAP's policy consideration, do you agree that the rules included in the Lottery Section of the Code are in line with CAP's general policy objectives (see Part 1 (4) of this consultation document) and should be applied to marketing communications for the National Lottery as they presently are to marketing communications for other lotteries? If your answer is no, please explain why and, if relevant, please identify those rules that should not be applied to marketing communications for the National Lottery.

**We see no objection to the regulation of marketing communications for the National Lottery and SLA lotteries by the same rules, directed by CAP's general policy objectives.**

## Participating in a lottery in a working environment

### Question 60

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



explain why.

**No. We would prefer to see the current prohibition on marketing communications maintained, but with a possible exemption for the National Lottery due to its special status and role in donating significant sums to good causes (i.e. keep the status quo). While we also note (16.37) that syndicates have operated in some workplaces for many years, there are a great number of workplaces where they do not, and also a range of workplaces in the context of which it would be inappropriate to show employees engaging in such activities.**

## **Section 18: Alcohol**

### **Alcoholic strength**

#### **Question 62**

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

**This appears to be a helpful harmonisation and simplification of the rules regarding portrayal of low alcohol products.**

### **Provision for low-alcohol drinks**

#### **Question 63**

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

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

**This appears to be a helpful harmonisation and simplification of the rules regarding portrayal of low alcohol products.**

#### **Question 64**

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

**This appears to be a helpful clarification of the rules regarding portrayal of the consumption of low-alcohol products in the environments outlined.**

**We agree with the proposals covered by Questions 62-64, although the question of the broad policy of tightening the regulations on low-alcohol products is finely balanced. While attempts to generate a culture of 'continental drinking' and promote the consumption of less alcohol are admirable aims, the logic advanced by CAP is convincing: that the current regulations could lead to consumer confusion; and that the serving of low-alcohol products to under 18s is as illegal as serving higher-alcohol products. For these reasons we support each of the proposals.**

# Consultation questions

You may respond to some or all of the consultation questions. This Annex is provided in Word format to enable you to copy and paste the questions into a document that should accompany your completed cover sheet, which is made available [here](#). See 'Responding to this consultation' in this Annex.

**THE COMMENTS BELOW FOR THE CAP (NON-BROADCAST) CODE REVIEW CONSULTATION APPLY EQUALLY TO BCAP (BROADCAST) CODE REVIEW CONSULTATION.**

## Section 1: Compliance

### Question 1

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Compliance rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **Yes**

### Compliance

#### Recent Changes to this section of the CAP Code

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

As stated in 1.iv "CAP intends its rules to be transparent, accountable, proportionate, consistent, targeted only where regulation is needed and written so that they are easily understood, easily implemented and easily enforced". The rules need to be free from contradiction and ensure Marketers are aware of any potential issues, for example, the issue of Verifiability. CAP had the opportunity to formulate a CAP ruling following the Lidl case (2006). CAP instead chose to take action against one organisation and enforce a decision whereas an amend to the Code and communication of the amend would have been a better means of ensuring fairness and respect.

"Sector-specific rules", should be defined or a help-note issued for the purposes of clarification.

The introduction of new relevant sector-specific rules should be communicated by CAP/copy advice team to ensure compliance from Marketers.

### Compliance Rules

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

"Fair" and "generally accepted" should be defined or a help-note issued for the purposes of clarification.

## Compliance

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

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

"Unreasonable delay" should be defined by CAP to ensure organisations respond to ASA enquiries within a specified period. The proposed requirement does not go far enough to ensure organisations respond within a specified period. CAP should consult then define what is reasonable. This would create consistency in the treatment of all cases and prevent organisations flouting the law or CAP rules by continuing to advertise when clear breaches of the Code or failure to substantiate have occurred.

The CAP Code 'Sanctions' also states "if a marketing communication is obviously misleading or offensive, the ASA and CAP may take compliance action in the absence of complaints or during an investigation". It is not clear under what circumstances such action will be taken. This should be explained for the purposes of clarification.

## Section 2: Recognition of marketing communications

### Question 2

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Recognition of Marketing Communications rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 3: Misleading

### Clarity of qualifications

### Question 3

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

### Misleading Qualification

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

The reference to "hear" in the proposed CAP Code appears to be out of context given that the proposed Code is for non-broadcast communications. "Clear" should be defined, or guidance

issued, to ensure Marketers comply with the requirements of the Code. Specifically, directions for the use of caveats, asterisks, bold etc. The requirement for qualifications to be clear to consumers who see the ad only “once” could result in complaints that have less to do with clarity and more to do with the period in which consumers had to comprehend the ad. It is therefore recommended that “only once” is deleted from 3.1.

## Exaggerated performance

### Question 4

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

#### Misleading Exaggeration

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

“Normal use” should be defined or a help-note issued for the purposes of clarification.

## Restrictions on availability

### Question 5

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

#### Misleading Availability

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

Under the proposed CAP code, the requirement for age limits to be included in marketing communications should be deleted as this is beyond the requirements of legislation. Under the CAP proposal, it is not clear whether there would be a requirement to display, for example, age restrictions for solvents (e.g. oven cleaner) and aerosols within marketing communications. This requirement appears to be beyond the powers of the ASA.

“Geographic restrictions” should be defined or a help-note issued for the purposes of clarification.

## Testimonials

### Question 6

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

## Additional rights provided by guarantees

### Question 7

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

## The unavoidable cost of responding

### Question 8

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

### Misleading Free

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

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

It is considered that it is reasonable to expect customers to pay for packaging, in addition to postage, if this is clearly stated within the "free" offer e.g. "Excludes Post & Packaging" and the price charged for packaging appropriately reflects the cost to the organisation. Free refers to the product.

## Other questions

### Question 9

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **Yes**

### Misleading Prices – Principle

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

Given that the BERR's Pricing Practices Guide is not statutory, it is proposed that the reference to "should take account" is amended to "may have regard to" as the Code should reflect legislation including the Consumer Protection Regulations (2008). By stating "should take account" CAP may deem that a organisation has not complied with the BPPG, when compliance should be with the CPRs (2008).

## **Misleading Principle**

<b>Principle</b>	<b>The ASA will take into account the impression created by marketing communications as well as specific claims. It will adjudicate on the basis of the likely effect on consumers, not the marketer's intentions.</b>
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This requirement should be aligned with the Consumer Protection Regulations (2008) which make reference to the 'average consumer'. The reference to "impression" made here and elsewhere in the Code is too subjective and goes beyond legislation. In including "impression", CAP goes beyond its powers and the spirit of the legislation. Indeed, it could hold everything is in their "impression" misleading.

A single consumer could potentially complain that an "impression" was created – as a recent complaint (not upheld by the ASA) against Asda's "Big Rollback" demonstrated. The term "impression" can be viewed in a number of different ways and should not be used in this context.

The reference to "consumers" should be replaced with the "average consumer" – as per the CPRs – to better reflect the likely effect of communications on consumers.

## **Misleading Definition**

<b>3.20 Marketing communications that state prices must also state applicable delivery, freight or postal charges or, if those cannot reasonably be calculated in advance, state that such charges are payable.</b>
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"Packaging" has been omitted from the list of charges and should be included.

## **Misleading Price Comparison**

<b>3.39 Marketing communications that include a price comparison must state the basis of the comparison. Comparisons with a competitor price must be with the price for an identical or substantially equivalent product and must explain significant differences between the products. If the competitor offers more than one similar product, marketers should compare their price with the price for the competitor's product that is most similar to the advertised product.</b>
--

The reference to "substantially equivalent" is not clear and it is not understood where such a requirement exists in current legislation.

The proposed requirement contradicts the "Retailers Price Comparisons" CAP help note, which states: "Marketers should, as far as is reasonably possible, compare products of the same, or very similar, quality (for example own-brand with own brand, brand with brand and premium with premium)."

No reference is made to "substantially equivalent".

The reference is also in contradiction of the BERR Pricing Practices Guide which states: "In general

you should compare like with like. This implies that the products compared should be the same or very similar”.

Again, no reference is made to “substantially equivalent”.

The Business Protection from Misleading Marketing Regulations 2008 state “Comparative advertising shall, as far as the comparison is concerned, be permitted only when the following conditions are met... it objectively compares one or more material, relevant, verifiable and representative features of those products, which may include price”.

The reference to “substantially equivalent” should be deleted as it not a legislative requirement nor is it referenced in any guidance.

## Section 4: Harm and Offence

### Flashing images

#### Question 10

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

### Other Questions

#### Question 11

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Harm and Offence rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 5: Children

### Promotions that contain a direct exhortation to buy a product

#### Question 12

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

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

#### Question 13

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

### Other questions

#### Question 14

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Children rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

### Section 6: Privacy

#### Question 15

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Privacy rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

### Section 7: Political Advertisements

#### Question 16

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Political Advertisements rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

### Section 8: Sales Promotions

#### Withholding prizes

#### Question 17

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

#### Promotions directed at children; the need for a closing date



### Question 18

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

### Prizes and Gifts

#### Question 19

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

#### Question 20

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

### Significant conditions exception: limited by time or space

#### Question 21

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

### Sales Promotions

#### Significant conditions for promotions

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

"Easily-accessible" should be explained e.g. would terms and conditions hosted on a website be considered easily-accessible?

### Distinction between prizes and gifts: a significant proportion

#### Question 22

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

### Supervising Prize Draws

#### Question 23

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

### Auditing instant-win promotions

#### Question 24

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

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

## Judging of prize promotions

### Question 25

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

## Sales Promotions Prize Promotions

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

The requirement for an "independent judge" for national competitions appears inconsistent with the rules for regional competitions where no such requirement is specified. Also, promotions and competitions should be treated separately within the Code for clarity.

## Receipt of prizes: time

### Question 26

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

## Appeal to children

### Question 27

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

## Other questions

### Question 28

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

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

be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## **Section 9: Distance Selling**

### **Personal visits**

#### **Question 29**

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

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

#### **Question 30**

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

### **Other questions**

#### **Question 31**

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

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? **No**

iii) Do you have other comments on this section? **No**

## **Section 10: Database practice**

### **Collection of data from children**

#### **Question 32**

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

### **Explicit consent of consumers: Bluetooth**

#### **Question 33**

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

### **Other questions**

### Question 34

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Database Practice rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 11: Environmental Claims

### Question 35

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

### Other questions

### Question 36

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 12: Medicines, Treatments, Devices and Health

### Traditional Herbal Medicinal Products

### Question 37

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

### Medicinal claims

### Question 38

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

### Other questions

### Question 39

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Medicines, Treatments, Devices and Health rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## **Section 13: Weight Control and Slimming**

### **Targeting the obese**

#### **Question 40**

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

### **Loss of weight or fat from specific parts of the body**

#### **Question 41**

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

### **Very Low-Calorie Diets (VLCDs)**

#### **Question 42**

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

### **Other questions**

#### **Question 43**

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Weight Control and Slimming rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 14: Financial products Individual Voluntary Arrangements (IVAs)

### Question 44

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

### Other questions

### Question 45

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 15: Food, Dietary supplements and Associated Health and Nutrition claims

### Permitted nutrition and health claims

### Question 46

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

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

### Question 47

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

### Comparative nutrition claims

### 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. **Yes**

### Comparison with one product

### 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. **Yes**

## Prohibitions

### 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. **Yes**

### 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. **Yes**

### 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. **Yes**

## The use of health professionals

### 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. **Yes**

## Food labelling Regulations (1996) (FLRs)

### 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. **Yes**

### 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. **Yes**

## Infant and follow-on formulae

### Question 56

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

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

iii) Do you consider CAP has correctly reflected the relevant provisions of the Infant Formula and Follow-on Formula Regulations 2007 (as amended) in the proposed CAP Code? If your answer is

no, please explain why. **Yes**

## Other questions

### Question 57

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

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? **No**

iii) Do you have other comments on this section? **No**

## Section 16: Gambling

### Consistency: principle

#### Question 58

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

### Consistency: rules

#### Question 59

Given CAP's policy consideration, do you agree that the rules included in the Lottery Section of the Code are in line with CAP's general policy objectives (see Part 1 (4) of this consultation document) and should be applied to marketing communications for the National Lottery as they presently are to marketing communications for other lotteries? If your answer is no, please explain why and, if relevant, please identify those rules that should not be applied to marketing communications for the National Lottery. **Yes**

## Participating in a lottery in a working environment

#### Question 60

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

## Other questions

### Question 61

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

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



present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this Section? **No**

## Section 18: Alcohol

### Alcoholic strength

#### Question 62

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

### Provision for low-alcohol drinks

#### Question 63

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

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

#### Question 64

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

### Other questions

#### Question 65

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Alcohol rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 19: Motoring

### The legal requirements of the Highway Code

#### Question 66

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

## Prices in motoring marketing communications

### Question 67

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

## Other questions

### Question 68

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Motoring rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 20: Employment, Homework Schemes and Business Opportunities

### Employment businesses

### Question 69

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

### Required information in marketing communications for homework schemes

### Question 70

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

### Vocational training and instruction courses

### Question 71

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

## Other Questions

### Question 72

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the

proposed Employment, Homework Schemes and Business Opportunities section, are necessary and easily understandable? If your answer is no, please explain why. **N/A**

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

iii) Do you have other comments on this section? **N/A**

## **Section 21: Tobacco, Rolling Papers and Filters**

### **Question 73**

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Tobacco, Rolling Papers and Filters rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## **Section 22: Other comments**

### **Question 74**

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

### **The Code Review**

#### **The Scope of the Code**

**4.ix The Digital Media Group (set up by the Advertising Association) is the communications industry policy group consisting of experts and practitioners from a variety of industry bodies, including traditional and digital media owners, agencies and advertisers. It is presently considering if and how the scope of CAP's Code might, for example, extend to an advertiser's claims that appear on that advertiser's website. Further information about this work will be communicated separately to this review.**

It is not clear from 4.ix to what extent online has been incorporated into the code. As stated in 4.viii "CAP's proposed Code will spell out, for the avoidance of any doubt, the extent to which new forms of digital advertising are already regulated by the ASA".

### **Comments on the CAP Code Review Consultation:**

1. The comments above for CAP (non-broadcast), apply equally to BCAP (broadcast).
2. There is a need for greater consistency between the CAP Code and BCAP Code.
3. There is no reference to the 'average consumer', as defined in the Consumer Protection Regulations (2008), in the CAP Code Review Consultation. The process was extremely

labour intensive and onerous. It was particularly difficult to cross-reference Annex 1 and Annex 2 as the former follows the order of the proposed Code, the latter the order of the current Code. The questions raised in Annex 1 were primarily concerned with the issues identified by CAP.

4. There is generally a need for greater guidance and transparency from CAP, in order for organisations to ensure compliance with the Code. As highlighted in the above comments, there is a need for further clarification of certain aspects of the Code. The ASA have previously indicated that they will do this.
5. The codes now state “must” instead of “should” with a view to removing any ambiguity within the Code. The Code should make reference to “must” only where legislation is in place e.g. CPR’s to ensure that the CAP and BCAP Codes do not have the appearance of creating law for what otherwise would be considered guidance. Akin to this, there should be no need for CAP/BCAP to ‘gold-plate’ the CPRs.
6. Adjudications which deal with issues of principle should be updated in the help notes.
7. The proposed Code gold plates aspects of the CPRs, including the requirements on what can be described as a ‘free’ item.

## Annex 3

# Consultation questions

You may respond to some or all of the consultation questions. This Annex is provided in Word format to enable you to copy and paste the questions into a document that should accompany your completed cover sheet, which is made available [here](#). See ‘Responding to this consultation’ in this Annex.

**THE COMMENTS BELOW FOR THE CAP (NON-BROADCAST) CODE REVIEW CONSULTATION APPLY EQUALLY TO BCAP (BROADCAST) CODE REVIEW CONSULTATION.**

## Section 1: Compliance

### Question 1

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Compliance rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **Yes**

### Compliance

#### Recent Changes to this section of the CAP Code

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

As stated in 1.iv “CAP intends its rules to be transparent, accountable, proportionate, consistent, targeted only where regulation is needed and written so that they are easily understood, easily implemented and easily enforced”. The rules need to be free from contradiction and ensure Marketers are aware of any potential issues, for example, the issue of Verifiability. CAP had the opportunity to formulate a CAP ruling following the Lidl case (2006). CAP instead chose to take action against one organisation and enforce a decision whereas an amend to the Code and communication of the amend would have been a better means of ensuring fairness and respect.

“Sector-specific rules”, should be defined or a help-note issued for the purposes of clarification.

The introduction of new relevant sector-specific rules should be communicated by CAP/copy advice team to ensure compliance from Marketers.

### Compliance Rules

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

"Fair" and "generally accepted" should be defined or a help-note issued for the purposes of clarification.

## **Compliance**

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

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

"Unreasonable delay" should be defined by CAP to ensure organisations respond to ASA enquiries within a specified period. The proposed requirement does not go far enough to ensure organisations respond within a specified period. CAP should consult then define what is reasonable. This would create consistency in the treatment of all cases and prevent organisations flouting the law or CAP rules by continuing to advertise when clear breaches of the Code or failure to substantiate have occurred.

The CAP Code 'Sanctions' also states "if a marketing communication is obviously misleading or offensive, the ASA and CAP may take compliance action in the absence of complaints or during an investigation". It is not clear under what circumstances such action will be taken. This should be explained for the purposes of clarification.

## **Section 2: Recognition of marketing communications**

### **Question 2**

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Recognition of Marketing Communications rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## **Section 3: Misleading**

### **Clarity of qualifications**

#### **Question 3**

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

## **Misleading Qualification**

**3.10 Qualifications must be clear to consumers who see or hear the marketing**

**communication only once.**

The reference to “hear” in the proposed CAP Code appears to be out of context given that the proposed Code is for non-broadcast communications. “Clear” should be defined, or guidance issued, to ensure Marketers comply with the requirements of the Code. Specifically, directions for the use of caveats, asterisks, bold etc. The requirement for qualifications to be clear to consumers who see the ad only “once” could result in complaints that have less to do with clarity and more to do with the period in which consumers had to comprehend the ad. It is therefore recommended that “only once” is deleted from 3.1.

## Exaggerated performance

### Question 4

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

**Misleading  
Exaggeration**

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

“Normal use” should be defined or a help-note issued for the purposes of clarification.

## Restrictions on availability

### Question 5

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

**Misleading  
Availability**

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

Under the proposed CAP code, the requirement for age limits to be included in marketing communications should be deleted as this is beyond the requirements of legislation. Under the CAP proposal, it is not clear whether there would be a requirement to display, for example, age restrictions for solvents (e.g. oven cleaner) and aerosols within marketing communications. This requirement appears to be beyond the powers of the ASA.

“Geographic restrictions” should be defined or a help-note issued for the purposes of clarification.

## Testimonials

### Question 6

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

### Additional rights provided by guarantees

#### Question 7

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

### The unavoidable cost of responding

#### Question 8

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

#### Misleading Free

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

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

It is considered that it is reasonable to expect customers to pay for packaging, in addition to postage, if this is clearly stated within the "free" offer e.g. "Excludes Post & Packaging" and the price charged for packaging appropriately reflects the cost to the organisation. Free refers to the product.

### Other questions

#### Question 9

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **Yes**

#### Misleading Prices – Principle



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

Given that the BERR's Pricing Practices Guide is not statutory, it is proposed that the reference to "should take account" is amended to "may have regard to" as the Code should reflect legislation including the Consumer Protection Regulations (2008). By stating "should take account" CAP may deem that a organisation has not complied with the BPPG, when compliance should be with the CPRs (2008).

### **Misleading Principle**

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

This requirement should be aligned with the Consumer Protection Regulations (2008) which make reference to the 'average consumer'. The reference to "impression" made here and elsewhere in the Code is too subjective and goes beyond legislation. In including "impression", CAP goes beyond its powers and the spirit of the legislation. Indeed, it could hold everything is in their "impression" misleading.

A single consumer could potentially complain that an "impression" was created – as a recent complaint (not upheld by the ASA) against Asda's "Big Rollback" demonstrated. The term "impression" can be viewed in a number of different ways and should not be used in this context.

The reference to "consumers" should be replaced with the "average consumer" – as per the CPRs – to better reflect the likely effect of communications on consumers.

### **Misleading Definition**

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

"Packaging" has been omitted from the list of charges and should be included.

### **Misleading Price Comparison**

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

The reference to "substantially equivalent" is not clear and it is not understood where such a requirement exists in current legislation.

The proposed requirement contradicts the "Retailers Price Comparisons" CAP help note, which states: "Marketers should, as far as is reasonably possible, compare products of the same, or very similar, quality (for example own-brand with own brand, brand with brand and premium with premium)."

No reference is made to “substantially equivalent”.

The reference is also in contradiction of the BERR Pricing Practices Guide which states: “In general you should compare like with like. This implies that the products compared should be the same or very similar”.

Again, no reference is made to “substantially equivalent”.

The Business Protection from Misleading Marketing Regulations 2008 state “Comparative advertising shall, as far as the comparison is concerned, be permitted only when the following conditions are met... it objectively compares one or more material, relevant, verifiable and representative features of those products, which may include price”.

The reference to “substantially equivalent” should be deleted as it not a legislative requirement nor is it referenced in any guidance.

## Section 4: Harm and Offence

### Flashing images

#### Question 10

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

### Other Questions

#### Question 11

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Harm and Offence rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 5: Children

### Promotions that contain a direct exhortation to buy a product

#### Question 12

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

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

#### Question 13

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

## Other questions

### Question 14

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Children rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 6: Privacy

### Question 15

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Privacy rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 7: Political Advertisements

### Question 16

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Political Advertisements rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 8: Sales Promotions

### Withholding prizes

### Question 17

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

## Promotions directed at children; the need for a closing date

### Question 18

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

## Prizes and Gifts

### Question 19

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

### Question 20

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

## Significant conditions exception: limited by time or space

### Question 21

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

## Sales Promotions

### Significant conditions for promotions

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

"Easily-accessible" should be explained e.g. would terms and conditions hosted on a website be considered easily-accessible?

## Distinction between prizes and gifts: a significant proportion

### Question 22

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

## Supervising Prize Draws

### Question 23

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

## Auditing instant-win promotions

### Question 24

- i) Do you agree that the present requirement, in CAP rule 35.8, for a promoter to obtain an independently audited statement that all prizes have been distributed, or made available for distribution on a fair and random basis is disproportionate and should not therefore be included in the Code? If your answer is no, please explain why?
- ii) Given CAP's policy consideration, do you agree that rule 8.25 should be included in the Code? If your answer is no, please explain why. **Yes**

## Judging of prize promotions

### Question 25

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

## Sales Promotions Prize Promotions

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

The requirement for an "independent judge" for national competitions appears inconsistent with the rules for regional competitions where no such requirement is specified. Also, promotions and competitions should be treated separately within the Code for clarity.

## Receipt of prizes: time

### Question 26

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

## Appeal to children

### Question 27

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

## Other questions

### Question 28

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Sales Promotions rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## **Section 9: Distance Selling**

### **Personal visits**

#### **Question 29**

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

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

#### **Question 30**

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

### **Other questions**

#### **Question 31**

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

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? **No**

iii) Do you have other comments on this section? **No**

## **Section 10: Database practice**

### **Collection of data from children**

#### **Question 32**

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

### **Explicit consent of consumers: Bluetooth**

#### **Question 33**

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

## Other questions

### Question 34

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Database Practice rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 11: Environmental Claims

### Question 35

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

## Other questions

### Question 36

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 12: Medicines, Treatments, Devices and Health

### Traditional Herbal Medicinal Products

### Question 37

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

## Medicinal claims

### Question 38

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

## Other questions

### Question 39

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

## Section 13: Weight Control and Slimming

### Targeting the obese

#### Question 40

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

### Loss of weight or fat from specific parts of the body

#### Question 41

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

### Very Low-Calorie Diets (VLCDs)

#### Question 42

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

### Other questions

#### Question 43

- i) Taking into account CAP's general policy objectives, do you agree that CAP's rules, included in the proposed Weight Control and Slimming Section are necessary and easily understandable? If your answer is no, please explain why? **Yes**
- ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Weight Control and Slimming rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**



iii) Do you have other comments on this section? **No**

## **Section 14: Financial products Individual Voluntary Arrangements (IVAs)**

### **Question 44**

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

### **Other questions**

### **Question 45**

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## **Section 15: Food, Dietary supplements and Associated Health and Nutrition claims**

### **Permitted nutrition and health claims**

### **Question 46**

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

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

### **Question 47**

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

### **Comparative nutrition claims**

### **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. **Yes**

### **Comparison with one product**

### **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. **Yes**

## Prohibitions

### 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. **Yes**

### 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. **Yes**

### 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. **Yes**

## The use of health professionals

### 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. **Yes**

## Food labelling Regulations (1996) (FLRs)

### 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. **Yes**

### 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. **Yes**

## Infant and follow-on formulae

### Question 56

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

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

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

## Other questions

### Question 57

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

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? **No**

iii) Do you have other comments on this section? **No**

## Section 16: Gambling

### Consistency: principle

#### Question 58

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

### Consistency: rules

#### Question 59

Given CAP's policy consideration, do you agree that the rules included in the Lottery Section of the Code are in line with CAP's general policy objectives (see Part 1 (4) of this consultation document) and should be applied to marketing communications for the National Lottery as they presently are to marketing communications for other lotteries? If your answer is no, please explain why and, if relevant, please identify those rules that should not be applied to marketing communications for the National Lottery. **Yes**

## Participating in a lottery in a working environment

#### Question 60

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

## Other questions

### Question 61

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this Section? **No**

## Section 18: Alcohol

### Alcoholic strength

#### Question 62

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

### Provision for low-alcohol drinks

#### Question 63

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

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

#### Question 64

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

### Other questions

#### Question 65

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Alcohol rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 19: Motoring

### The legal requirements of the Highway Code

#### Question 66

Given its policy consideration, do you agree with CAP's proposal to include rule 19.2 in the Code?

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

### Prices in motoring marketing communications

#### Question 67

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

### Other questions

#### Question 68

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Motoring rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 20: Employment, Homework Schemes and Business Opportunities

### Employment businesses

#### Question 69

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

### Required information in marketing communications for homework schemes

#### Question 70

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

### Vocational training and instruction courses

#### Question 71

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

### Other Questions

#### Question 72

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

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

iii) Do you have other comments on this section? **N/A**

## **Section 21: Tobacco, Rolling Papers and Filters**

### **Question 73**

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Tobacco, Rolling Papers and Filters rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## **Section 22: Other comments**

### **Question 74**

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

### **The Code Review**

#### **The Scope of the Code**

**4.ix The Digital Media Group (set up by the Advertising Association) is the communications industry policy group consisting of experts and practitioners from a variety of industry bodies, including traditional and digital media owners, agencies and advertisers. It is presently considering if and how the scope of CAP's Code might, for example, extend to an advertiser's claims that appear on that advertiser's website. Further information about this work will be communicated separately to this review.**

It is not clear from 4.ix to what extent online has been incorporated into the code. As stated in 4.viii "CAP's proposed Code will spell out, for the avoidance of any doubt, the extent to which new forms of digital advertising are already regulated by the ASA".

### **Comments on the CAP Code Review Consultation:**

1. The comments above for CAP (non-broadcast), apply equally to BCAP (broadcast).
2. There is a need for greater consistency between the CAP Code and BCAP Code.

3. There is no reference to the 'average consumer', as defined in the Consumer Protection Regulations (2008), in the CAP Code Review Consultation. The process was extremely labour intensive and onerous. It was particularly difficult to cross-reference Annex 1 and Annex 2 as the former follows the order of the proposed Code, the latter the order of the current Code. The questions raised in Annex 1 were primarily concerned with the issues identified by CAP.
4. There is generally a need for greater guidance and transparency from CAP, in order for organisations to ensure compliance with the Code. As highlighted in the above comments, there is a need for further clarification of certain aspects of the Code. The ASA have previously indicated that they will do this.
5. The codes now state "must" instead of "should" with a view to removing any ambiguity within the Code. The Code should make reference to "must" only where legislation is in place e.g. CPR's to ensure that the CAP and BCAP Codes do not have the appearance of creating law for what otherwise would be considered guidance. Akin to this, there should be no need for CAP/BCAP to 'gold-plate' the CPRs.
6. Adjudications which deal with issues of principle should be updated in the help notes.
7. The proposed Code gold plates aspects of the CPRs, including the requirements on what can be described as a 'free' item.

# Responding to this consultation

## How to respond

CAP invites written comments including supporting evidence on the proposals contained in this document, by 5pm on 19 June. Respondents should complete a consultation cover sheet, which is made available [here](#).

When responding, please state if you are doing so as an individual or if you are representing an organisation. Also, please make clear what your individual interest is or who your organisation represents. It will be helpful if you explain fully and clearly why you hold your opinion.

We strongly prefer to receive responses as e-mail attachments, in Microsoft Word format, because that helps us to process the responses.

Please send your response to [CAPcodereview@cap.org.uk](mailto:CAPcodereview@cap.org.uk).

If you are unable to reply by e-mail, you may submit your response by post or fax (+44 (0)20 7404 3404), marked with the title of the consultation, to:

CAP Code Review  
Code Policy Team  
Broadcast Committee of Advertising Practice  
Mid City Place  
71 High Holborn  
London WC1V 6QT

## Accessibility

We want our consultation process to be accessible to everyone. If you have particular accessibility needs please contact the Code Policy team and we shall be happy to help.

Telephone: 020 7492 2200

E-mail: [CAPcodereviewquestions@cap.org.uk](mailto:CAPcodereviewquestions@cap.org.uk)

Fax: 020 7404 3404

Textphone: 020 7242 8159

Note that we do not need a hard copy in addition to an electronic version. Also note that, other than an automated response to responses received by email, CAP will not routinely acknowledge receipt of responses.

CAP has sent written notification of this consultation to the organisations and individuals listed in this annex. We welcome suggestions of others you think should be informed of this consultation.

## More information



If you have any questions about this consultation or need advice on the form of response, please contact CAP's Code Policy team on +44 (0)20 7492 2200 or email us at [CAPcodereviewquestions@cap.org.uk](mailto:CAPcodereviewquestions@cap.org.uk).

### Confidentiality

CAP considers that everyone who is interested in the consultation should see the consultation responses. We shall publish all non-confidential responses on our website, [www.cap.org.uk](http://www.cap.org.uk), when we announce the outcome of the consultation.

All comments will be treated as non-confidential unless you state that all or a specified part of your response is confidential and should not be disclosed. If you reply by e-mail or fax, unless you include a specific statement to the contrary in your response, the presumption of non-confidentiality will override any confidentiality disclaimer generated by your organisation's IT system or included as a general statement on your fax cover sheet.

If part of a response is confidential, please put that in a separate annex so that non-confidential parts may be published with your identity. Confidential responses will be included in any statistical summary of numbers of comments received.

### Annex 3

## Consultation questions

You may respond to some or all of the consultation questions. This Annex is provided in Word format to enable you to copy and paste the questions into a document that should accompany your completed cover sheet, which is made available [here](#). See 'Responding to this consultation' in this Annex.

**THE COMMENTS BELOW FOR THE CAP (NON-BROADCAST) CODE REVIEW CONSULTATION APPLY EQUALLY TO BCAP (BROADCAST) CODE REVIEW CONSULTATION.**

### Section 1: Compliance

#### Question 1

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Compliance rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **Yes**

#### Compliance

#### Recent Changes to this section of the CAP Code

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

As stated in 1.iv "CAP intends its rules to be transparent, accountable, proportionate, consistent, targeted only where regulation is needed and written so that they are easily understood, easily implemented and easily enforced". The rules need to be free from contradiction and ensure Marketers are aware of any potential issues, for example, the issue of Verifiability. CAP had the opportunity to formulate a CAP ruling following the Lidl case (2006). CAP instead chose to take action against one organisation and enforce a decision whereas an amend to the Code and communication of the amend would have been a better means of ensuring fairness and respect.

"Sector-specific rules", should be defined or a help-note issued for the purposes of clarification.

The introduction of new relevant sector-specific rules should be communicated by CAP/copy advice team to ensure compliance from Marketers.

## **Compliance Rules**

<b>1.6 Marketing communications must respect the principles of fair competition generally accepted in business.</b>
---

"Fair" and "generally accepted" should be defined or a help-note issued for the purposes of clarification.

## **Compliance**

### **Meeting the need to ensure that marketing communications meet the standards set out in the Code**

<b>1.7 Any unreasonable delay in responding to the ASA's enquiries will normally be considered a breach of the Code.</b>
--

"Unreasonable delay" should be defined by CAP to ensure organisations respond to ASA enquiries within a specified period. The proposed requirement does not go far enough to ensure organisations respond within a specified period. CAP should consult then define what is reasonable. This would create consistency in the treatment of all cases and prevent organisations flouting the law or CAP rules by continuing to advertise when clear breaches of the Code or failure to substantiate have occurred.

The CAP Code 'Sanctions' also states "if a marketing communication is obviously misleading or offensive, the ASA and CAP may take compliance action in the absence of complaints or during an investigation". It is not clear under what circumstances such action will be taken. This should be explained for the purposes of clarification.

## **Section 2: Recognition of marketing communications**

### **Question 2**

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

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

present to the proposed Recognition of Marketing Communications rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 3: Misleading

### Clarity of qualifications

#### Question 3

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

#### Misleading Qualification

<b>3.10 Qualifications must be clear to consumers who see or hear the marketing communication only once.</b>
--

The reference to “hear” in the proposed CAP Code appears to be out of context given that the proposed Code is for non-broadcast communications. “Clear” should be defined, or guidance issued, to ensure Marketers comply with the requirements of the Code. Specifically, directions for the use of caveats, asterisks, bold etc. The requirement for qualifications to be clear to consumers who see the ad only “once” could result in complaints that have less to do with clarity and more to do with the period in which consumers had to comprehend the ad. It is therefore recommended that “only once” is deleted from 3.1.

### Exaggerated performance

#### Question 4

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

#### Misleading Exaggeration

<b>3.11 Marketing communications must not exaggerate the capability or performance of a product; claims must be based on normal use.</b>
--

“Normal use” should be defined or a help-note issued for the purposes of clarification.

### Restrictions on availability

#### Question 5

Given CAP’s policy consideration, do you agree with the revisions made to rule 3.28.3? If your

answer is no, please explain why. **No**

### **Misleading Availability**

#### **3.28.3 Marketing communications must state restrictions on the availability of products, for example, geographical restrictions or age limits.**

Under the proposed CAP code, the requirement for age limits to be included in marketing communications should be deleted as this is beyond the requirements of legislation. Under the CAP proposal, it is not clear whether there would be a requirement to display, for example, age restrictions for solvents (e.g. oven cleaner) and aerosols within marketing communications. This requirement appears to be beyond the powers of the ASA.

“Geographic restrictions” should be defined or a help-note issued for the purposes of clarification.

### **Testimonials**

#### **Question 6**

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

### **Additional rights provided by guarantees**

#### **Question 7**

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

### **The unavoidable cost of responding**

#### **Question 8**

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

### **Misleading Free**

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

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

It is considered that it is reasonable to expect customers to pay for packaging, in addition to postage, if this is clearly stated within the “free” offer e.g. “Excludes Post & Packaging” and the price charged for packaging appropriately reflects the cost to the organisation. Free refers to the

product.

## Other questions

### Question 9

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

**Yes**

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **Yes**

### Misleading Prices – Principle

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

Given that the BERR's Pricing Practices Guide is not statutory, it is proposed that the reference to "should take account" is amended to "may have regard to" as the Code should reflect legislation including the Consumer Protection Regulations (2008). By stating "should take account" CAP may deem that a organisation has not complied with the BPPG, when compliance should be with the CPRs (2008).

### Misleading Principle

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

This requirement should be aligned with the Consumer Protection Regulations (2008) which make reference to the 'average consumer'. The reference to "impression" made here and elsewhere in the Code is too subjective and goes beyond legislation. In including "impression", CAP goes beyond its powers and the spirit of the legislation. Indeed, it could hold everything is in their "impression" misleading.

A single consumer could potentially complain that an "impression" was created – as a recent complaint (not upheld by the ASA) against Asda's "Big Rollback" demonstrated. The term "impression" can be viewed in a number of different ways and should not be used in this context.

The reference to "consumers" should be replaced with the "average consumer" – as per the CPRs – to better reflect the likely effect of communications on consumers.

### Misleading Definition

<b>3.20 Marketing communications that state prices must also state applicable delivery, freight or postal charges or, if those cannot reasonably be calculated in advance, state that such charges are payable.</b>
---

“Packaging” has been omitted from the list of charges and should be included.

## **Misleading Price Comparison**

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

The reference to “substantially equivalent” is not clear and it is not understood where such a requirement exists in current legislation.

The proposed requirement contradicts the “Retailers Price Comparisons” CAP help note, which states: “Marketers should, as far as is reasonably possible, compare products of the same, or very similar, quality (for example own-brand with own brand, brand with brand and premium with premium).”

No reference is made to “substantially equivalent”.

The reference is also in contradiction of the BERR Pricing Practices Guide which states: “In general you should compare like with like. This implies that the products compared should be the same or very similar”.

Again, no reference is made to “substantially equivalent”.

The Business Protection from Misleading Marketing Regulations 2008 state “Comparative advertising shall, as far as the comparison is concerned, be permitted only when the following conditions are met... it objectively compares one or more material, relevant, verifiable and representative features of those products, which may include price”.

The reference to “substantially equivalent” should be deleted as it not a legislative requirement nor is it referenced in any guidance.

## **Section 4: Harm and Offence**

### **Flashing images**

#### **Question 10**

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

### **Other Questions**

#### **Question 11**

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

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

retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 5: Children

### Promotions that contain a direct exhortation to buy a product

#### Question 12

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

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

#### Question 13

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

### Other questions

#### Question 14

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Children rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 6: Privacy

### Question 15

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Privacy rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 7: Political Advertisements

### Question 16

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Political Advertisements rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## **Section 8: Sales Promotions**

### **Withholding prizes**

#### **Question 17**

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

### **Promotions directed at children; the need for a closing date**

#### **Question 18**

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

### **Prizes and Gifts**

#### **Question 19**

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

#### **Question 20**

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

### **Significant conditions exception: limited by time or space**

#### **Question 21**

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

## **Sales Promotions**

### **Significant conditions for promotions**

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



**to retain those conditions or easily access them throughout the promotion.**

“Easily-accessible” should be explained e.g. would terms and conditions hosted on a website be considered easily-accessible?

### **Distinction between prizes and gifts: a significant proportion**

#### **Question 22**

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

### **Supervising Prize Draws**

#### **Question 23**

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

### **Auditing instant-win promotions**

#### **Question 24**

- i) Do you agree that the present requirement, in CAP rule 35.8, for a promoter to obtain an independently audited statement that all prizes have been distributed, or made available for distribution on a fair and random basis is disproportionate and should not therefore be included in the Code? If your answer is no, please explain why?
- ii) Given CAP’s policy consideration, do you agree that rule 8.25 should be included in the Code? If your answer is no, please explain why. **Yes**

### **Judging of prize promotions**

#### **Question 25**

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

### **Sales Promotions Prize Promotions**

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

The requirement for an “independent judge” for national competitions appears inconsistent with the rules for regional competitions where no such requirement is specified. Also, promotions and competitions should be treated separately within the Code for clarity.

### **Receipt of prizes: time**

### Question 26

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

### Appeal to children

### Question 27

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

### Other questions

### Question 28

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Sales Promotions rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 9: Distance Selling

### Personal visits

### Question 29

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

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

### Question 30

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

### Other questions

### Question 31

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

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? **No**

iii) Do you have other comments on this section? **No**

## Section 10: Database practice

### Collection of data from children

#### Question 32

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

### Explicit consent of consumers: Bluetooth

#### Question 33

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

### Other questions

#### Question 34

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Database Practice rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 11: Environmental Claims

#### Question 35

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

### Other questions

#### Question 36

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## **Section 12: Medicines, Treatments, Devices and Health**

### **Traditional Herbal Medicinal Products**

#### **Question 37**

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

### **Medicinal claims**

#### **Question 38**

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

### **Other questions**

#### **Question 39**

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Medicines, Treatments, Devices and Health rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## **Section 13: Weight Control and Slimming**

### **Targeting the obese**

#### **Question 40**

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

### **Loss of weight or fat from specific parts of the body**

#### **Question 41**

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

## Very Low-Calorie Diets (VLCDs)

### Question 42

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

## Other questions

### Question 43

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Weight Control and Slimming rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 14: Financial products Individual Voluntary Arrangements (IVAs)

### Question 44

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

## Other questions

### Question 45

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 15: Food, Dietary supplements and Associated Health and Nutrition claims

## Permitted nutrition and health claims

### Question 46

Do you agree CAP has correctly reflected the requirements of Articles 8(1), 10(1) and 28 of the

NHCR in CAP's proposed rules 15.1.1 and 15.1.2? If your answer is no, please explain why. **Yes**

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

#### **Question 47**

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

### **Comparative nutrition claims**

#### **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. **Yes**

### **Comparison with one product**

#### **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. **Yes**

### **Prohibitions**

#### **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. **Yes**

#### **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. **Yes**

#### **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. **Yes**

### **The use of health professionals**

#### **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. **Yes**

### **Food labelling Regulations (1996) (FLRs)**

#### **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. **Yes**

#### **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. **Yes**

### **Infant and follow-on formulae**

#### **Question 56**

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

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

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

### **Other questions**

#### **Question 57**

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

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? **No**

iii) Do you have other comments on this section? **No**

## **Section 16: Gambling**

### **Consistency: principle**

#### **Question 58**

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

### **Consistency: rules**

#### **Question 59**

Given CAP's policy consideration, do you agree that the rules included in the Lottery Section of the Code are in line with CAP's general policy objectives (see Part 1 (4) of this consultation document) and should be applied to marketing communications for the National Lottery as they presently are to marketing communications for other lotteries? If your answer is no, please explain why and, if relevant, please identify those rules that should not be applied to marketing communications for the National Lottery. **Yes**

### Participating in a lottery in a working environment

#### Question 60

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

### Other questions

#### Question 61

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this Section? **No**

## Section 18: Alcohol

### Alcoholic strength

#### Question 62

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

### Provision for low-alcohol drinks

#### Question 63

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

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

#### Question 64

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



## Other questions

### Question 65

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

## Section 19: Motoring

### The legal requirements of the Highway Code

#### Question 66

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

### Prices in motoring marketing communications

#### Question 67

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

## Other questions

### Question 68

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

## Section 20: Employment, Homework Schemes and Business Opportunities

### Employment businesses

#### Question 69

Given its policy consideration, do you agree with CAP's proposal to extend the requirements of the present rule on marketing communications by employment agencies to cover marketing

communications by employment businesses? If your answer is no, please explain why. **N/A**

### Required information in marketing communications for homework schemes

#### Question 70

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

### Vocational training and instruction courses

#### Question 71

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

### Other Questions

#### Question 72

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

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

iii) Do you have other comments on this section? **N/A**

## Section 21: Tobacco, Rolling Papers and Filters

#### Question 73

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Tobacco, Rolling Papers and Filters rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 22: Other comments

#### Question 74

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

## **The Code Review**

### **The Scope of the Code**

**4.ix The Digital Media Group (set up by the Advertising Association) is the communications industry policy group consisting of experts and practitioners from a variety of industry bodies, including traditional and digital media owners, agencies and advertisers. It is presently considering if and how the scope of CAP's Code might, for example, extend to an advertiser's claims that appear on that advertiser's website. Further information about this work will be communicated separately to this review.**

It is not clear from 4.ix to what extent online has been incorporated into the code. As stated in 4.viii "CAP's proposed Code will spell out, for the avoidance of any doubt, the extent to which new forms of digital advertising are already regulated by the ASA".

### **Comments on the CAP Code Review Consultation:**

1. The comments above for CAP (non-broadcast), apply equally to BCAP (broadcast).
2. There is a need for greater consistency between the CAP Code and BCAP Code.
3. There is no reference to the 'average consumer', as defined in the Consumer Protection Regulations (2008), in the CAP Code Review Consultation. The process was extremely labour intensive and onerous. It was particularly difficult to cross-reference Annex 1 and Annex 2 as the former follows the order of the proposed Code, the latter the order of the current Code. The questions raised in Annex 1 were primarily concerned with the issues identified by CAP.
4. There is generally a need for greater guidance and transparency from CAP, in order for organisations to ensure compliance with the Code. As highlighted in the above comments, there is a need for further clarification of certain aspects of the Code. The ASA have previously indicated that they will do this.
5. The codes now state "must" instead of "should" with a view to removing any ambiguity within the Code. The Code should make reference to "must" only where legislation is in place e.g. CPR's to ensure that the CAP and BCAP Codes do not have the appearance of creating law for what otherwise would be considered guidance. Akin to this, there should be no need for CAP/BCAP to 'gold-plate' the CPRs.
6. Adjudications which deal with issues of principle should be updated in the help notes.
7. The proposed Code gold plates aspects of the CPRs, including the requirements on what can be described as a 'free' item.

# Responding to this consultation

## How to respond

CAP invites written comments including supporting evidence on the proposals contained in this document, by 5pm on 19 June. Respondents should complete a consultation cover sheet, which is made available [here](#).

When responding, please state if you are doing so as an individual or if you are representing an organisation. Also, please make clear what your individual interest is or who your organisation represents. It will be helpful if you explain fully and clearly why you hold your opinion.

We strongly prefer to receive responses as e-mail attachments, in Microsoft Word format, because that helps us to process the responses.

Please send your response to [CAPcodereview@cap.org.uk](mailto:CAPcodereview@cap.org.uk).

If you are unable to reply by e-mail, you may submit your response by post or fax (+44 (0)20 7404 3404), marked with the title of the consultation, to:

CAP Code Review  
Code Policy Team  
Broadcast Committee of Advertising Practice  
Mid City Place  
71 High Holborn  
London WC1V 6QT

## Accessibility

We want our consultation process to be accessible to everyone. If you have particular accessibility needs please contact the Code Policy team and we shall be happy to help.

Telephone: 020 7492 2200

E-mail: [CAPcodereviewquestions@cap.org.uk](mailto:CAPcodereviewquestions@cap.org.uk)

Fax: 020 7404 3404

Textphone: 020 7242 8159

Note that we do not need a hard copy in addition to an electronic version. Also note that, other than an automated response to responses received by email, CAP will not routinely acknowledge receipt of responses.

CAP has sent written notification of this consultation to the organisations and individuals listed in this annex. We welcome suggestions of others you think should be informed of this consultation.

## More information

If you have any questions about this consultation or need advice on the form of response, please contact CAP's Code Policy team on +44 (0)20 7492 2200 or email us at [CAPcodereviewquestions@cap.org.uk](mailto:CAPcodereviewquestions@cap.org.uk).

### **Confidentiality**

CAP considers that everyone who is interested in the consultation should see the consultation responses. We shall publish all non-confidential responses on our website, [www.cap.org.uk](http://www.cap.org.uk), when we announce the outcome of the consultation.

All comments will be treated as non-confidential unless you state that all or a specified part of your response is confidential and should not be disclosed. If you reply by e-mail or fax, unless you include a specific statement to the contrary in your response, the presumption of non-confidentiality will override any confidentiality disclaimer generated by your organisation's IT system or included as a general statement on your fax cover sheet.

If part of a response is confidential, please put that in a separate annex so that non-confidential parts may be published with your identity. Confidential responses will be included in any statistical summary of numbers of comments received.

## Annex 3

# Consultation questions

You may respond to some or all of the consultation questions. This Annex is provided in Word format to enable you to copy and paste the questions into a document that should accompany your completed cover sheet, which is made available [here](#). See 'Responding to this consultation' in this Annex.

**THE COMMENTS BELOW FOR THE CAP (NON-BROADCAST) CODE REVIEW CONSULTATION APPLY EQUALLY TO BCAP (BROADCAST) CODE REVIEW CONSULTATION.**

## Section 1: Compliance

### Question 1

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Compliance rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **Yes**

### Compliance

#### Recent Changes to this section of the CAP Code

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

As stated in 1.iv "CAP intends its rules to be transparent, accountable, proportionate, consistent, targeted only where regulation is needed and written so that they are easily understood, easily implemented and easily enforced". The rules need to be free from contradiction and ensure Marketers are aware of any potential issues, for example, the issue of Verifiability. CAP had the opportunity to formulate a CAP ruling following the Lidl case (2006). CAP instead chose to take action against one organisation and enforce a decision whereas an amend to the Code and communication of the amend would have been a better means of ensuring fairness and respect.

"Sector-specific rules", should be defined or a help-note issued for the purposes of clarification.

The introduction of new relevant sector-specific rules should be communicated by CAP/copy advice team to ensure compliance from Marketers.

### Compliance Rules

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

"Fair" and "generally accepted" should be defined or a help-note issued for the purposes of

clarification.

## **Compliance**

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

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

"Unreasonable delay" should be defined by CAP to ensure organisations respond to ASA enquiries within a specified period. The proposed requirement does not go far enough to ensure organisations respond within a specified period. CAP should consult then define what is reasonable. This would create consistency in the treatment of all cases and prevent organisations flouting the law or CAP rules by continuing to advertise when clear breaches of the Code or failure to substantiate have occurred.

The CAP Code 'Sanctions' also states "if a marketing communication is obviously misleading or offensive, the ASA and CAP may take compliance action in the absence of complaints or during an investigation". It is not clear under what circumstances such action will be taken. This should be explained for the purposes of clarification.

## **Section 2: Recognition of marketing communications**

### **Question 2**

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Recognition of Marketing Communications rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## **Section 3: Misleading**

### **Clarity of qualifications**

#### **Question 3**

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

## **Misleading Qualification**

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

The reference to “hear” in the proposed CAP Code appears to be out of context given that the proposed Code is for non-broadcast communications. “Clear” should be defined, or guidance issued, to ensure Marketers comply with the requirements of the Code. Specifically, directions for the use of caveats, asterisks, bold etc. The requirement for qualifications to be clear to consumers who see the ad only “once” could result in complaints that have less to do with clarity and more to do with the period in which consumers had to comprehend the ad. It is therefore recommended that “only once” is deleted from 3.1.

## Exaggerated performance

### Question 4

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

**Misleading  
Exaggeration**

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

“Normal use” should be defined or a help-note issued for the purposes of clarification.

## Restrictions on availability

### Question 5

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

**Misleading  
Availability**

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

Under the proposed CAP code, the requirement for age limits to be included in marketing communications should be deleted as this is beyond the requirements of legislation. Under the CAP proposal, it is not clear whether there would be a requirement to display, for example, age restrictions for solvents (e.g. oven cleaner) and aerosols within marketing communications. This requirement appears to be beyond the powers of the ASA.

“Geographic restrictions” should be defined or a help-note issued for the purposes of clarification.

## Testimonials

### Question 6

Given CAP’s policy consideration, do you agree that rule 3.45 should be amended to require



documentary evidence and contact details only? If your answer is no, please explain why. **Yes**

### Additional rights provided by guarantees

#### Question 7

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

### The unavoidable cost of responding

#### Question 8

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

#### Misleading Free

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

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

It is considered that it is reasonable to expect customers to pay for packaging, in addition to postage, if this is clearly stated within the "free" offer e.g. "Excludes Post & Packaging" and the price charged for packaging appropriately reflects the cost to the organisation. Free refers to the product.

### Other questions

#### Question 9

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **Yes**

#### Misleading Prices – Principle

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

Given that the BERR's Pricing Practices Guide is not statutory, it is proposed that the reference to "should take account" is amended to "may have regard to" as the Code should reflect legislation including the Consumer Protection Regulations (2008). By stating "should take account" CAP may deem that a organisation has not complied with the BPPG, when compliance should be with the CPRs (2008).

#### **Misleading Principle**

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

This requirement should be aligned with the Consumer Protection Regulations (2008) which make reference to the 'average consumer'. The reference to "impression" made here and elsewhere in the Code is too subjective and goes beyond legislation. In including "impression", CAP goes beyond its powers and the spirit of the legislation. Indeed, it could hold everything is in their "impression" misleading.

A single consumer could potentially complain that an "impression" was created – as a recent complaint (not upheld by the ASA) against Asda's "Big Rollback" demonstrated. The term "impression" can be viewed in a number of different ways and should not be used in this context.

The reference to "consumers" should be replaced with the "average consumer" – as per the CPRs – to better reflect the likely effect of communications on consumers.

#### **Misleading Definition**

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

"Packaging" has been omitted from the list of charges and should be included.

#### **Misleading Price Comparison**

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

The reference to "substantially equivalent" is not clear and it is not understood where such a requirement exists in current legislation.

The proposed requirement contradicts the "Retailers Price Comparisons" CAP help note, which states: "Marketers should, as far as is reasonably possible, compare products of the same, or very similar, quality (for example own-brand with own brand, brand with brand and premium with premium)."

No reference is made to “substantially equivalent”.

The reference is also in contradiction of the BERR Pricing Practices Guide which states: “In general you should compare like with like. This implies that the products compared should be the same or very similar”.

Again, no reference is made to “substantially equivalent”.

The Business Protection from Misleading Marketing Regulations 2008 state “Comparative advertising shall, as far as the comparison is concerned, be permitted only when the following conditions are met... it objectively compares one or more material, relevant, verifiable and representative features of those products, which may include price”.

The reference to “substantially equivalent” should be deleted as it not a legislative requirement nor is it referenced in any guidance.

## Section 4: Harm and Offence

### Flashing images

#### Question 10

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

### Other Questions

#### Question 11

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Harm and Offence rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 5: Children

### Promotions that contain a direct exhortation to buy a product

#### Question 12

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

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

#### Question 13

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

## Other questions

### Question 14

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Children rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 6: Privacy

### Question 15

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Privacy rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 7: Political Advertisements

### Question 16

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Political Advertisements rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 8: Sales Promotions

### Withholding prizes

### Question 17

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

## Promotions directed at children; the need for a closing date

### Question 18

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

## Prizes and Gifts

### Question 19

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

### Question 20

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

## Significant conditions exception: limited by time or space

### Question 21

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

## Sales Promotions

### Significant conditions for promotions

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

"Easily-accessible" should be explained e.g. would terms and conditions hosted on a website be considered easily-accessible?

## Distinction between prizes and gifts: a significant proportion

### Question 22

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

## Supervising Prize Draws

### Question 23

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

## Auditing instant-win promotions

### Question 24

- i) Do you agree that the present requirement, in CAP rule 35.8, for a promoter to obtain an independently audited statement that all prizes have been distributed, or made available for distribution on a fair and random basis is disproportionate and should not therefore be included in the Code? If your answer is no, please explain why?
- ii) Given CAP's policy consideration, do you agree that rule 8.25 should be included in the Code? If your answer is no, please explain why. **Yes**

## Judging of prize promotions

### Question 25

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

## Sales Promotions Prize Promotions

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

The requirement for an "independent judge" for national competitions appears inconsistent with the rules for regional competitions where no such requirement is specified. Also, promotions and competitions should be treated separately within the Code for clarity.

## Receipt of prizes: time

### Question 26

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

## Appeal to children

### Question 27

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

## Other questions

### Question 28

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Sales Promotions rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## **Section 9: Distance Selling**

### **Personal visits**

#### **Question 29**

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

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

#### **Question 30**

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

### **Other questions**

#### **Question 31**

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

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? **No**

iii) Do you have other comments on this section? **No**

## **Section 10: Database practice**

### **Collection of data from children**

#### **Question 32**

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

### **Explicit consent of consumers: Bluetooth**

#### **Question 33**

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

## Other questions

### Question 34

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Database Practice rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 11: Environmental Claims

### Question 35

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

## Other questions

### Question 36

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 12: Medicines, Treatments, Devices and Health

### Traditional Herbal Medicinal Products

### Question 37

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

## Medicinal claims

### Question 38

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

## Other questions



### Question 39

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

## Section 13: Weight Control and Slimming

### Targeting the obese

#### Question 40

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

### Loss of weight or fat from specific parts of the body

#### Question 41

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

### Very Low-Calorie Diets (VLCDs)

#### Question 42

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

### Other questions

#### Question 43

- i) Taking into account CAP's general policy objectives, do you agree that CAP's rules, included in the proposed Weight Control and Slimming Section are necessary and easily understandable? If your answer is no, please explain why? **Yes**
- ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Weight Control and Slimming rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## **Section 14: Financial products Individual Voluntary Arrangements (IVAs)**

### **Question 44**

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

### **Other questions**

### **Question 45**

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## **Section 15: Food, Dietary supplements and Associated Health and Nutrition claims**

### **Permitted nutrition and health claims**

### **Question 46**

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

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

### **Question 47**

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

### **Comparative nutrition claims**

### **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. **Yes**

### **Comparison with one product**

### **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. **Yes**

## Prohibitions

### 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. **Yes**

### 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. **Yes**

### 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. **Yes**

## The use of health professionals

### 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. **Yes**

## Food labelling Regulations (1996) (FLRs)

### 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. **Yes**

### 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. **Yes**

## Infant and follow-on formulae

### Question 56

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

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

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

## Other questions

### Question 57

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

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? **No**

iii) Do you have other comments on this section? **No**

## Section 16: Gambling

### Consistency: principle

#### Question 58

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

### Consistency: rules

#### Question 59

Given CAP's policy consideration, do you agree that the rules included in the Lottery Section of the Code are in line with CAP's general policy objectives (see Part 1 (4) of this consultation document) and should be applied to marketing communications for the National Lottery as they presently are to marketing communications for other lotteries? If your answer is no, please explain why and, if relevant, please identify those rules that should not be applied to marketing communications for the National Lottery. **Yes**

## Participating in a lottery in a working environment

#### Question 60

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

## Other questions

### Question 61

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration? **No**

iii) Do you have other comments on this Section? **No**

## Section 18: Alcohol

### Alcoholic strength

#### Question 62

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

### Provision for low-alcohol drinks

#### Question 63

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

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

#### Question 64

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

### Other questions

#### Question 65

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Alcohol rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 19: Motoring

### The legal requirements of the Highway Code

#### Question 66

Given its policy consideration, do you agree with CAP's proposal to include rule 19.2 in the Code?

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

### Prices in motoring marketing communications

#### Question 67

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

### Other questions

#### Question 68

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Motoring rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## Section 20: Employment, Homework Schemes and Business Opportunities

### Employment businesses

#### Question 69

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

### Required information in marketing communications for homework schemes

#### Question 70

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

### Vocational training and instruction courses

#### Question 71

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

### Other Questions

#### Question 72

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

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

iii) Do you have other comments on this section? **N/A**

## **Section 21: Tobacco, Rolling Papers and Filters**

### **Question 73**

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

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Tobacco, Rolling Papers and Filters rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration? **No**

iii) Do you have other comments on this section? **No**

## **Section 22: Other comments**

### **Question 74**

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

### **The Code Review**

#### **The Scope of the Code**

**4.ix The Digital Media Group (set up by the Advertising Association) is the communications industry policy group consisting of experts and practitioners from a variety of industry bodies, including traditional and digital media owners, agencies and advertisers. It is presently considering if and how the scope of CAP's Code might, for example, extend to an advertiser's claims that appear on that advertiser's website. Further information about this work will be communicated separately to this review.**

It is not clear from 4.ix to what extent online has been incorporated into the code. As stated in 4.viii "CAP's proposed Code will spell out, for the avoidance of any doubt, the extent to which new forms of digital advertising are already regulated by the ASA".

### **Comments on the CAP Code Review Consultation:**

1. The comments above for CAP (non-broadcast), apply equally to BCAP (broadcast).
2. There is a need for greater consistency between the CAP Code and BCAP Code.

3. There is no reference to the 'average consumer', as defined in the Consumer Protection Regulations (2008), in the CAP Code Review Consultation. The process was extremely labour intensive and onerous. It was particularly difficult to cross-reference Annex 1 and Annex 2 as the former follows the order of the proposed Code, the latter the order of the current Code. The questions raised in Annex 1 were primarily concerned with the issues identified by CAP.
4. There is generally a need for greater guidance and transparency from CAP, in order for organisations to ensure compliance with the Code. As highlighted in the above comments, there is a need for further clarification of certain aspects of the Code. The ASA have previously indicated that they will do this.
5. The codes now state "must" instead of "should" with a view to removing any ambiguity within the Code. The Code should make reference to "must" only where legislation is in place e.g. CPR's to ensure that the CAP and BCAP Codes do not have the appearance of creating law for what otherwise would be considered guidance. Akin to this, there should be no need for CAP/BCAP to 'gold-plate' the CPRs.
6. Adjudications which deal with issues of principle should be updated in the help notes.
7. The proposed Code gold plates aspects of the CPRs, including the requirements on what can be described as a 'free' item.



# Responding to this consultation

## How to respond

CAP invites written comments including supporting evidence on the proposals contained in this document, by 5pm on 19 June. Respondents should complete a consultation cover sheet, which is made available [here](#).

When responding, please state if you are doing so as an individual or if you are representing an organisation. Also, please make clear what your individual interest is or who your organisation represents. It will be helpful if you explain fully and clearly why you hold your opinion.

We strongly prefer to receive responses as e-mail attachments, in Microsoft Word format, because that helps us to process the responses.

Please send your response to [CAPcodereview@cap.org.uk](mailto:CAPcodereview@cap.org.uk).

If you are unable to reply by e-mail, you may submit your response by post or fax (+44 (0)20 7404 3404), marked with the title of the consultation, to:

CAP Code Review  
Code Policy Team  
Broadcast Committee of Advertising Practice  
Mid City Place  
71 High Holborn  
London WC1V 6QT

## Accessibility

We want our consultation process to be accessible to everyone. If you have particular accessibility needs please contact the Code Policy team and we shall be happy to help.

Telephone: 020 7492 2200

E-mail: [CAPcodereviewquestions@cap.org.uk](mailto:CAPcodereviewquestions@cap.org.uk)

Fax: 020 7404 3404

Textphone: 020 7242 8159

Note that we do not need a hard copy in addition to an electronic version. Also note that, other than an automated response to responses received by email, CAP will not routinely acknowledge receipt of responses.

CAP has sent written notification of this consultation to the organisations and individuals listed in this annex. We welcome suggestions of others you think should be informed of this consultation.

## More information

If you have any questions about this consultation or need advice on the form of response, please contact CAP's Code Policy team on +44 (0)20 7492 2200 or email us at [CAPcodereviewquestions@cap.org.uk](mailto:CAPcodereviewquestions@cap.org.uk).

### **Confidentiality**

CAP considers that everyone who is interested in the consultation should see the consultation responses. We shall publish all non-confidential responses on our website, [www.cap.org.uk](http://www.cap.org.uk), when we announce the outcome of the consultation.

All comments will be treated as non-confidential unless you state that all or a specified part of your response is confidential and should not be disclosed. If you reply by e-mail or fax, unless you include a specific statement to the contrary in your response, the presumption of non-confidentiality will override any confidentiality disclaimer generated by your organisation's IT system or included as a general statement on your fax cover sheet.

If part of a response is confidential, please put that in a separate annex so that non-confidential parts may be published with your identity. Confidential responses will be included in any statistical summary of numbers of comments received.



CAP Code Review  
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**19 June 2009**

## **CAP Code Review 2009**

### **Consultation on the proposed CAP Code**

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

### **AIME Submission**

#### **About AIME ( [www.aimelink.org](http://www.aimelink.org) )**

AIME is a UK based trade association that promotes excellence in the Interactive Media and Entertainment industry.

We uphold our Code of Ethics and create an environment of consumer trust and industry confidence within which our members' commerce can grow. We are committed to furthering the interests of Interactive Media and Entertainment through the regular exchange of information and communication throughout the value chain, effective engagement with regulators and legislators and the presentation of a successful industry image to media.

We are the only trade association with membership across all elements of the Interactive Media and Entertainment value chain.

AIME promotes the philosophy that consumers who are accurately and openly informed of the nature, content and cost of participation in an interactive service

experience are perfectly placed to exercise their freedom of choice and thereby enjoy the most effective form of consumer protection.

We welcome the opportunity to respond to this review of the CAP Code (last reviewed over 5 years ago) to ensure the rules for non-broadcast advertisements, sales promotion and direct marketing communications are up to date and fit for purpose.

## **1. General**

The stated aim of CAP (The Committee of Advertising Practice) is to ensure that all non broadcast marketing communications covered by the self regulatory CAP Code, which is declared to be media neutral, are legal, decent, honest and truthful and prepared with a due sense of social and professional responsibility and yet retain an environment in which responsible advertising can flourish. CAP intends its rules to be transparent, accountable, proportionate, consistent, targeted only where regulation is needed and written so that they are easily understood, easily implemented and easily enforced.

We particularly note the resolve to continue to offer necessary protection for the public but with due consideration to ensure a level playing field for the non-broadcast advertising industry.

AIME is totally supportive of the need to apply sensible standards to advertising and also believes that it is of paramount importance that regulation itself should abide by best regulation principles and standards to avoid creating impediments to legitimate and responsible business and associated advertising.

AIME also takes the view that, where practicable, a Code of Practice should consist of core statements of requirements surrounded by flexible Help Notes or Guidelines which can be readily adapted to changing circumstances. Codes which are too prescriptive in nature are eventually ineffective as they become cumbersome and difficult to understand and administer.

## **2. Sectors**

### **2.1 Compliance**

The ASA/CAP self-regulatory system is recognised by the Government, Office of Fair Trading and the Courts as one of the “established means” of consumer protection in non-broadcast marketing communications. Any matter that principally concerns a legal dispute will normally need to be resolved through law enforcement agencies or the Courts. There are no substantive changes proposed to the rules in this section.

#### **Question 1**

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

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

**Answer 1**

AIME believes the rules to be necessary and easily understandable but would like to see more emphasis placed on a Principles based Code with flexible Help Notes or Guidelines offering examples or clarification.

**2.2 Recognition of Marketing Communications**

The CPRs (Consumer Protection from Unfair Trading Practices Regulations 2008) came into force on 26 May 2008. Marketing communications are a form of trading practice and are therefore subject to the CPRs. CAP amended its Codes to ensure that they were in line with the new legal requirements and the amended Codes came into force on 21 November 2008. The CAP Code has long-established the need to ensure that marketing communications are clear and do not have the potential to cause confusion, mislead or otherwise be unfair. There are no substantive changes proposed to the rules in this section.

**Question 2**

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

**Answer 2**

AIME believes the rules to be necessary and easily understandable and favours an approach of ensuring clear labeling of cost and content to enable consumers to exercise freedom of informed choice.

**2.3 Misleading**

The Office of Fair Trading (OFT) is the UK's consumer and competition authority. The OFT formally recognises the ASA as a first line of control in protecting consumers from unfair advertising: advertising that misleads, is aggressive or otherwise unfair.

Two of the founding principles of advertising self-regulation are that advertising must be honest and truthful. CAP notes that an increasing number of non-broadcast advertising media, whether online, outdoor or on mobile

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

### **Clarity of qualifications**

3.10

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

Question 3

*Do you agree that rule 3.10 should be included in the Code?*

Answer 3

Agreed but add Restrictions or qualifications...

### **Exaggerated performance**

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

3.11

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

Question 4

*Do you agree that rule 3.11 should be included in the Code?*

Answer 4

AIME believes it sees a problem here since obvious exaggeration can often be an acceptable part of creative advertising. We suggest “not exaggerate to mislead or deceive” as a more acceptable form.

### **Restrictions on availability**

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

3.28

Marketing communications that quote a price for a featured product must state any reasonable grounds the marketer has for believing that it might not be able to supply the advertised (or an equivalent) product at the

advertised price within a reasonable period and in reasonable quantities.  
In particular:

3.28.3

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

Question 5

*Given CAP's policy consideration, do you agree with the revisions made to rule 3.28.3?*

Answer 5

Agreed

### **Testimonials**

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

3.45

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

Question 6

*Given CAP's policy consideration, do you agree that rule 3.45 should be amended to require documentary evidence and contact details only?*

Answer 6

Agreed

### **Additional rights provided by guarantees**

Question 7

No comment

### **The unavoidable cost of responding**

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

Question 8

*Given CAP's policy consideration, do you agree that marketing communications should not describe items as "free" if the consumer has to pay for packaging?*

Answer 8

Agreed

### **Misleading other questions**

Question 9

*i) Taking into account CAP's general policy objectives, do you agree that CAP's rules on misleading are necessary and easily understandable?*

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

*iii) Do you have other comments on this section?*

Answer 9

While AIME agrees that rules on misleading advertising are necessary we believe the approach of attempting to prescribe for every eventuality to be costly, ineffective and potentially confusing. It should be sufficient for CAP to state that advertising should not deliberately or unintentionally mislead and that the judgment of CAP is final. The availability of copy advice from CAP would help where advertisers are uncertain of their position.

### **2.4 Harm and Offence**

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

4.7

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

Question 10

*Given CAP's policy consideration, do you agree that rule 4.7 should be included in the proposed CAP Code?*

Answer 10



Agreed.

Question 11

No further comment.

## 2.5 Children

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

### **Promotions that contain a direct exhortation to buy a product**

To comply with CPR's prohibited practice of directly exhorting children to make a purchase CAP now proposes to include proposed rule 5.7. CAP considers that its proposal would not amount to a change in advertising policy or practice but would provide clarification that promotions that require a purchase to participate, and include a direct exhortation to make a purchase, must not be addressed to or targeted at children.

#### 5.7

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

Question 12

*Given CAP's policy consideration, do you agree that rule 5.7 should be included in the Code?*

Answer 12

Agreed, although it is suggested that Guidance could usefully be provided on what constitutes "exhortation".

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

CAP proposes to introduce a rule 5.5 that specifically prohibits marketing communications that contain a direct exhortation to buy products via a direct-response mechanism from being directly targeted at children. The proposed Distance Selling section defines a 'direct-response mechanism' as mechanisms 'that allow readers to place orders without face-to-face contact with the marketer'.

#### 5.5

Marketing communications that contain a direct exhortation to buy products via a direct-response mechanism must not be directly targeted at children. For a

definition of “direct-response” mechanism, see the Distance Selling Section (Section 9).

Question 13

*Given CAP’s policy consideration, do you agree that rule 5.5 should be included in the Code?*

Answer 13

Agreed with the proviso that the expression “exhortation” be re-examined. What is being addressed here is “promotions targeted at children”.

Question 14

- i) Taking into account its general policy objectives, do you agree that CAP’s rules, included in the proposed Children section, are necessary and easily understandable?*
- ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Children rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?*
- iii) Do you have other comments on this section?*

Answer 14

Yes. No further comments.

## **2.6 Privacy**

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

Question 15

- i) Taking into account its general policy objectives, do you agree that CAP’s rules, included in the proposed Privacy section, are necessary and easily understandable?*
- ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Privacy rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?*
- iii) Do you have other comments on this section?*

Answer 15

Agreed. No further comments

## **2.7 Political Advertisements**

## Question 16

No comments

## 2.8 Sales Promotions

### Withholding prizes

On 24 June 2008, the CAP Code was changed to take account of CPRs. (See 'Recent changes to this section of the CAP Code'). Rules were added, revised or deleted to ensure that the Code did not conflict with the Regulations. The following rule, which does not conflict with the CPRs, was deleted in error and CAP proposes to reinstate the rule to make clear when it is acceptable to withhold a prize.

### 8.27

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

## Question 17

*Given CAP's policy consideration, do you agree that rule 8.27 should be included in the Code?*

## Answer 17

Agreed

### Promotions directed at children; the need for a closing date

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

### 8.17.4.b

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

## Question 18

*Given CAP's policy consideration, do you agree that rule 8.17.4.b should be included in the Code?*

## Answer 18

Agreed.

## Prizes and Gifts

Present rule 34.1e requires promoters to specify the minimum number of any prizes. That requirement informs consumers about the likelihood of receiving a prize and, therefore, their decision to participate in the promotion. CAP considers the present rule can be abused; for example a promoter that states '100+ prizes' implies a relatively higher quality of prize than '10,000 prizes'. In addition, because there is no present requirement for the number of gifts to be stated in any capacity, that has allowed some promoters to blur the line between what is a prize and what is a gift and mislead consumers.

CAP proposes that, if the exact number is not known, a reasonable estimate of the number of prizes or gifts should be stated in order to prevent that abuse. CAP proposes this rule:

#### **8.17.6**

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

#### **Question 19**

*Given CAP's policy consideration, do you agree that rule 8.17.6 should be included in the Code?*

#### **Answer 19**

While AIME agrees entirely with the sentiment of this rule it could adequately be dealt with under the category of misleading consumers. It seems unnecessarily prescriptive to engineer a specific rule for something that would be more appropriately handled as a Help Note or Guideline.

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

#### **8.17.6.a**

Promoters must:

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

#### **Question 20**

*Given CAP's policy consideration, do you agree that rule 8.17.6.a should be included in the Code?*

#### **Answer 20**

Yes. Assuming that evidence of such confusion exists this is a similar case to Question 19 and could perhaps be adequately handled as an example of misleading consumers.

**Significant conditions exception: limited by time or space**

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

**8.18**

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

**Question 21**

*Given CAP's policy consideration, do you agree that rule 8.18 should be included in the Code?*

**Answer 21**

Agreed that this should be in the Code or, alternatively, clarified in Help Notes or Guidelines.

**Distinction between prizes and gifts: a significant proportion**

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

**8.19**

Promoters must not claim that consumers have won a prize if they have not. The distinction between prizes and gifts must always be clear: items offered to a significant proportion of consumers in a promotion should be described as gifts, not prizes. If a promotion offers a gift to a significant proportion and a prize to those who win, special care is needed to avoid confusing the two: the promotion

must, for example, state clearly that consumers "qualify" for the gift but have merely an opportunity to win the prize. If a promotion includes, in a list of prizes, a gift for which consumers have qualified, the promoter must distinguish clearly between the two.

#### Question 22

*Do you agree that rule 8.19 should be included in the CAP Code?*

#### Answer 22

As with answer 21 with the proviso that this is bordering on prize draw management rather than marketing communications.

### **Supervising Prize Draws**

Present rule 35.7 states: Promoters of prize draws should ensure that prizes are awarded in accordance with the laws of chance *and under the supervision of an independent observer*. CAP considers that rule should be revised to allow for the proper use of a computer to randomly select a winner in accordance with the laws of chance. CAP considers the computer process should be verified to be random, for example by the programmer or software manufacturer, and suitable for the task. CAP proposes the following wording for the proposed rule:

#### 8.24

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

#### Question 23

*Given CAP's policy consideration, do you agree that rule 8.24 should be included in the Code?*

#### Answer 23

Given that the present rule requires that prizes are awarded in accordance with the laws of chance it should not be necessary for CAP to define how this might be achieved. While the wording of the rule appears sensible AIME is also concerned that it ventures beyond advertising into the actual mechanics and content of prize draws and questions whether this is proper to the allocated remit of CAP.

### **Auditing instant-win promotions**

Present rule 35.8 states: ... Instant-win tickets, tokens or numbers should be awarded on a fair and random basis and verification should take the form of an independently audited statement that all prizes have been distributed, or made available for distribution, in that manner. CAP considers that the principle of distributing or making available for distribution prizes on a fair and random basis should be maintained but it recognises that the requirement to obtain an

independently audited statement for each instant-win promotion is an onerous requirement for promoters that offer several instant-win promotions.

CAP considers it is appropriate that national promotions must be audited to ensure compliance with the process in order that participants are dealt with fairly and that the process of allocation is random, fair and secure. CAP considers it is not reasonable to extend the auditing requirement to all promotions of this type because of the disproportionate drain of resources to small and medium sized promoters and CAP proposes this text for rule: 8.25

#### 8.25

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

#### Question 24

- i) Do you agree that the present requirement, in CAP rule 35.8, for a promoter to obtain an independently audited statement that all prizes have been distributed, or made available for distribution on a fair and random basis is disproportionate and should not therefore be included in the Code?*
- ii) Given CAP's policy consideration, do you agree that rule 8.25 should be included in the Code?*

#### Answer 24

As with the previous question it appears to AIME that, while much of this ruling is sensible, the mechanics of prize draws and instant win promotions should not be the concern of CAP beyond the fact that they are legal as the proposed rules relate to management of the service content and not the advertising or marketing communications.

#### **Judging of prize promotions**

The independence of a judge or a panel that selects winning entries on the basis of a subjective interpretation is fundamental to maintaining consumer confidence in those prize promotions. CAP considers that independence from the competition's promoters and intermediaries is not sufficient. It proposes that the judge or panel should also be independent of the pool of entrants from which the eventual winner is picked. CAP proposes this wording for: 8.26

#### 8.26

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

Question 25

*Given CAP's policy consideration, do you agree that rule 8.26 should be included in the Code?*

Answer 25

While AIME considers the rule to be sensible we question whether the subject matter lies within the allocated remit of CAP.

**Receipt of prizes: time**

Present rule 35.9c states that prize promotions should specify, before or at the time of entry, when prizewinners will receive their prizes if that is to be more than six weeks after the promotion's closing date. CAP proposes that the time limit should be reduced from 6 weeks (i.e. 42 days) down to 30 days. CAP understands that 30 days more accurately reflects industry practice and is likely to be more in keeping with consumers' expectations. CAP proposes this wording for:

**8.23.3**

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

Question 26

*Given CAP's policy consideration, do you agree that rule 8.23.3 should be included in the Code?*

Answer 26

Agreed.

**Appeal to children**

Practice 28 of Schedule 1 of the Consumer Protection from Unfair Trading Regulations 2008 bans: "Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them".

To help compliance with the Code's general requirement that marketing communications must comply with the law, CAP proposes this revised wording:

**8.33**

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

**8.33.9**

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

Question 27

*Given CAP's policy consideration, do you agree that rules 8.33 and 8.33.9 correctly updates present rule 37.1(i) to reflect the CPRs?*



Answer 27

Agreed.

## **Other questions**

Question 28

*i) Taking into account CAP's general policy objectives, do you agree that CAP's Sales Promotions rules are necessary and easily understandable?*

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

*iii) Do you have other comments on this section?*

Answer 28

AIME believes that CAP may be straying beyond its remit of addressing advertising and promotional marketing communications issues regarding prize draws, competitions etc. by attempting to regulate the content and processes of the services concerned.

## **2.9 Distance Selling**

Primary responsibility for enforcing the Consumer Protection (Distance Selling) Regulations 2000 (DSRs) (as amended) lies with Trading Standards organisations and the Office of Fair Trading.

Some distance selling contracts are also regulated by other bodies. Services provided on premium-rate telephone lines must comply with the PhonePay Plus Code as well as the DSRs.

Contracts for financial products are not subject to the DSRs. The Financial Services Authority regulates the advertising and distance selling of some financial services under the Financial Services and Markets Act 2000 and the Financial Services and Markets Act (Financial Promotion) Order 2005 (as amended).

## **Consumer Protection from Unfair Trading Regulations 2008 (CPRs)**

Distance selling advertisements, like all other business-to-consumer marketing communications, must comply with the CPRs. The CPRs forbid advertisers from using misleading, aggressive or unfair sales techniques, which are defined in the Regulations and specific prohibitions on certain practices that are deemed to be unfair in all circumstances.

## **Business Protection from Misleading Marketing Regulations 2008 (BPRs)**

Business-to-business marketing and comparative advertisements must comply with the BPRs. The BPRs prohibit advertising that is misleading to the traders to whom it is addressed or that injures or is likely to injure a competitor.

CAP is not proposing any new or revised rules in this section.

### **Personal visits**

Present CAP rule 42.7 states: If marketers intend to call on respondents personally, this should be made clear in the marketing communication or in a follow-up mailing. To allow consumers an adequate opportunity to refuse a personal visit, marketers should provide a reply-paid postcard or Freephone telephone contact instructions.

CAP notes that data protection law requires marketers to tell consumers how they intend to use the personal data supplied by the consumer. The ASA has received no complaints about personal calls from sales representatives in the last four years, which suggests that consumers do not look to the ASA to ensure they are protected from unexpected calls from sales representatives. For those reasons and because the rule has little bearing on consumers' perception of distance selling advertisements CAP proposes not to include 42.7 in the proposed Code.

#### **Question 29**

*Given CAP's policy consideration, do you agree present rule 42.7 should not be included in the proposed Code?*

#### **Answer 29**

Agreed.

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

The Code (42.8) presently states: "Marketers should take particular care when packaging products that might fall into the hands of children". That rule is intended to capture packages that form part of a marketing communication. To the extent that those marketing communications are promotional, that rule is duplicated by:

#### **8.8**

"Special care should be taken with promotions addressed to children or if products or items intended for adults might fall into the hands of children". If packages that form part of marketing communications are not sales promotions, rule 42.8 is adequately covered by:

#### **1.3**

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

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

#### **Question 30**

*Given CAP's policy consideration, do you agree that present rule 42.7 should not be included in the Code?*

#### **Answer 30**

Agreed.

## Other questions

### Question 31

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

### Answer 31

No further comments.

## 2.10 Database Practice

The Information Commissioner's Office (ICO) is the UK's independent authority set up to promote access to official information and to protect personal information.

### Collection of data from children

The ICO's guidance states: Information should not be collected from children under 12 without first obtaining the permission of a parent or guardian. Personal data about adults should not be collected from children (based on a definition of a child as a person aged 16 or under). CAP proposes these two rules:

#### 10.15

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

#### 10.16

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

### Question 32

*Given CAP's policy consideration, do you agree that rules 10.15 and 10.16 should be included in the Code?*

### Answer 32

To differentiate responsibilities between ICO and CAP we suggest each rule be qualified with “---must not knowingly” as part of advertising or a promotion.

## Explicit consent of consumers: Bluetooth

Present rule 43.4 (c) states “The explicit consent of consumers is required before sending marketing communications by e-mail or to mobile devices...”. That rule

reflects Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR). PECR does not cover Bluetooth, however, and so marketers are not required by law to obtain the explicit consent of consumers before sending marketing communications by Bluetooth technology. CAP has considered whether its Code should go beyond the law in requiring Bluetooth marketers to comply with the restriction set out in 43.4 (c).

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

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

#### Question 33

*Given CAP's policy consideration, do you agree rules 10.13.3 and 10.6 should explicitly exempt marketing communications sent by Bluetooth technology?*

#### Answer 33

As a principle AIME prefers and recommends that regulation should be technology neutral since technology is liable to change and well meaning regulations can interfere with technological development, in addition to encouraging ever more prescription in the Code. However, AIME supports this proposal on the grounds that it enables Bluetooth communications.

### Other questions

#### Question 34

- i) Taking into account CAP's general policy objectives, do you agree that CAP's Database Practice rules are necessary and easily understandable?*
- ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Database Practice rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?*
- iii) Do you have other comments on this section?*

#### Answer 34

No further comments

### 2.11 Environmental Claims

#### Questions 35 – 36

No comments

## **2.12 Medicines, treatment and Health**

Questions 37 – 39

No comments

## **2.13 Weight Control and Slimming**

Questions 40 – 43

No comments

## **2.14 Financial Products**

Questions 44 – 45

No comments

## **2.15 Food, Dietary Supplements and Associated Claims**

Questions 46 –57

No comments

## **2.16 Gambling**

The Gambling Act (2005) entered fully into force in September 2007. The Act replaced most existing gambling law with a new regulatory system governing all gambling in Great Britain, defined as betting, gaming and lotteries except the National Lottery and spread betting. The Act includes provisions on gambling advertising.

### **Gambling Commission**

The Gambling Commission was set up under the Gambling Act 2005 and was formally established in October 2005. It took over the role previously played by the Gaming Board for Great Britain in regulating casinos, bingo, gaming machines and lotteries and also has responsibility for the regulation of betting and remote gambling, as well as helping to protect children and vulnerable people from being harmed or exploited by gambling. Under the Gambling Act, CAP and BCAP, the ASA, the Gambling Commission, Ofcom and the Secretary of State (DCMS) share responsibility for the regulation of gambling advertising. The Gambling Commission may issue code of practice provisions on non-broadcast advertising in consultation with CAP, the Secretary of State, the gambling industry, problem gambling experts and HM Commissioners for Revenue and Customs. The Commission asked CAP to perform that function in line with its commitment to better regulation principles and to ensure consistency with the broadcast advertising rules.

### **The National Lottery**

CAP proposes to create a dedicated lottery advertising section, which would

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

**Question 58**

*Given CAP's policy consideration, do you agree in principle that National Lottery and society and local authority marketing communications should be regulated by the same rules?*

**Answer 58**

Agreed

**Question 59**

*Given CAP's policy consideration, do you agree that the rules included in the Lottery Section of the Code are in line with CAP's general policy objectives and should be applied to marketing communications for the National Lottery as they presently are to marketing communications for other lotteries?*

**Answer 59**

Agreed

**Participating in a lottery in a working environment**

CAP proposes that not only National Lottery marketing communications but all lottery marketing communications should be able to condone or feature participation in a working environment.

**Question 60**

*Given CAP's policy consideration, do you agree that lottery marketing communications should be able to feature participation in a lottery in a working environment?*

**Answer 60**

Agreed

**Other questions**

**Question 61**

- i) Taking into account CAP's policy consideration, do you agree that CAP's rules on Gambling and Lotteries are necessary and easily understandable?*
- ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration?*

*iii) Do you have other comments on this Section?*

Answer 61

No further comment

## **2.17 Lotteries**

Covered under section 2.16

## **2.18 Alcohol**

Questions 62 – 65

No comments

## **2.19 Motoring**

Questions 66 – 68

No comments

## **2.20 Employment, Homework Schemes and Business Opportunities**

Questions 69 – 72

No comments

## **2.21 Tobacco**

Question 73

No comments

## **Conclusion**

CAP has a clear principle, which is shared by AIME, that consumers are fully informed and properly protected from inappropriate advertising and marketing communications and it is appreciated that the CAP Code is also concerned to limit interference in legitimate commerce. However, while acknowledging and sympathising with the wide scope which this Code has to cover, we believe there is a tendency for it to be overly prescriptive and CAP would benefit from confining the actual Code to core principles where practicable while making full use of flexible Help Notes or Guidelines to assist readers with examples or clarification.

Having also considered the BCAP Code Consultation AIME believes there would be benefit in pursuing one single media (and technology) neutral Code of Practice for advertising and marketing communications, be it broadcasting or other media, under the auspices of ASA to avoid unnecessary, costly and potentially confusing duplication of regulatory effort.

AIME has noted what it believes to be some confusion over demarcation of regulatory authority in this CAP Consultation and there are several examples where CAP considerations and proposals extend beyond the understood CAP

remit of advertising and marketing communications into issues of management of content and associated process, particularly in the areas of prize draws and competitions.

It is important that well intentioned regulation should not unreasonably inhibit the consumer's freedom of choice, nor should it deter investment in the development of new and popular service offerings for ultimate consumer benefit.

### **Statement of Representation**

AIME confirms that this response has been compiled following a process of circulation of the relevant Consultation documentation to all our members for consideration and comment. A list of our members may be found at [www.aimelink.org/currentmembers.aspx](http://www.aimelink.org/currentmembers.aspx)

The views expressed in this response are a fair representation of the views held by the responding AIME membership. Individual members are actively encouraged to submit their own independent views as they deem fit and at their sole discretion.

### **Close**

We look forward to your response and assure you that, as ever, our comments are made constructively and with the aim of achieving an effective, fair and proportional regulatory regime for the Interactive Media and Entertainment Industry.

If any clarification to our response is required, or if we can be of any further assistance, please contact Zoe Patterson +44 (0) 8445 828 828 or [zoe@aimelink.org](mailto:zoe@aimelink.org).

Sincerely

AIME Secretariat



## Confidential response

### Section 1: Compliance

#### Question 1

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

Yes

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

No

iii) Do you have other comments on this section?

No

### Section 2: Recognition of marketing communications

#### Question 2

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

We welcome the CAP's proposal to include a section within the CAP Code for Recognition of Marketing Communications. However we believe that further clarification is required in relation to the definition of electronic mail.

Rule 2.2 within the proposed CAP Code states that "Unsolicited e-mail marketing communications must be obviously identifiable as marketing communications without the need to open them (see also 10.13.3)".

This could cause confusion in relation to SMS messages as the definition of email used within the CAP Code differs to the definition within The Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR). The CAP Code differentiates between "emails and text transmissions (including SMS and MMS)", however the PECR states "electronic mail means any text, voice, sound or image message sent over a public electronic communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient and includes messages sent using a short message service".

Therefore as it is not possible to ascertain the nature of a SMS message until it is opened, rule 2.2 can not be complied with for SMS messages, if the definition of email is used as per the PECR.

We ask for clarification on this point.

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

Please refer to response to question 2(i).

iii) Do you have other comments on this section?

Please refer to response to question 2(i).

## **Section 3: Misleading**

### **Clarity of qualifications**

#### **Question 3**

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

We understand the principle behind the inclusion of rule 3.10, however we have concerns surrounding how the inclusion of this rule will impact our ability to promote our products. For example roadside billboards viewing time can be restricted by their very nature i.e. consumers driving past, therefore it may not be possible for consumers to read and digest all the content on first viewing.

Therefore we believe that this rule should be reconsidered to exclude the reference to consumers who see the communication only once.

### **Exaggerated performance**

#### **Question 4**

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

Yes.

### **Restrictions on availability**

#### **Question 5**

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

We understand the principle behind the inclusion of rule 3.28.3, however we have concerns surrounding how the inclusion of this rule will impact our ability to promote products that have significant geographical limitations. It is impractical to list all of the countries where certain products are not available.

Therefore we believe this rule should be reconsidered in relation to the requirement for geographical limitations to be stated for financial services products.

### **Testimonials**

#### **Question 6**

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

We welcome the Committee of Advertising and Practice's proposal to include rule 3.45, however we believe that the requirement that it be dated and include the persons and / or organisations' address should be included. This should supply sufficient proof of its authenticity of when and by whom it was given in the event of any dispute or challenge. This is especially prudent as many are now given via email.

Therefore we believe that rule 3.45 should be reconsidered as detailed.

## Additional rights provided by guarantees

### Question 7

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

Yes

## The unavoidable cost of responding

### Question 8

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

Yes

## Other questions

### Question 9

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

Please refer to responses to questions 3, 5 & 6.

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

Please refer to responses to questions 3, 5 & 6.

iii) Do you have other comments on this section?

Yes.

We request clarification in respect of rule 3.29. It is not clear if the previous requirement to provide "evidence" of stock monitoring still applies. There also seems to be a reduced onus from "swift withdrawal" of marketing to "withdraw or amend whenever possible" which makes it unclear in relation to what would be expected by "whenever possible".

We request clarification on this point.

## Section 4: Harm and Offence

## Flashing images

### Question 10

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

Yes.

## Other Questions

### Question 11

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

Yes.

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

No.

iii) Do you have other comments on this section?

No.

## Section 5: Children

### Promotions that contain a direct exhortation to buy a product

#### Question 12

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

Yes.

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

#### Question 13

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

Yes.

### Other questions

#### Question 14

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

Yes.

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

No.

iii) Do you have other comments on this section?

No.

## Section 6: Privacy

### Question 15

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

Yes.

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

No.

iii) Do you have other comments on this section?

No.

## Section 7: Political Advertisements

### Question 16

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

N/A

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

N/A

iii) Do you have other comments on this section?

N/A

## Section 8: Sales Promotions

### Withholding prizes

### Question 17

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

Yes.

### Promotions directed at children; the need for a closing date

### Question 18

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

Yes.

## Prizes and Gifts

### Question 19

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

Yes.

### Question 20

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

Yes.

## Significant conditions exception: limited by time or space

### Question 21

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

Yes.

## Distinction between prizes and gifts: a significant proportion

### Question 22

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

Yes.

## Supervising Prize Draws

### Question 23

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

We welcome the inclusion of rule 8.24 within the proposed CAP Code, however we request further clarification in respect of what is meant by a "random computer process", the impact of any manual input into this process and whether the use of a computerised process for obtaining the winners would need to be specifically stated within the terms and conditions of any sales promotion.

## Auditing instant-win promotions

### Question 24

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

Yes.

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

Yes.

### Judging of prize promotions

#### Question 25

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

We welcome the inclusion of rule 8.26 within the proposed CAP Code, however to ensure clarity we consider that the reference to the independent judge being competent to judge the "subject matter" should remain as per the existing rule 35.9(f).

### Receipt of prizes: time

#### Question 26

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

Please confirm that Question 26 refers to rule 8.28.3 and not 8.23.3. For the avoidance of doubt we welcome the inclusion of rule 8.28.3 within the proposed CAP Code.

### Appeal to children

#### Question 27

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

Yes.

### Other questions

#### Question 28

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

Yes.

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

No.

iii) Do you have other comments on this section?

i) We would welcome further clarity surrounding rule 8.17.2 which states "Any free entry route should be explained clearly and prominently". To comply with this proposed CAP Code will it be acceptable to enter the required information within the terms and conditions or significant conditions as explained within rule 8.18 or is it expected that this will need to be detailed within the "body copy" of the promotion? This is especially relevant in relation to Northern Ireland residents who fall within scope of the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985, rather than the Gambling Act 2005, as inconsistency with the two laws mean the legal requirements are different, as

the requirement for a “no purchase entry route” still applies.

ii) We would welcome further detail in rule 8.28.9 to expand it to “any intention to use winners *or their personal information* in post-event publicity”. We feel individuals should understand that it may be more than their image that is used, for example it may include their name and image or other information that may make them identifiable.

We request clarification on these points.

## **Section 9: Distance Selling**

### **Personal visits**

#### **Question 29**

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

Yes.

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

#### **Question 30**

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

Please confirm that Question 30 refers to rule 42.8. For the avoidance of doubt we agree with the deletion of rule 42.8 from the proposed CAP code.

### **Other questions**

#### **Question 31**

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

Yes.

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?

Yes.

iii) Do you have other comments on this section?

Yes.

We would welcome clarification in relation to the term “individual consumer”. The definition of this section states that “The rules in this Section apply to marketing communications that are sent directly to individual consumers”. Therefore is this statement stating that section 9 of the CAP Code does not apply to distance selling to businesses?

We request clarification on this point.

## **Section 10: Database practice**

### **Collection of data from children**



### Question 32

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

Yes.

### Explicit consent of consumers: Bluetooth

### Question 33

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

Yes.

### Other questions

### Question 34

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

Yes.

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

No.

iii) Do you have other comments on this section?

Yes.

(i) We believe that section 10 should make reference to "individual" or "data subject" rather than "consumer" to ensure consistency with current Data Protection and Privacy legislation.

(ii) Rule 10.4.3 states "anyone who has been notified to them as dead is not mailed again and the notifier is referred to the relevant Preference Service". In our opinion this rule could be potentially misleading if the term "mailed" was used, given the fact that rule 10.4 refers to telephone, fax, e-mail or other remote media. "Mailed" does not appear to encompass all these mediums and therefore we believe that "marketed" would appear to be an appropriate alternative.

(iii) Rule 10.4 does not include "mail" as an example of a remote media. We believe for clarity this term should be included within this rule.

(iv) Rule 10.5 states that "Consumers are entitled to have their personal information suppressed". We believe it is more appropriate to describe it as "Consumers are entitled to ask for their personal information not to be used or processed for marketing purposes" as their actual information is not suppressed, rather the use of it to market them is suppressed.

(v) Rule 10.6 states that "Marketing communications sent by electronic mail must contain the marketer's full name..." We have concerns with this rule, as the definition of electronic email within section 10 includes SMS / text and given the technical limitations of character length, it is not feasible for a firm to include its full name in a marketing SMS / text. For example, we use *Barclays* rather than *Barclays Bank PLC* which we believe to be adequate for SMS / text marketing. We

would therefore welcome an amendment to this rule to specify that the “full name or a **recognisable** abbreviation of the name to make the firm's identity clear given the content of the message”,

We request clarification of these points.

## **Section 11: Environmental Claims**

### **Question 35**

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

Yes.

### **Other questions**

### **Question 36**

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

Yes.

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

No.

iii) Do you have other comments on this section?

No.

## **Section 12: Medicines, Treatments, Devices and Health**

### **Traditional Herbal Medicinal Products**

### **Question 37**

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

N/A

### **Medicinal claims**

### **Question 38**

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

N/A

### **Other questions**

### **Question 39**

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

N/A

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

N/A

iii) Do you have other comments on this section?

N/A

## **Section 13: Weight Control and Slimming**

### **Targeting the obese**

#### **Question 40**

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

N/A

### **Loss of weight or fat from specific parts of the body**

#### **Question 41**

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

N/A

### **Very Low-Calorie Diets (VLCDs)**

#### **Question 42**

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

N/A

### **Other questions**

#### **Question 43**

i) Taking into account CAP's general policy objectives, do you agree that CAP's rules, included in

the proposed Weight Control and Slimming Section are necessary and easily understandable? If your answer is no, please explain why?

N/A

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

N/A

iii) Do you have other comments on this section?

N/A

## **Section 14: Financial products Individual Voluntary Arrangements (IVAs)**

### **Question 44**

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

Yes.

### **Other questions**

### **Question 45**

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

Yes.

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

No.

iii) Do you have other comments on this section?

No.

## **Section 15: Food, Dietary supplements and Associated Health and Nutrition claims**

### **Permitted nutrition and health claims**

### **Question 46**

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

N/A

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

### **Question 47**

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

N/A

### Comparative nutrition claims

#### 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.

N/A

### Comparison with one product

#### 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.

N/A

### Prohibitions

#### 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.

N/A

#### 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.

N/A

#### 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.

N/A

### The use of health professionals

#### 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.

N/A

### Food labelling Regulations (1996) (FLRs)

#### 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.

N/A

#### **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.

N/A

### **Infant and follow-on formulae**

#### **Question 56**

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

N/A

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

N/A

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

N/A

### **Other questions**

#### **Question 57**

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

N/A

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?

N/A

iii) Do you have other comments on this section?

N/A

## **Section 16: Gambling**

## Consistency: principle

### Question 58

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

N/A

## Consistency: rules

### Question 59

Given CAP's policy consideration, do you agree that the rules included in the Lottery Section of the Code are in line with CAP's general policy objectives (see Part 1 (4) of this consultation document) and should be applied to marketing communications for the National Lottery as they presently are to marketing communications for other lotteries? If your answer is no, please explain why and, if relevant, please identify those rules that should not be applied to marketing communications for the National Lottery.

N/A

## Participating in a lottery in a working environment

### Question 60

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

N/A

## Other questions

### Question 61

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

N/A

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

N/A

iii) Do you have other comments on this Section?

N/A

## Section 18: Alcohol

### Alcoholic strength

### Question 62

Given CAP's policy consideration, do you agree that rule 18.9 should be included in the Code? If

your answer is no, please explain why.

N/A

### Provision for low-alcohol drinks

#### Question 63

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

N/A

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

N/A

#### Question 64

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

Yes.

### Other questions

#### Question 65

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

Yes, in relation to Question 64 only.

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

No.

iii) Do you have other comments on this section?

No.

## Section 19: Motoring

### The legal requirements of the Highway Code

#### Question 66

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

Yes.

### Prices in motoring marketing communications



### Question 67

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

N/A

### Other questions

### Question 68

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

Yes, in relation to Question 66 only.

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

No.

iii) Do you have other comments on this section?

No.

## Section 20: Employment, Homework Schemes and Business Opportunities

### Employment businesses

### Question 69

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

N/A

### Required information in marketing communications for homework schemes

### Question 70

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

N/A

### Vocational training and instruction courses

### Question 71

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

N/A

## Other Questions

### Question 72

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

N/A

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

N/A

iii) Do you have other comments on this section?

N/A

## Section 21: Tobacco, Rolling Papers and Filters

### Question 73

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

N/A

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

N/A

iii) Do you have other comments on this section?

N/A

## Section 22: Other comments

### Question 74

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

Yes.

We would welcome clarification in respect of whether Lord Chris Smith's (Advertising Standards Authority Chairman) recent comments which stated that a social responsibility rule from the Broadcasting Committee in Advertising Practice Code (BCAP) to ban irresponsible lending advertisements will also apply to the CAP Code.

We request clarification on this point.

**The following question was issued as an addendum. The closing date for responses to this question is 10 July 2009.**

**Question 75**

Given CAP's policy consideration, do you agree that the evidence contained in the ScHARR Review does not merit a change to CAP's alcohol advertising content or scheduling rules? If your answer is no, please explain why you consider the ScHARR Review does merit a change to CAP's alcohol advertising content or scheduling rules.

N/A



**The Committee on Advertising Practice's Code Review Consultation  
Response by the Baby Milk Action and the Baby Feeding Law Group June  
2009**

**Introduction – why the promotion of breastmilk substitutes should not be permitted**

We are pleased to submit a response to this consultation on behalf of Baby Milk Action, the UK member of the International Baby Food Action Network (IBFAN) and the Baby Feeding Law Group (BFLG), an ad hoc group of 23 health professional and lay organizations.

As members of the Steering Group of the Breastfeeding Manifesto Coalition we also endorse the submission sent in on behalf of the BMC.

Our submission is limited to the issues which are agreed policy positions of the above organizations in relation to all marketing of infant and young child feeding products and to health and nutrition claims.

The BFLG has been working since 1997 to ensure that UK and EU policies are in line the UN standards - namely the *International Code of Marketing of Breastmilk Substitutes*, the subsequent relevant Resolutions, and the *Global Strategy for Infant and Young Child Feeding*.

In the global context the protection and promotion of breastfeeding is the most cost-effective intervention for child survival and could prevent 13–15% of child deaths in low-income countries.<sup>30</sup> Breastfeeding is also the optimum and natural way to feed all babies, regardless of where they live, and in the light of its importance to child health the *International Code* was adopted as a '*minimum requirement*' to be adopted '*in its entirety*' by ALL countries.

Artificial feeding places an unnecessary burden on the environment. There can be no food more locally produced, more sustainable or more environmentally friendly than a mother's breastmilk - a naturally renewable resource which requires no packaging or transport and results in no wastage. Breastmilk substitutes, in contrast are the product of the dairy industry and a number of industrial processes, which are all high energy consuming and polluting of our environment.

Breastfeeding also provides an ideal window of opportunity for obesity prevention. Exclusive breastfeeding protects against rapid weight gain during infancy and may also help in the development of taste receptors and appetite control. Systematic reviews have demonstrated an association between not breastfeeding and an increased risk of obesity in childhood which is dose dependent, ie babies who are exclusively breastfed for longer are less likely to develop obesity.

***Extent of advertising in the UK***

Unpublished doctoral research by Nina Berry, from the Centre for Health Initiative, at the University of Wollongong NSW AUSTRALIA, compares the volume of advertising that occurs in magazines in the UK with the USA and Australia. Preliminary reports indicate that despite the UK regulations being in place - there are as

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<sup>30</sup> Jones et al. *How many child deaths can we prevent this year?* The Lancet, Vol 362 July 5, 2003 65-71 Child survival 11

many pages of adverts for formula here as there are in these countries where there is no regulation (Australia and New Zealand have voluntary measures which restrict the advertising of infant formula (in Australia infant formula includes follow-up formula) )

Indeed it seems that any restriction of the advertising to certain products is ineffective because the baby feeding industry simply extends the range in a process known as line extension to include a product that they can advertise - a standard practice in the advertising industry. This is why the International Code includes all milks marketed for infants and young children (up to the age of three) to be within its scope. Toddler formulas and growing up milks are all advertised using the same advertising and claims and use the same brand identifiers. **What is needed is a comprehensive ban any promotion of brands associated with infant formula milk, including direct marketing, carelines and proprietary ingredient blends.**

In recognition of the health benefits and health savings that can be made, the UK Government has made numerous commitments to increase breastfeeding rates.<sup>31</sup>

### UK International obligations

The UK Government was one of the strongest advocates of Resolution WHA34.22 by which the World Health Assembly adopted the **International Code of Marketing of Breast-milk Substitutes** in 1981. WHA34.22 stressed that adherence to the International Code "*is a minimum requirement and only one of several important actions required in order to protect healthy practices in respect of infant and young child feeding*". The Code, like the UN Universal Declaration of Human Rights, is not a treaty, but an intergovernmental resolution which while not a legally binding instrument as such, nevertheless represents an expression of the collective will of the membership of WHO. It was adopted as a '*minimum requirement*' to be adopted by '*all member states...in its entirety*' for the entire membership of WHO, not just for developing countries. The UK has since endorsed the adoption of the more than 12 subsequent relevant WHA Resolutions that have strengthened and clarified the Code. The health and nutrition rights which the International Code aim to protect were strengthened by the **Convention on the Rights of the Child** (CRC), which was adopted in 1989 and which the UK has ratified. Governments that have ratified the CRC are legally bound by its provisions and can be held legally accountable for action which hinders the enjoyment of its rights and freedoms. The CRC:

- Stresses the right to protection from commercial exploitation.<sup>32</sup>
- Recognises the fundamental role that breastfeeding plays in fulfilling the right of every child to the highest attainable standard of health.

The **CRC Committee**<sup>33</sup> views the *International Code* as a tool to help governments fulfil their obligations to

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<sup>31</sup> See Choosing Health, Making Healthy Choices easier, White Paper (2004); NICE Maternal and child nutrition Guidance for midwives, health visitors, pharmacists and other primary care services to improve the nutrition of pregnant and breastfeeding mothers and children in low income households (2008) NICE Maternal and Child Nutrition Programme Modelling the cost effectiveness of interventions to promote breastfeeding (2007). "*peer support which achieves a relatively high increase in breastfeeding rates actually saves the NHS money in the long run, because levels of hospitalisation of babies drop, breastfed babies grow up into healthier children and adults, fewer women develop breast cancer, and less has to be spent on infant formula.*"

32

Article 24 (1.e) of the CRC calls on States Parties : "*To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents*"

Article 17 calls for: "*the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being.*"

Article 32: "*States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.*"

Article 36 says: "*States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.*"

<sup>33</sup> The Committee on the Rights of the Child (CRC) is the body of independent experts that monitors implementation of the Convention on the Rights of the Child by its State parties. It meets in Geneva three times a year.

Article 24 of the Convention, and in 2002 called on the UK to implement the Code. In 2008 the UN Committee on the Rights of the Child analysed UK Government and civil society submissions on the state of compliance with the CRC and concluded in its report, issued in October 2008, (paragraphs 58 and 59):

*“ The Committee, while appreciating the progress made in recent years in the promotion and support of breastfeeding in the State party, it is concerned that implementation of the International Code of Marketing of Breastmilk Substitutes continues to be inadequate and that **aggressive promotion of breastmilk substitutes remains common [emphasis added]**. The Committee recommends that the State party implement fully the International Code of Marketing of Breastmilk Substitutes. The State party should also further promote baby-friendly hospitals and encourage that breastfeeding is included in nursery training.”*

The UK is also a signatory to *the European Charter on Counteracting Obesity, the Blueprint for Action to Protect, Promote and Support Breastfeeding, the Global Strategy on Infant and Young Child feeding, the Global Strategy on Diet, Physical Activity and Health, the European Charter on Counteracting Obesity, the Universal Declaration on Human Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child as well as General Comment 12 of the Committee on Economic, Social and Cultural Rights, the ILO Maternity Protection Convention No 183*. Also of relevance is the WHO Regional Office for Europe, *Food and Nutrition policy for schools*, and the *EU Strategy for Europe on Nutrition, Overweight and Obesity related health issues COM(2007) 279 FINAL SEC(2007) 707*

All the above contain commitments to protect child rights, to protect, promote and support, breastfeeding, and to avoid conflicts of interest.

### **Responsibility of the media to portray breastfeeding as the norm**

Relevant to the BCAP consultation is the UK Government's endorsement of the **European Blueprint for Action on the Protection, promotion and support of breastfeeding in Europe**<sup>34</sup> This Blueprint is intended as a framework for all EU governments, and specifically addresses the responsibility of media in portraying breastfeeding as the norm.

#### **Page 18 2.Information,education,communication (IEC)**

*Adequate IEC is crucial for the re-establishment of a breastfeeding culture in countries where artificial feeding has been considered the norm for several years/generations. IEC messages must be consistent with policies, recommendations and laws, as well as consistent with practices within the health and social services sector. A key objective of IEC activities should be, as highlighted in the CRC, to fulfil the right of all segments of the society to clear, full and unbiased information about breastfeeding. **Breastfeeding is the normal way to feed and bring up infants and young children, and should be portrayed universally as such.** Expectant and new parents have the right to full, correct and optimal infant feeding information, including guidance on safe, timely and appropriate complementary feeding, so that they can make informed decisions.*<sup>19</sup>

**Page 20 Recommended Objective:** To present exclusive breastfeeding for six months and continued breastfeeding up to two years and beyond as the normal way to feed and bring up infants and young children in all written and visual materials relating to or making reference to IYCF and to the role of mothers

**Responsibility:** *All multi-media organisations and commissioning authorities with responsibility for content of books, programmes, etc.*

**Outputs and outcomes:** *Information outlining their responsibility disseminated to the multi-media organisations; monitoring measures in place*

### **Risks of self-regulation and the need for independent monitoring.**

It is critically important that marketing is regulated and independently monitored according to stringent

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<sup>34</sup> *Protection, promotion and support of breastfeeding in Europe: a blueprint for action* <http://www.iblce-europe.org/Download/Blueprint/Blueprint%20English.pdf>

benchmarks. A study done by the **International Food Policy Research Institute** in Washington found that self-regulatory systems in fact fail to limit the extent and impact of marketing. Instead they promote trust in advertising amongst consumers and governments, undermining resolve to bring in legislation needed to protect health. Under self-regulatory systems the volume of advertising increases.

The Baby Feeding Law Group conducts on-going independent monitoring of the baby feeding market using the International Code and Resolutions as a benchmark, and also comparing this to existing UK legislation. The BFLG has produced a series of monitoring reports which have been submitted to the UK Government's Independent Review Panel (IRP) which was convened by the Food Standards Agency to evaluate the effectiveness of the UK Regulations which were revised in 2007.

BFLG and BMA also regularly submit complaints to LACORS and the Trading Standards Home Authorities as an agreed way to raise concerns. However our analysis from the responses from the authorities show that enforcement officers feel there is little they can do because the promotions are outside the scope of the law or test cases are needed to define the law.

The Guidance Notes, presented by the Government as addressing some of the issues not covered by the law, were intended to carry the same weight as the law but are ignored by the companies.

The BFLG reports can be found on the following link:

<http://www.babyfeedinglawgroup.org.uk/resources/review0808.html>

## Specific answers

### Advertising of Infant formula Follow-on milks

#### Infant and Follow-on Formula: Non Broadcast Review Question 56 and Broadcast Review Question 85

**i) Do you agree that BCAP has correctly reflected the requirements of Regulation 21(a) of the Infant and Follow-on Formula Regulations (2007) (amended) in BCAP's proposed rule 13.8? If your answer is no, please explain why.**

**ii) Do you agree that BCAP has correctly reflected the requirements of Regulation 19 of the Infant Formula and Follow-on Formula Regulations 2007 (as amended) in BCAP's proposed rule 13.8.1? If your answer is no, please explain why.**

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

## ANSWER

**Yes and No.** While we are pleased that the BACP now includes specific reference to the regulations on infant formula and follow-on formula it should also, at the very least to refer to the *Guidance Notes on The Infant Formula and Follow-on Formula Regulations 2007 (as amended)* which include a series of provisions relating to the marketing of follow on formula, definitions of advertising<sup>35</sup> and specific requirements relating to the

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<sup>35</sup> *Guidance Notes on The Infant Formula and Follow-on Formula Regulations 2007 (as amended)*

advertising, appearance, colour scheme etc of follow-on milk promotion. These guidance notes reflect the Agency's view on how the Regulations should be interpreted and were produced to provide advice on the legal requirements of the Regulations.

However, because the UK Government has so far failed to bring the regulations fully into line with the *International Code of Marketing of Breastmilk Substitutes* and subsequent, relevant Resolutions of the World Health Assembly, there are major fault lines running through the regulations and the Guidance Notes. The BACP could do much to mitigate the harmful effects of the loopholes in the regulations by strengthening its rules as proposed by the BFLG and BMC, and specifically to extend the advertising ban that exists for infant formula to follow-on milks.

The misleading information contained in much advertising of follow-on milks is a major contributory factor to the undermining of breastfeeding and infant health in the UK and globally. It directly undermines the health messages the Government and health professionals are trying to convey to parents.

As mentioned in the BMC submission, the 2005 survey carried out by MORI on behalf of UNICEF UK and the National Childbirth Trust 2005 and the NOP survey for the Department of Health, both showed that parents are being misled by the promotion of follow-on milks which in effect advertises infant formula and projects an image that artificial feeding is safe, healthy and the norm.

In summary, the MORI findings revealed that:

- The majority of women (60%) believed they had seen infant formula advertising even though it's been banned for over ten years
- Around a third said the advertising gave the impression that infant formula milk was 'as good as' or 'better than' breastmilk
- Nearly one in five mothers (17%) who used follow-on milk said they started before their baby was three months old – even though it's unsuitable for children of this age

The definition of 'breastmilk substitute' in the *International Code* refers to "any food being marketed or otherwise represented as a partial or total replacement for breast milk, whether or not suitable for that purpose." The scope attempts to cover all foods targeted at infants and young children and covers far more than infant formula: "The Code applies to the marketing, and practices related thereto, of the following products:

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The term 'advertisement' has not been defined in the Regulations (a definition was given in the previous Regulations). The term 'advertising' is used in the Directive but is not defined. It is considered that any attempt to define the term runs the risk of limiting its scope bearing in mind the wide range of forms that advertising has taken in recent years. Guidance relating to the interpretation of 'advertising' in the context of the Regulations is provided in Appendices I and II. The Agency considers the term "advertising" to mean: Any representation that is made in connection with a trade, business, or company in order to promote, either directly or indirectly, the supply, including sale or transfer, of infant and/or follow-on formula. The above paragraph includes the term "representation". The following list includes some examples of the means by which a representation can be made within the context of advertising. The list is not definitive due to the fact that the nature of advertising is always changing.

- newspapers, magazines, brochures, leaflets, circulars, direct mailings, e-mails, text transmissions, fax transmissions, catalogues, follow-up literature and other electronic and printed material (including advertorials)
- publications for healthcare professionals which are not scientific publications
- posters and other promotional media in public places, including moving pictures

- cinema and video commercials
- non-broadcast electronic media, (refer to Appendix II for further guidance with regard to the internet)
- television and radio broadcast commercials
- correspondence between a trade, business or company and their customers, in writing, orally (including telephone calls and company carelines), electronically or by other means
- press releases and other public relations material and activities that can be accessed by consumers
- tickets, timetables and price lists
- celebrity endorsements in connection with a trade, business, or company
- product placement in websites



*breastmilk substitutes, including infant formula; other milk products, foods and beverages, including bottle-fed complementary foods, when marketed or otherwise represented to be suitable, with or without modification, for use as a partial or total replacement of breast-milk; feeding bottles and teats. It also applies to their quality and availability, and to information concerning their use."*

OFCOM regulations introduced in April 2007 restrict advertising of unhealthy food products during children's television programming on the principle that children under the age of 16 should be protected from unhealthy food marketing. This principle could and should be used to cover the marketing of follow-on formulas on the basis that the UK Government health policy strongly advocates exclusive breastfeeding of infants up to 6 months and continued breastfeeding alongside appropriate family foods thereafter, and that follow-on formulas (which are breastmilk substitutes for the older baby) are considered not necessary.

**UNICEF Position** on follow-on milks. In its statement to the *European Parliament Development and Co-operation Committee* UNICEF said: <http://www.babymilkaction.org/press/press23nov00unicef.html>

*"The Code applies to ALL BREASTMILK SUBSTITUTES and related products, which include feeding bottles and teats. The Code is not limited to basic infant formula intended for healthy babies born after nine months of gestation and with adequate weight and length for age as many companies would argue. The Code covers special formulae such as those for premature infants, hypoallergenic formulae, lactose free formulae and follow-on formulae (ref 4). It also covers waters, juices, teas, and foods if marketed or in any other way represented as a partial or total replacement for breastmilk. These two principles, universality and the scope including all breastmilk substitutes, cannot be over emphasised given the tendency of the infant feeding industry to attempt to limit the application of the Code."*

WHO and UNICEF training materials clearly state:<sup>36</sup>

#### **Which products fall under the scope of the Code?**

The Code applies to breastmilk substitutes, including infant formula; other milk products, foods and beverages, including bottle-fed complementary foods, when marketed or otherwise represented to be suitable, with or without modification, for use as a partial or total replacement of breastmilk; feeding bottles and teats. Since exclusive breastfeeding is to be encouraged for 6 months, any food or drink shown to be suitable for feeding a baby during this period is a breastmilk substitute, and thus covered by the Code. This would include baby teas, juices and waters. Special formulas for infants with special medical or nutritional needs also fall under the scope of the Code. **Since continued breastfeeding is to be encouraged for two years or beyond, any milk product shown to be substituting for the breastmilk part of the child's diet between six months and two years, such as follow-on formula, is a breastmilk substitute and is thus covered by the Code.**

#### **Question 52**

- i) Given BCAP's policy consideration, do you agree that the ban on TV advertisements for commercial services offering individual advice on consumer or personal problems should be relaxed? If your answer is no, please explain why.
- ii) Given BCAP's specific policy objectives, do you agree that BCAP's proposed rule 26.2 is necessary and easily understood? If your answer is no, please explain why.

**Answer:** No. The ban should not be relaxed and in addition a specific clause should be added that prohibits manufacturers of breastmilk substitutes from carrying out such services.

Use of Health Professionals: Broadcast Code Review , Question 61

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<sup>36</sup> WHO, UNICEF Baby Friendly Hospital training materials.  
[http://www.unicef.org/nutrition/files/BFHI\\_Revised\\_Section1.pdf](http://www.unicef.org/nutrition/files/BFHI_Revised_Section1.pdf)

The BFLG endorses the BMC concern regarding the proposal to relax rules on the use of health professionals in advertisements. Under the International code and Resolutions and the UK regulations the Government has a responsibility to **provide objective** and consistent information on infant and young child feeding, and to **avoid conflicts of interest in funding of infant feeding programmes**. Health professionals have a duty to provide evidence based information on treatment and products which best meet the needs of their patients.

We are strongly against any further relaxation in the code which may increase the use of health professionals in advertisements of any kind.

The European Food Safety Authority (EFSA) is currently evaluating applications for claims which could appear on the labels of follow-on formulas and baby foods and has already dismissed as unsubstantiated many of the claims currently used in the promotion of infant formula and follow-on formulas.

The BFLG position is that there should be NO HEALTH or NUTRITION claims permitted for any foods for infants and young children.

If an ingredient has been unequivocally demonstrated to be essential and beneficial by an independent review of data (which must contain as large as possible proportion of independently-funded research) it should be a mandatory ingredient in all breastmilk substitutes, not flagged up with a claim for commercial advantage.[3]

There is no health advantage in using a breastmilk substitute compared to breastfeeding, so the basis for a health or nutrition claim is entirely absent. Claims on commercial complementary foods also compete unfairly with fresh, home prepared family foods, continued breastfeeding and sound complementary feeding practices.

#### **Question 86**

ii) Given BCAP's policy consideration, do you agree that the Code should allow broadcast food advertisements to include health claims that refer to a recommendation by an association if that association is a health-related charity or a national representative body of medicine, nutrition or dietetics? If your answer is no, please explain why.

No! see above.

#### **CONCLUSION**

Given the importance of breastfeeding and appropriate complementary feeding in the long and short term health of children, and the rising rates of obesity and diet-related ill health, UK infants and children must be protected from marketing of all breastmilk substitutes and unhealthy food products, regardless of the medium used.

The CAP should make the following amendments to the Code in order to better protect infants and children from unhealthy food marketing:

- Extend the advertising restrictions that apply to infant formula to follow-on milks, specialised formulas and all products associated with breastmilk substitutes, **and feeding bottles, teats, dummies etc**
- Ban the use of health and nutrition claims and health professional endorsement in all labelling and marketing of foods and drinks for infants and young children.
- Prohibit **the promotion of any brand or logo associated with infant formula, including direct marketing, carelines and proprietary ingredient blends.**
- prohibit baby feeding companies from seeking direct or indirect contact with pregnant women, mothers, carers of infants and young children and other members of the public (including a clear ban on

company 'carelines', pamphlets, mailshots, emails and promotional websites)

- prohibit company-produced or sponsored materials on pregnancy, maternity, infant feeding or care (the Government must provide objective information, avoiding conflicts of interest in funding infant feeding programmes);
- Prohibit TV advertisements for commercial services offering individual advice on consumer or personal problems provided by any company that manufactures, markets or distributes breastmilk substitutes or foods for infants and young children/

## Bayer HealthCare Consumer Care



CAP Code Review  
Code Policy Team  
Broadcast Committee of Advertising Practice  
Mid City Place  
71 High Holborn  
London WC1V 6QT

### Re: CAP Code Review Consultation

Bayer is a major manufacturer of over the counter medicines and food supplements in the UK. The ability to effectively market our products is fundamental to our business. As members of PAGB we endorse the need to ensure that advertising is truthful, balanced, and responsible and does not mislead, offend or harm and are fully supportive of the current system of regulatory and self-regulatory controls through the various Advertising Codes of Practice. We welcome the review of the CAP Code and are pleased to note the commitment to ensuring that provisions comply with the principles of better regulation, that they are transparent, accountable, proportionate, consistent and targeted.

Bayer is broadly supportive of the proposed changes particularly the proposal for a single Code covering both TV and radio advertising broadcast media rather than having separate Codes as at present but given the nature of our business we are particularly interested in the proposed changes relating to medicines and food supplements.

### Medicines

We support the proposed amendments to;

- exempt medicines from the rule which states that marketers must not offer treatment for conditions for which medical supervision should be sought. We anticipate that this amendment will overcome some of the problems which companies have had advertising products for new therapeutic indications where OTC medicines are now available (e.g. products which have previously been subject to prescription control but have now been reclassified for over the counter use).
- permit marketers of traditional herbal medicines to advertise for the indications listed in the product's summary of product characteristics.
- restrict the range of products permitted to be advertised for obesity to medicines which are indicated for that condition.

5 May 2009

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### Food supplements

We note that the Code has been updated to bring it into line with the Nutrition and Health Claims Regulation and we fully support the proposals to;

- make it clear that the target groups only apply to claims which are relevant to people who would otherwise have a sub-optimal intake of that nutrient. This allows for the possibility of the European Commission approving claims relating to a higher intake of a particular nutrient for a particular function.
- permit claims that a food supplement can elevate mood or enhance normal performance if they are approved by the European Commission.

## Annex 3

# Consultation questions

You may respond to some or all of the consultation questions. This Annex is provided in Word format to enable you to copy and paste the questions into a document that should accompany your completed cover sheet, which is made available [here](#). See ‘Responding to this consultation’ in this Annex.

## Section 18: Alcohol

### Alcoholic strength

#### Question 62

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

**We would like rule 18.9 to be considered carefully as we believe, in certain circumstances, it would be appropriate and right to communicate the that a drink may be preferred because of its alcohol content when that content is lower than the average or usual strength.**

**The current rule states that marketing communications ‘must not otherwise imply that a drink may be preferred because of its alcohol content or intoxicating effect.’ Clearly, this is logical in relation to the communication of higher than average strength products but it does not seem to be within the spirit of the code when used in relation to lower alcohol products.**

**Drinks manufacturers are increasingly providing a greater range of lower strength products within their portfolios to promote responsible drinking behaviour. It seems fair and reasonable that the benefits of these lower strength alcoholic products should be communicated to consumers so that they can make an informed choice.**

**For example, when creating an advertising campaign for a drinks manufacturer with a 2% product we found that the current rules prevented emphasis on the 2% alcohol content. However, the introduction of a 2% product is clearly within the spirit of promoting responsible drinking, in line with Government policy, and it would be in the interests of consumers to communicate and emphasis the lower alcohol content.**

### Provision for low-alcohol drinks

#### Question 63

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

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

### Other questions

## Provision for low-alcohol drinks

### Question 64

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

## Other questions

### Question 65

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

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

iii) Do you have other comments on this section?

**We believe that the current BCAP code is very effective.**

**We, as an advertising agency, find we are able to work with it well and that the rules are clear and reasonable.**

**In our view, the current code does a good job protecting the vulnerable and the young from any communications that may encourage harmful or unhealthy consumption.**

# Betfair Limited's response to the CAP Code Review Consultation

**19<sup>th</sup> June 2009**

## introduction to betfair

***Betfair Limited (previously The Sporting Exchange Limited trading as Betfair) is a leading provider of gambling products and services. After launching the world's first successful online betting exchange in June 2000, Betfair has grown into a multi-million pound business with an established portfolio of online gaming products comprising of sports betting, poker, casino and games. We now have in excess of two million registered customers with over 50% of all new registrations coming from outside the UK and Ireland. On an average day, we process more than 5 million transactions – more than all the European stock exchanges combined. Founded in London in 1999, we currently hold licences in the United Kingdom, Australia, Austria, Germany, Italy and Malta.***

***Our strategy for success is simple. We aim to be the service provider of choice by providing the best value, service and protection and we are committed to setting the benchmark standard in innovation, integrity, fairness and consumer protection. Ensuring our advertising and marketing communications are prepared with a due sense of social and professional responsibility is a core component of that strategy. Our success in promoting our principles of innovation, fairness, business integrity and commercial excellence has been consistently recognised.***

***Betfair was awarded the Queen's Award for Enterprise, in the Innovation category, in 2003 and in the International Trade category in 2008. It was also awarded the CBI Company of the Year award in both 2004 and 2005, the only company to have received the award twice. In the domain of marketing Betfair was awarded the eGaming Industry Review "Offline Marketing Campaign" award in September 2008 for our work on the "Spring Racing 2008" campaign. We were also awarded the Data Strategy 2008 Award for Best Data Quality Service in recognition of our work to use data to make email communications more pertinent to individual customers. We were also proud to be named as "Socially Responsible Operator of the Year" in the eGaming Review Industry Awards for the second time in consecutive years in 2006.***



***At Betfair, we are committed to innovative yet responsible advertising and as such we welcome this opportunity to respond to CAP's first major review of the Code for five years. We see this as an opportunity to make our contribution to maintaining a regulatory framework which is fit for purpose, ensuring adequate safeguards to protect consumers, yet which enables responsible advertising to develop and flourish. Like CAP, we wish to ensure that the Code delivers a regulatory framework which is: "transparent, accountable, proportionate, consistent, targeted only where regulation is needed and written so that they are easily understood, easily implemented and easily enforced".***

## **Rules on Gambling**

***We note that with the exception of the revisions to lottery marketing communications, CAP does not propose to make any revisions to the rules that relate to gambling, as set out in revised Rule 16 of the consultation document.***

***While Betfair respects the enduring principles contained within the Code and values the continuity and consistency that the rules are intended to provide, we are disappointed that CAP has not used the opportunity presented by the consultation to adopt a more comprehensive approach to review the rules on gambling.***

***In particular, we invite CAP to broaden the scope of the consultation and put forward our proposal for a revision to rule 57.4 (n)***

Proposal for an exception to Rule 57.4(n) to allow professionals /celebrities from the gambling world the freedom to promote or endorse gambling products

***Under the current rule 57.4 (n) marketing communications for gambling products or services "must not include a child or a young person. No one who is, or seems to be, under 25 years old may be featured gambling or playing a significant role".***

***For the avoidance of doubt, Betfair fully and wholeheartedly supports measures to protect children and young people from being harmed or exploited by gambling. However, while we support rule 57.4(n) in principle, we feel that the absence of an exception to allow young people aged over 18 years but under 25 years and who have achieved professional success in the field of poker the freedom to be able to***

*promote poker or betting products and services is disproportionate to its stated aim. We feel the current provisions are unnecessarily restrictive and amount to an unfair and discriminatory restraint of trade for successful young poker professionals.*

*Success at poker is widely considered to be dependent to a very large degree on skill and in some countries is treated officially as a sport with national poker federations with their own constitutions and rules. Furthermore, recent court decisions outside the UK have declared tournament poker, in which Annette has made her name, to be a game of skill. It is also widely shown on television, including sports channels such Sky Sports and ESPN. This clearly distinguishes poker from other gaming activities.*

*The most obvious example of an individual being denied freedom to contract and freedom of commercial expression under the current system is Annette Obrestad, the youngest person to ever win a World Series of Poker bracelet. In 2007, Annette was considered to be one of the best poker tournament players in the world.*

*Annette Obrestad is widely recognized and respected within the poker community, both on and offline, not on the basis of her age but on the basis of her world-class talent. However, the current rules restricting those aged under 25 from featuring in gambling promotions within the UK prevent Annette from being able to capitalize on her achievements and professional success by entering into lucrative endorsement and promotions relating to her discipline within the UK. Currently aged 20, Annette will need to stay at the top of her game for at least the next five years before she will be entitled to fully capitalize on her considerable potential earning power from advertising and endorsement. If she is unable to maintain her current ranking in her discipline by the time she reaches 25, the commercial opportunities available to her may be lost.*

*In fact, Annette could even be prevented from earning money after her 25<sup>th</sup> birthday, because the current rule purports to prohibit people who seem to be under 25. If Annette keeps her youthful looks, she will be prejudiced financially. This may add a layer of sexual discrimination to the age discrimination inherent in the rule, because a 25 year old male professional poker player may more easily take steps to ensure that he looks older than his years by growing a beard for example.*

*We regard the decision to impose a blanket age-restriction on marketing communications relating to gambling discriminates against*

***young dedicated professionals, like Annette on grounds of age. Annette is an intelligent, responsible, talented adult, who is rightly admired within her field. There is no legal or moral objection to her right to choose to play poker, to exploit her talent as her main source of income and to compete to achieve recognition and success within her chosen field. However, the current lack of flexibility in the Code's requirements place young professionals like Annette at a disadvantage in relation to world-class sportsmen and women practicing in other disciplines and in relation to players within her own discipline aged over 25.***

***The Employment Equality (Age) Regulations 2006, which protect not only employees but also contractors delivering services, recognize that there are circumstances where a discriminatory provision, criterion or practice may be justified if it pursues a legitimate aim. However, the Regulations clearly state that in such circumstances the discriminatory provision, criteria or practice must be proportionate means for achieving this aim.<sup>37</sup> As we will explain in greater detail below, we believe that this restriction within the CAP code amounts to a restraint of trade upon both professionals and brand-owners, which stifles commercial freedom to an extent that is disproportionate to the stated aim of protecting young people.***

***By imposing a blanket rule, the Code is preventing young adults aged 18 to 25, who have the legal right to access gambling services, compete in competitions and achieve national and international accolades, from being able to access commercial opportunities arising naturally from their professional success. In imposing such blanket restrictions, CAP has gone beyond the statutory policy of the Gambling Act 2005 and in our view beyond what is reasonable to promote responsible gaming promotions.***

***The failure to make an exception for professional or award winning poker players to appear in marketing communications regardless of age poses an interference with what is a fundamental human right of freedom of commercial expression for professionals such as Annette to communicate their commercial views and preferences.***

***The case law of the European Court of Human Rights indicates that all forms of expression merit protection by virtue of Article 10(1) of the Convention. This includes what is commonly known as commercial expression,<sup>38</sup> being the provision of information, expression of ideas or***

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<sup>37</sup> S3(1) Employment Equality (Age) Regulations 2006, SI 2006 No.1031

<sup>38</sup> See for example, Markt Intern Verlag GmbH and Another v. Germany (A/164): (1990) 12

***communication of images as part of the promotion of a commercial activity and the concomitant right to receive such communications.***

***Clearly the exercise of freedom of expression, like that of other rights and freedoms may be subject to proportionate restrictions in order to secure the enjoyment of rights by others or the achievement of certain objectives in the common good. The protection of children is indisputably a legitimate social aim. However, we believe that in the context of the existing provisions within the Code intended to protect children and young people and the comprehensive industry standards regulating the Gambling Industry, the blanket restriction on gambling marketing communications featuring those aged 18 to 25 regardless of status is disproportionate to this aim.***

***There is a further anomaly in that advertising for gambling services often feature images of professional sports men and women, albeit as the subject matter for gambling, rather than as gamblers themselves. It is notable, however, that these men and women, particularly Premier League Football players, are role models to children and young people and far better known to them than someone like Annette. Betfair believes that the intention of rule 57.4 (n) in its current form is to avoid the depiction of young people engaged in the activity of gambling and/or playing a significant role in the activity of gambling, rather than in the advertisement itself. Otherwise, any advert for a gambling service that, for example, features Premier League Football players aged 25 or less in a significant role, would be in breach. However, this does not appear to be how the ASA currently interprets the rule.***

***In addition to rule 57.4 (n) there are a number existing provisions within the CAP Code which recognise children as a group entitled to special protection thereby providing adequate safeguards to ensure that children and young people are protected from being harmed or exploited by advertising that features or promotes gambling.***

***Rules 57.2 states marketing communications for gambling should be socially responsible, with particular regard to the need to protect children, young persons and other vulnerable persons from being harmed or exploited by advertising that features or promotes gambling;***

***57.4(b) states marketing communications should not exploit the susceptibilities, aspirations, credulity, inexperience or lack of knowledge of children, young persons or other vulnerable persons;***

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E.H.R.R. 161, paras [25] & [26] ; Groppera Radio Ag v. Switzerland (A/173): (1990) 12 E.H.R.R. 321, para. [55] ;  
and Casado Coca v. Spain (A/285) : (1994) 18 E.H.R.R. 1, paras [35] & [36]

57.4 (l) states marketing communications should not be likely to be of particular appeal to children or young persons, especially by reflecting or being associated with youth culture; and

57.4 (m) states marketing communications should not be directed at those aged below 18 years (or 16 years for lotteries, football pools, equal chance gaming (under a prize gaming permit or at a licensed family entertainment centre), prize gaming (at a non-licensed family entertainment centre or at a travelling fair) or Category D gaming machines) through the selection of media or context in which they appear.

In addition to the above further measures within rule 57.4 aimed at protecting vulnerable groups more generally provide added protection for children.

*As a socially responsible provider of gambling products and services, Betfair fully endorses and supports these measures and also supports the general principle of rule 57.4(n) on the proviso that CAP introduces an exception for professional/celebrity endorsement as proposed above.*

*In addition to the protective measures contained within the Code it must be noted that it is a criminal offence to invite a child or young person to gamble under section 25 of the Gambling Act 2005.*

*Betfair believes the combination of statute, Gambling Commission licence conditions and self-regulation which governs the operation of the gambling industry particularly in relation to age restriction and verification procedures provide additional protection to young people. Like many providers in our industry, we have adopted a rigorous approach to protecting children and young people from exposure to gambling. We have a robust and comprehensive array of age-verification procedures to ensure that young people are not able to gain access to our products and services.*

Betfair is fully compliant with the Remote Gambling Association's Codes for Social Responsibility<sup>39</sup> and Age Verification.<sup>40</sup>

Betfair's under age policy is clear and information and warnings are carried on our homepages and during account registration, making it clear to all consumers that it is illegal for anyone under the age of 18 to open an account or to gamble on Betfair.<sup>41</sup>

Our rigorous age-verification process takes customers through multiple stages to confirm their identity and age.

Funding amount restrictions are imposed and withdrawals are blocked on all accounts until age has been verified and full account suspension is imposed where age cannot be verified from a reliable independent source such as the electoral roll.

<sup>39</sup> <http://www.rga.eu.com/shopping/images/RGA%20SR%20Code%20-%20%20Final%2007.pdf>

<sup>40</sup> <http://www.rga.eu.com/shopping/images/Final%20RGA%20AV%20code%2025%20October%202005.pdf>

<sup>41</sup> [www.betfair.com](http://www.betfair.com)

**We constantly monitor our processes and perform regular random checks on all accounts.**

**Our website pages are Internet Content Rating Association labelled which allows us to be recognised as a gambling provider and we encourage our customers to use parental filtering programmes.**

**All Betfair employees receive responsible gambling awareness training within their first three months of employment, with further in-depth training programmes provided for customer-facing employees. Refresher training is given annually or more frequently when required. GamCare, the leading authority on the social impact of gambling in the UK, has been instrumental in the development of our training material.**

***In the context of the measures described above, we feel confident that our proposal to liberate young professionals aged 18 to 25 from the current discriminatory regime by allowing freedom of contract and freedom of commercial expression will have no detrimental impact on the wellbeing of children and young people.***

***We are grateful for the opportunity to respond to this consultation and to present our proposals. If you would like to discuss this response in more detail please do not hesitate to contact Andrew McCabe of Betfair Limited who would be delighted to expand upon the contents of this submission.***

I am a Solicitor at Bond Pearce LLP. I have read through the two consultation papers that you have published for the CAP and BCAP codes and have the following comments.

### **Broadcast CAP consultation response**

#### **Question 17** - New Rules 3.25 and 3.26

*Advertisements must not describe an element of a package as "free" if that element is included in the package price.*

We believe that the wording around the use of "free" as it currently stands is ambiguous. We believe that CAP should specifically include provision and rules regarding "buy one get one free" offers and introductory offers. This issue is something that all retailers and advertisers require a clear set of rules on. Whilst there is a CAP help note on the topic, not including provision within the rules for such an important issue would be a lost opportunity.

#### **Question 18** - New rule 3.28.3

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

We believe that the inclusion of this rule will make it very difficult for national retailers with 100+ stores to advertise offers on a national scale where they cannot guarantee availability in every store. The wording of the clause as it stands does not go far enough to explain the extent to which a geographical restriction applies. Would a statement to the effect of: "Not available in all stores see [www.website.co.uk](http://www.website.co.uk) for more details" suffice? Added to this will including a small statement such as "available in 80% of stores" suffice? This is certainly a clause that requires further explanation.

### **Non Broadcast CAP consultation response.**

#### **Question 3** - New rule 3.10

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

Whilst we understand the reasoning behind and agree with the inclusion of rule 3.10, we believe that it does not explain in enough detail what is meant by a communication only being seen once. Does this include very small adverts such as online Google search results where the amount of space to include information is very limited. There are always a number of qualifications that in most cases are obvious to consumers. We believe that online adverts which allow people seeing the advert to click through to a further website where more information will be provided should be given a certain amount of leniency. For example, broadband providers are supposed to include a qualification whenever stating the speed of their "up to" service. With the implementation of this rule, it will seemingly be impossible for them to advertise the "up to" speed on a small confined advert.

#### **Question 4** - New Rule 3.28.3

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



We believe that the inclusion of this rule will make it very difficult for national retailers with 100+ stores to advertise offers on a national scale where they cannot guarantee availability in every store. The wording of the clause as it stands does not go far enough to explain the extent to which a geographical restriction applies. Would a statement to the effect of "Not available in all stores see [www.website.co.uk](http://www.website.co.uk) for more details" suffice? Added to this will including a small statement, such as: "available in 80% of stores" suffice? This is certainly a clause that requires further explanation.

## Question 9

Further considerations. CAP have decided not to make any major changes regarding the use of the word "free" in advertising. The code currently states.

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

*a) the minimum, unavoidable cost of responding to the promotion, eg the current public rates of postage, the cost of telephoning up to and including the national rate or the minimum, unavoidable cost of sending an e-mail or SMS text message*

*b) the true cost of freight or delivery*

*c) the cost, including incidental expenses, of any travel involved if consumers collect the offer.*

We believe that the wording around the use of "free" as it currently stands is ambiguous. We believe that CAP should specifically include provision and rules regarding "buy one get one free" offers and introductory offers. This issue is something that all retailers and advertisers require a clear set of rules on. Whilst there is a CAP help note on the topic, not including provision within the rules for such an important issue would be a lost opportunity.

If you wish to discuss any of the above, please do let me know.

## RESPONSE TO CAP CONSULTATION FROM xxx

### Section 1: Compliance

#### Question 1

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

Yes, subject to point (iii) below.

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

No, subject to point (iii) below.

iii) Do you have other comments on this section?

We welcome the clarification to electronic media and website content and whether they are included within the CAP Code. However, we consider that "viral advertisement" requires further clarification. The new definition reads that a viral advertisement is "an email, text or other non-broadcast marketing communication designed to stimulate significant circulation by recipients to generate commercial or reputational benefit". Some organizations put films on their website for consumers to download and watch in their own time. In many cases, there is no exhortation to spread the film but consumers often do. The new definition has the potential to catch much more website content given the potential breadth of the definition of a "viral advertisement". We request additional clarification to ensure that only genuine viral films are included within the CAP Code.

### Section 2: Recognition of marketing communications

#### Question 2

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

Yes

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

No

iii) Do you have other comments on this section?

No

### Section 3: Misleading

#### Clarity of qualifications

#### Question 3

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

why.

We believe that the proposed clause 3.10 is overly restrictive in relation to marketing communications. Some marketing communications require lengthy clarification (e.g. holiday/travel marketing and financial goods and services) and many of these, perfectly valid marketing messages, may be deemed to be in breach of the CAP Code if this clause is introduced. What is considered “once” and the time the consumer spends looking at the communication?

We also point to the Consumer Protection from Unfair Trading Regulations 2008 in which misleading omissions are discussed (see Regulation 6). It states that, in determining whether an omission is misleading, the following will be taken into consideration: “limitations of the medium used....(including limitations of time or space)” and “where the medium used....imposes limitations of time or space, any measures taken by the trader to make the information available to consumers by other means”. Each case is obviously judged on its own merits but the general law indicates, and provides support for the contention, that the each communication needs to be assessed on its own merits. If the communication is not clear then it is likely to be misleading but the “once” argument adds additional criteria which is hard for advertisers to understand and comply with bearing in mind the different advertising mediums.

### Exaggerated performance

#### Question 4

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

Yes

### Restrictions on availability

#### Question 5

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

Yes

### Testimonials

#### Question 6

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

Yes

### Additional rights provided by guarantees

#### Question 7

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

Yes

### The unavoidable cost of responding

#### Question 8

Given CAP’s policy consideration, do you agree that marketing communications should not

describe items as “free” if the consumer has to pay for packaging? If your answer is no, please explain why.

Yes

## Other questions

### Question 9

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

Yes, subject to point (iii) below.

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

No, subject to point (iii) below.

iii) Do you have other comments on this section?

Clause 3.35 relating to comparisons references the need for claims to be “verifiable”. Clause 3.39 explicitly refers to price comparisons and the need for the basis of the comparison to be stated. Clause 3.35 has no explicit reference yet adjudications are now being given (Tensar) in which non-price comparisons have to include references to the basis for the comparison in the communication (i.e. verifiable). If this is a new requirement, the consultation should explicitly cover this new requirement although we appreciate that the consultation was launched prior to the Tensar decision. In the absence of such a requirement, non-price comparisons should not have to follow the on-advert verification so long as the basis for the comparison is verifiable.

## Section 4: Harm and Offence

### Flashing images

#### Question 10

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

Yes

### Other Questions

#### Question 11

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

Yes

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

No

iii) Do you have other comments on this section?

No

## Section 5: Children

### Promotions that contain a direct exhortation to buy a product

#### Question 12

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

Yes

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

#### Question 13

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

Yes

### Other questions

#### Question 14

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

Yes

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

No

iii) Do you have other comments on this section?

No

## Section 6: Privacy

#### Question 15

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

Yes

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

retained or otherwise given dedicated consideration?

No

iii) Do you have other comments on this section?

No

## Section 7: Political Advertisements

### Question 16

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

Not answered

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

Not answered

iii) Do you have other comments on this section?

Not answered

## Section 8: Sales Promotions

### Withholding prizes

### Question 17

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

Yes

### Promotions directed at children; the need for a closing date

### Question 18

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

Yes

### Prizes and Gifts

### Question 19

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

Yes

### Question 20

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

Yes

### Significant conditions exception: limited by time or space

#### Question 21

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

Yes although we would like clarification concerning rule 3.10 which seems to be inconsistent with the latitude permitted advertisers in rule 8.18.

### Distinction between prizes and gifts: a significant proportion

#### Question 22

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

Yes

### Supervising Prize Draws

#### Question 23

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

Yes

### Auditing instant-win promotions

#### Question 24

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

Yes

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

Yes

### Judging of prize promotions

#### Question 25

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

Yes

### Receipt of prizes: time

### Question 26

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

Yes

### Appeal to children

### Question 27

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

Yes

### Other questions

### Question 28

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

Yes

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

No

iii) Do you have other comments on this section?

No

## Section 9: Distance Selling

### Personal visits

### Question 29

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

Yes

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

### Question 30

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

Yes

### Other questions

### Question 31



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

Yes

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?

No

iii) Do you have other comments on this section?

No

## Section 10: Database practice

### Collection of data from children

#### Question 32

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

Yes

### Explicit consent of consumers: Bluetooth

#### Question 33

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

Yes

### Other questions

#### Question 34

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

Yes

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

We request further consideration in relation to send-to-a-friend communications ("STAF"). The Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR") are followed within the revised CAP Code. As the law stands, STAF communications are in breach of the PECR although the Information Commissioner's Office notes that these are common ways marketers can reach consumers. The ICO's published guidance for marketers on the implementation of PECR (page 23) refers to the mechanism for STAF and whilst not officially endorsing the practice, does clearly indicate that it is not objectionable (subject to conditions). As ICO is the regulator of data protection, should the CAP Code mirror it and include provisions dealing with STAF communications?

iii) Do you have other comments on this section?

No

## Section 11: Environmental Claims

### Question 35

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

Yes

### Other questions

### Question 36

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

Yes

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

No

iii) Do you have other comments on this section?

No

## Section 12: Medicines, Treatments, Devices and Health

### Traditional Herbal Medicinal Products

### Question 37

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

Not answered

### Medicinal claims

### Question 38

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

Not answered

### Other questions

### Question 39

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

Not answered

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

Not answered

iii) Do you have other comments on this section?

Not answered

## Section 13: Weight Control and Slimming

### Targeting the obese

#### Question 40

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

Not answered

### Loss of weight or fat from specific parts of the body

#### Question 41

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

Not answered

### Very Low-Calorie Diets (VLCDs)

#### Question 42

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

Not answered

### Other questions

#### Question 43

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

Not answered

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

Not answered

iii) Do you have other comments on this section?

Not answered

## **Section 14: Financial products Individual Voluntary Arrangements (IVAs)**

### **Question 44**

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

Not answered

### **Other questions**

### **Question 45**

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

Not answered

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

Not answered

iii) Do you have other comments on this section?

Not answered

## **Section 15: Food, Dietary supplements and Associated Health and Nutrition claims**

### **Permitted nutrition and health claims**

### **Question 46**

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

Yes

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

### **Question 47**

Do you agree CAP has correctly reflected the requirements of Article 3(b) of the NHCR in

proposed rule 15.6 and 15.6.5? If your answer is no, please explain why.

Yes

### Comparative nutrition claims

#### 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.

Yes

### Comparison with one product

#### 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.

Yes

### Prohibitions

#### 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.

Yes

#### 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.

Yes

#### 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.

Yes

### The use of health professionals

#### 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.

Yes

### Food labelling Regulations (1996) (FLRs)

#### 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.

Not answered

#### 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.

Yes

#### Infant and follow-on formulae

#### Question 56

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

Not answered

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

Not answered

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

#### Other questions

#### Question 57

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

Yes

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?

No

iii) Do you have other comments on this section?

No

### Section 16: Gambling

#### Consistency: principle

### Question 58

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

Not answered

### Consistency: rules

### Question 59

Given CAP's policy consideration, do you agree that the rules included in the Lottery Section of the Code are in line with CAP's general policy objectives (see Part 1 (4) of this consultation document) and should be applied to marketing communications for the National Lottery as they presently are to marketing communications for other lotteries? If your answer is no, please explain why and, if relevant, please identify those rules that should not be applied to marketing communications for the National Lottery.

Not answered

### Participating in a lottery in a working environment

### Question 60

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

Not answered

### Other questions

### Question 61

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

Not answered

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

Not answered

iii) Do you have other comments on this Section?

Not answered

## Section 18: Alcohol

### Alcoholic strength

### Question 62

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

Yes

### Provision for low-alcohol drinks

#### Question 63

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

Yes

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

Yes

#### Question 64

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

Yes

### Other questions

#### Question 65

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

Yes

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

No

iii) Do you have other comments on this section?

No

## Section 19: Motoring

### The legal requirements of the Highway Code

#### Question 66

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

Yes

### Prices in motoring marketing communications

#### Question 67



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

Yes

## Other questions

### Question 68

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

Yes

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

No

iii) Do you have other comments on this section?

No

## Section 20: Employment, Homework Schemes and Business Opportunities

### Employment businesses

#### Question 69

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

Not answered

### Required information in marketing communications for homework schemes

#### Question 70

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

Not answered

### Vocational training and instruction courses

#### Question 71

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

Not answered

## Other Questions

### Question 72

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

Not answered

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

Not answered

iii) Do you have other comments on this section?

Not answered

## Section 21: Tobacco, Rolling Papers and Filters

### Question 73

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

Not answered

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

Not answered

iii) Do you have other comments on this section?

Not answered

## Section 22: Other comments

### Question 74

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

Please see comment in relation to comparisons in rule 3.9 which needs to be addressed given that adjudications are now being made on the point.

**The following question was issued as an addendum on 29 May 2009. The closing date for responses to this question is 10 July 2009. The full text of the addendum can be found [here](#).**

### Question 75

Given CAP's policy consideration, do you agree that the evidence contained in the ScHARR

Review does not merit a change to CAP's alcohol advertising content or scheduling rules? If your answer is no, please explain why you consider the ScHARR Review does merit a change to CAP's alcohol advertising content or scheduling rules.

## **British Beer & Pub Association's response to CAP Code Review Consultation**

The British Beer & Pub Association is the trade association representing the British brewing and pub industry. We represent about 98% of beer production and our members own 60% of the UK's pubs.

### **Section 18: Alcohol**

#### **Alcoholic strength**

##### **Question 62**

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

**We do not agree with the insertion of rule 18.9 into the CAP Code. At a time when Government is seeking to encourage reduced alcohol consumption it would seem both prudent and reasonable to allow producers the option of communicating their products as having lower alcohol content. This would be in common with incentives offered in other countries, such as the Irish Government introducing a reduced rate of duty for beers and ciders under 2.8% abv.**

**CAP highlights concerns that promoting 'lower-strength' drinks could introduce confusion, especially in relation to drinking and driving'. The industry's position is that if one intends to drive, then one should not drink. That clear message has been the centre-piece of industry and Government campaigns for more than thirty years. Alcohol strength and/or alcohol units information were not devised in the context of drink-driving and should never be used as a guide in relation to driving. Under the proposed Code (statement 4.6) it makes it clear that alcohol 'marketing communications must not encourage consumers to drink and drive'.**

**Use of a descriptor such as 'strong' on certain products (normally in the name of the product) does not necessarily refer to alcohol content. The term can be used to describe full flavour, body and mouth-feel etc.. However, by law, packages must display an accurate declaration of the abv and the vast majority of products also have a voluntary alcohol unit declaration. There should be no lack of clarity as to the actual alcohol content.**

#### **Provision for low-alcohol drinks**

##### **Question 63**

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

**We agree with CAP's position on the removal of rule 56.15.**

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

**Yes, we agree that these products should be subject to all the alcohol rules.**

##### **Question 64**

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

**Yes, we agree with the inclusion of rule 18.12.**

## Other questions

### Question 65

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

**Whilst not referring specifically to this section the change to section 10.2 (to become section 4.6) the word "should" has been replaced by "must" with relation to including a prominent warning of the dangers of drinking and driving, where "relevant". We do not believe it is appropriate to oblige a marketer to include a warning without defining what is included as "relevant". We fully support that communications should not encourage drinking and driving.**

- iii) Do you have other comments on this section?

**There have been changes to the text that remove examples of positive statements that can be made about a product, such as a brand reflecting 'the drinker's good taste and discernment'. We believe that keeping such examples within the text helps clarify what can be claimed and what cannot.**

### Question 75

Given CAP's policy consideration, do you agree that the evidence contained in the ScHARR Review does not merit a change to CAP's alcohol advertising content or scheduling rules? If your answer is no, please explain why you consider the ScHARR Review does merit a change to CAP's alcohol advertising content or scheduling rules.

**We agree with CAP's position that the evidence contained in the ScHARR review should not lead to a change in CAP's alcohol advertising content or scheduling rules.**

## **CAP/BCAP CONSULTATION: BBFC RESPONSE**

### **A. GENERAL**

The British Board of Film Classification (BBFC) is an independent, non-governmental body funded through the fees it charges to those who submit films and video works for classification. Video works include video games, and films and programmes released on DVD or Blu-ray, or distributed by means of download or streaming on the internet.

There are two guiding principles under which the BBFC exercises the broad discretion conferred on it:

- that works should be allowed to reach the widest audience that is appropriate for their theme and treatment
- that adults should, as far as possible, be free to choose what they see, provided that it remains within the law and is not potentially harmful

When applying these guiding principles, we also apply three main qualifications:

1. whether the material is in conflict with the law, or has been created through the commission of a criminal offence
2. whether the material, either on its own, or in combination with other content of a similar nature, may cause any harm at the category concerned. This includes not just any harm that may result from the behaviour of potential viewers, but also any ‘moral harm’ that may be caused by, for example, desensitising a potential viewer to the effects of violence, degrading a potential viewer’s sense of empathy, encouraging a dehumanised view of others, suppressing pro-social attitudes, encouraging anti-social attitudes, reinforcing unhealthy fantasies, or eroding a sense of moral responsibility. Especially with regard to children, harm may also include retarding social and moral development, distorting a viewer’s sense of right and wrong, and limiting their capacity for compassion
3. whether the availability of the material, at the age group concerned, is clearly unacceptable to broad public opinion. It is on this ground, for example, that the BBFC intervenes in respect of bad language.

In assessing legal issues, potential harm or acceptability to broad public opinion, the BBFC takes account of relevant research and expert opinion. However, such research and expert opinion is often lacking, imperfect, disputed, inconclusive or contradictory. In many cases the BBFC must therefore rely on its collective experience and expertise to make a judgement as to the suitability of a work for classification, or for classification at a particular category.

We welcome both the update of the two codes and the opportunity to comment on the proposals.

The draft revised codes contain a sensible set of proposals. They come from the same starting points as the BBFC – namely legal requirements set out in UK legislation and the principle of protecting children and other vulnerable groups.

Although the areas of competence of the BBFC and CAP sometimes coincide (for example, cinema and video advertising) we generally look for different things. For example, we are less concerned by whether an advertisement is honest and truthful and more concerned by suitability of content and in particular whether the content is likely to be harmful. We use the classification system to protect children and other vulnerable groups from potentially harmful material in advertisements. This may mean putting an advertisement to a higher category. It may mean cuts. Or in extreme cases, it may mean rejecting an advertisement entirely.

The BBFC's classification criteria are based on published Guidelines derived from extensive public consultation. These are updated every 4/5 years to take account of changes in public attitudes. Although the Guidelines are very different from the CAP codes, some of our key underlying principles are similar, and our classification decisions on the advertising of for example alcohol, gambling and junk food products will be informed by the outcome of this present consultation.

Below are more specific comments, first on the proposed CAP Code and second on the proposed BCAP Code.

## **B. CAP**

### **Photosensitive epilepsy**

A small number of viewers are sensitive to flashing and flickering light, or some shapes and patterns, and may experience seizures or other serious physical effects. It is the responsibility of film makers and distributors to identify works in which such issues may arise and to ensure that, when required, appropriate warnings are given to viewers. Such effects are therefore not normally taken into account when we reach a classification decision. However, if it is obvious during our examination that the work is highly likely to affect a significant number of viewers, the BBFC may advise the distributor of the need to ensure that appropriate warnings are in place. In extreme cases, assurances regarding the display of appropriate warnings may be required as a condition of classification.

**The BBFC therefore shares the concern about this issue and supports the proposed rule 4.7 designed to protect members of the public with photosensitive epilepsy.**

## **C. BCAP**

### **Video games**

The BBFC agrees that the responsible marketing of games is fundamentally important if children are to be protected from potentially harmful game content. We believe that where games are classified for older teens or adults, the marketing needs to reflect the classification and not be directed at younger children. Generally we rely on the good sense and corporate responsibility of the publisher. But where an 18-rated game has significant appeal to children, we may intervene to ensure that the marketing is restricted as far as possible to adults only. For example, before rating for adults only the very violent video game *50 Cent Bulletproof*, which features the hugely popular hip hop star 50 Cent who has significant appeal to young teenagers, we agreed with its publisher a restrictive marketing strategy for the game, focusing on media with little child appeal. Research we commissioned following the

release of *50 Cent Bulletproof* demonstrated that this approach was effective - there was virtually no underage playing of this game.

Research shows that parents are concerned by the same content in films and games: violence, sex, racism, drug use, dangerous activities presented as safe. And films and games are converging. Often, film and game emerge from the same creative vision. Often a game and film are placed on the same disc, and this is increasing as Blu-ray takes off. Against this backdrop of parental concern and media convergence; with child protection the key driver; and given the impact of broadcast advertisements, it makes sense for restrictions on advertising 15 and 18-rated films and DVDs to apply equally to 15, 16+ and 18 rated video games as is proposed under section 32 of the revised BCAP code. All the more so because parents do not understand video games as well as they understand films and DVDs.

**We therefore support the proposals at 32.5, 32.5.4, 30.20 and 32.20.5 to restrict advertising of 15, 16+ and 18-rated video games to keep them away from programmes aimed at viewers under 16, thereby mirroring the restrictions on broadcast advertisements for 15 and 18-rated films and videos/DVDs.**

**For the same reasons, and given the potential for both serious harm and offence, we also support the proposed new rule 31.1.4 to require central copy clearance of radio ads for 18-rated video games, thereby bringing the regime for 18-rated video games into line with the regime for 18-rated films.**

Video game advertisements are sometimes released and broadcast before a game is classified. In general, games publishers have an accurate idea of both (i) the classification rating they want for a game; and (ii) the rating they are likely to get. With BBFC support, they often use a TBC rating (see examples below for likely 15 and 18-rated games) in the advertisements for these as yet unrated games. Given that the potential for harm and offence arising from such advertisements is virtually identical to that in advertisements for the rated product, it makes sense to apply the same restrictions on broadcast advertisements.



**We therefore recommend that the above proposals also apply to video games which have not yet been classified, but which are expected by the publisher to secure a 15, 16+ or 18-rating.**

We await a Government decision on the future of video game classification following Dr Tanya Byron's independent review. Meanwhile, the Video Recordings Act 1984 (VRA) requires a BBFC classification of video games which contain gross violence, human sexual activity, human genital organs or urinary or excretory functions and techniques likely to be useful in the commission of offences. A BBFC classification is also required under the Act for any game disc which contains linear material not integral to the game. This may include



trailers, featurettes, shorts and even full length features. Furthermore, many games companies prefer the security and trust that a BBFC classification provides and submit works to us for which exemption could be claimed. This means that we classify games at all categories, from U to R18, not just 15 and 18, contrary to the implication in paragraph 32.16 of the consultation document. Paragraph 32.16 also suggests that the VSC monitors the BBFC's classification system. This is not the case. The BBFC performs a statutory function. Our decisions have statutory force and are enforced by TSOs and other enforcement agencies. The VSC is merely an advisory industry body. It has no role in BBFC classifications.

## **Pornography**

We note the proposed relaxing of the code governing the advertising of pornographic material (30.3 and 30.4) and in particular the proposal to allow advertising of R18 level material, provided such material is not shown. We have considered this proposal in the light of Section 12(1) of the Video Recordings Act which covers the supply of R18 material. Having taken legal advice, we **recommend that to be safe and avoid falling foul of the VRA, advertisements for video recordings classified R18 should carry the statement "This DVD is only available at licensed sex shops"**.

**We also suggest that there should be no advertising of any pornographic video recordings which have not been classified by the BBFC.** We of course remove any material which is obscene from such works before they are distributed. This is relevant to the proposed rule 10.1.6. We also remove other illegal material from these works, including content which contravenes the Video Recordings Act, the Protection of Children Act 1978, The Sexual Offences Act 2003 and the Criminal Justice and Immigration Act 2008.

We would be happy to discuss any of this further with you if you would find it helpful.



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19 June 2009

## Response of the British Heart Foundation to the CAP Code Review

### Introduction

The British Heart Foundation (BHF) is the nation's heart charity, dedicated to saving lives through pioneering research, patient care, campaigning for change and by providing vital information. We welcome the opportunity to respond to the CAP code review. We are also responding to the BCAP code review as we believe that **consistency between broadcast and non broadcast media is vital to protecting children's health**. The review of both codes provides an opportunity to secure consistency which must not be missed.

Heart and circulatory disease is the UK's biggest killer and causes almost 198,000 deaths a year<sup>42</sup>. Obesity, a key risk factor for the development of heart disease has now reached epidemic proportions, with the recent Foresight report on obesity warning that up to half of boys will be obese by 2050 unless decisive action is taken<sup>43</sup>.

The BHF believes that the promotion of unhealthy foods to children must be reduced in order to lower the burden of diet related ill-health. Taking action to reduce the volume of marketing children are exposed to via non-broadcast media is essential. The CAP code has crucial a role to play in making sure advertising standards relating to the marketing of food to children are fit for purpose.

### The consultation process

The consultation documents provided by CAP were cumbersome and difficult to navigate, and the BHF is concerned this will have a negative impact on the quality of responses individuals and organisations are able to provide. This should be considered for future consultations.

We have focussed our response on giving an overview of key points of principle on the marketing of unhealthy foods to children and the responsibilities of the CAP code in relation to this.

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<sup>42</sup> [www.heartstats.org](http://www.heartstats.org)

<sup>43</sup> *Tackling Obesities: Future Choices*, Foresight (October 2007)

## Impact of advertising

Every year millions of pounds is spent marketing food and drink products to children. The vast majority of this money promotes unhealthy foods: that is, foods which are high in fat, sugar and/or salt (HFSS)<sup>44</sup>. The Department of Health estimates that the commercial sector spends £335m every year promoting confectionery, snacks, fast food and sugary drinks<sup>45</sup>.

The impact of television adverts on food choices has been shown, as has the association between the proportion of overweight children and the number of food advertisements shown each hour during children's television.<sup>46</sup> The Hastings Review<sup>47</sup> found that food promotion affects preferences not only at brand level (e.g. persuading people to choose one burger restaurant over another) but also, more importantly, at category level (e.g. persuading people to eat more burgers instead of fruit).

Whilst Hastings found there was a proven "modest direct" impact on children from advertising, it is clear that the true scale of advertising's indirect impact on children's food choices is hard to quantify.

However, we consider this indirect link to be significant. Research conducted by the National Children's Bureau with young people confirms that there are a number of marketing methods which young people themselves recognise help to drown out healthy eating messages with unhealthy ones<sup>48</sup>.

**The BHF 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.**

The BHF has recently published two reports examining the way that HFSS foods are marketed via non broadcast media. Our *Protecting Children from Unhealthy Food Marketing* report argues that 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>49</sup>. The follow up report, *How Parents Are Being Misled* 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>50</sup>. Copies of both these reports are included with our consultation response.

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<sup>44</sup> Ofcom (2006) *Television advertising of food and drink products to children - Options for new restrictions*. London: Ofcom

<sup>45</sup> Change4Life (2009) *Partner FAQs*. [www.nhs.uk/Change4life/Pages/PartnerFAQ.aspx](http://www.nhs.uk/Change4life/Pages/PartnerFAQ.aspx)

<sup>46</sup> Halford and Boyland (2007) *Missing the target – Changing children's food preferences*; University of Liverpool

<sup>47</sup> Hastings et al. (2003) Review prepared for the Food Standards Agency. Centre for Social Marketing: The University of Strathclyde

<sup>48</sup> National Children's Bureau (2006) *Children's views on non-broadcast food and drink advertising*, Report for the Office of the Children's Commissioner

<sup>49</sup> BHF and CFC (2008) *Protecting children from unhealthy food marketing*, CFC, London

<sup>50</sup> *How parents are being misled: a campaign report on children's food marketing*, British Heart Foundation, 2008

The BHF 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 Unfair Commercial Practices. It would be useful to know how these are being considered and how they will inform the current review.

## **Key points on the Code**

### A consistent definition of children

The code should contain a definition of children which is consistent with other regulation. All measures contained within the Code to restrict unhealthy food advertising should include children aged 16 and under.

The BHF believes that applying some standards only to younger children (school aged or pre-school aged) is unacceptable and not grounded in evidence. For example, the following paragraph on the use of promotional offers is taken from the consultation document: *"promotional offers must be used with a due sense of responsibility. They may not be used in HFSS product advertisements targeted directly at pre-school or primary school children."* This standard should cover all children under the age of 16.

This would bring the CAP code into line with Ofcom, which has accepted that restrictions on television food advertising should apply to people under 16 years of age. This is essential as children under 16 will be no less vulnerable to marketing through non-broadcast media than they are to television marketing.

The proposed changes to the BCAP code include provisions on children's health and hygiene, with a specific provision that 'advertisements must not condone or encourage practices that are detrimental to children's health'<sup>51</sup>. This must be mirrored in the CAP code to ensure that there is consistent protection for children across broadcast and non broadcast media.

### Defining unhealthy foods

In order to determine which products are suitable for marketing to children, the CAP Code should adopt the Nutrient Profiling Model currently used by Ofcom to differentiate between healthy and unhealthy products.

The Nutrient Profiling Model, developed by the Food Standards Agency for Ofcom, has been proven to be fit for purpose<sup>52</sup>. The model identifies "healthy" products, to which no special standards or restrictions should apply; and "less healthy" products, for which children should not be subjected to marketing and advertising. While this model was developed to support the Ofcom restrictions on TV advertising, it has broader utility for regulating advertising children.

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<sup>51</sup> ASA (2009) *BCAP Code Review: Consultation on the proposed BCAP Broadcast Advertising Standards Code*

<sup>52</sup> FSA (2009) *FSA Board agrees advice to Ministers on nutrient profiling model*, 25 March 2009

Again, adopting this model will ensure that regulation of broadcast and non-broadcast marketing to children is consistent.

This amendment would also reduce the regulatory burden on business because foods deemed “healthy” by the model would not be subject to regulation regarding their marketing to children.

### **Conclusion**

We believe that the proposed regulation of marketing of unhealthy food to children contained within this Code leaves gaps in the protection offered to children.

We urge CAP to make sure that the Code is consistent with the regulation already in place for broadcast advertising by ensuring that measures cover all children under the age of 16, that the Nutrient Profiling Model is adopted to differentiate between healthy and less healthy foods and that there is consistent protection for children’s health.

Making these changes would make the regulation governing food marketing to children more efficient and media neutral and help to further efforts to improve children’s health. This would reduce long term costs to individuals, families and the NHS.

For further information please contact Alex Callaghan, Policy Officer, on 020 7554 0157 or [Callaghana@bhf.org.uk](mailto:Callaghana@bhf.org.uk)

A handwritten signature in dark ink, appearing to read 'Ruairi O'Connor', written in a cursive style.

**Ruairi O Connor**  
**Head of Policy and Public Affairs**  
**British Heart Foundation**

British Naturism is the representative organisation for naturists in the UK.

About 1.5 million people in the United Kingdom describe themselves as being a naturist<sup>53</sup> and there are about ten times that number who practise naturism to at least some extent. There is a surprisingly high level of acceptance by the public though there are also some who are deeply prejudiced against nudity. Few people realise how numerous we are.<sup>54</sup>

In this response we frequently refer to attitudes, harm and benefit. Please see our briefing notes on "Statistics", "Children", and "Health and Well-being" for the supporting evidence.

#### **Question 11**

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

No.

There are numerous references to avoiding harm and similarly numerous references to avoiding causing widespread and serious offence. Unfortunately the code does not recognise that there are many situations where the two requirements conflict and it does not provide a rule for resolving the conflict. We firmly believe that considerations of harm must always take precedence over offence. Anything else is indistinguishable from prejudice.

The rules are almost entirely concerned with the rights of marketers and the rights of individuals receiving advertising material. Marketing materials are part of the general pattern of life and they do have an impact on society as a whole. The code needs to give more weight to the general well-being of society.

Protection must be based on evidence of what causes harm and of what promotes well-being.

Anything else is indistinguishable from prejudice and acting on prejudice almost invariably causes harm.

#### **Question 28**

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

No.

Rule "8.7 No promotion or promotional item should cause serious or widespread offence to consumers."

This rule must carry the rider that considerations of harm take precedence over offence.

Avoiding causing offence to one group can cause offence to other groups. This must be recognised.

#### **Question 74**

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

Great care must be taken to ensure that mistaken ideas about what is harmful do not prevent advertising that is beneficial to the well-being of individuals or society in general. In particular complaints from a large proportion of a vociferous but tiny minority must not carry more weight than considerations of harm and the wishes of the overwhelming majority.

Most people are unaware of how much censorship takes place and they are also unaware of how much harm some of that censorship causes. Surveys are often flawed because the respondents do not have the knowledge required to give a considered response.

The document is almost entirely centred around the rights of marketers and the rights of individuals receiving advertising material. Marketing materials are part of the general pattern of life and they do have an impact on society as a whole. The code needs to give much more weight to the general well being of society.

There are numerous references to avoiding harm and similarly numerous references to avoiding causing widespread and serious offence. Unfortunately the proposals fail to take account of the many situations where the two requirements conflict. We firmly believe that harm must always take precedence over offence. Anything else is indistinguishable from prejudice.

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1. 53 NOP poll. 2001. "and would you describe yourself as being a naturist?"

1. 54 When a naturist gets dressed the disguise is perfect.. The Statistics Briefing Note provides further information.

We are disturbed that further consideration of "offence" will not be the subject of a public consultation. This is one of the most pervasive parts of the code and many of the consequences are far from obvious.

British Naturism

To discuss the detail of this submission or related issues please contact Malcolm Boura  
[rlo@british-naturism.org.uk](mailto:rlo@british-naturism.org.uk), 07734 964435.

For further information about British Naturism or naturism in general please contact the  
office [headoffice@british-naturism.org.uk](mailto:headoffice@british-naturism.org.uk), 01604 620361.

## **CAP Code Review Consultation: A response from BPAS (the British Pregnancy Advisory Service)**

BPAS (the British Pregnancy Advisory Service) has been a registered charity since 1968, and is the UK's leading sexual healthcare provider. As well as contraceptive advice and treatment, in 2008 BPAS carried out around 60,000 terminations of pregnancy. 92% of all BPAS' treatments are carried out on behalf of the NHS. All of BPAS' Consultation Centres are registered Pregnancy Advisory Bureaux, providing non-directive counselling and regulated by the Department of Health.

As indicated in our covering note, we are submitting this response to the CAP code review consultation because we are recommending that the points made with reference to the BCAP consultation are also applied to the CAP code. The points made below are equally applicable to broadcast and non-broadcast advertising.

<p><b>Question 147)</b>  <b>'Do you agree that television advertisements for condoms should be relaxed from its present restriction and not be advertised in or adjacent to programmes commissioned for, principally directed at, or likely to appeal particularly to children below the age of 10? If your answer is no, please explain why.'</b></p>
<p><b>Answer to Question 147)</b>          Yes.          Condoms are important in helping to prevent unintended pregnancies. They are the only contraceptive method proven to reduce the risk of all sexually transmitted infections (STIs), including HIV<sup>1</sup> and the human papillomavirus which can cause cervical and cervical cell abnormalities. In the interests of public health, advertising for condoms should be less restricted.          Children under 10 will obviously not be the target demographic for such advertisements, but in any case, it is acceptable that as suggested, condom advertising may not be permitted to be screened in, or adjacent to programmes which this age group are likely to watch.</p>

<p><b>Question 62)</b>  <b>i)'Given BCAP's policy consideration, do you agree that it is necessary to maintain a rule specific to post-conception advice services and to regulate advertisements for pre-conception advice services through the general rules only?'</b></p>
<p><b>Answer to Question 62) i)</b>  <b>Yes- we agree that it is necessary to maintain a rule specific to post-conception advice services. We also agree that advertisements for pre-conception advice services in general should be regulated through the general rules only. However, we believe special regulation is required for advertising on pre-conception advice services regarding emergency contraception.</b>          Advertising for pre-conception advice on emergency contraception requires special regulation because women who may respond to such advertising are in an extremely time-sensitive position. These women may be seeking to avoid pregnancy after their regular contraception has failed, or who may not have used contraception, or who were forced to have sex without it. Emergency contraception (the 'morning-after' pill) is effective only within 72 hours of unprotected sex. EC is more likely to prevent pregnancy the sooner it is taken. Taken within</p>



24 hours after unprotected sex, EC will prevent up to 95% of pregnancies expected to have occurred if it had not been used. If EC is taken between 49 to 72 hours afterwards, it will only prevent up to 58% of pregnancies that would have been expected to occur. An emergency IUD ('coil') fitted within five days of unprotected sex can also prevent pregnancy.<sup>ii</sup>

At present there is no requirement for services offering pre-conception advice to make it clear when they don't prescribe EC. It is possible that non-evidence based personal advice may be offered about EC. Although EC is neither in medical terms, nor in UK law, abortion, amongst contrasting ethical views, there is an ethical viewpoint that considers that EC 'causes abortion'. EC involves the same medication as the regular contraceptive pill given at a higher dose, which is different to the medical or the surgical process of an abortion. EC has no effect if the woman is pregnant. It works by stopping a woman's egg being released, or by preventing the implantation of an already fertilised egg into her womb lining, thus preventing a pregnancy from beginning. It is this second effect, the non-implantation of the fertilised egg, which is seen as 'abortifacient' by people holding this view. The Prolife Alliance, said of the recent Levonelle One-Step television advertisement that *'We are absolutely outraged that... Levonelle One Step.. is advertised inaccurately as emergency contraception, when in fact its major function is to cause the abortion of an embryo that has already been conceived, not as suggested by the name to prevent conception'*<sup>iii</sup> Christian Concern for our Nation said of these TV ads that they are *'concerned at the further liberation towards abortifacients.'* (sic)

This group also object to EC because: *'it is clear that increased availability of the morning-after pill is a move towards abortion on demand. It has also clear that such attitudes will not increase responsibility but rather will encourage promiscuity and irresponsible sexual behaviour, with a consequent risk of spreading sexually transmitted diseases.'*<sup>iv</sup> In fact, multiple research evidence demonstrates that making EC more widely available does not increase couples' sexual risk-taking nor does it adversely affect the use of regular, more reliable contraception<sup>v, vi, vii, viii, ix, x, xi, xii, xiii, xiv, xv, xvi, xvii, xviii, xix, xx</sup>

While we would support the right of groups to offer non-evidence based advice about EC, we believe it is not ethical for adverts to request that women should contact them to discuss emergency contraception, without at the same time making clear that they will not provide EC. This may delay women from accessing EC when it is effective. Causing delay is an approach apparent in non-advertisement materials from some groups that have an interest in not prescribing EC. For example, the anti-abortion charity LIFE provide and advertise pregnancy counselling. They have the following advice on their website's FAQ section:

*'Q. I've had unprotected sex - I don't want to be pregnant - what can I do?*

*A. Try not to panic - Call our National Helpline on 0800 915 4600 and talk it through, remember you don't conceive every time you have intercourse. Talk to one of our skilled helpers, they will be able to clarify the situation.'*

Elsewhere in their online briefing materials<sup>xxi</sup> LIFE say of EC: *'It ends life. It therefore ends a pregnancy. It is undoubtedly an abortifacient.'*

Anti-abortion advice service CARE Confidential, (a department of the charity Christian Action Research and Education<sup>xxii</sup>) also request women to contact them to discuss EC, whilst not stating that they don't provide EC. 'Care Confidential' offers a national phoneline, web-based counselling and refers women to local crisis pregnancy centres for face-to-face advice<sup>xxiii</sup>. Care Confidential's briefing papers present EC as abortifacient.<sup>xxiv</sup> Their general advice also appears to imply that emergency contraception could end a pregnancy (here, a 'conception') whilst stating that a doctor may need to see a woman before EC can be used. This is not the case.

*'You may be feeling that your situation is quite urgent, but it is also important to consider how progestogen-only pills work... it may prevent an already fertilised egg from implanting (settling into the womb). Conception will already have taken place.. If you are taking any other medication, you will need to consult a doctor before taking emergency contraception pills.'*

*The IUD .. can also prevent a fertilised egg from implanting. Again, this means that conception has already taken place. It is important that you consider carefully what this means, because you may want to think about when life begins. [...] Talk to a CareConfidential advisor on 0800 028 2228 about emergency contraception.'*

We suggest that similarly to the proposed requirement in **question 62/11.11**, there should be a requirement for clarity on the part of advertisers promoting advice services in connection with emergency contraception. This may need enhancement from a simple statement about non-referral. Required wording might state, for example, that *'We do not prescribe emergency contraception. This is available for free from the NHS. It is most effective at preventing pregnancy the soonest it is taken after unprotected sex, but can be taken within 72 hours. For more information call NHS Direct on 0845 4647.'*

Such a requirement would reflect the clarity required given the urgently time-limited nature of the treatment. We also feel it is necessary to make it clear in advertising that EC is available for free. Possible users of EC include those with limited financial resources, particularly, but not exclusively young people. The cost of this medication from a pharmacist is around £30 which for some can be prohibitive. It is important that people who see advertisements for EC do not gain the impression that this is a product that is solely commercially available.

**Question 62)**

**ii) 'Given BCAP's policy consideration, do you agree that 11.11 should be included in the proposed BCAP code?'**

*('11.11: Advertisements for post-conception pregnancy advice services must make clear in the advertisement if the service does not refer women directly for abortion. See also rule 11.9 and Section 15 Faith and Section 16 Charities.')*

Answer to **Question 62) ii)**

**Yes. We agree that it is necessary to maintain a rule specific to post-conception advice services. We agree that 11.11 should be included in the proposed BCAP code.**

Pregnant women who may need information and support about pregnancy options should be able to access this from non-directive, informed sources. These may be women who are unsure of what they want the outcome of the pregnancy to be, or women who have decided that they need to seek an abortion. This situation is common: the Royal College of Obstetricians and Gynaecologists, (RCOG) states that 'at least one-third of British women will have had an abortion by the time they reach the age of 45'<sup>xxv</sup>

All patients must be able to make free and informed decisions about accessing medical care. A requirement as per section 11.11 to state clearly in advertising where abortion referral is not a part of the offered service is likely to enable women to more clearly judge what advertisers are offering. Clarity in advertising is particularly needed where medical services need to be accessed within a limited time. Agencies opposed to abortion are entitled to give anti-abortion views, but advertising must indicate what their service actually consists of lest they unnecessarily delay women are from antenatal care or abortion care. The Christian Medical Fellowship website describes the motivation within such an advice service: 'abortion is **never** a good solution to an unplanned pregnancy. [...] this movement is a spontaneous, compassionate, grass roots response by Christian people to the problem of abortion.'<sup>xxvi</sup>

Unregulated 'Crisis Pregnancy Counselling' networks operate widely in the UK, outside of the standards of the Department of Health's Register of Pregnancy Advice Bureaux. Services referring for abortion, such as BPAS and Marie Stopes International, are regulated by the Department of Health and are inspected against standards of information giving on all three outcomes of pregnancy (abortion, parenthood, parenthood ending in adoption). Services which do not refer women for abortion (and may have a philosophy against abortion) are not subject to any regulatory oversight. The Department of Health's advice to the public is: *'There are a number of organisations advertised in phone directories and on the internet offering free pregnancy testing and counselling. Some of these organisations do not refer*

women for termination of pregnancy. We would advise women to check this before making an appointment'.<sup>xxvii</sup>

Some unregulated services do not always provide quality information or may not always be non-directive in this area. 'Care Confidential' is a large organisation,<sup>xxviii</sup> offering 'confidential, unbiased pregnancy and abortion counselling through a network of centres located throughout the United Kingdom'. 'The 'Care Confidential' website includes statements which when read with no balancing material, may mislead women who were seeking unbiased information about pregnancy options. For example, pages are headed: *'Possible 30% greater risk of breast cancer after abortion'*<sup>xxix</sup>, or text given such as *'Findings suggest that an induced abortion increases the risk of breast cancer, by up to 50%. Women who are under 18 or over 30 at the time of the first induced abortion face an increased risk of breast cancer.'*<sup>xxx</sup>

In fact, cancer charities such as Breakthrough Breast Cancer<sup>xxxi</sup> and MacMillan Cancer Support<sup>xxxii</sup> state that 'the World Health Organization and the Royal College of Obstetricians and Gynaecologists in the UK'<sup>xxxiii</sup> have both independently reviewed the scientific evidence [and] concluded that abortion does not increase the risk of developing breast cancer. In 2003, the US National Cancer Institute hosted a workshop of over 100 of the world's leading experts who study pregnancy, abortion and breast cancer risk [which] concluded that having an abortion or miscarriage does not increase a woman's subsequent risk of developing breast cancer.'

Requirements for clarity in advertising regarding abortion referral may help to resolve confusion where anti-abortion centres name themselves very similarly to Department of Health-registered Pregnancy Advisory Bureaux (PABX), as can be seen on the Care Confidential website<sup>xxxiv</sup>. Some centres open geographically close by to registered PABX. For example, the UK Life League website, says that *'Pro Life Care is helping set up a crisis pregnancy centre in Brixton, South London. It is located right in the heart of a large Marie Stopes clinic - surrounding the pro-life centre on 3 sides! Many women on their way to arrange abortions through the Marie Stopes clinic have actually wandered into the pro-life centre by accident - mistaking it for the entrance to the clinic!'*<sup>xxxv</sup>. UK Life league's 'principles' include that *'Abortion is the deliberate murder of an innocent child and is a most grievous sin against God and a crime against humanity. Contraception is the cornerstone and root cause of abortion, sexual immorality and the disintegration of the family.'*<sup>xxxvi</sup>

Finally, we note that the protections afforded by the proposed regulation would only apply to broadcast advertising. We feel this must be accompanied by equivalent requirements regarding non-broadcast advertising. We will be responding accordingly to the CAP consultation to highlight this need.

<sup>i</sup> <http://www.who.int/mediacentre/factsheets/fs243/en/>

<sup>ii</sup> 'Emergency Contraception', BPAS, <http://www.bpas.org/bpaswoman.php?page=75>

<sup>iii</sup> Prolife.org.uk, website of the Prolife alliance.

<http://prolife.org.uk/pill-that-causes-early-abortion-to-be-shown-on-tv/>

<sup>iv</sup> 'Pill that causes early abortion to be shown on TV', Posted by Editor in *Abortion, News, Press releases* on 23 April 2009. \* Accessed 18 June 2009

<sup>iv</sup> 'Controversial TV advert for the morning after pill screened despite serious opposition' <http://www.ccfon.org/view.php?id=727> Accessed 18 June 2009

<sup>v</sup> Marston C, Meltzer H, Majeed A. Impact on contraceptive practice of making emergency hormonal contraception available over the counter in Great Britain: repeated cross sectional surveys. *Br Med J* 2005;331(7511):271-3.

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- xxxiii RCOG Information for patients: 'Does abortion cause breast cancer?', within 'How safe is abortion?', within 'About abortion care: what you need to know', 'For most women an abortion is safer than carrying a pregnancy and having a baby. [...] Research evidence shows that having an abortion does not increase your risk of developing breast cancer.' <http://www.rcog.org.uk/womens-health/clinical-guidance/about-abortion-care-what-you-need-know#safe>

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xxxiv <http://www.careconfidential.com/Centres.aspx>  
xxxv <http://www.uklifeleague.com/enews/061110%20e-alertFrankBrookes>  
xxxvi <http://www.uklifeleague.com/statement.php>

## Section 13: Weight Control and Slimming

### Targeting the obese

#### Question 40

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

We would be concerned that a pharmacy might not offer sufficiently controlled advice and does not provide the opportunity to measure relevant health markers such as blood sugars, triglycerides or cholesterol, and as such would recommend that consumers are encouraged to visit their GP or a dietitian before considering weight loss medications.

### Loss of weight or fat from specific parts of the body

#### Question 41

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

Yes, however, if this refers to clinics offering the surgical removal of fats, this is not recognised as a method of substantial weight loss, but rather for the removal of small fat deposits that do not respond to diet and exercise. It is important that advertising communications reflect this and do not promote the surgical removal of fat from the body as a way of reducing overall body weight or body fat.

We would agree that advertisers should not refer to the amount of weight that can be lost.

### Very Low-Calorie Diets (VLCDs)

#### Question 42

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

Yes, because the COMA report was published some time ago.

### Other questions

#### Question 43

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

Yes

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Weight Control and Slimming rules that are likely to amount to a

significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

No

iii) Do you have other comments on this section?

No

## **Section 15: Food, Dietary supplements and Associated Health and Nutrition claims**

### **Permitted nutrition and health claims**

#### **Question 46**

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

Yes. 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.

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

#### **Question 47**

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

Yes. 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

### **Comparative nutrition claims**

#### **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.

Yes. 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.

### **Comparison with one product**

#### **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.

No, Article 9 of the regulation does not refer to the use of a sole product, but to a range of products within a category.

## Prohibitions

### 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.

Yes.

### 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.

Yes, we feel that the CAP 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.

### 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.

Yes.

## The use of health professionals

### 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.

Yes, but, it may be useful to provide a list of bodies from whom a recommendation would be acceptable to avoid inappropriate organisations being referenced.

## Food labelling Regulations (1996) (FLRs)

### 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.

Yes, 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.

### 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.

In most cases yes, but, much 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.



**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.**

## Other questions

### Question 57

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

Yes

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?

No mention is 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.

iii) Do you have other comments on this section?

No



CAP Code Review  
Code Policy Team  
Broadcast Committee of Advertising Practice  
Mid City Place  
71 High Holborn  
London WC1V 6Q

**BY E-MAIL**

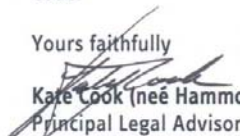
Thursday, 25 June 2009

Dear Sirs

**CAP Code Review Consultation**

We welcome the opportunity to respond to the consultation and apologise that our submission which we are aware, will reach you after the consultation has closed. We will nevertheless consider our comments which are set out in an attachment to this email. We will also consider the relevant sections of the CAP Code, but our comments apply equally to the CAP Code.

Yours faithfully

  
Kate Cook (née Hammond)  
Principal Legal Advisor

## **Consultation on the CAP and BCAP Codes**

### **Response from the British Retail Consortium (BRC)**

#### **The role and approach of the ASA and its Code needs to change dramatically or its abolition must be on the agenda**

The BRC does not believe the ASA and its Codes is any longer fit for purpose.

The putative reason for the revision to the Codes is the passage of the Consumer Protection Regulations (CPRs). However, the BRC does not believe that the proposed revision of the CAP and BCAP Codes provides a satisfactory response to the changes brought about by the CPRs, implementing as they do a full harmonisation Directive.

Given the CPRs introduce a whole new approach to Consumer Protection in the UK – a purposive rather than a detailed prescriptive approach – it would have been appropriate for the ASA to reconsider both its own role and the whole nature and purpose of the Codes instead of simply trying to suggest it is business as usual and all that is necessary is to tinker with the Codes and amend them in a technical fashion.

The BRC does not believe it is appropriate for the system to carry on as if nothing has changed.

One issue is whether the Code continues to be necessary or desirable. The second issue is one of process if the ASA and the Code are to continue.

The ASA has lost the confidence of advertisers as a result of its over-zealous approach and its lack of judgement in passing on complaints about advertisements.

More than that, its lack of transparency in assessing complaints; the lack of an independent system of appeals; and its failure to involve those whom its Code most affects in any effective system of consultation on the Code or the Help Notes it produces, and against which it assesses advertisements (and this is clear from the Consultation when it states that the ASA is not obliged to consult stakeholders on the changes) are not acceptable in the 21<sup>st</sup> century approach to enforcement and regulation.

The options are simple:

- The ASA can administer a voluntary Code that binds only those who voluntarily sign up to it – though others may observe choose to observe it as good practice guidance. The Code can have no effect on the acceptance of an advertisement from an advertiser who is not a signatory. This would leave the OFT to enforce the CPRs and the ASA to have a limited role only in areas of taste and decency which are outwith the scope of the CPRs.

OR

- The ASA can become an ‘established means’ for the enforcement of the CPRs (NB: NOT the Code as presently proposed) and a slimmed down Code that refers only to matters that are outside the scope of the CPRs such as taste and decency. In this case the ASA will need to win back the confidence of those with whom it deals. This means it will need to establish effective, transparent procedures for assessing and addressing complaints of breaches of the CPRs with a proper procedure for giving oral evidence and oral cross examination; and an independent appeals procedure. The ASA could also issue guidance produced after consultation with all stakeholders but such guidance should be only guidance on one way of meeting the requirements of the CPRs and have no evidential value.

Unless the ASA shows a willingness to change its approach, the BRC would be inclined towards the first option.

#### **In principle objections to the revised Code**

Our 'in principle objections' to the Code as proposed are based on a number of elements

- De facto compulsory nature of the Code
- Gold plating of the CPRs
- Lack of transparency in interpreting the Code
- Lack of proper procedures for investigating complaints and hearing evidence
- Lack of appeals procedures against decisions on complaints
- Failure to observe the letter and spirit of the standards proposed by the OFT for 'Established Means' and indeed for OFT recognised Codes.

The ASA Code gold plates the CPRs and in doing so purports to gold plate a full harmonisation Directive. It undermines the whole thrust of that Directive as transposed.

The recent ECJ decision in a case against the Government of Belgium has made it crystal clear that no Member State can introduce Regulations that go beyond the full harmonisation UCP Directive in the space it covers.

It is, therefore, clear that the UCP (correctly transposed into UK law) is the only legal test against which claims of misleading advertising to consumers can be assessed. That Directive includes references to the average consumer; a transactional decision test; and professional diligence – none of which appear in the revised CAP or BCAP Codes.

The problem stems at least in part from the de facto compulsory nature of the Code. It is impossible to place an advertisement that is in breach of the Code. Although the OFT may act as a backstop for enforcement, the ASA is the primary means for enforcement of the Code. Its judgements are made solely in terms of whether in its view there has been a breach of the Code (or even in some cases breaches of its Help Notes) not whether there has been a breach of the law.

This is entirely different from enforcing a Code where those bound by it are willing and voluntary signatories. In that case, the signatories willingly agree to go beyond the strict legal requirements and, having agreed to do that, are required legally to observe the Code. In the case of the ASA Code there is no option for anyone who wishes to advertise and there is no element of voluntarily signing up to its provisions.

In effect, in the UK the CPRs/UCP are being enforced through a non-voluntary Code that extends the requirements of the UCP in a way that, prima facie, would seem to breach the requirements of a full harmonisation Directive as confirmed by the ECJ.

Examples of 'gold plating' include:

- the requirements for describing an item as a 'free' item;
- taking into account the 'impression' on consumers instead of assessing whether it would lead the average consumer to take a transactional decision he would not otherwise have taken';
- the need to take account of the Pricing Practices Guide when the Guide is quite explicit that there is no requirement to take account of its provisions;
- the need for any conditions to be clear to any consumer who sees the advertisement only once.

Other examples will be found in our detailed answers below.

The need to withdraw statutory codes that inhabit the space of the UCP/CPRs was recognised by the then DTI in its approach to the Prices Code. Where the former Code had evidential value and a statutory basis, the replacement makes it very clear that it is purely guidance on one way in which a business can comply with the CPRs; that it has no evidential value; and that the legal basis for any challenge to a business is solely the CPRs. In other words, a case can only be brought and judged on the basis of compliance with the CPRs.

The ASA Codes make no such distinction. They do not purport to be solely guidance or good practice.

### **Is there a future for the Codes and the ASA?**

The BRC strongly believes that the new Codes should be absolutely clear that, to the extent they inhabit the space of the UCP/CPRs (ie excluding taste and decency) they are purely advisory.

The OFT has suggested that the ASA should be an 'established means' for the purposes of enforcing the CPRs. It should also be clear that if the ASA is to be an 'established means' for the purposes of the CPRs, its judgements must be against the CPRs not the Codes. The Codes, if they are to continue to exist for some purpose must not be de facto compulsory codes.

The BRC strongly believes that any 'established means' should observe the normal standards of due process in coming to its judgements. This includes transparency; proper limitations on the time for bringing and investigating a complaint; oral questioning of evidence; and a totally independent appeals procedure. These are expressed in the OFT consultation in the following terms:

- *5.15 Compliance partners are likely to be able to demonstrate their actions are in line with the requirements of better regulation, in that they are proportionate, consistent, transparent, targeted and accountable. It will also need to have regard to or respect the HRA rights of both consumers and traders/businesses.*

Unfortunately, in the case of the ASA there is a lack of transparency in coming to a judgement; there is no effective procedure for questioning the evidence orally; no time limits in the new Code; no independent appeals procedure – and no loser pays principle. Currently the Code makes clear that the decisions of the ASA are 'final'.

In light of the above comments, if the ASA and its Codes are to continue we believe the proposals should be withdrawn.

Pending any legal clarification of the status of the Code through a case before the ECJ, the BRC believes that

- The Codes should be clearly identified as being voluntary guidance on good practice.
- If the ASA is to be an 'established means' its judgements should be against the CPRs NOT the Codes; its judgements should be open to scrutiny and appeal to an independent 'body'; and its procedures should reflect normal standards expected of a semi-judicial body with the possibility for cross questioning evidence and clear time limits on investigations and adjudications.
- The ASA should be entitled to observe whether or not an advertisement breaches the Code but that should have no legal effect and should not lead to any requirement to withdraw the advertisement or any requirement or expectation on the media to reject the advertisement. Alternatively, the ASA could become the enforcer of a voluntary code which businesses may or may not sign. Their agreement to the Code should have no value in determining whether or not they can advertise but if they do sign the Code, they would be bound by it.

The rules in the Codes should be replaced by references to the CPRs, the OFT Guidance and the Pricing Practices Guide without further elaboration and all judgements within this space should be made against the requirements of the CPRs. The Codes could elaborate specific rules on taste and decency, which are outwith the CPRs. In addition there could be a Guide, along the lines of the Pricing Practices Guide, to one way to observe the CPRs.

Moreover, in as much as the concepts of misleading are universal in the CPRs, there should be no requirement for separate Codes or Guides – and certainly no requirement for separate guides with differing provisions. The only requirement should be for a separate chapter covering the broadcast media where the nature of that media has specific relevance.

## **The Individual Questions**

Our comments on individual questions below are made without prejudice to our overall views and purely within the terms of the Code itself. We have only commented where we disagree with a specific aspect of a rule or have a specific observation.

### **Question 1**

This introductory section should identify the role of the Code within the CPRs, including the fact that the definitive requirement is to abide by the CPRs and that the Code itself is not definitive in law. It should note that the new legislation is no longer detailed but purposive and principled and the Code should recognise and be adapted to that change.

There should be a distinction between ‘paid for’ and ‘non-paid for’ advertising. The ASA Code should not purport to have jurisdiction over ‘non paid for advertising such as but not only ‘in store advertising’; window displays and posters; company websites where its products are offered for sale; or catalogues. This distinction should be made absolutely clear. In particular, where it purports to apply to websites and viral advertising should be clearer.

The relevant ‘sector specific rules’ mentioned in 1.4 should be defined.

Under the CPRs the broader test is one of professional diligence rather than ‘fair competition’. The Code should reflect this.

The Code should set out clear time limits for making a complaint (as did the previous Code); investigating a complaint; making an adjudication; for an appeal; and for answering a query from the ASA. In the old Code there was a time limit of 3 months for a complaint in Section 60 – but the mapping document seems to omit a number of provisions of the old Code after point 57.

### **Question 3**

No. Rule 3.10 goes well beyond the UCP. There is no reason for the addition of the words ‘only once’ and indeed it is not clear what this requirement would mean in terms of the advertisement or its appearance. On what grounds would an advertiser be held to account under this rule – and there is no mention here that this should apply to the average consumer defined as reasonably well informed and circumspect.

### **Question 4**

No. This may be appropriate for a ‘help note’ but this is an attempt to reinterpret rules unnecessarily. It should be possible to explain that the advertisement does not refer to normal use.

### **Question 5**

No. The proposal in 3.28.3 is too prescriptive and goes beyond the CPRs. 3.28 should only apply to ‘invitations to purchase’ and there is no legal requirement to state each and every age restriction in terms of age related sales. This could be particularly difficult where the age restrictions vary in relation to specific video titles, for example.

The need to state the time period and quantities available goes well beyond the CPRs and accepted practice.

### **Question 6**

The due diligence defence and its requirements is set out in the CPRs. This is an attempt to start to define what that due diligence should look like. It is unnecessary.

### **Question 8**

This is not in line with the CPRs which refer only to the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item. The proposed wording in the Code is more explicit and could lead to a legal promotion being barred.

### **Question 9**

The revisions often use the word 'must' instead of 'should'. We see no reason for this change. The suggestion that price statements should take account of the Pricing Practices Guide is an attempt to make law by stealth. The Guide itself says it can be ignored.

The section should be re-phrased as one way of securing compliance.

The proposed wording in the Principle to the effect that the ASA will take account of the impression created by the communication goes well beyond the CPRs which refer to the average consumer and the transactional decision test. The Code should reflect the CPRs.

Rule 3.3 should refer to the average consumer.

Rule 3.20 should include packaging as a reasonable charge.

Rule 3.39 should merely repeat the advice in the Pricing Practices Guide and it should clearly be advice.

### **Questions 19 and 20**

These requirements are not practical.

### **Question 21**

It needs to be made clear whether information on a website counts as 'easily accessible'

### **Question 24**

We are not clear of the logic for distinguishing between national and local competitions – and this can only lead to regional or non-national competitions advancing at the expense of national competitions.

### **Question 25**

It is not clear what is meant, in this instance, by 'independent' judge. This goes beyond the requirements of the Gambling Act. The judge should be independent of the competition not necessarily the promoter.

### **Question 28**

The point of rule 8.4 is not apparent. Alcohol should never be supplied to anyone under 18 so it is clear that it must not be available on promotion to anyone under 18.

Rule 8.12 is impractical in that it is not possible simply to switch the promotion to another product. ^That would merely cause a problem for the supply of that product.

### **Question 31**

The rules seem superfluous as with the exception of the rules on harm to children they merely state the law. They have nothing to do with the ASA remit.

Rule 9.4.3 conflicts with OFT Guidance but is supported.

Rule 9.5 is superfluous being a statement of the law

No definition of a sales promotion is given. It is not made clear, as it should be, that a website that is not a sales promotion should not be covered by the code.

#### **Question 34**

The section should be technology neutral given the constant changes to, and innovation in, technology.

#### **Question 38**

The basis for a reference to and inclusion of beauty products is unclear.

#### **Question 39**

Much of the contents of this section are superfluous. Medicines and health products are highly regulated and the law is well known. There is no need for additional rules in this tightly controlled area.

#### **Question 40**

The proposed rule could be helpful as guidance but there are dangers in using body mass index (which is not a good measure of obesity) as a requirement on which to base advertising.

#### **Question 43**

13.10.1 - 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.

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):

*In the absence of case law, it is difficult to make categorical assertions about the scope of this prohibition. Reference to periods of time alone, particularly in more general terms such as "rapid", "fast", etc should not mislead consumers, but may not be subject to this prohibition.*

*When considering compliance with this provision context will often need to be considered. For example, personal experiences and before and after photographs that can be substantiated and which are presented in a way that does not imply a guarantee of effect for the average consumer and which make no reference to an amount of weight or an amount of weight over a period of time, are probably beyond the scope of this prohibition. However, they are likely to be caught by the definition of health claim and as such may need to be either subject to a specific authorisation, or, as the case may be, under the provisions in Article 10(3) accompanied by an authorised claim.*



#### **Question 46**

No.

15.1.1 - The European Regulation leaves business operators the flexibility to use equivalent wording to the one specified in the legislation. We believe it is 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'.

The last paragraph under section 15.1.1 implies that marketing communications have to be filed and approved by the relevant Home Authority, this is not correct.

The Code cannot go beyond the requirements in the Nutrition and Health Claims Regulation. 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.

#### **Question 47**

15.6.2 - 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.

#### **Question 48**

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.

#### **Question 52**

No. 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.

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):

*In the absence of case law, it is difficult to make categorical assertions about the scope of this prohibition. Reference to periods of time alone, particularly in more general terms such as "rapid", "fast", etc should not mislead consumers, but may not be subject to this prohibition.*

*When considering compliance with this provision context will often need to be considered. For example, personal experiences and before and after photographs that can be substantiated and which are presented in a way that does not imply a guarantee of effect for the average consumer and which make no reference to an amount of weight or an amount of weight over a period of time, are probably beyond the scope of this prohibition. However, they are likely to be caught by the definition of health claim and as such may need to be either subject to a specific authorisation, or, as the case may be, under the provisions in Article 10(3) accompanied by an authorised claim.*

#### **Question 55**

In general we feel that the reference 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.

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, amendments to the criteria of certain nutrition claims and nutrient profiles to establish the foods that can bear claims.

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.

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.

### **Question 57**

The Nutrition and Health Claims Regulation 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.

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 account.

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

15.7 – The requirements under this paragraph go beyond the requirements in the Nutrition and Health Claims Regulation. 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 specified under the ‘conditions of use’ of an approved article 13 claim. They do not have to provide evidence of a health relationship already given a positive opinion by EFSA and approved by Standing Committee.

For nutrition claims, the marketers have to prove that their product contains 15% or 30%, depending on the claim made, of the Recommended Daily Allowance.

The Code refers to food and soft drinks while the Nutrition and Health Claims Regulation applies to food and all drinks.

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.

### **BCAP code**

It is strange to say the least that the BCAP Code should be so much longer than the CAP Code

In principle we believe the BCAP Code should be brought totally into line with and included in a single CAP Code. Where there are clear reasons for any differences based on the nature of the media there should be specific references in the CAP text or in an annex.

We have some specific comments as follows:

#### **Question 32**

Yes. While we agree with the new provisions “13.2. Advertisement must avoid anything likely to encourage poor nutritional habits or an unhealthy lifestyle, especially in children”, it should be clarified that the promotion of an indulgent product when the advert does not encourage people to regularly eat the product or to consume it as a substitute for a meal, will not be caught under this provisions.

#### **Question 77**

12.8 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.

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):

*In the absence of case law, it is difficult to make categorical assertions about the scope of this prohibition. Reference to periods of time alone, particularly in more general terms such as “rapid”, “fast”, etc should not mislead consumers, but may not be subject to this prohibition.*

*When considering compliance with this provision context will often need to be considered. For example, personal experiences and before and after photographs that can be substantiated and which are presented in a way that does not imply a guarantee of effect for the average consumer and which make no reference to an amount of weight or an amount of weight over a period of time, are probably beyond the scope of this prohibition. However, they are likely to be caught by the definition of health claim and as such may need to be either subject to a specific authorisation, or, as the case may be, under the provisions in Article 10(3) accompanied by an authorised claim.*

#### **Question 80**

The provisions have been correctly interpreted.

However the wording used for 13.5.1 is not as clear as it could be, we therefore suggest it is reworded: Comparative nutrition claims may only be made between foods of the same category.

#### **Question 84**

In general we feel that the reference to the FSA guidance in the document (background) should be removed and the specific sections of that document referred to in each of the relevant sections of the Codes.

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, amendments to the criteria of certain nutrition claims and nutrient profiles to establish the foods that can bear claims.

Furthermore, the Codes use defined terms such as food product, low alcohol etc. These are defined terms under the Nutrition and Health Claims Regulation. The use of these terms in the Code should be consistent with the definitions under the Regulation.

The Code refers to food and soft drinks while the Nutrition and Health Claims Regulation applies to food and all drinks.

13.4.2 We believe that the requirements under this paragraph could be interpreted to go beyond the requirements in the Nutrition and Health Claims Regulation. 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. They do not have to provide evidence of a health relationship already given a positive opinion by EFSA and approved by Standing Committee.

For nutrition claims, the marketers have to prove that their product contains the quantity required under the criteria laid down in Annex I of Nutrition and Health Claims Regulation for that nutrient or substance when making that claim.

13.11 This paragraph gold plates the provisions of the EU Regulation. The way to establish whether a claim can be made on a product is by assessing it against the nutrient profile set for this purpose and which is currently under development. The OFCOM model which classifies food as HFSS and Non-HFSS should not be used for the purpose of claims.

13.7 The Commission has the responsibility of proposing legislation but they cannot approve it. This is the role of Council and Parliament.

13.4 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. This paragraph 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 register can be used, which is incorrect, e.g. article 10.3 health claims do not need to be neither authorised 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.

13.9.2 The provisions under this paragraph should be consistent with those in paragraph 13.3. Fruit and vegetables should be allowed to be advertised in both TV and radio.

#### **Question 87**

The Nutrition and Health Claims Regulation 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.

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 account.

19.18 The last phrase should include ‘and claims with the same meaning’.

**British Telecommunications plc** – response to consultation on the proposed CAP Code (“the Code”)

**Interest:** provider and marketer of communications products and services; and media owner for marketing content accessible via digital TV

**Summary:** We are in broad agreement with the vast majority of proposed changes to the Code, and welcome the accessibility and clarity provided by the new layout. We have, therefore, only responded to the Consultation Questions to which we hold a particularly strong view in favour of the change, where we are in disagreement, or where we believe that more could be done to clarify CAP’s position. The latter chiefly involves our disappointment that CAP has not yet taken this opportunity to amend the rules on the use of ‘free’ in line with the ASA adjudications and CAP guidance produced since the last Code Review. Where we have been able to do so, we have suggested specific amendments with the intention of easing the Executive’s task.

We would be grateful if you would consider the following responses (numbered as per Annex 3, “Consultation questions”):

*Section 3: Misleading*

*Question 3*

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

*Qualifications must be clear to consumers who see or hear the marketing communication only once. (3.10)*

Given the possible limits on time and space, we understand the underlying rationale for the new rule. However, we consider that it is already an implicit requirement of the Code that all relevant qualifications must be clear in any event. For example, if it were alleged that an advertisement were misleading, we do not envisage that it would be accepted as a legitimate defence that “it became clearer if seen or heard more than once”. Accordingly, the proposed rule may be superfluous. However, we would not object to the inclusion of a new rule that put more emphasis on the need for qualification per se, rather than the number of times the advertisement is heard or seen. For example:

Qualifications must be clear to consumers in the first instance and not rely on the marketing communication being seen or heard more than once.

*Question 4*

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

*Marketing communications must not exaggerate the capability or performance of a product; claims must be based on normal use. (3.11)*

We agree that “exaggeration” is one of the key ways in which an advertisement may mislead and accordingly support the inclusion of the first element of the proposed new rule. However, the subsequent reference to “normal use” is not helpful. The phrase may be applied in many different contexts and it is entirely likely that its inclusion would lead to the development of complex and unwieldy case law. The concept of “normal use” would be particularly difficult to pin down in the communications industry, where, for example, the performance of a broadband service may vary according to a broad range of factors.

If (and it is by no means clear) “normal use” were to be interpreted as “standard/ average

performance” (in itself a difficult concept), this may be taken to preclude advertising based on the possibility of superior performance. We consider such advertising to be entirely legitimate, provided it is of course suitably qualified (as currently permitted by CAP and ASA). We consider that the application of a general test of “exaggeration” (i.e. taking into consideration all relevant circumstances) is the appropriate one, given the range and complexity of the products and services available to consumers.

*Question 5*

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

*Marketing communications must state restrictions on the availability of products, for example, geographical restrictions or age limits. (3.28.3)*

Again, whilst we understand and support the underlying rationale, we believe that as currently drafted the requirement is too broad. The insertion at the end of the rule of something along the lines of “where omission of a restriction is likely to mislead” would provide suitable qualification. We consider that qualification to be necessary in two discrete contexts. Firstly, a restriction may in some circumstances be irrelevant (e.g. a geographical restriction when advertising within a small, local market) and secondly, the restriction may be obvious (e.g. age restrictions for purposes of entering into service contracts).

*Question 7*

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

*Marketers should inform consumers about the nature and extent of any additional rights provided by the guarantee, over and above those given to them by law, and should make clear how to obtain redress” (17.2)*

Yes, we approve of the deletion of this rule.

*Question 8*

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

No. The use of “free” is an important and potentially valuable marketing tool. We also consider that the notion of “free, subject to post and packaging (for example) “ is one that is well understood by consumers and, when applied responsibly, a potentially significant factor in enabling them to evaluate the respective merits of competing products and services.

Whilst we acknowledge the practical difficulties in determining the reasonable costs of packaging, we do not consider that this should result in the removal of a powerful and informative marketing message that can be applied entirely legitimately. We would urge the ASA to reconsider its position on this and to explore the possibility that the problem may be overcome to some extent via guidance from CAP. In cases where the guidelines were not met and complaints ensued, the burden would be on the advertiser to prove that the true cost had not been inflated.

This answer should be read in conjunction with our answer to question 9 below. The rules and case law regarding the use of “free” are of great concern to us.

#### Question 9

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

#### Proposed rule 3.25

*Marketers must not describe an element of a package as "free" if that element is included in the package price (3.25).*

Use of the word "free" has been a long-standing concern for BT, and we are disappointed that the opportunity has not been taken in this consultation to provide greater clarity on the legitimate use of "free" in all contexts.

The immediate issue is that the proposed new rule appears to conflict with CAP/BCAP guidance cited below. Is the intention for the new rule to mark a significant change of approach? If so, we are surprised that this has not been expressly flagged.

*Marketers may [...] describe elements that have been added to those pre-existing packages as "free" for a reasonable period after their introduction.*

*To summarise, if a package price is payable, marketers may describe elements that are included in the package as "at no extra cost" or "inclusive" but may not describe them as "free" unless they have been recently added to an established package without increasing its price.*

*(Clause 3.2.2, CAP/BCAP Guidance on the use of 'free')*

More generally, whilst we acknowledge that "free" is a very complex and contentious issue, especially in the communications sector, we consider that CAP's approach has now become inconsistent and unwieldy, and that in the absence of clear underlying principles, it has become hugely difficult- for marketers and regulator alike- to assess the legitimacy of free claims.

In particular the following issues need to be considered afresh:

- treatment of opt-in processes
- description of "package" elements as free (as above)
- what constitutes a package
- what elements of a package are considered intrinsic and why
- what elements are considered as notionally separable and why



- “free” services that are parasitic on other (paid for) services
- “conditional” free offers (e.g. “free if you stay with us for 15 months”)
- short-term free offers on new packages

We consider that there is a pressing need to revisit these and other issues and then to distil some consistent and workable principles/ guidelines that have some resonance for marketers, regulators and- importantly- consumers.

#### Comparisons principle and the addition of 3.39

We particularly appreciate the inclusion of the following:

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

*Marketing communications that include a price comparison must state the basis of the comparison. Comparisons with a competitor price must be with the price for an identical or substantially equivalent product and must explain significant differences between the products. If the competitor offers more than one similar product, marketers should compare their price with the price for the competitor’s product that is most similar to the advertised product. (3.39)*

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

We believe they will provide marketers with a much clearer understanding of the requirements for comparative advertising, whilst preserving the necessary flexibility in cases where it is difficult to identify the precise product or service against which a comparison should be made. These rules should be cross-referenced to the CAP Help Note on Price claims in telecommunications marketing.

#### Proposed rule 3.4.6

We are strongly in favour of deleting the new rule 3.4.6 (i.e. requirement to include applicable cancellation rights in marketing communications that quote a price – added since last Code review).

We can see no justification for such a requirement. There is already a general law requirement to provide information regarding cancellation rights before a consumer enters into a contract and to provide confirmation of that information in writing. To require inclusion of those rights in *all* marketing information amounts to the imposition of a new substantive requirement which goes beyond current UK and EU law. Moreover, on a practical note, cancellation requirements do not apply in all instances and this would have to be clarified in every communication.

We have been advised by the CAP Copy Advice team that cancellation rights need only be included if omission is likely to affect the consumer’s decision to purchase, and are, therefore, not required where there is a clear order journey where this additional information is explained. We believe this is a reasonable approach.

### Proposed rule 3.7

Although it does not appear to be of particular significance, we are surprised by the change to the substantiation rule, i.e. “must hold documentary evidence to prove all claims, whether direct or implied, that are capable of objective substantiation” (old 3.1) being amended to “must hold documentary evidence to prove claims that consumers are likely to regard as objective” (new 3.7). That is, the new rule implies that the measure of objectivity is subjective. It may be more appropriate here to replace “are likely to” with “can reasonably”.

### *Section 8: Sales Promotions*

#### *Question 17*

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

*Withholding prizes is justified only if participants have not met criteria set out clearly in the rules of the promotion. (8.27)*

We are happy for this to be included in principle, but there appears to be a conflict between this rule and 8.15.1 and 8.28.2 (i.e. there are circumstances where equivalents can be offered). We, therefore, recommend that you could qualify the wording in line with the above rules and the CPRs guidelines. For example:

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

#### *Question 23*

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

Yes, we welcome the change allows winners are selected by a verifiably random computer process, as an alternative to supervision by an independent observer.

## Brook response

Brook is the UK's leading sexual health charity providing sexual health services and advice for all young people under 25. We have 45 years of experience working with young people and reach more than 200,000 young people every year.

Our services provide free and confidential sexual health information, contraception, pregnancy testing, advice and counselling, testing and treatment for sexually transmitted infections and outreach and education work through a network of centres across England, Scotland, Northern Ireland and Jersey.

Ask Brook, our confidential telephone helpline, online enquiry service and text information service, is available free and in confidence to young people.

Brook is responding to both the BCAP and the CAP consultations on the issues of advertising pregnancy advisory services. The suggested changes to the BCAP consultation (question 62) should also be mirrored in the CAP so that they are common across all forms of advertising including posters and telephone directories.

### BCAP Question 62

*i) Given BCAP's policy consideration, do you agree that it is necessary to maintain a rule specific to post-conception advice services and to regulate advertisements for pre-conception advice services through the general rules only?*

ii) Given BCAP's policy consideration, do you agree that rule 11.11 should be included in the proposed BCAP Code? If your answer is no, please explain why.

Brook agrees with both of the above points.

It is every woman's right to choose an abortion. All women, whatever their age, should have access to impartial information and support in order to make an informed choice about their pregnancy.

Brook Centres provide impartial and non-judgemental information, counselling and support to young pregnant women (and their partners) to help them make an informed choice about their options. Brook Centres can refer women to the NHS for a termination of pregnancy if that is the woman's choice.

Women must have easy access to early abortion services if they need to which allows them the time to make the decision that is best for them. Access to early abortion services also reduces the risk of medical complications.

Services cannot be grouped into purely 'post-conception' and 'pre-conception' as some services provide both.

It is important that services state whether they refer for abortion so that women are clear about the help that is available from them. Some women may mistakenly visit an anti-choice clinic on their first visit and be given misleading and inaccurate information. This causes unnecessary delays and distress to the women involved. Some women may feel scared and guilty and vulnerable to their choice being influenced.

There is anecdotal evidence from Brook Centres of GPs delaying young people requesting abortion, some by asking them to return a week or two later for a pregnancy test then introducing a further delay for the results or others just saying they don't agree with abortion and not referring on to another service. This can lead to delays and trauma for the young person. All services therefore need to be clear about the help that they provide and whether or not they refer for abortion.

Women may be unlikely to make a complaint if they received a bad or misleading service as they may be feeling particularly vulnerable at this time. Younger women who may be less assertive may not go on to another service if they have received judgmental attitudes at their first consultation.

While Brook welcomes the suggested changes to the regulations we challenge point 11.37 that some people might be offended by pregnancy advisory services. Contraception services and abortion are both legal and available and we need to separate this from the idea that it might cause offence.

The vast majority of women of childbearing age use contraception. The fact that a small minority might be offended is no reason to deny access to information for services that are legally available.

While Brook agrees that services must state whether they refer women for abortion the regulations must go further and require organisations to state their pro/anti choice bias. While not all organisations can refer women for abortion there are services, such as the Ask Brook helpline, that will give non-judgmental advice and signpost women to where they can obtain a referral so the code would need to distinguish between these services and those that do not give impartial advice.

Clearer advertising of sexual health services across all formats and the help that those services provide will improve women's access to sexual health and abortion services.

## Brook response

Brook is the UK's leading sexual health charity providing sexual health services and advice for all young people under 25. We have 45 years of experience working with young people and reach more than 200,000 young people every year.

Our services provide free and confidential sexual health information, contraception, pregnancy testing, advice and counselling, testing and treatment for sexually transmitted infections and outreach and education work through a network of centres across England, Scotland, Northern Ireland and Jersey.

Ask Brook, our confidential telephone helpline, online enquiry service and text information service, is available free and in confidence to young people.

Brook is responding to both the BCAP and the CAP consultations on the issues of advertising pregnancy advisory services. The suggested changes to the BCAP consultation (question 62) should also be mirrored in the CAP so that they are common across all forms of advertising including posters and telephone directories.

### BCAP Question 62

*i) Given BCAP's policy consideration, do you agree that it is necessary to maintain a rule specific to post-conception advice services and to regulate advertisements for pre-conception advice services through the general rules only?*

ii) Given BCAP's policy consideration, do you agree that rule 11.11 should be included in the proposed BCAP Code? If your answer is no, please explain why.

Brook agrees with both of the above points.

It is every woman's right to choose an abortion. All women, whatever their age, should have access to impartial information and support in order to make an informed choice about their pregnancy.

Brook Centres provide impartial and non-judgemental information, counselling and support to young pregnant women (and their partners) to help them make an informed choice about their options. Brook Centres can refer women to the NHS for a termination of pregnancy if that is the woman's choice.

Women must have easy access to early abortion services if they need to which allows them the time to make the decision that is best for them. Access to early abortion services also reduces the risk of medical complications.

Services cannot be grouped into purely 'post-conception' and 'pre-conception' as some services provide both.

It is important that services state whether they refer for abortion so that women are clear about the help that is available from them. Some women may mistakenly visit an anti-choice clinic on their first visit and be given misleading and inaccurate information. This causes unnecessary delays and distress to the women involved. Some women may feel scared and guilty and vulnerable to their choice being influenced.

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Clearer advertising of sexual health services across all formats and the help that those services provide will improve women's access to sexual health and abortion services.

**We would like the code to recognise the reality that certain primarily adult themes may have minimal, unintended and incidental appeal to limited numbers of young persons, and for the code to address instances of such unintended appeal in a proportionate manner. For this reason, we welcome the introduction of 'particular appeal' as a threshold requirement for breach.**

**On the removal of the specific appeal 'threshold age' of 18, and its replacement with the proposal to reference 'children and young persons' as being the primary group to whom alcohol advertisers must avoid targeting communications, we would tend to support the change, without being persuaded that it will materially impact regulatory analysis.**

**In addition, we remain concerned that the indicator of 'reflecting or being associated with youth culture' is one which will remain difficult for advertisers and the regulator alike to apply with any degree of certainty and/or consistency.**

**As an example, the sport of mountain-biking is one with notional appeal across all age-ranges, but would arguably fall within a broad definition of 'youth culture'. Provided that the overall presentation of an alcohol ad is sufficiently 'adult', Brown-Forman would expect an alcohol advertiser to be able to feature mountain-biking in such an ad. The fact that it would feature an element arguably within 'youth culture' should not give rise to a finding of breach.**

## Cambridge Health and Weight Plan (CHWP)

would like to thank you for the opportunity to comment on the Committee on Advertising Practice (CAP) consultation on the revision of the CAP code.

We very much welcome this revision of the CAP code to ensure that its rules remain up-to-date and fit for purpose.

CHWP offers a variety of weight management options, including a Very Low Calorie Diet (VLCD) programme, for those who are overweight and clinically obese. We believe that commercial weight management organisations, such as CHWP, can play an important role in supporting health services in tackling the obesity problem. Several primary and secondary care environments in England already use the VLCD programme, which is also available within the wider community as a referral option.

Flexible programme options are offered between 415 kcal/day and 1500 kcal/day, all using a nutritionally balanced formula food as the foundation. Re-education towards longer term healthy eating habits, behavioural change and feedback to health professionals, as appropriate to each individual, are common to all programmes.

Please find below our specific comments:

### Section 13: Weight Control and Slimming

#### Targeting the obese

##### Question 40

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

*CHWP appreciates this step in the right direction to allow people that are obese to be targeted. However we feel that the CAP should be consistent in its thinking. If non-prescriptive medicines will be allowed to target obese people, then surely non-medical products should also be allowed to target people who are obese, especially when the sale of those food products is monitored by trained counsellors.*

*We would like to point out that this rule now effectively puts food products intended for weight loss, such as VLCDs, in the position of facing stricter requirements for advertising than medicinal products. After all VLCDs, while falling under the European Directive on Food for Particular Nutritional Uses, remain a food product and not a medical product. They are food products, for a particular nutritional use, which comply with all relevant legislation and provide daily essential nutrients to give effective weight loss at predictable rate. People using a VLCD receive advice from specially trained counsellors on which programmes are available and how to use them properly.*

*Therefore, there seems to be no reason why products such as VLCDs could not be offered under the supervision of a specially trained counsellor to people who are obese.*

#### Very Low-Calorie Diets (VLCDs)

##### Question 42

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

*CHWP agrees that the rules should be updated to include the most up-to-date guidance on VLCDs.*

*However, we would like to note that, while the NICE guidance suggests that VLCDs less than 600kcal/day should only be used under “clinical supervision”, the guidance itself does not actually provide a definition of what this means, leading to a lack of clarity for companies wishing to advertise their products. A proper definition of what constitutes “clinical supervision” would be needed, if the ASA intends to measure against it. However, Cambridge does not believe the ASA is the appropriate body to provide such a definition.*

*In addition to the above, we would also like to point out that the NICE guidance does not cover formulation issues, unlike the COMA Report, which does. Cambridge fears that by removing the reference to COMA completely, new companies entering the market may not feel compelled to apply the formulation suggestions contained within COMA, which are considered best practice by Cambridge and the Industry Group we are a Member of.*

*It is also worth noting that CHWP strongly encourages participants in their VLCD programmes to seek medical advice before commencing the programme. All of Cambridge’s counsellors have received detailed instruction on contra-indicated medical conditions and medications so that they are well-placed to screen clients throughout the programme. If needed, the counsellor will also ensure that relevant issues are raised with the client’s general practitioner.*

## **Other questions**

### **Question 43**

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

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

iii) Do you have other comments on this section?

*iii) CHWP would like to make the point that Very Low Calorie Diets are not only completely legal food products complying with the applicable legislation in place. They are also scientifically sound and are grounded in up to date research and substantiated by rigorous trials on people. They are very efficient weight loss tools especially designed for those people that are obese, providing them with the necessary daily amount of essential nutrients for wellbeing and optimum health whilst following a programme.*

*As re-education towards longer term healthy eating habits and behavioural change are essential elements of all CHWP programmes, these products offer a real chance to help obese people achieve significant weight loss and, more importantly, also sustain it in the long term, and thereby improve their overall health and reduce their chance of suffering from obesity related illnesses.*

*As the prevalence of obesity is increasing, it is almost impossible that advertising for such products will not reach the obese. Furthermore, this rising prevalence of obesity means it is important that responsible adverts for weight loss products should be able to target the obese, as a way of helping to tackle a major public health crisis. Some individuals may even be prompted by seeing the adverts to realise that they have a weight problem and that there are tools available to assist them with their weight management.*

*Given the rising costs of ill-health associated with obesity, it simply does not make sense that responsible advertisers cannot inform obese people about the existence of these products.*



*In addition to the more general remarks above, we would also like to comment on new rule 13.10.1, implemented to comply with the Nutrition and Health Claims Regulation.*

*While we fully understand that this rule merely reflects law and therefore the change was necessary, it does seem to give rise to discrimination between food based programmes and non-food based programmes. Following this new rule, non-food based programmes are able to continue to make a rate or amount of weight loss claims. While as stipulated, a food-based programme is no longer able to do so. This provides non-food programmes with a commercial advantage over food programmes. However, the purpose and advertised intent of food programmes is the same as for non-food programmes. In addition, from a consumer's point of view, no difference is perceived - both programmes are equal tools to them to lose weight, but both tools are not given equal access to that same consumer.*

## **Section 15: Food, Dietary supplements and Associated Health and Nutrition claims**

### **Permitted nutrition and health claims**

#### **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.

*CHWP agrees that this is a correct interpretation of the requirements of Article 12(b) of the NHCR.*

*However, we would strongly suggest that the ASA liaises 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.*

### **Other questions**

#### **Question 57**

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

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

iii) Do you have other comments on this section?

*We would like to repeat that while CHWP agrees that rules 15.6 and 15.6.6 are a correct interpretation of the requirements of the NHCR, we 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.*

## **Camelot Group plc's response to the Consultation on the CAP and BCAP Codes – June 2009**

### **Introduction**

As the CAP/BCAP consultation document makes clear, revision of the advertising Codes to accommodate the requirements of the Communications Act 2003 and of the Gambling Act 2005 has been under active consideration since 2006. As part of that process, the regulator of The National Lottery (TNL), the National Lottery Commission (NLC), and the operator, Camelot, have been involved in detailed discussions with BCAP.

We have concentrated our remarks on the BCAP provisions. So far as we are aware, there has been no change to the non-broadcast provisions as stated by CAP in correspondence with Camelot dated 20 December 2006, in which it stated:

*“CAP recognised the Gambling Act 2005 provides no explicit public policy mandate to include the National Lottery in the proposed CAP gambling rules.”*

Camelot took the view that the current regime for regulating National Lottery advertising has always worked extremely well. There is no evidence of the existing system having failed to protect players, and, crucially, the current rules reflect the special status of TNL as determined by Parliament. It therefore argued that there were powerful policy and legal reasons for retaining a structure that broadly reflected the status quo – i.e. in addition to its general provisions, BCAP should maintain its existing but light-touch National Lottery-specific rules; (these are covered in more detail in our response to Question 105). At the same time, the NLC should continue to regulate TNL through the detailed Advertising and Sales Promotion Code of Practice (*the Lottery Code*), which is a Licence requirement.

The NLC recognised that the liberalisation of gambling advertising had properly resulted in a re-consideration of the position of TNL and accepted that, in principle, it was appropriate for there to continue to be separate, lottery specific provisions within the new BCAP Code. The NLC made clear, however, that it believed that the existing lottery specific provisions of the Code should only be extended where there was a clear case for doing so.

In an attempt to reach agreement, and in recognition of BCAP's duties and responsibilities under the Communications and Gambling Acts, Camelot argued that if BCAP were to recommend the inclusion of TNL in the new Code, then it should not be as part of the general gambling provisions, nor should it be placed in a separate section covering lotteries - i.e. Society and Local Authority Lotteries (SLAs). Rather, if BCAP were to recommend extending the rules to include TNL it should be in a discrete National Lottery section. Camelot's reasons for continuing to advocate this course are outlined in this response.

After protracted discussions among and between all the parties involved, we remain of the view that no compelling case for change has been made. **Our overriding concern about the proposal is that CAP/BCAP's desire to embrace the better regulation principle of consistency has not been adequately balanced against the better regulation principle of proportionality.**

## Section 17: Gambling

*Consistency; principle*

### Question 105

Given BCAP's policy consideration, do you agree in principle that National Lottery and SLA lottery broadcast advertisements should be regulated by the same rules?

*Answer*

While we support consistency as a principle of good regulation, we do not believe that in this case it will be achieved by applying the same rules to lotteries that are quite different in scale and character, and the subject of separate and distinct Acts of Parliament.

The National Lottery and SLAs share a definition of their activity as a lottery and a responsibility to raise money for good causes. However, in other characteristics, they are not at all similar. We would suggest that there is not so much any inconsistency in treatment between TNL and other lotteries, but rather differing needs arising from major differences in audiences, media usage and scale of operation. That is why in our discussions with BCAP we have argued that TNL should have its own stand-alone section and not be bracketed with SLAs, for the following reasons:

- (i) TNL and SLAs are governed by different legislation. TNL is subject to the National Lottery etc Act 1993 (as amended) and is specifically excluded from most of the Gambling Act 2005, whereas SLAs are specifically subject to the Gambling Act. The special status of TNL has always been recognised by Parliament and upheld by successive governments. For example, the DCMS *Decision document on National Lottery Licensing and Regulation*, of July 2003, stated that...*"the unique support that it (TNL) provides for good causes has led the Government to conclude that it should not be exposed to direct competition that could undermine its role."*
- (ii) TNL and SLAs are regulated by different bodies; the NLC and the Gambling Commission respectively. The priorities of the NLC differ from those of the Gambling Commission. The Gambling Commission has a duty to allow gambling to expand and develop in new ways even when new products may compete directly with TNL.

By contrast, the NLC's first priority is to ensure that any product developed as part of TNL must be safe for all, not just for children and the vulnerable. This regulatory demarcation was deliberate and has been successful in delivering a fair and a prosperous National Lottery and a thriving society lotteries sector.

- (iii) TNL has a dedicated regulator to ensure that issues of propriety and player protection – including the conduct of advertising – are properly dealt with as part of a comprehensive system of oversight and regulation. This close scrutiny sets TNL apart from sectors regulated by the Gambling Commission. SLAs are not subject to the same intensity of regulation.
- (iv) TNL is subject to other safeguards, primarily through licence conditions, which include a requirement for an Advertising and Sales Promotion Code (*the Lottery Code*), which the NLC approves and enforces. The Code is reviewed annually under the terms of Section 5 of the Licence. This is not the case for SLAs, which are wholly regulated by BCAP Codes.
- (v) TNL has nearly 15 years of experience in mass media advertising and other promotional activities which have been conducted to high standards of propriety. As yet, there is no such track record within the gambling industry and we believe the approach to TNL should reflect the responsibility it has demonstrated in this area over a prolonged period.
- (vi) The scale of operation of TNL and SLAs is radically different and they have marketing expenditure to match. As a consequence, their requirements of broadcast advertising codes are very different. For example, the question of whether a lottery can or cannot advertise during *Coronation Street* is likely to be of hypothetical interest only to SLAs, whereas it is a critical question for TNL.
- (vii) SLAs enjoy a number of commercial freedoms which TNL does not. For example, there is no restriction on the frequency of draws held by SLAs in traditional manned retail environments, whereas TNL is limited to hourly draws. SLAs are also able to vend unmanned and TNL is not.
- (viii) Because of the unique status of TNL it is conceivable that at some point it may be desirable to make changes to the Code. While there would need to be a wide consultation, it would be a benefit for BCAP to have the flexibility to change requirements as they affect TNL exclusively. Equally, it could potentially be very frustrating for SLAs to be caught up by Code changes that are designed to impact on National Lottery advertising only, and vice versa.

*Consistency; age of appeal of content*

### **Question 107**

Given BCAP's policy consideration, especially the requirement for consistency in regulation, do you agree it is proportionate to increase the restriction on age of appeal for broadcast National Lottery advertisements from 16+ to 18+?

*Answer*

In acknowledging BCAP's argument that it would be impractical to ask the ASA Council to distinguish between content of particular appeal to under 16s and content of particular appeal to under 18s, because such an assessment is subjective, on balance the NLC concluded that the minimum age of appeal (for National Lottery advertisement content, or restrictions on the scheduling or placement of advertisements) should be 18.

Camelot, on the other hand, took the view that the expansion of the BCAP rules would be disproportionate to the perceived regulatory problem. The principle of proportionality requires that the means used to attain a given end should be no more than what is appropriate and necessary to attain that end. Where consistency of treatment is appropriate, Camelot said there was sufficient consistency of treatment in the present 'side-by-side' operation of *the Lottery Code* and the existing BCAP provisions.

National Lottery products can be purchased legally by those who are 16+ and no case has been made or evidence provided to suggest that the current minimum age of 16 has led to any detriment. In seeking to be consistent in its own Code, BCAP has recommended the creation of a significant inconsistency between its provisions and those of *the Lottery Code*. This illustrates the pitfalls of dual regulation and of conflating the rules applying to two very different lottery sectors. Should the recommendation be implemented the only way to assure consistency would be for the NLC to drop the age related provisions from its Code entirely.

An adequate system for preventing harmful National Lottery advertisements is already in place which operates in the same field and is regulated to a comparable level of detail. There is no mischief that needs solving because there is no evidence that the existing age restrictions applied to TNL are a cause for concern. The whole basis of better regulation is a requirement for a thorough risk assessment. This has not, so far as Camelot is aware, taken place and no risks have been raised to justify change.

*Consistency; age at which a person may be featured gambling in a lottery advertisement*

### **Question 107**

Given BCAP's policy consideration, especially the requirement for consistency in regulation, do you agree it is proportionate to apply rules 18.6 and 18.7 to all broadcast lottery advertisements?

*Answer*

We think it is wholly disproportionate to increase the content rules on the age of persons featured in lottery advertisements to 25. Not only does this proposal fail to reflect that lotteries have different age limits to those set for other forms of gambling (for which this rule was developed), but it also fails to take account of the fact that the present rules for advertising of TNL in this regard have been in place for nearly 15 years and have not led to any significant public concern or regulatory action.

*Consistency; other lottery rules*

### **Question 108**

Given BCAP's policy consideration, do you agree that the rules included in the Lottery Section of the Code are in line with BCAP's general policy objectives and should be applied to broadcast advertisements for the National Lottery as they presently are to broadcast advertisements for other lotteries?

*Answer*

We support BCAP's general policy objectives as outlined in Part 1 (4) of the consultation document. We note, however, that at 4.x it states that: *"BCAP considers that users of the Code should feel confident that the Code does not conflict with the law or otherwise undermine it."*

Parliament has consistently separated TNL from other forms of gambling. This separation is not just in terms of regulatory structure, but is also reflected in different regulatory and public policy principles. This is one of the main reasons we have argued in favour of TNL having a stand-alone section in the revised Code rather than being grouped with SLAs. Moreover, a number of BCAP's recommendations for aligning TNL more closely with the rules covering SLAs in effect align all lotteries much more closely with harder forms of gambling. For example, the proposals on age restrictions (see Questions 106 and 107) are identical to the general gambling provisions. This was never Parliament's intention. The Government has always been explicit that the regimes applied to TNL and to the gambling sector should differ. In 'A Safe Bet for Success', published in 2002, it says:

*"5.3 – While the National Lottery clearly involves gambling, the unique support which it provides for good causes has led the Government to*

*conclude that it should not operate on the same playing field as other kinds of gambling.”*

We are therefore concerned that an unintended consequence of ‘tidying up’ the new Code would be to blur the clear distinction that has always existed between TNL and the gambling sector. This may not conflict with the law but we think it breaches and undermines its spirit.

*Participating in a lottery in a working environment*

### **Question 109**

Given BCAP’s policy consideration, do you agree that lottery advertisements should be able to feature participation in a lottery in a working environment?

*Answer*

We think that while this provision may be appropriate for gambling products, it would be inappropriate to extend it to National Lottery play. As BCAP recognise, syndicates have been operated by groups of colleagues in a working environment for many years, with no apparent detriment.

*Other questions*

### **Question 10**

(i) Taking into account BCAP’s policy consideration, do you agree that BCAP’s rules on Gambling and Lotteries are necessary and easily understandable?

*Answer*

As we have explained in this paper, we do not think TNL should be grouped with SLAs for the purpose of harmonizing the level and extent of the exceptions to the BCAP gambling advertising rules that are granted to all lotteries, and we remain vigorously opposed to the extent to which the proposed new rules move TNL squarely into restrictions applied to the gambling sector.

## Response from CARE and CareConfidential to the Consultation on the proposed CAP Advertising Standards Code

Responding to Question 9 of CAP consultation

Given that this question relates to misleading advertising and that the BCAP Questions 62 relates to pregnancy crisis counselling providers in relation to para. 11.37 we would like to draw your attention to the evidence we submitted to that consultation for the purpose of informing your thinking in relation to printed advertising in response to question 9 of the CAP consultation. The below makes it plain that the current advertising regime - whether broadcast or print - is sound, highlighting significant concerns about the pressures for change.

### **BCAP consultation response to question 62**

**CARE** is a well-established mainstream Christian charity whose concern is to combine practical caring initiatives for those in need, outworking Christian values of love, mercy, acceptance, grace, kindness and compassion, with helping to bring Christian truth, insight and experience to matters affecting society today by providing resources and insight to public policy. CARE is represented in the UK Parliaments and Assemblies, at the EU in Brussels and the UN in Geneva and New York.

CareConfidential is a part of CARE and undertakes caring work in the fields of pregnancy counselling and advice on dealing with unplanned pregnancy and post-abortion situations. Through its extensive contact over 20 years with those affected by abortion, **CareConfidential is one of the major national organisations providing counselling and support in this sensitive area through a helpline and via the web through online advisory services.** CareConfidential also assists a network of over 150 affiliated pregnancy crisis centres.<sup>55</sup>

The aim of CareConfidential is to provide a safe, impartial environment in which women and men can talk through their circumstances of unexpected pregnancy and discover all of the options open to them. CareConfidential also offers a longer term post-abortion counselling service.

We are responding to the BCAP consultation on Question 62 and Question 147.

### **Advertisements for Post-conception Pregnancy Advice Centres**

#### **Question 62**

*i) Given BCAP's policy consideration, do you agree that it is necessary to maintain a rule*

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<sup>55</sup> The centres offer a range of facilities including free pregnancy testing, counselling relating to unplanned pregnancy, post abortion counselling, miscarriage counselling, befriending services, adoption schemes, accommodation, provision of free clothes and equipment for those on low income, advice on benefits and accommodation and parenting classes. The network has approximately 800 trained volunteer counsellors in the UK, as well as a **help line and website**. The network provides services to over 38,000 clients per year and there have been over 10,000 calls to the help line. The website has self help information and access to online advisors plus links to the network of centres throughout the UK and recently won a BT Helpline Association Award for innovative use of web based applications.



*specific to post-conception advice services and to regulate advertisements for pre-conception advice services through the general rules only?*

*ii) Given BCAP's policy consideration, do you agree that rule 11.11 should be included in the proposed BCAP Code? If your answer is no, please explain why.*

**11.11** *Advertisements for post-conception pregnancy advice services must make clear in the advertisement if the service does not refer women directly for abortion.*

**We do not agree that rule 11.11 should be included in the proposed BCAP code.**

1. Para 11.37 claims that some groups in society are potentially vulnerable to misleading or otherwise irresponsible advertisements for those centres, including women who are or might be pregnant and members of the public who are seeking advice on contraception.

**Q9 in the CAP consultation** may be used to similarly require that pregnancy counselling services must state in print advertising whether or not they provide abortion services, in order that women are not misled.

2. However there is **no evidence provided to suggest that advertising by pregnancy counselling centres has been misleading**. The title of the centres themselves makes it very clear what the service is that they provide – e.g. ‘pregnancy advisory centres’, ‘pregnancy counselling centres’ – and such descriptions reflect exactly the holistic services offered. There is no need to restrict or control advertising wording when they already clearly describe what they do. A good example is the CareConfidential website at [www.careconfidential.com](http://www.careconfidential.com).

3. The stated purpose for introducing this new rule is concern that pregnancy advisory services delay women accessing abortion provision (11.38) and can provide misleading advertisements (11.37, 11.42). However, as there is **no evidence** provided for such an assertion it is misleading to suggest this is a problem. Pregnancy advisory services always refer women straight to their GP if a woman wants an abortion, so there is really no delay, other than to inform a woman (and/or her partner) of their choices, including abortion. To falsely alarm people about potential delay is unsubstantiated and unnecessary and discriminatory.

4. We are very concerned about the emphasis in the consultation on the need for speed in referral straight to an abortion, and the trivialisation of informed decision-making. The message given is that informed consent *and* time to make a considered decision is unnecessary and unimportant compared to the need for speed in obtaining an abortion. Thus the benefit of (and right for women to have) informed consent is trivialised over the desire to speed the whole process up. Yet research comparing the risk of early abortion versus pregnancy has found that there is actually a *lower* risk of psychotic reactions after *pregnancy* than post-abortion: 18.4/10,000 for women who had an abortion compared to 12/10,000 for those who gave birth.<sup>56</sup> A 2002 study of out-patient mental health claims over a four year period, comparing abortions versus deliveries, found that after 90 days there were 63% more claims post abortion, after 180 days there were 42% more claims, after 1 year there were 30% more claims and after 2 years there were 16% more claims post abortion than delivery.<sup>57</sup> After years of denying any link between abortion and women's mental health, the Royal College of Psychiatrists recently released a statement recognising that having an abortion may damage a woman's mental health.<sup>58</sup> This is based on evidence such as that from the recent large longitudinal, methodologically robust study in New Zealand (published since the RCOG report, para 11.38), which found that having an abortion doubles the chances of the woman concerned suffering from depression and psychological difficulties, even where there is no previous history of depression.<sup>59</sup> **Thus this should not be a decision taken lightly, quickly or without informed consent.**

5. The Royal College of Psychiatrists likewise recognises that good practice in relation to abortion will include **informed consent**, which clearly cannot be fully informed without the provision of adequate and appropriate information regarding the possible risks and benefits to physical and mental health.<sup>60</sup> Women considering an abortion have a *right to know* what they are choosing and time to make a decision. When facing an unexpected pregnancy, women and their partners need accurate information and an opportunity to look at all the options available - parenting, adoption or abortion. There has been - and still is - huge resistance among abortion providers to giving women enough information – perhaps for the

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<sup>56</sup> David et al 1981. *Family Planning Perspectives*. 13 (1):. 32-34.

<sup>57</sup> Coleman et al. 2002. *American Journal Orthopsychiatry*. 72,1. 141-152. Study of first time psychiatric out-patient contact in 4 years post-abortion. Data set: 14,297 in abortion group, 40,122 in birth group. Research controlled for pre-existing psychological problems, age, number of pregnancies and months of eligibility.

<sup>58</sup> Position Statement on Women's Mental Health in Relation to Induced Abortion, Royal College of Psychiatrists, 14 March 2008.

<sup>59</sup> Fergusson, DM, Horwood, LJ and Ridder, EM, *Journal of Child Psychology and Psychiatry*, 47 (1), 2006, pages 16-24.

<sup>60</sup> Position Statement on Women's Mental Health in Relation to Induced Abortion, Royal College of Psychiatrists, 14 March 2008.

reason that too many of them might choose not to have an abortion. Yet valid choices cannot be made without information. The 'right to choose' is meaningless unless people know just exactly what they are choosing.

6. Moreover, failure to provide women with anything less than this is an affront to their dignity and human rights. It could also make government/regulators/service providers vulnerable to subsequent legal challenge should it be demonstrated that women were provided with sub-standard information. If the ASA is to adopt a progressive, rights based, approach it must ensure that women are properly informed so that they enjoy a 'felt right to choose', especially after they have undergone the chosen way of dealing with the pregnancy, whether that is to stay pregnant, give the child up for adoption or abortion.

7. Whilst we are not advocating preventing women from having abortions if they choose, nor deliberately delaying them if they wish to be referred to a GP for an abortion, we do believe that the role of advisory centres in providing time and information is both unique and essential given the seriousness of the abortion procedure and the possible physical and psycho-social consequences noted above. Alongside information, women often need *time* to explore the options as well as their feelings, without pressure or judgment, and it is not helpful for them to feel rushed into making major decisions that may have a long-term impact. Here we are not talking about weeks, but rather days. Indeed, we have heard from many women who have felt rushed into decisions that have impacted them in a significant way, long-term. Over-emphasising the importance of speed of referral not only undermines the need for time but can also mislead women about the seriousness of the decision and procedure involved.

8. Decision making about proceeding with an abortion warrants careful, objective counselling. Instead of undermining and restricting the work of pregnancy advisory centres, they should be supported, promoted and their unique service should be made more widely available for women with unplanned pregnancies. Indeed, many GPs welcome them in their area as they can provide the time, the practical and emotional support and the on-going assistance (whatever the decision) that many GPs do not have the time or resources to offer. As we said above, centres will always refer women who want to go ahead with abortion to their GPs.

9. It is striking that there is no requirement from the BCAP that advice centres who do not offer such full informed consent, any alternatives, on-going support, in depth counselling and a full caring service including material assistance, should state this in their advertising. Many do not offer a 'full service' but only an abortion service, which could similarly be construed as being misleading. It is also notable which organisations are driving this policy:

the Independent Advisory Group on Sexual Health and HIV consists of people who have a vested financial interest to promote abortion. These include Brook, The Family Planning Association and the British Pregnancy Advisory service (which alone, is responsible for more than a quarter of all abortions in England and Wales.) We are concerned that the BCAP, which should take a non-partisan position, seems overly concerned to promote the views of pro-abortion groups only.

**We disagree with the proposed policy to allow abortion providers the freedom to advertise on TV.**

10. Allowing abortion organisations to advertise abortion on television **would trivialise the seriousness of abortion**, and treat abortion in a promotional and misleading manner. It would fail to inform women of the potential consequences they may face (especially risks to emotional and physical health, see para 4 above) and would undermine any message that abortion is a serious procedure that involves either a surgical operation and/or powerful drugs. Nor should advertising be used to encourage even larger numbers of women to have abortions. We are unaware of any other Western country that permits the promotional advertising of abortion services.

11. Along with trivialising abortion, there is a very real danger that **abortion will become increasingly ‘normalised’ by TV advertising and promotion**. As the BCAP consultation document itself claims regarding sanitary protection products, these have been normalised to such an extent through advertising that they are associated in adverts with healthy and active lifestyles: *“In her letter to BCAP, Baroness Gould noted that the lesser degree of restriction placed on sanitary protection products had helped normalise those products and that advertising now associated them with healthy and active lifestyles.”* (para 32.27). While we welcome the effect that advertising has had on sanitary protection products, we are concerned about the same happening to abortion, and it becoming a simple, seemingly consequence-free lifestyle choice, rather than the much more serious matter that it is. Given that the Royal College of General Practitioners has seen an increase in abortion being used as a contraceptive this point is particularly worrying. (see para. 12 for citation)

12. We already have concerns that abortion is being treated in the same way as contraception, and indeed seems to be increasingly used as a method of contraception.<sup>61</sup> Again, in our view, the answer lies not in easier abortion provision but in treating abortion as a serious procedure.

13. The high rate of terminations does not suggest that it is ignorance of the options nor availability that sees so many women having terminations. Even among young girls the rates are higher than ever: in 2007, more than 20,000 girls under the age of 18 received a legal abortion in England and Wales - a rate of 20/1000, the highest ever recorded.

14. Allowing the advertising of abortion services would not deal with the real problem that the Government is facing, which is that its strategy on teenage pregnancy (based on condoms, the morning-after pill and abortion) is failing as teenage conceptions are continuing to rise. This proposed approach is like having an ambulance at the bottom of the cliff to deal with the casualties, rather than providing a fence at the top to prevent them in the first place.

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<sup>61</sup> *"I have already seen an increase in the number of women coming forward for abortions. Many are now using it as a method of contraception..."* Dr Sarah Jarvis, Royal College of General Practitioners spokeswoman for women's health.

(<http://www.healthcarerepublic.com/news/index.cfm?fuseaction=HCR.News.GP.LatestNews.Article&nNewsID=879810&sHashCode=#AddComment> accessed 19 June 2009)

We have read with interest the proposed changes to the two codes and welcome the simplification of the language and the aligning of the two. We have no problems with the suggested changes as far as advertising is concerned. My colleague Marc Michaels will separately comment on the suggestions for direct marketing.

Many thanks

## Annex 3

# Consultation questions

You may respond to some or all of the consultation questions. This Annex is provided in Word format to enable you to copy and paste the questions into a document that should accompany your completed cover sheet, which is made available [here](#). See 'Responding to this consultation' in this Annex.

## Section 1: Compliance

### Question 1

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

**YES**

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

**NO**

iii) Do you have other comments on this section?

**We think the inclusion of 1.2 in the proposed code is a valuable addition for advertisers to recognize their responsibilities to their audience and society. This is particularly relevant to the work of our charity, *Changing Faces* that supports and represents children, young people and adults who have disfigurements. A public attitude survey in 2008 of a representative sample of 1000 showed that 9 out of 10 people have unwitting negative attitudes towards disfigurements. If not tackled, these attitudes may constitute 'facial prejudices' and lead to 'facial discrimination' at work, at school and in public situations. They can have a detrimental effect on the self-esteem, lives and prospects of people who have disfigurements.**

**Advertisers need to be aware that their material could reinforce negative stereotypes amongst an uninformed audience and could cause offence towards people who have disfigurements and further contribute to their challenges. For example, when portraying disfigurement, they may automatically use scars/disfigurement to portray negative qualities (evil, something nasty).**

**Advertisers promoting fire prevention/drink driving and other accident prevention also need to be careful that images used with the intention of preventing harm, are also considerate to those who have disfigurements and doesn't unduly cast a person's disfigurement in an offensively negative light.**

**In order to enact this code however, advertisers need to be fully informed about the various sectors of society that exist and need to show a willingness to engage with those with knowledge about these sectors.**

## **Section 2: Recognition of marketing communications**

### **Question 2**

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

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

iii) Do you have other comments on this section?

## **Section 3: Misleading**

### **Clarity of qualifications**

#### **Question 3**

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

**Yes**

### **Exaggerated performance**

#### **Question 4**

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

**Yes**

### **Restrictions on availability**

#### **Question 5**

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

### **Testimonials**

#### **Question 6**

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

**Yes**

### **Additional rights provided by guarantees**

#### **Question 7**

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



## The unavoidable cost of responding

### Question 8

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

## Other questions

### Question 9

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

#### Yes

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

#### No

iii) Do you have other comments on this section?

**It is important that misleading is understood by advertisers to include exaggeration/hyperbole. We find that this is often the case with posters/material advertising plastic surgery which often minimize the risks (ie of disfigurement, injury) and promote it as the key to a better quality of life.**

## Section 4: Harm and Offence

### Flashing images

### Question 10

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

## Other Questions

### Question 11

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

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

iii) Do you have other comments on this section?

## Section 5: Children

## Promotions that contain a direct exhortation to buy a product

### Question 12

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

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

### Question 13

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

## Other questions

### Question 14

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

## Section 6: Privacy

### Question 15

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

## Section 7: Political Advertisements

### Question 16

- i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Political Advertisements Section, are necessary and easily understandable? If your answer is no, please explain why.
- ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Political Advertisements rules that are likely to amount to a significant

change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

## **Section 8: Sales Promotions**

### **Withholding prizes**

#### **Question 17**

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

### **Promotions directed at children; the need for a closing date**

#### **Question 18**

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

### **Prizes and Gifts**

#### **Question 19**

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

#### **Question 20**

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

### **Significant conditions exception: limited by time or space**

#### **Question 21**

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

### **Distinction between prizes and gifts: a significant proportion**

#### **Question 22**

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

### **Supervising Prize Draws**

#### **Question 23**

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

## Auditing instant-win promotions

### Question 24

- i) Do you agree that the present requirement, in CAP rule 35.8, for a promoter to obtain an independently audited statement that all prizes have been distributed, or made available for distribution on a fair and random basis is disproportionate and should not therefore be included in the Code? If your answer is no, please explain why?
- ii) Given CAP's policy consideration, do you agree that rule 8.25 should be included in the Code? If your answer is no, please explain why.

## Judging of prize promotions

### Question 25

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

## Receipt of prizes: time

### Question 26

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

## Appeal to children

### Question 27

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

## Other questions

### Question 28

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

## Section 9: Distance Selling

### Personal visits

### Question 29

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

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

#### **Question 30**

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

### **Other questions**

#### **Question 31**

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

## **Section 10: Database practice**

### **Collection of data from children**

#### **Question 32**

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

### **Explicit consent of consumers: Bluetooth**

#### **Question 33**

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

### **Other questions**

#### **Question 34**

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

## **Section 11: Environmental Claims**

### **Question 35**

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

### **Other questions**

### **Question 36**

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

## **Section 12: Medicines, Treatments, Devices and Health**

### **Traditional Herbal Medicinal Products**

### **Question 37**

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

### **Medicinal claims**

### **Question 38**

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

### **Other questions**

### **Question 39**

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

## Section 13: Weight Control and Slimming

### Targeting the obese

#### Question 40

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

### Loss of weight or fat from specific parts of the body

#### Question 41

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

### Very Low-Calorie Diets (VLCDs)

#### Question 42

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

### Other questions

#### Question 43

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

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

iii) Do you have other comments on this section?

## Section 14: Financial products Individual Voluntary Arrangements (IVAs)

#### Question 44

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

### Other questions

#### Question 45

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

## **Section 15: Food, Dietary supplements and Associated Health and Nutrition claims**

### **Permitted nutrition and health claims**

#### **Question 46**

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

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

#### **Question 47**

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

### **Comparative nutrition claims**

#### **Question 48**

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

### **Comparison with one product**

#### **Question 49**

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

### **Prohibitions**

#### **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.

#### **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.



### **Question 52**

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

### **The use of health professionals**

### **Question 53**

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

### **Food labelling Regulations (1996) (FLRs)**

### **Question 54**

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

### **Question 55**

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

### **Infant and follow-on formulae**

### **Question 56**

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

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

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

### **Other questions**

### **Question 57**

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

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

dedicated consideration?

iii) Do you have other comments on this section?

## **Section 16: Gambling**

### **Consistency: principle**

#### **Question 58**

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

### **Consistency: rules**

#### **Question 59**

Given CAP's policy consideration, do you agree that the rules included in the Lottery Section of the Code are in line with CAP's general policy objectives (see Part 1 (4) of this consultation document) and should be applied to marketing communications for the National Lottery as they presently are to marketing communications for other lotteries? If your answer is no, please explain why and, if relevant, please identify those rules that should not be applied to marketing communications for the National Lottery.

### **Participating in a lottery in a working environment**

#### **Question 60**

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

### **Other questions**

#### **Question 61**

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

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

iii) Do you have other comments on this Section?

## **Section 18: Alcohol**

### **Alcoholic strength**

#### **Question 62**

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

## Provision for low-alcohol drinks

### Question 63

- i) Given CAP's policy consideration, do you agree that CAP rule 56.15 should not be included in the present Code? If your answer is no, please explain why.
- ii) Given CAP's policy consideration, do you agree that, with the exception of the rule that prevents preference based on alcoholic strength, marketing communications for low-alcohol drinks should be subject to all the Alcohol rules? If your answer is no, please explain why.

### Question 64

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

## Other questions

### Question 65

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

## Section 19: Motoring

### The legal requirements of the Highway Code

### Question 66

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

### Prices in motoring marketing communications

### Question 67

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

## Other questions

### Question 68

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

please explain why.

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

iii) Do you have other comments on this section?

## **Section 20: Employment, Homework Schemes and Business Opportunities**

### **Employment businesses**

#### **Question 69**

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

### **Required information in marketing communications for homework schemes**

#### **Question 70**

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

### **Vocational training and instruction courses**

#### **Question 71**

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

### **Other Questions**

#### **Question 72**

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

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

iii) Do you have other comments on this section?

## **Section 21: Tobacco, Rolling Papers and Filters**

#### **Question 73**

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

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

iii) Do you have other comments on this section?

## **Section 22: Other comments**

### **Question 74**

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

**We believe that this Code does not give adequate attention to the issues around the advertising of cosmetic surgery and other beauty industry products which has become more and more prolific in recent times.**

**The Department of Health's Chief Medical Officer is committed to the tighter regulation of the cosmetic surgery as a whole and has drawn attention to the need for scrutiny of the advertising of cosmetic surgery (see [http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_4102047](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4102047)).**

**The Department is also exercised about the need for potential consumers/patients of cosmetic surgery not to be influenced by advertising hyperbole and to ask the right questions ([http://www.dh.gov.uk/en/PublicHealth/CosmeticSurgery/DH\\_913](http://www.dh.gov.uk/en/PublicHealth/CosmeticSurgery/DH_913)).**

**Given the increasing numbers of people undergoing cosmetic procedures, this is something Changing Faces believes should merit a whole section of the Code.**

**In particular, we suggest attention should be given to the following points:**

- **Advertisements for cosmetic surgery should not exaggeratedly associate 'good looks' with lifelong happiness, getting promotion or other aspirations.**
- **Advertisements should not overestimate the benefits of cosmetic surgery procedures nor underestimate their risks. To do so may lead to the harm of potentially vulnerable people (ie. young people and those with low self-esteem).**
- **All advertisements for cosmetic surgery should provide information about the credentials, competencies and experience of those clinics/individuals providing the service - again to prevent harm.**

**The following question was issued as an addendum on 29 May 2009. The closing date for responses to this question is 10 July 2009. The full text of the addendum can be found [here](#).**

**Question 75**

Given CAP's policy consideration, do you agree that the evidence contained in the ScHARR Review does not merit a change to CAP's alcohol advertising content or scheduling rules? If your answer is no, please explain why you consider the ScHARR Review does merit a change to CAP's alcohol advertising content or scheduling rules.

# Responses from the Charity Law Association Working Party

## Introduction

The Charity Law Association (CLA) has over 900 members, mainly lawyers but also accountants and charity professionals. It is concerned with all aspects of the law relating to charities, and has established a Working Party to consider the CAP and BCAP Code consultations.

The members of the Working Party are:

- Elizabeth Davis – Blake Lapthorn - Chairman
- Nick Burrows - Blandy and Blandy
- Yvette Deerness - Cancer Research UK
- Sue Greaves - Wrigleys Solicitors LLP
- Natalie Johnson - Wrigleys Solicitors LLP
- William Lister - Pannone LLP
- Stephen Ravenscroft - Stone King Sewell LLP
- Geoffrey Sturgess - Blake Lapthorn

The members of the Working Party serve in a personal capacity and the views expressed in this submission should not be taken to be the formal opinion of the organisations that they represent.

## General Remarks

In many areas the Working Party are supportive of the proposals made to the CAP and the BCAP Codes. The proposals are a welcome response to the way that society and the industry have moved on. We do however feel that the new Codes lack clear construction, and more consideration should be given to the proposed amendments.

In particular there is an inconsistency of terminology and a lack of definitions through introducing provisions from the Consumer and Business Protection from Unfair Trading Regulations without considering their relevance or context. Further the Codes appear uncertain as to the extent to which the rules should be designed to protect consumers and small and big businesses. For example the provisions of BCAP 3.24 prohibiting exaggeration directly contradicts 2.2 allowing "puffery" without making it clear that one should read 3.24 in the light of 2.2.

While these issues may not cause a problem at the consultation stage we feel that it may cause significant problems for advertisers and their advisers leading to increased costs when advertisers need to qualify the advice. Charities that wish to advertise may be disadvantaged in finding the necessary financial or administrative resources to obtain skilled advice to protect them from risk of breach of the Code and subsequently the expense and administrative resources required to deal with any allegation of breach or other challenge.

# Consultation questions

## Section 1: Compliance

### Question 1

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

Yes

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

No

**iii) Do you have other comments on this section?**

No

## Section 2: Recognition of marketing communications

### Question 2

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

Yes subject to 2(iii) below.

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

No

**iii) Do you have other comments on this section?**

The new wording at the end of the proposed clause 2.3 is we, believe, insufficiently clear. It says that marketing communications "must make clear their commercial intent". It could lead to confusion in trying to determine what "commercial intent" is particularly in the context of charitable activities. It may well be sensible for more thought to be given to the wording of that part of the sub-clause i.e. "that it is a commercial communication".

## Section 3: Misleading

### Clarity of qualifications

### Question 3

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



Yes but the rule should be qualified itself where practicable and if not apparent on further investigation of opportunity.

### Exaggerated performance

#### Question 4

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

Yes except in circumstances where examination is obvious. As written it contradicts rule 3.2.

### Restrictions on availability

#### Question 5

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

Rule should be qualified unless obvious from context.

### Testimonials

#### Question 6

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

Yes

### Additional rights provided by guarantees

#### Question 7

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

Yes

### The unavoidable cost of responding

#### Question 8

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

Yes but should be packaging or delivery.

### Other questions

#### Question 9

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

Not entirely necessary as much governed by Consumer Protection from Unfair Trading Regulations and too much protection of non-consumers in Code. Use of defined term 'marketer' requires clarification. See for example 3.5- identity of marketer.

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

No

**iii) Do you have other comments on this section?**

1.10- Marketer as defined is three types of promoter. How can all three have primary responsibility?

3.10- Needs to be clear that its target is communications *intended or likely* only to be heard once.

3.15- Reference to 'advertiser'- should be 'marketer'.

3.16- Some pyramid schemes are lawful. Promoting them lawfully should not be a breach of the code.

3.21- "the purchase of" should be re-instated.

3.27- Should be clarified to show that reasonable is judged when estimating, not on outcome.

3.37- This is anti-consumer and anti-competitive. Fair comparison should be permitted.

## **Section 4: Harm and Offence**

### **Flashing images**

#### **Question 10**

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

The Charity Law Association agrees that rule 4.7 ought to be included. However, the rule as drafted may cause difficulties given that it is a matter of medical opinion as to what effects or techniques may or may not affect members of the public with photosensitive epilepsy and what sort of affects it is likely to have on members of the public. It is accordingly difficult for marketers to know how any such effects or techniques may affect the public. Accordingly, we think it may be useful, in the spirit of the Code in general, if it was provided that it is the responsibility of marketers, prior to the publication of any marketing communication, to satisfy themselves that visual effects or techniques are unlikely to adversely affect members of the public in any manner which may be reasonably anticipated by members of the medical profession.

### **Other Questions**

#### **Question 11**

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

Please see answer to 10 above.

The onus should be on marketers to ensure that effects on members of the public are a

consequence recognised by members of the established medical profession. If marketers have to obtain medical reports before they embark on any effect or technique, that should be their responsibility. It is not adequate for marketers to simply warn the public about the possibility of, by way of example, strobe lighting or flashing photography, given that the public do not ask to see the marketing communication and is not intended primarily for the public's benefit, as opposed to, for instance, news items which may contain flash photography where a warning is usually given.

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

See (i) above.

**iii) Do you have other comments on this section?**

No.

## **Section 5: Children**

### **Promotions that contain a direct exhortation to buy a product**

#### **Question 12**

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

There may be significant difficulties in enforcing rule 5.7 as drafted given what may or may not be a direct exhortation to children might be subjective rather than objective. However, marketers may regard it as making no or little sense if toys for young children are marketed at their parents.

We would recommend that some limitation be placed on rule 5.7 in respect of electronic games or any product which has a significant value.

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

#### **Question 13**

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

Yes - note however that in strict terms, legally, a contract for the purchase of a toy by a child under the age of 18 is not legally enforceable as not being a "necessary".

### **Other questions**

#### **Question 14**

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

No definition is contained in rule 5 as to what constitutes "moral harm" (rule 5.1). A definition currently used in law of "tending to deprave and corrupt" might be a suitable starting point.

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

**should be retained or otherwise given dedicated consideration?**

Consider whether it is worth adding a clause to the effect that children should not be shown in any light in which they are acting in an inappropriate manner, either for their age or in respect of accepted social responsibility.

**iii) Do you have other comments on this section?**

No.

## **Section 6: Privacy**

### **Question 15**

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

The section should deal with the use of photographs taken of members of the public without their knowledge and/or permission in compliance with recent authority in the European Court of Human Rights of *Reklos and Davourlis – v - Greece*. Any such use would constitute an infringement of such a member of the public's privacy, in particular, a photograph that included a child.

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

See (i) above.

**iii) Do you have other comments on this section?**

No

## **Section 7: Political Advertisements**

### **Question 16**

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

No comment.

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

No comment.

**iii) Do you have other comments on this section?**

No.

## **Section 8: Sales Promotions**

## Withholding prizes

### Question 17

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

Yes

## Promotions directed at children; the need for a closing date

### Question 18

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

It is the enforcement of a non-notified closing date rather than the non-notification that should be regulated.

## Prizes and Gifts

### Question 19

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

Yes

### Question 20

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

Yes

## Significant conditions exception: limited by time or space

### Question 21

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

Yes

## Distinction between prizes and gifts: a significant proportion

### Question 22

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

Yes

## Supervising Prize Draws

### Question 23

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

Yes

### Auditing instant-win promotions

#### Question 24

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

Yes

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

Should be capable of independent verification, not necessarily independently verified. This is disproportionate for small promotions.

### Judging of prize promotions

#### Question 25

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

Yes

### Receipt of prizes: time

#### Question 26

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

Yes

### Appeal to children

#### Question 27

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

Rules 8.33 and 8.33.9 are preferred over the old rule 37.1.

### Other questions

#### Question 28

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

The rules are necessary but see notes below.

**ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Sales Promotions rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?**

See notes below

**iii) Do you have other comments on this section?**

8.21.1- A mere false claim or implication should not also need cost to create breach of code.

8.23- Revert to 'should' as some complexity will be necessary in some circumstances.

## **Section 9: Distance Selling**

### **Personal visits**

#### **Question 29**

**Given CAP's policy consideration, do you agree present rule 42.7 should not be included in the proposed Code? If your answer is no, please explain why.**

Yes. It is a useful rule, but it is probably no longer relevant.

### **The packaging of products that might fall into the hands of children**

#### **Question 30**

**Given CAP's policy consideration, do you agree that present rule 42.7 should not be included in the Code? If your answer is no, please explain why.**

Yes

### **Other questions**

#### **Question 31**

**i) Taking into account CAP's policy consideration, do you agree that CAP's rules on Distance Selling are necessary and easily understandable? If your answer is no, please explain why.**

Yes

**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?**

No

**iii) Do you have other comments on this section?**

No

## **Section 10: Database practice**

### **Collection of data from children**

#### **Question 32**

**Given CAP's policy consideration, do you agree that rules 10.15 and 10.16 should be included in the Code? If your answer is no, please explain why.**

No not rule 10.15 in its current form. The Charity Law Association agree with CAP's policy considerations however it is unclear as to the rationale behind making the rules "musts" rather than "shoulds" – a higher threshold than the one imposed by the ICO. As CAP mentions, there is currently little guidance in this area and so a threshold for marketers to essentially make reasonable efforts to comply would seem more reasonable and practical rather than an absolute requirement to comply when what constitutes compliance is still unclear. For example, what constitutes having obtained parental consent? A telephone call with the parent? A tick-box on a social net-working site? An email from the parent?

With regard to rule 10.16 would this extend to viral emails/email a friend type promotions (the sort of thing that young people like)? Sometimes an email will be sent from a marketer saying "your friend mary brown thought you would be interested in this..", the marketer having been provided with Mary's email address from the friend – so again it is the issue around making it an absolute prohibition by using the word "must" as opposed to using "should" as has been used by the ICO – we would question whether this was intended and whether more leeway is necessary?

### Explicit consent of consumers: Bluetooth

#### Question 33

**Given CAP's policy consideration, do you agree rules 10.13.3 and 10.6 should explicitly exempt marketing communications sent by Bluetooth technology? If your answer is no, please explain why.**

Yes

### Other questions

#### Question 34

**i) Taking into account CAP's general policy objectives, do you agree that CAP's Database Practice rules are necessary and easily understandable? If your answer is no, please explain why.**

Subject to the comments above and below at ii), yes.

**ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Database Practice rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?**

New Clause 10.9.3 "if the marketer intends to disclose the information to third parties, including associated but legally separate companies, or put the information to a use significantly different from that for which it is being provided; if so an opportunity to prevent this from happening must be given".

The amendment has changed this rule into an absolute obligation and it does not make the distinction between transferring to third party Data Controllers – where data subject should be able to say no and third party Data Processors – where you are not obliged to provide data subjects with the opportunity to prevent that from happening. Obviously your Privacy Policy needs to be clear about what you do with data. The current wording may be confusing and lead marketers to think they need to do more than they have to in order to comply.

**iii) Do you have other comments on this section?**

With regard to clause 10.3 and 10.6 does "electronic mail" adequately describe what the rules are intended to capture or will the marketer consider this just applies to e-mail and not txt-message or other digital messaging?



## Section 11: Environmental Claims

### Question 35

Given CAP's policy consideration, do you agree that rule 11.7 should be included in the Code? If your answer is no, please explain why.

Yes

### Other questions

### Question 36

i) Taking into account CAP's general policy objectives, do you agree that CAP's rules on Environmental Claims are necessary and easily understandable? If your answer is no, please explain why.

Yes

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration?

No

iii) Do you have other comments on this section?

Yes. The new wording for the proposed rule 11.5 does not include any reference to the position where evidence is inconclusive. In our view, that is not adequately covered within the proposed wording of new rule 11.5 and the wording dealing with inconclusive evidence in old rule 49.3 should be reinstated in some way.

## Section 12: Medicines, Treatments, Devices and Health

### Traditional Herbal Medicinal Products

### Question 37

Given CAP's policy consideration, do you agree that rule 12.20 should be included in the Code? If your answer is no, please explain why.

Yes.

### Medicinal claims

### Question 38

Given CAP's policy consideration, do you agree that rule 12.1 should be included in the proposed CAP Code? If your answer is no, please explain why.

Yes subject to the MHRA approving the wording.

### Other questions

### Question 39

i) Taking into account CAP's general policy objectives, do you agree that CAP's rules, included in the proposed Medicines, Treatments, Devices and Health Section are necessary

**and easily understandable? If your answer is no, please explain why.**

No further comments.

**ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Medicines, Treatments, Devices and Health rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?**

As above.

**iii) Do you have other comments on this section?**

No

## **Section 13: Weight Control and Slimming**

### **Targeting the obese**

#### **Question 40**

**Given CAP's policy consideration, do you agree it is justified to allow marketing communications for non-prescription medicines that are indicated for obesity and that require the involvement of a pharmacist in the sale or supply of the medicine to target people who are obese? If your answer is no, please explain why?**

People that are overweight may not be aware of their own BMI and are unlikely to know how to ascertain their BMI. They may not even acknowledge that they are overweight or obese.

Rule 13.2 should be amended in its second sentence to read:

*"Marketing communications for non-prescription medicines that are indicated for obesity or other weight loss and that require the involvement of the pharmacist ..."*

### **Loss of weight or fat from specific parts of the body**

#### **Question 41**

**Given CAP's policy consideration, do you agree that marketing communications for surgical clinics, establishments and the like that can remove fat from specific parts of the body may make claims about losing weight or fat from specific parts of the body but that those advertisers must not refer to the amount of weight that can be lost? If your answer is no, please explain why?**

Yes however it can be foreseen that a product may be advertised which could legitimately enable a user to lose a precise amount of weight within a stated period. Rule 13.9 does not cater for such eventuality.

### **Very Low-Calorie Diets (VLCDs)**

#### **Question 42**

**Given CAP's policy consideration, do you agree that rule 13.7 should reference 'Obesity: the prevention, identification, assessment and management of overweight and obesity in adults and children' (2006) published by the National Institute for Health and Clinical Excellence' and not Government COMA Report No.31, The Use of Very Low Calorie Diets? If your answer is no, please explain why?**

Yes.

## Other questions

### Question 43

i) Taking into account CAP's general policy objectives, do you agree that CAP's rules, included in the proposed Weight Control and Slimming Section are necessary and easily understandable? If your answer is no, please explain why?

See answer to question 40.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Weight Control and Slimming rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

No further comment.

iii) Do you have other comments on this section?

No.

## Section 14: Financial products Individual Voluntary Arrangements (IVAs)

### Question 44

Given CAP's policy consideration, do you agree that the underlined wording should be included in the Background to CAP's rules on Financial products? If your answer is no, please explain why.

Yes

## Other questions

### Question 45

i) Taking into account CAP's policy consideration, do you agree that CAP's rules on financial products are necessary and easily understandable? If your answer is no, please explain why.

Yes

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration?

No

iii) Do you have other comments on this section?

No

## Section 15: Food, Dietary supplements and Associated Health and Nutrition claims

### Permitted nutrition and health claims

#### Question 46

**Do you agree CAP has correctly reflected the requirements of Articles 8(1), 10(1) and 28 of the NHCR in CAP's proposed rules 15.1.1 and 15.1.2? If your answer is no, please explain why.**

No not with regard to Rule 15.1.1 – 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.

Rule 15.1.2 correctly reflects the requirements of the relevant Articles.

**Give rise to doubt the safety or nutritional adequacy of another product**

#### Question 47

**Do you agree CAP has correctly reflected the requirements of Article 3(b) of the NHCR in proposed rule 15.6 and 15.6.5? If your answer is no, please explain why.**

Yes

**Comparative nutrition claims**

#### 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.**

Yes

**Comparison with one product**

#### 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.**

Yes

**Prohibitions**

#### 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.**

Yes

#### 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.**

Yes

#### 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.**

Yes

### **The use of health professionals**

#### **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.**

Yes

### **Food labelling Regulations (1996) (FLRs)**

#### **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.**

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.

#### **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.**

Yes, subject to the comments above.

### **Infant and follow-on formulae**

#### **Question 56**

**i) Do you agree CAP has correctly reflected the requirements of Regulation 21(a) of the Infant Formula and Follow-on Formula Regulations 2007 (as amended) in CAP's proposed rule 15.11? If your answer is no, please explain why.**

**ii) Do you agree CAP has correctly reflected the requirements of Regulation 19 of the Infant Formula and Follow-on Formula Regulations 2007 (as amended) in CAP's proposed rule 15.11.1? If your answer is no, please explain why.**

**iii) Do you consider CAP has correctly reflected the relevant provisions of the Infant Formula and Follow-on Formula Regulations 2007 (as amended) in the proposed CAP Code? If your answer is no, please explain why.**

No comment.

### **Other questions**

#### **Question 57**

i) Taking into account CAP's general policy objectives, do you agree that CAP's rules, included in the proposed Food, Dietary supplements and Associated Health and Nutrition claims Section are necessary and easily understandable? If your answer is no, please explain why?

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

No further comments subject to those above.

## Section 16: Gambling

### Consistency: principle

#### Question 58

Given CAP's policy consideration, do you agree in principle that National Lottery and society and local authority marketing communications should be regulated by the same rules? If your answer is no, please explain why.

The Charity Law Association agrees with this approach to ensure consistency of treatment between SLA lotteries and the National Lottery.

### Consistency: rules

#### Question 59

Given CAP's policy consideration, do you agree that the rules included in the Lottery Section of the Code are in line with CAP's general policy objectives (see Part 1 (4) of this consultation document) and should be applied to marketing communications for the National Lottery as they presently are to marketing communications for other lotteries? If your answer is no, please explain why and, if relevant, please identify those rules that should not be applied to marketing communications for the National Lottery.

Generally, the Charity Law Association agrees with CAP's position with regard to questions 59, 60 and 61. In particular, the Charity Law Association considers that there should be consistency between advertisements on the one hand for SLAs and on the other hand for the National Lottery.

### Participating in a lottery in a working environment

#### Question 60

Given CAP's policy consideration, do you agree that lottery marketing communications should be able to feature participation in a lottery in a working environment? If your answer is no, please explain why.

The Charity Law Association has no particular views with regard to the featuring of groups of colleagues in working environments.

### Other questions

#### Question 61

i) Taking into account CAP's policy consideration, do you agree that CAP's rules on Gambling and Lotteries are necessary and easily understandable? If your answer is no,

**please explain why?**

No further comments.

**ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration?**

No further comments.

**iii) Do you have other comments on this Section?**

No.

## **Section 18: Alcohol**

### **Alcoholic strength**

#### **Question 62**

**Given CAP's policy consideration, do you agree that rule 18.9 should be included in the Code? If your answer is no, please explain why.**

Yes

### **Provision for low-alcohol drinks**

#### **Question 63**

**i) Given CAP's policy consideration, do you agree that CAP rule 56.15 should not be included in the present Code? If your answer is no, please explain why.**

Yes

**ii) Given CAP's policy consideration, do you agree that, with the exception of the rule that prevents preference based on alcoholic strength, marketing communications for low-alcohol drinks should be subject to all the Alcohol rules? If your answer is no, please explain why.**

Yes

#### **Question 64**

**Given CAP's policy consideration, do you agree that rule 18.12 should be included in the Code? If your answer is no please explain why**

Yes

### **Other questions**

#### **Question 65**

**i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Alcohol Section, are necessary and easily understandable? If your answer is no, please explain why.**

Yes

**ii) On consideration of the mapping document in Annex 2, can you identify any changes**

from the present to the proposed Alcohol rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

No

iii) Do you have other comments on this section?

Charities operating in areas affected by alcohol and related issues will probably welcome any changes to tighten the codes.

## **Section 19: Motoring**

### **The legal requirements of the Highway Code**

#### **Question 66**

Given its policy consideration, do you agree with CAP's proposal to include rule 19.2 in the Code? If your answer is no, please explain why.

Yes

### **Prices in motoring marketing communications**

#### **Question 67**

Given its policy consideration, do you agree with CAP's proposal not to include present rule 48.7 in the Code? If your answer is no, please explain why.

Yes

### **Other questions**

#### **Question 68**

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Motoring section, are necessary and easily understandable? If your answer is no, please explain why.

Yes

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Motoring rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

No

iii) Do you have other comments on this section?

No

## **Section 20: Employment, Homework Schemes and Business Opportunities**

### **Employment businesses**

#### **Question 69**



**Given its policy consideration, do you agree with CAP's proposal to extend the requirements of the present rule on marketing communications by employment agencies to cover marketing communications by employment businesses? If your answer is no, please explain why.**

Yes

### Required information in marketing communications for homework schemes

#### Question 70

**Given its policy consideration, do you agree with CAP's proposal to require all marketing communications for homework schemes to include limitations or conditions that might influence consumers before their decision to participate and to state whether the marketers will buy any products made? If your answer is no, please explain why.**

Yes - although the change may make it considerably more difficult for advertisements to be concise, since previously much of the information that now needs to be included in the advert could be dealt with by way of follow up. This contrasts with those matters in clause 20.6 which can be dealt with by follow up material (although it is acknowledged that these are generally less significant matters).

There are also differences from clause 20.8 relating to business opportunities where the information which is required in an advertisement for homework schemes can be dealt with for business opportunities advertisements by way of follow up literature rather than in the advertisement itself. The overall effect of this may be that any homework schemes promoted by charitable organisations will now have to formulate less eye catching and more verbose advertisements.

### Vocational training and instruction courses

#### Question 71

**Given its policy consideration, do you agree with CAP's proposal to require marketing communications for vocational training and other instruction courses to make clear significant conditions for acceptance and significant conditions likely to affect a consumer's decision to embark on a course? If your answer is no, please explain why.**

Yes

### Other Questions

#### Question 72

**i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Employment, Homework Schemes and Business Opportunities section, are necessary and easily understandable? If your answer is no, please explain why.**

Yes

**ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Employment, Homework Schemes and Business Opportunities rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?**

No

**iii) Do you have other comments on this section?**

No

## **Section 21: Tobacco, Rolling Papers and Filters**

### **Question 73**

**i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Tobacco, Rolling Papers and Filters section, are necessary and easily understandable? If your answer is no, please explain why.**

Rule 21.2 should include a sub-rule that the marketing of rolling papers should not, equally, suggest that they can be used, whether expressly or by innuendo, for the smoking of proscribed drugs.

**ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Tobacco, Rolling Papers and Filters rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?**

See above.

**iii) Do you have other comments on this section?**

No.

## **Section 22: Other comments**

### **Question 74**

**Do you have other comments or observations on CAP's proposed Code that you would like CAP to take into account in its evaluation of consultation responses?**

There is confusing use (or lack of use) of defined terms.

The removal of background information is unhelpful.

There is inadequate distinction between 'consumer' and business buyer.

**The following question was issued as an addendum on 29 May 2009. The closing date for responses to this question is 10 July 2009. The full text of the addendum can be found [here](#).**

### **Question 75**

**Given CAP's policy consideration, do you agree that the evidence contained in the ScHARR Review does not merit a change to CAP's alcohol advertising content or scheduling rules? If your answer is no, please explain why you consider the ScHARR Review does merit a change to CAP's alcohol advertising content or scheduling rules.**

National Children's Bureau, The Children's Society, Alliance for Childhood, Child Growth Foundation, Children's Food Campaign, British Association for Community Child Health

Cap Code Review  
Code Policy Team  
Broadcast Committee of Advertising Practice  
Mid City Place  
71 High Holborn  
London  
WC1V 6QT

19 June 2009

Dear Sir/Madam,

We, the undersigned organisations, have considerable experience of and interest in issues concerning children's rights and write in response to Committee on Advertising Practice (CAP) Code Review Consultation.

We are concerned that the current CAP Code is inconsistent in its definition of a child. While the CAP Code 1.3i states that "a *child* is anyone under 16" (original emphasis), certain sections use different definitions. For example, CAP Code 47.8 states that "Except those for fresh fruit or fresh vegetables, food or drink advertisements that are targeted directly at *pre-school or primary school children* through their content should not include promotional offers."

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.

We believe that all children and young people under the age of 16 have a right to be protected from unhealthy food marketing. We therefore call upon the Committee of Advertising Practice to ensure that the sections of the CAP Code on food marketing are appropriately amended to ensure that all children and young people have equal protection. To bring the Code into line with the Ofcom regulations, we recommend deleting the words '*pre-school or primary school*' from sections 47.8 and 47.9.

We look forward to the outcome of the consultation.

Yours sincerely,



Jo Butcher  
Assistant Director  
National Children's Bureau



Bob Reitemeier  
Chief Executive  
The Children's Society



Lily Murtaza  
Convener

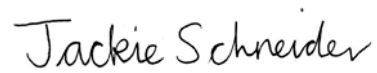
British Association for Community Child Health Alliance for Childhood



Christopher Clouder  
Director



Tam Fry  
Chairman  
Child Growth Foundation



Jackie Schneider  
Campaign Coordinator  
Children's Food Campaign

Cc Rt Hon Dawn Primarolo  
Gillian Merron MP

## **CCFON /CLC RESPONSE TO THE CAP CODE REVIEW CONSULTATION**

1. CCFON & CLC welcome the opportunity to respond briefly to the CAP code review.
2. The Committee of Advertising Practice (CAP) is the industry body responsible for the UK's advertising Codes. As well as regulating the content of advertisements in print, on posters, in new media and at the cinema, CAP covers all sales promotions, the use of personal data for direct marketing and the delivery of mail order goods or refunds.<sup>62</sup> The code is based on self-regulation.
3. The brief comments made on changes in the CAP Code here are on the basis of a comparison between the current code and the proposed new Code as illustrated in the CAP mapping document with page references to that document.<sup>63</sup>
4. The current rule 5.1. on page 10 should be retained, as it is of concern that the proposed replacement rule 4.1. omits the words "of decency" after prevailing standards when it is important to maintain standards of decency. Current rules 6.1. and 7.1. on page 11 on honesty and truthfulness should be retained to avoid a weakening of the Code.
5. The proposed new rule 12.12 on page 71, states that prescription-only medicines or medical treatment may not be advertised to the public. This prohibition should be extended to the "morning after pill", which although not on prescription, is offensive to many on the grounds of religion or belief, particularly as both the current code and the proposed code on page 10 state that particular care must be taken to avoid causing offence on the grounds of religion.
6. We note that there are rules on page 42 to allow for the advertising of charity-linked promotions and this can include causes that are not charities and who define their nature and objectives. This is a welcome change from the very restrictive rules found in the BCAP codes on charities, which only allow charities to fundraise.
7. There is a section of the Code on the topic of misleading marketing communications. However, the executive summary of the CAP code<sup>64</sup> states that an enduring principle of the CAP Code is not to mislead, harm or offend and there is a need to protect children adequately. It would be helpful if the proposed principle in rule 1.5 on page 7 added those points as a specific part of the principles to the Code.

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<sup>62</sup> See [http://www.asa.org.uk/cap/about/cap\\_non\\_broadcast](http://www.asa.org.uk/cap/about/cap_non_broadcast)

<sup>63</sup> See <http://www.asa.org.uk/NR/rdonlyres/7F4B2A2D-AD13-4854-9C85-7DA9503FF4E5/0/CAPConsultationAnnex2.pdf>

<sup>64</sup> See [http://www.asa.org.uk/cap/Consultations/open/CAP\\_Code\\_Review\\_consultation/CAP+Code+Review+Executive+Summary.htm](http://www.asa.org.uk/cap/Consultations/open/CAP_Code_Review_consultation/CAP+Code+Review+Executive+Summary.htm)

# Combe

**international ltd.**

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21<sup>st</sup> April 2009

CAP Code Review

Code Policy Team

Broadcast Committee of Advertising Practice

Mid City Place

71 High Holborn

London

WC1V 6QT

**Re: CAP Code Review Consultation**

Combe International is a manufacturer of over the counter medicines and toiletry products in the UK. The ability to effectively market our products is fundamental to our business. As members of PAGB and CTPA, we endorse the need to ensure that advertising is truthful, balanced, and responsible and does not mislead, offend or harm and are fully supportive of the current system of regulatory and self-regulatory controls through the various Advertising Codes of Practice. We welcome the review of the CAP Code and are pleased to note the commitment to ensuring that provisions comply with the principles of better regulation, that they are transparent, accountable, proportionate, consistent and targeted.

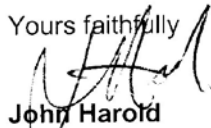
Combe International is broadly supportive of the proposed changes particularly the proposal for a single Code covering both TV and radio advertising broadcast media rather than having separate Codes as at present but given the nature of our business we are particularly interested in the proposed changes relating to medicines.

**Medicines**

We support the proposed amendments to;

- Exempt medicines from the rule which states that marketers must not offer treatment for conditions for which medical supervision should be sought. We anticipate that this amendment will overcome some of the problems which companies have had advertising products for new therapeutic indications where OTC medicines are now available (e.g. products which have previously been subject to prescription control but have now been reclassified for over the counter use).
- Permit marketers of traditional herbal medicines to advertise for the indications listed in the product's summary of product characteristics.
- Restrict the range of products permitted to be advertised for obesity to medicines which are indicated for that condition.

Yours faithfully



**John Harold**

**Managing Director**

Registered in England No. 1162890

C. P. Combe (USA), D. McQuinn (USA)



**Consumer  
Focus**  
Campaigning for a fair deal

# **Consumer Focus response to consultation on the proposed CAPS and BCAPS Code**

**June 2009**

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# Consultation on the proposed CAPS and BCAPS Code

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The face of advertising is changing radically and this review is timely and critical. Our comments are included below and make specific reference to the CAPS code but many have application to the equivalent sections in the BCAPS code.

Many of the comments focus on the need to be future-facing in amending the code to ensure its continuing relevance. There will also be a need for more regular reviews given the pace of change in the area, and a commitment to genuine consultation. We would suggest an annual review on fast developing areas or areas of concern with a total review at least every five years.

## The Scope of the Code

A code of practice should:

- deliver a higher level of consumer protection than the basics set down in law
- build on best practices within a sector
- react quickly to changes in market practices
- deliver commercial benefits to business<sup>1</sup>

The complaints mechanism and remedies should be included in the code and we submit that the provision of conciliation procedures and for independent arbitration would strengthen the code in line with the standard required for approval by OFT.

We are particularly concerned by the statement that ‘Consumer Protection regulation goes far wider and deeper than could be reflected in a self-regulatory code of practice but compliance with the Code **goes a long way** to ensuring compliance with law in subjects covered by the Code’<sup>2</sup> (our emphasis). The code needs to incorporate the law at a minimum and give guidance on compliance, not cherry-pick aspects of the law (eg, at para 2.10 where the code is said to ‘approximate the law’ or para 9.23 where it is stated that the code ‘incorporates many of the DSRs’ requirements). To do so is misleading of itself and leads to confusion for the industry and the consumer as to what applies. There is still room for the Code to provide administrative remedies for specific breaches while clearly sign-posting the principles and the legal requirements in one consistent document.

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<sup>1</sup> The Office of Fair Trading guide to consumer codes of practice  
[http://www.offt.gov.uk/oft\\_at\\_work/consumer\\_initiatives/codes/quick-guide](http://www.offt.gov.uk/oft_at_work/consumer_initiatives/codes/quick-guide)

<sup>2</sup> p6

## Application of code

We welcome the extended definition of advertisements in non-broadcast electronic media as this picks up significant growth areas of online advertising that were not previously covered. We encourage the extension of the code to advertiser's claims that appear on the advertiser's website to ensure that advertisers and consumers understand that these claims are subject to the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).

In 1.1(d) it is unclear whether the code applies to advertisements in space that is not paid for, and whether it applies to commercial websites such as [www.rupertbear.com](http://www.rupertbear.com) and [www.inthenightgarden.co.uk](http://www.inthenightgarden.co.uk), which have a clear marketing and influencing focus.<sup>3</sup> Given the developments in online advertising these are areas for particular concern and need mention as specific inclusions to remove doubt.

The issue of non-UK-registered websites needs to be subject to specific work by the ASA to seek co-operation from other advertising regulatory organisations to the principles of the code and as to how cross-border issues are dealt with.

## Misleading

There have been some amendments to the code made in the light of the CPRs but arguably the most significant change introduced by the CPRs is the prohibition against misleading by omission. This is an important change that needs to be reflected in the code.

The proposed rule 2.3 attempts to combine two different legislative provisions and in doing so appears to water down the provision that 'any commercial communication provided by him (sic) ...shall be clearly identifiable as a commercial communication'.<sup>4</sup> The provisions should be reflected separately and reproduce the legislation.

A new rule 3.10 is proposed, that 'Qualifications must be clear to consumers who see or hear the marketing communication only once.' This is especially true of mobile phone marketing, where restrictions on time and space are likely to be greatest and therefore to have the most impact. The rule should also include ads seen only briefly to include something to reflect that it covers ads that may be seen on a small mobile screen.

Proposed rule 3.24.1, 'Marketing communications must not describe items as "free" if the consumer has to pay for packing, packaging, handling or administration' should add 'or through the provision of personal information', as many free services are now provided in exchange for this information that is subsequently traded on or used for profiling.

Rule 32.5 in the present code states any consumer 'liability for costs should be made clear in all material featuring "free" offers. An offer should be described as free only if consumers pay no more than:

- a) the minimum, unavoidable cost of responding to the promotion, eg the current public rates of postage, the cost of telephoning up to and including the national rate or the minimum, unavoidable cost of sending an e-mail or SMS text message"

We believe that the definition of unavoidable cost of responding is helpful and that it should be retained in the new rule.

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<sup>3</sup> See also the recommendations of the Office of Fair Trading, 'Internet shopping', OFT 2007, para 9.47p. 132.

<sup>4</sup> Electronic Commerce (EC Directive) Regulations 2002, 7.

A new rule 3.28.3 states ‘marketing communications must state restrictions on the availability of products, for example, geographical restrictions or age limits.’ It may be necessary to state specifically that marketing related to mobiles or goods and services provided to mobile users by third parties should state where geographical restrictions apply due to a lack of network coverage (especially 3G services).

## Harm and offence

We support the proposed changes in relation to flashing images and believe that the general accessibility guidelines issued by the Equality and Human Rights Commission should form basic standards for marketing under the code.

## Children

The Trans Atlantic Consumer Dialogue (TACD) has recently revised its resolution on marketing to children online.<sup>5</sup> The adoption of the resolution’s recommendations would provide an appropriate framework for online marketing to these vulnerable consumers.

Our recommendation regarding specific coverage of websites by the code applies specifically to marketing to children because of the popularity of these websites with children. Previous research carried out by the National Consumer Council which assessed commercial activity on children’s favourite websites<sup>6</sup> recommended that the existing codes take action to monitor internet advertising practices and be pro-active in enforcing codes and regulations. This would assist in closing existing loopholes which allow companies to promote products that are unsuitable for children within editorial spaces or by other hidden forms, for example, advertisers taking over whole home pages or within profiles on social networking sites.

Consumer Focus wants to see greater consistency in the protection of children aged up to 16 years old with regard to the restrictions for advertising to children in both CAP and BCAP codes.

We would want to see a tightening up of the proposed principle that ‘the way in which children perceive and react to marketing communications is influenced by their age, experience and the context in which the message is delivered. Marketing communications that are acceptable for young teenagers will not necessarily be acceptable for younger children. The ASA will take those factors into account when assessing whether a marketing communication complies with the code.’

We are concerned about arbitrary distinctions being made. Recent neuroscience research conducted both in the EU and the US suggests that, contrary to previous beliefs, children over 12 do not have adult-like understanding and critical judgement of marketing<sup>7</sup>. Compliance is easier if there is a consistent age limit of application and the minimum should be 16, with consideration of 18 being the minimum in relation to areas such as financial services and explicit material.

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<sup>5</sup> TACD, Resolution to Marketing to Children online, March 2009, [www.tacd.org](http://www.tacd.org)

<sup>6</sup> Anna Fielder, Will Gardner, Agnes Nairn, Jillian Pitt *Fair Game? Assessing commercial activity on children’s favourite websites and online advertisements*, National Consumer Council, December 2007.

<sup>7</sup> Cornelia Pechman, Linda Levine, Sandra Loughlin and Francis Leslie. *Impulsive and Self-conscious: Adolescents’ vulnerability to advertising and promotion*. Journal of Public Policy marketing. Vol 24.

## Food and Soft drink advertisements and children

Although the advertising of High Fat Sugar Salt food and drinks are regulated by Ofcom's rule (using nutrient profiling) and the EU Nutrition and Health Claims regulation, the code should reflect and enhance on the principles contained there and also set minimum standards that apply consistently throughout the codes. Age protection should consistently be set at up to a minimum of 16 years and this standard is applied to some parts of the codes but not others.

For example at 13.13 in the BCAP code:

'Promotional offers to children must be used with a due sense of responsibility. They may not be used in food or soft drink product advertisements targeted directly at pre-school or primary school children.'

And under 15.14 and 15.15 (CAP) – 'Marketing communications featuring a promotional offer must be prepared with a due sense of responsibility. Except for those for fresh fruit and vegetables, marketing communications for food advertisements that are targeted through their content directly at pre-school or primary school children must not include a promotional offer.'

Licensed equity characters should be included in restrictions on the involvement of licensed characters and celebrities popular with children in advertising of less healthy food, eg the Dairy Lea cow, (47.9 CAP, 7.2 BCAP) as these characters are also used to market a diet that conflicts with expert recommendations.

Restrictions need to be expanded in the CAP code on food marketing and advertising based on restricting less healthy foods utilising the Food Standards Agency nutrient profiling model.<sup>8</sup> This will ensure a level playing field with the BCAP codes and enable the marketing of healthier foods.

Infant formula and follow-on formula restrictions should include restrictions for foods that the consumer is reasonably led to believe will fulfil these functions even if not labelled as such (15.11 CAP 13.8 BCAP).

## Gambling

We note that under section 16 of the CAP code children are defined as people of 15 and under and young persons are people of 16 or 17, yet the legal age for gambling in a betting shop or football pools is 16 years. Point 16.1 proposes that 'marketing communications for gambling must be socially responsible, with the particular need to protect children.' We want to see a tightening up of children's potential exposure to gambling advertisements online with monitoring and a more pro-active stance taken by the ASA. Research by the National Consumer Council<sup>9</sup> has found that out of a total of 70 online advertisements surveyed, nine per cent were for online gambling and children as young as 12 were being exposed to these advertisements.

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<sup>8</sup> <http://www.food.gov.uk/healthiereating/advertisingtochildren/nutlab/ef>

<sup>9</sup> Anna Fielder, Will Gardner, Agnes Nairn, Jillian Pitt (December 2007). *Fair Game? Assessing commercial activity on children's favourite websites and online advertisements*.

## Privacy

The code has not been altered in relation to privacy and therefore fails to respond to the developments of online behavioural advertising. Consumers are concerned about privacy issues but not necessarily equipped to protect their own privacy. The profile/tracking process is not transparent and because of lack of transparency, marketing methods may be unfair and deceptive. Information is passed on to third parties with whom consumers have no direct relationship and therefore have no control over the transactions.

Profiling also collects sensitive information, such as health or medical issues and potentially targets the vulnerability of certain users in a way that is not known in traditional commercial arrangements. For example, almost every website used by young people is commercial. The content is funded by three methods: selling advertising space to third parties who want to target children; selling merchandise direct from the site; and/or collecting children's data to sell to other organisations.

The Internet Advertising Bureau has recently revised their Good Practice Principles for Online Behavioural Advertising<sup>10</sup> to safeguard individual privacy. They have reflected basic protections such as notice, choice through an opt-out mechanism and user education. Our preferred model and industry best practice, would require affirmative express consent (by way of an opt in model) for use of information, however the CAP code should at the least reflect the IAB principles to enable some consistent dealing with online advertising across the industry.

Data should only be collected, processed and used with the express and voluntary permission of consumers to the form, collection and processing of data held and the code needs to make provision for this. We suggest a form of amendment to 10.15 below.

## Distance selling

Data protection law requires marketers to tell consumers how they intend to use the personal data supplied by the consumer. These provisions need to be better reflected in the code, as the use of personal data is not just for the purpose of sending a representative to visit,<sup>11</sup> but is now increasingly used for profiling by the advertiser themselves or to sell on to ad networks. As such there needs to be transparency about how information is collected, if the information is stored and the details about this, if it may subsequently be used by the advertiser or if it is passed on to a third party and what are the advertiser's security arrangements in relation to this data.

Almost 58 per cent of advertising online classifies as search advertising where traders pay for listing and prominent positions on the search engines and search comparison sites<sup>12</sup>. There is a lack of transparency in disclosing information about this form of advertising to consumers and consumers are unaware that the prominent position of a trader on a search engine list may not equate with the best quality offer or best match of product searched for. We would recommend that the Code require publishers such as search engines and search comparison sites to include a declaration that results lists and advertising displays are prioritised according to commercial arrangements and do not, therefore, carry any ranking according to whether the advertisement may be appropriate to a consumer's needs.

Separate attention in the Code should be given to online auctions where large proportions of complaints recorded by Consumer Direct refer to misleading claims and

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<sup>10</sup> <http://www.iabuk.net/en/1/behaviouraladvertisinggoodpractice.html>

<sup>11</sup> 9.28

<sup>12</sup> Office of Fair Trading, 'Internet shopping', OFT 2007

omissions.<sup>13</sup> Yet consumers face problems with redress because the auction platforms do not accept liability for sellers or buyers loss, or quality, safety or legality of the products on sale.

With the convergence of operating platforms and increasing number of mobile phone users, mobile advertising is becoming a growing lucrative market, which can benefit both consumers and business. However the exploratory TACD survey on mobile commerce<sup>14</sup> and the OECD Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce<sup>15</sup> highlighted problems in relation to mobile advertising which impact on consumers. Areas of particular concern are: limited information disclosure due to a small mobile screen and low memory capacity, unauthorised use of personal information and protection of minors. The Code does not address the problems and only makes references to the issues, for example, in rule 3.3.

We would recommend that ASA deal with consumer concerns over mobile advertising in the review of the Code and specifically address the recommendations highlighted by the TACD Resolution on Mobile Commerce 2005 such as:

- Require clear and full disclosure about the products and services offered, the cost, and the terms and conditions in any commercial communication as well as immediately before any individual transaction
- Prohibit fraud and deceptive and misleading solicitations and provide especially strong sanctions against such solicitations targeting vulnerable consumers
- Protect consumer privacy in mobile commerce and prohibit use of any personal data (including purchase and location information) for purposes that consumers have not explicitly agreed to or that unfairly disadvantage them
- Give special protection to children and restrict marketing practices targeting children<sup>16</sup>

## Database practice

The collection of data generally needs to comply with the data protection principles, ie:

- Fairly and lawfully processed
- Processed for limited purposes
- Adequate, relevant and not excessive
- Accurate and up to date
- Not kept for longer than is necessary
- Processed in line with your rights
- Secure
- Not transferred to other countries without adequate protection.<sup>17</sup>

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<sup>13</sup> Internet Shopping, OFT 2007, p 147.

<sup>14</sup> TACD Mobile Commerce Survey, 2006.

<sup>15</sup> OECD Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce, Korea 2008.

<sup>16</sup> [www.tacd.org](http://www.tacd.org)

<sup>17</sup> [http://www.ico.gov.uk/Home/what\\_we\\_cover/data\\_protection/the\\_basics.aspx](http://www.ico.gov.uk/Home/what_we_cover/data_protection/the_basics.aspx)



If information is collected then it must be done fairly (ie transparently), it must be relevant and processed for limited purposes (ie it should not be done without informed consent as to the exact uses of the information because there is no need for an advertiser to collect this information), it is to be kept securely and not for longer than is necessary (and this again underlines the need for the consumer to understand and consent to the purpose). The US Federal Trade Commission has recognised in a recent report that information need not on its own be personally identifiable information (PII) in order to potentially or reasonably be associated with a consumer or device.

In order to properly reflect the principles above and ensure compliance in a changing environment we submit that 10.15 needs to be amended to read:

‘Marketers must not collect information for marketing or other purposes that could potentially or reasonably be associated with a consumer or device without first obtaining affirmative express consent to the collection and specific uses of that information from the consumer.’

At 10.26, the CAP code consultation paper says:

‘CAP considers that consumers make an informed choice to potentially receive marketing communications broadcast via Bluetooth and it is, therefore, disproportionate to extend the ‘explicit consent requirements’ of the Privacy and Electronic Communications (EC Directive) Regulations to Bluetooth marketers.’

This seems reasonable – mobile users tend to leave Bluetooth deactivated because of the high battery consumption it uses, as well as for privacy reasons. However, it will be important for the ASA to monitor developing technology in this area; successors to Bluetooth technology could potentially have wider application while being more power efficient, which could lead to them being targeted as a medium by marketers.

## Sales Promotion

We believe that the issues in relation to advertising on mobiles and PDAs, ie small screen devices would be better dealt with through the following amendment to rule 8.18

‘Marketing communications that include a promotion and are significantly limited by time or space must include information about significant conditions and must direct consumers clearly to an easily-accessible alternative source where all the significant conditions of the promotion are prominently stated. Participants should be able to retain those conditions or easily access them throughout the promotion.’

## Environmental claims

Consumer Focus has done extensive research<sup>[1]</sup> with consumers on green claims in advertising, offering insights into what gives consumers confidence in these claims. It showed that, despite the credit crunch, consumers still want to buy products that are better for the environment – 53 per cent of consumers say they are buying more environmentally friendly products than two years ago. However, two thirds of consumers say they are not sure how to tell if claims made by companies advertising green products – from household cleaners to cars and energy – are true. Only one in five people think it is not possible for companies to make false claims about their products’ environmental credentials.

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<sup>[1]</sup> Lucy Yates ‘Green expectations: consumers’ understanding of green claims in advertising’, Consumer Focus, June 2009.

Consumers are now confronted with an increasing number of green claims – some in relation to specific products or product ranges, others in relation to a company brand or even an industry sector as a whole. Green claims in advertising have the potential to play a part in encouraging consumers to make sustainable consumption choices, as well as rewarding progressive companies for their efforts. This can, in turn, encourage business to make further environmental innovations, completing a virtuous circle. However, green claims also have the possibility, intentionally or otherwise, to mislead consumers and, in doing so, erode trust in the premise of environmentally responsible purchases. Alongside this, consumers can find green claims confusing – the complexity of information required to make a judgement on the greenness of a product can leave even the most dedicated green consumer confused and disempowered.

Our research shows that, in order for consumers to have confidence and trust in the green claims, companies need to follow the 3Cs:

**Clarity** – consumers are looking for, as a minimum, claims that are clear and easy to understand. There is demand for information on green issues that is direct and ‘to the point’. Ambiguous and overly technical terms are not widely understood or liked by consumers.

**Credibility** – consumers want realistic, accessible and verifiable claims. They deploy a series of ‘perceptual filters’ to make rapid judgements, based on intuitive and in-built rules of thumb. They can be grouped into four categories:

- **Ad specific elements** – There is widespread dislike of small text, asterisks and footnotes (all of which are considered to represent ‘the catch’), whereas third-party endorsements from well known and respected organisations are highly valued by consumers. Consumers were confused by imagery that was unclear or not obviously connected to the product.
- **Perceptions of brand & brand ‘fit’ with the environment** – Consumers were more likely to accept and believe claims that ‘made sense’ (ie, a brand with which they have positive associations and/or believe is consistent with environmental responsibility) but were more suspicious of other brands. This ‘brand baggage’ affected their assessment of the specific green claim.
- **Ingrained habits and beliefs** – Consumers draw upon their own experiences of green products to judge the credibility of a claim and – where they have no experience – expectations of performance are used as a proxy.
- **The wider market and social context** – Consumers have varying levels of confidence in how strictly green claims are regulated and this impacts on how credible they perceive claims to be.

**Comparability** – these emerge as one of consumers’ most important demands. Consumers want simple, meaningful and ‘like-for-like’ comparisons. The absence of meaningful comparisons, the general proliferation of labelling schemes and comparisons that are not well understood (eg, grams of CO<sub>2</sub>/km on car ads) offer little or even undermine the relevance and usefulness of a green claim. In addition, as the number of products and claims expands, the sheer amount of information may drown out the ability of consumers to make like-for-like comparisons and ceases to provide them with any useful means of differentiation.

In light of these findings, we recommend that both Codes currently have insufficient focus in relation to the following issues:



The use of imagery: The code should include a rule that states ‘Marketing communications must not use green imagery that implies broader environmental impacts than the product offers: for example, by using a general green image such as a wind turbine to advertise a product that’s only claim of greenness is a longer battery life.’

Comparisons: Rules that cover absolute claims and comparative claims state ‘absolute claims must be supported by a high level of substantiation. Comparative claims such as ‘greener’ or ‘friendlier’ can be justified, for example, if the advertised product provides a total environmental benefit over that of the marketer’s previous product or competitor products and the basis of the comparison is clear.’

However, this deals insufficiently with the issue of comparisons for consumers. Our research demonstrates that valid and useful comparisons are in strong demand among consumers because they help them navigate their way through the multiple claims and offers that are presented to them on a daily basis. Consumers highlighted the following aspects of what makes a useful comparison for them (quotes provided are from our June 2009 research ‘Green expectations: consumers understanding of green claims in advertising):  
Relative and absolute comparisons were demanded to help to understand if a claim offers something that is above and beyond ‘business as usual’:

*‘But then I don’t know even how long other products take to biodegrade so for me there’s no comparison at all. That doesn’t tell me if it’s any better than anything else’*

*‘So if it’s the best of the seven seaters, where does it rate overall? Way down’*

Meaningful comparisons - All groups struggled with measures of grams of CO<sub>2</sub>/km used in car ads. Some of those classified as high-green receptivity did understand this term but it was a definite minority. Instead – in relation to cars – consumers used road tax bands as a proxy for environmental performance. Many were keen on this way of deciding whether a car advert with a green claim was valid or not because it provided them with clarity in comparing one car with another:

*‘Well it’s just a random figure [g CO<sub>2</sub>/km]. Unless they compare it with something it’s just a random figure’*

*‘I mean it’s stating CO<sub>2</sub> but unless you’ve looked into what’s good and what’s bad you just see the number you don’t know where on the scale that is’*

*‘The road tax is £35 a year which is very cheap. So that is saying something about the emissions straight away because if it were higher then the road tax would be a lot higher’*

Standardisation and the consolidation of standards – this emerged as a priority area, with several participants highlighting the amount of different labelling schemes – echoing the findings of our previous research<sup>[2]</sup> – while others pointed

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<sup>[2]</sup> *Bamboozled, Baffled and Bombarded: consumers’ views on voluntary food labelling*, NCC (2004)

to both the A-G ratings on white goods and the healthy eating traffic light as good practice examples to follow:

*'Different stores have their own labels and there's no consistency between them so it can be confusing'*

*'I think we went through a phase where it was all about your calories and fat and everything like that in your food and that's quite well indicated now, but how recyclable a product is, or how environmentally friendly it is, that's not clear'.*

The danger for green products and claims, as the number of products and claims expands, is that the sheer amount of information drowns out the ability of consumers to make like-for-like comparisons and ceases to provide them with any useful means of differentiation. This point was neatly made in the discussions, as follows:

*'When you've got so many cars pitching against each other you just kind of lose any interest, they're all making these claims so none of them stand out'*

The CAP and BCAP Codes need to reflect these findings. There is a fine line between consumer scepticism and cynicism – without confidence in the truth of advertising, consumers could become reluctant to exercise their green purchasing power, as they no longer know who or what to believe. This can put the whole market for the 'green pound' in danger. Getting this right is clearly in businesses self-interest and the Codes must provide clear guidance of how to do this.

We are pleased to see that the Codes will include a principle that states that 'marketers should take account of Government guidance including the Green Claims Code published by Defra'. This helps to ensure that any new Government guidance on emerging issues and definitions in the green claims area will be taken into account by the ASA when investigating complaints about environmental claims. However, we would like the Code to include this as a rule, ensuring stronger coordination between the Government Green Claims Code and the CAP and BCAP Codes.

## Digital products and services

The OFT study recognises that 'poor information may include omitting important details on for instance, restrictions on usage' and refers to particular examples such as music downloads which are often limited by Digital Rights Management Software or by the terms of a subscription service.<sup>18</sup> These limitations need to be clearly stated in advertising material as the consumer assumption is that products will be interoperable and not subject to controls.

## Other comments

The Consultation document was long and rather unwieldy, and would discourage even the hardiest of consumers. A more public-facing consultation would assist in reinforcing the principles and their credibility and making them relevant.

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<sup>18</sup> Internet Shopping, OFT 2007, p 129.



*This response is made by me on behalf of the Cosmetic, Toiletry and Perfumery Association (CTPA). None of the content of this response is confidential.*

The CTPA represents UK manufacturers and distributors of cosmetic products who, collectively, constitute over 80% of the UK retail market by value. It is a market in the UK worth £7.3 billion and which, even today, reports year on year growth of over 3% (CTPA Annual Report, 2008; 18<sup>th</sup> June, 2009). It is a sector which makes significant use of print and broadcast advertising to communicate product attributes to the customer, placing the sector amongst the very top of those contributing financially to the running of the scheme by which advertising in the UK is controlled.

CTPA welcomes the wide-ranging review and public consultation on the rules announced by the Advertising Standards Authority on 26<sup>th</sup> March, 2009. Member companies and others will comment individually to the ASA in response to this consultation; CTPA wishes to confine its response largely to broad principles but does have some specific comments to make on detail and thanks the ASA for specifically inviting the CTPA to respond to the consultation.

CTPA agrees that the existing codes have worked well in underpinning the principle of self-regulation in advertising within a well-defined and consistently applied framework of codes and guides. Simplification of a single broadcast code from the existing four separate codes and a clearer format for presentation of the codes themselves are both welcomed. However, the process by which those codes are put into practice has given, and continues to give, concern to members of CTPA. Although, for example, the selection of consultants and experts is an area where the CTPA could offer suggestions for change that may be cost-effective as well as addressing members' concerns, CTPA recognises the present consultation is on the codes themselves and not on the processes adopted by the regulators.

Therefore, in addition to the welcome updating of the codes themselves, CTPA looks forward to seeing a wide-ranging review of the practices adopted by reviewers of claim support material to minimise some of the uncertainty inherent in the current system, to improve transparency throughout the system and to ensure a cost-effective process is maintained for the future.

#### **Sector-specific requirements – the CTPA Guide to Advertising Claims**

In an all-encompassing code covering all advertisers in all sectors, it is clearly not possible to deal with individual market sectors unless they present specific and significant areas of concern (e.g. alcohol advertising). This does not mean that other sectors could not benefit from additional guidance on how the codes might be applied in practice within a more specialised sector of the whole advertising market. The cosmetics sector is a case in point.

Of particular importance to the cosmetics sector is consistency of advertising message across all media and therefore a consistent evaluation of the same supporting information under the two codes, CAP and BCAP, is vital.

CTPA has worked closely with ASA and Clearcast over the past three years to develop a sector-specific guideline relevant to the cosmetics sector. This guide, "The CTPA Guide to Advertising Claims" (copy enclosed), has been welcomed and adopted by both bodies as augmenting the codes and clarifying practical procedures to ensure a consistent approach is applied to advertising claims whether in print or broadcast format. Although this guide is understood to be the only such initiative to date by a specific industry sector, CTPA finds it important to see included in the codes a specific reference to the CTPA Guide as an example of the benefit of adopting specific guidance for particular sectors. An opportunity would exist at the start of the section on Health and Beauty Products & Therapies in the CAP code; a similar reference in the BCAP code is also sought.

This would, we believe, underpin the authority of the Guide and recognise the joint work by both Clearcast and the ASA in contributing to its production and in endorsing the final product as well as perhaps providing a stimulus for other sectors to develop their own guides along similar lines.

#### **Professional endorsement**

CTPA welcomes the clarification regarding the use of endorsement of products and claims made for them by professionals. Such endorsements have been routinely accepted in other countries and this change will enable advertisers to develop more harmonised advertising campaigns across wider markets. CTPA believes the current proposal represents an acceptable balance between permitting professional endorsement in principle and applying adequate controls to avoiding the misuse of professionals to the consequent detriment of the consumer.

**Medicinal claims: CAP Rule 12.1 – Question 38/BCAP Rule 11.4 – Question 60**

Rule 12.1 of the proposed CAP code and rule 11.4 of the proposed BCAP code each refers to making medicinal claims. The new text goes further than the original text (original rule 50.1 of the CAP code, there being no reference in the BCAP code) by saying that “Medicinal claims may be made for a medicinal product that is licensed by the MHRA or EMEA, or a medical device...” This implies that medicinal claims may not be made for products that are not licensed medicinal products or medical devices; the original text did not suggest such a restriction since it referred only to “Medical and scientific claims made about beauty and health-related products should be backed by evidence...”

CTPA does not agree with the proposed text of these two rules and wishes to see them both amended to allow cosmetic products to continue to be able to make secondary medicinal claims (e.g. oral care products which are primarily for cleaning but which made secondary claims referring to gum health or tooth decay). Such claims would need to be backed by evidence.

Such secondary health-related benefits are of importance to consumers when making purchasing decisions. To be denied this opportunity to inform the consumer of product benefits would put advertisers at a considerable disadvantage in the UK.

*Rationale*

Such a restriction implied by the proposed wording of CAP rule 12.1 / BCAP rule 11.4 is not in accord with the legislation governing cosmetic products (The Cosmetics Directive 76/768/EEC) and the accumulated wisdom pertaining to the borderline situation between cosmetic products and medicinal products. The Cosmetics Directive, implemented in the UK by the Cosmetic Products (Safety) Regulations, defines cosmetic products as “... any substance or preparation intended to be placed in contact with the various external parts of the human body... with a view exclusively or mainly to cleaning them... etc.” This has become accepted by competent authorities for both cosmetic and medicinal products as meaning that a cosmetic product may have a secondary function which is not a cosmetic function and yet does not disqualify that product from being a cosmetic product.

Given that European legislation includes mutual exclusivity between cosmetic and medicinal products, a product may not be a cosmetic and medicine at the same time: it can only be one or the other. Such decisions are incorporated into the Manual on the Scope of Application of the Cosmetics Directive 76/768/EEC prepared by the European Commission; this guide is based on decisions taken by member states authorities and has established precedents for cosmetic products making secondary medicinal claims yet not being re-classified as medicines on the basis of this secondary function. CTPA sees it as important that this well-established European-level principle is not undermined by the revision of the CAP and BCAP codes.

*Proposed solution*

An additional sentence should be added to both CAP rule 12.1 and BCAP rule 11.4 saying “Secondary medicinal claims made for cosmetic products as defined in the appropriate European legislation should be backed by evidence.” This does not conflict with the requirements elsewhere in the codes that medicinal products should not present themselves as cosmetics.

CTPA trusts these comments are helpful in the current consultation process.

## **Response from the Department for Children, Schools and Families on the CAP/BCAP consultations on proposed Advertising Standards Codes**

This letter constitutes the response from the Department for Children, Schools and Families (DCSF) to the consultation on proposed BCAP and CAP Codes of Advertising Practice.

This is an overarching response on behalf of DCSF and does not respond to all the individual questions. Detailed points relating to food will be addressed in a response from the Department of Health (Cross Government Obesity Team) and the Food Standards Agency. Issues relating to alcohol will be included in a response to the ScHARR assessment review due 10 July 2009.

The range of organisations consulted on these codes is varied and aimed at advertisers and their agencies. *It is not clear what attempts have been made to involve children and their parents.* Experience has indicated that the involvement of children and parents can provide beneficial insight into how these kinds of issues are viewed and interpreted. DCSF would be willing to help in engaging children and parents.

Given that both the CAP and BCAP consultations ask if the information is easily understandable, DCSF would like to see more user-friendly information made available to families, explaining the advertising codes and what that means for them. Such information should also provide details of how, if there is a concern over advertising, a complaint can be made to the ASA.

### **CAP Consultation**

It would be helpful if the principles set out the position with relation to children and include a principle of the order of: Special care must be taken with marketing communications aimed at children and not exploit their inexperience, credulity or sense of loyalty.

We are pleased that the CAP code will maintain a separate section relating specifically to children.

The rules relating to marketing communications that contain promotions of appeal to children should stipulate the need for the promotion to be age appropriate.

We would like to see present rule 4.7 remain. It is not clear that children will necessarily understand the ability to refuse visits and DMA guidelines. This rule provides them with some redress.

We are not convinced that owning Bluetooth technology automatically implies consent, as children may have access to such technology without understanding the implications.

The rules relating to database practice will need to be constantly updated to reflect new and emerging technologies and consideration should be given to any special issues that emerge relating specifically to children.

### **BCAP Consultation**

There needs to be some clarity over whether the notes that support the rules will still apply following the proposed revisions.

We are pleased that the code will maintain a separate section relating specifically to children.

Children do not always have the ability to distinguish between editorial and advertising content. Therefore we would want rule 2.1 to read:

Advertisements must be obviously distinguishable from editorial content, especially if they use a situation, performance or style reminiscent of editorial content, to prevent the audience being confused between the two. The audience should quickly recognise the message as an advertisement. This is important for advertisements in and around children's programming.

In terms of expensive products of interest to children, family income is varied and wide ranging. DCSF's work with parents would indicate that £20 or more is expensive, not the £30 specified in the consultation. This is a specific area on which BCAP may want to consult families.

DCSF is supportive of the introduction of a rule that prohibits advertisements for a promotion directly targeted at children if they include a direct exhortation to buy a product.

DCSF is supportive of the rule changes relating to computer and console games.

## Response from the Department of Health for England on the CAP/BCAP consultations on proposed Advertising Standards Codes

This letter constitutes the response from the Department of Health for England (DH) to the consultation on proposed BCAP and CAP Codes of Advertising Practice.

The Department of Health has three main aims:

- **Better health and well-being for all:** helping you stay healthy and well, empowering you to live independently, and tackling health inequalities
- **Better care for all:** the best possible health and social care, offering safe and effective care, when and where you need help, and empowering you in your choices
- **Better value for all:** delivering affordable, efficient and sustainable services, contributing to the wider economy and the nation.

The Department of Health is committed to improving health and wellbeing for all by promoting healthy behaviours and preventing ill health, and creating a wider environment that makes it easier for people to make better, healthier choices.

The role of advertising is part of this public health agenda, helping to reinforce and support our general drive to improve the health and well being of the population, by both restricting the advertisement of dangerous products such as tobacco and encouraging the promotion of healthy products. This is particularly so in the areas of tobacco, alcohol and HFSS food advertising and the need to protect children. Although clearly not the sole factor, advertising can be used to help change behaviour, both positively and negatively, by influencing product choices.

Whilst we appreciate that this is essentially a technical consultation, we hope to work closely with you on this wider agenda over the coming months, particularly on the development of a voluntary set of principles to underpin all forms of marketing and promotion of food and drink to children and to consider the implications of both the ScHARR reviews and Impact of the Commercial World on Childhood, commissioned by the DCSF and DCMS and due to be published shortly.

This response focuses on the areas of the Code of particular interest to DH in **Part 2** of the consultation document namely:

Section 5 - Children

Section 10 – Prohibited categories (tobacco)

Section 11 – Medicines, Medical devices, Treatments and Health

Section 12 - Weight control and slimming

Section 13 – Food, dietary supplements and associated health and nutrition claims

Section 19 - Alcohol

### Children

We have no specific comments on the proposed changes to the general rules about advertising to children.

### Prohibited categories (tobacco)

We are generally content with proposed changes, with one comment on a point of detail.



We would like an amendment to Rule 21.2 considered (page 174 of the consultation document). We suggest replacing the words:

*‘Marketing communications must neither encourage people to start smoking nor encourage smokers to increase their consumption or smoke to excess.’*

With the words:

*‘Marketing communications must neither encourage people to start smoking nor encourage people who smoke to increase their consumption.’*

The reasons for these suggested changes are:

- To refer to people who smoke as ‘smokers’ could be perceived as demeaning and does not acknowledge the broader context in which they are consumers of marketing information; and
- to refer to ‘smoke to excess’ suggests there is a level of smoking that is acceptable or safe. Any level of smoking is potentially dangerous to health and no level can be considered safe.

### Medicines

The Medicines and Healthcare Products Regulatory Authority (MHRA) has reviewed the sections on medicines and medicinal products and has no significant policy concerns with the proposals. Minor points of detail relating to interpretation of medicines advertising legislation will be dealt with in a direct response.

### Weight loss products

In 2007 the Foods Intended for use in Energy Restricted Diets for Weight Reduction Regulations 1997 were amended to remove the prohibition on references to “a reduction in the sense of hunger or an increase in the sense of satiety”. This brought the 1997 Regulations in-line with Regulation 1924/2006 on nutrition and health claims made on foods and should be reflected in the BCAP code. To ensure the code is in line with the Regulations we would like to recommend that reference to “a reduction in the sense of hunger or an increase in the sense of satiety” be removed from section 12.13.2.

The code refers to The Foods Intended for use in Energy Restricted Diets for Weight Reduction Regulations 1997 as amended. As these Regulations only apply to England, Wales and Scotland, we suggest that reference is also made to the Foods Intended for Use in Energy Restricted Diets for Weight Reduction Regulations (Northern Ireland) 1997, as amended.

### Food, dietary supplements and associated nutrition and health claims

The Food Standards Agency will be commenting on compliance with EU regulations on dietary supplements and the use of nutrition and health claims.

In the overview document BCAP and CAP state that “*new strict rules governing food and soft drink advertising to children ..... came into force in 2007. BCAP and CAP propose to maintain those restrictions*”. 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.

DH has called for 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 therefore disappointed that CAP has not reconsidered the use of a tool to differentiate between healthier and less health 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.

#### Infant formula and follow on formula

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.

#### Alcohol

DH is content with the minor technical changes to the BCAP consultation on rules on alcohol advertising, which we believe will strengthen the guidance for the advertising of alcohol. DH will respond separately to the addenda on the assessment of the SchARR review.

## Introduction

The Direct Marketing Association (DMA) is Europe's largest trade association in the marketing and communications sector, with over 920 corporate members and positioned in the top 5% of UK trade associations by income. The total value of direct marketing to the UK economy was £50.5 billion in 2007. This comprises three separate figures; £18 billion on expenditure on direct marketing media and activities, £18.6 billion on employment and £13.9 billion on overheads resulting from employment (Economic Impact Analysis 2008: the Direct Marketing Industry published by the DMA).

The DMA represents both advertisers, who market their products using direct marketing techniques, and specialist suppliers of direct marketing services to those advertisers - for example, advertising agencies, outsourced contact centres etc. The DMA also administers the Mailing Preference Service, the Telephone Preference Service and the Fax Preference Service. On behalf of its membership, the DMA promotes best practice, through its Direct Marketing Code of Practice, in order to maintain and enhance consumers' trust and confidence in the direct marketing industry.

The Direct Marketing Commission is an independent body that monitors industry compliance.

Please visit our website [www.dma.org.uk](http://www.dma.org.uk) for further information about us.

## The Consultation

### Introduction

The DMA welcomes this opportunity to comment on the proposed CAP Code. In general, the DMA agree with the proposed revised and new clauses and we will therefore not be responding to each question but we have comments on a few proposals made.

**Question 30: Given CAP's policy consideration, do you agree that the present rule 42.7 (typing error as should be 42.8) should not be included in the Code? If your answer is no, please explain why.**

42.8 in the current code states: 'Marketers should take particular care when packaging products that might fall into the hands of children.'

It is proposed not to include this in the new Code because clauses 1.3 and 8.8 in the new Code adequately cover this situation.

1.3 states: 'Marketing communications must be prepared with a sense of responsibility to consumers and to society.'

8.8 states: 'Special care should be taken with promotions addressed to children or if products or items intended for adults might fall into the hands of children.'

Although it is stated that 42.8 will not be included in the new Code, it actually is included at 9.6 and the DMA believe that it should remain in the Code. 42.8 is a specific rule that would cover how products are packaged, irrespective of to whom the product is sent. 1.3 is a wide subjective requirement open to interpretation and 8.8 refers to the promotion itself in terms of its suitability for children or precautions where a product or item intended for adults lands in the hands of children. For example an adult movie sent by post may have security measures built in to avoid unauthorised people from viewing it.

8.8 does not cover, in the view of the DMA, the packaging that the adult movie may come in.

42.8, now 9.6 is a useful requirement to have as it is specific and self explanatory. The DMA believe it should remain in the new Code.

**Question 33: 'Given CAP's policy consideration, do you agree rules 10.13.3 and 10.6 should explicitly exempt marketing communications sent by Bluetooth technology? If your answer is no, please explain why.'**

The DMA does not accept that rules 10.13 .3 and 10.6 should explicitly exempt marketing communications sent by Bluetooth technology.

The DMA accepts the Information Commissioner's Office (ICO) and CAP's view that Bluetooth marketing is not covered by the Privacy and Electronic Communications Regulations 2003. In the ICO press release of October 11 2007 announcing the ICO's view the ICO said:

"We would like to stress that regardless of whether a particular technology is covered by PECR, consumers are increasingly aware of, and concerned about, the sophisticated methods of sending marketing to them and it is good practice to take their concerns into account when devising a responsible marketing strategy. We would urge marketers considering the use of Bluetooth technology to consult industry guidelines on good marketing practice."<sup>65</sup>

Since October 2007, consumer concerns about "sophisticated methods of sending marketing to them" have increased. Bluetooth is one of these. Indeed, since each mobile phone has a MSC address or code, Bluetooth marketing can be used for profiling customers and for targeted behavioural advertising.

The ICO urged marketers to consult industry guidelines on good marketing practice. The DMA produced its Mobile Marketing Best Practice Guidelines in January 2009<sup>66</sup>, which sets out at paragraph 3.9 our views on Bluetooth campaigns and at paragraph 3.9.2 our views as to why Bluetooth marketing should be subject to explicit consent.

The DMA is also concerned that Bluetooth marketing may end up suffering from spam in the same way as email marketing has done. Text messaging is already suffering from the problem of spam, as per the article 'Spam to go- the new mobile menace' in The Observer, Sunday 3 May 2009.<sup>67</sup> This is likely to be the case if consumers keep the Bluetooth application on, simply because they have forgotten to turn it off. There is the very real risk that if industry does not produce self- regulatory guidelines on Bluetooth marketing, there will be consumer pressure for legislation introducing explicit consent, as was the case with email marketing.

**Question 57(iii): 'Do you have any other comments on this section? (Section 15)**

Section 15 is about food, dietary supplements and associated health and nutritional claims. Clauses 15.12 – 15.18 concerns food and soft drink product marketing communications and children. Following the implementation of the Consumer Protection from Unfair Trading Regulations (CPRs), it is a prohibited practice to make a direct

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<sup>65</sup> <http://www.ico.gov.uk/upload/documents/pressreleases/2007/bluetooth.pdf>

<sup>66</sup> [http://www.dma.org.uk/\\_attachments/resources/4756\\_S4.pdf](http://www.dma.org.uk/_attachments/resources/4756_S4.pdf)

<sup>67</sup> <http://www.guardian.co.uk/money/2009/may/03/mobile-phones-text-spam>

exhortation to children to buy or persuade a parent or guardian to buy in 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. The DMA therefore suggest the clause should read as follows:

15.17.2: 'Marketing communications addressed to children must not include a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them and must not contain 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.'

## **Conclusion**

The DMA welcomes the new Code, which it believes on the whole provides clear, specific and relevant rules in order to raise standards within the advertising and marketing industries.

## **The CAP Code Review**

E.ON UK is one of the UK's largest retailers of electricity and gas. We are also one of the UK's largest electricity generators by output and operate Central Networks, the distribution business covering the East and West Midlands. In addition, our E.ON Climate and Renewables business is a leading developer of renewable plant in the UK.

We have considerable experience in advertising and marketing. Our responses are focused solely on those areas which affect the products we sell or audiences we target. For simplicity we have excluded questions where we have no comments.

We have noted that CAP and BCAP have decided to continue the use of separate codes for broadcast and non-broadcast purposes. Our preference would have been to have a single code with unified rules accept where the medium of communication required special provisions.

### **Section 1: Compliance**

#### **Question 1**

i) Taking into account CAP's general policy objectives, do you agree that CAP's rules, included in the proposed Compliance Section are necessary and easily understandable? If your answer is no, please explain why.

Yes

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Compliance rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

No

iii) Do you have other comments on this section?

No

1 |

### **Section 2: Recognition of marketing communications**

#### **Question 2**

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Recognition of Marketing Communications Section, are necessary and easily understandable? If your answer is no, please explain why.

Yes

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Recognition of Marketing Communications rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

No

iii) Do you have other comments on this section?

No

### **Section 3: Misleading**

#### **Clarity of qualifications**

#### **Question 3**

Do you agree that rule 3.10 should be included in the Code? If your answer is no, please explain why.

No – In Energy it will be very hard for the consumer to fully understand qualifications when it is communicated to them only once. For example, one of our caveats at the moment is:- "Applies to dual fuel customers with average annual electricity consumption of 3,300kwh and above and average annual gas consumption of 20,500kwh and above, including all discounts. This relates to customers who remain on the product until 1 September 2010, pay by fixed monthly Direct Debit or pay promptly in full by quarterly cash or cheque and continue to pay in this way. It applies against bills for British Gas existing customers on the Standard tariff until 1 September 2010. Track and save is only available for dual fuel and single gas customers. Not available to Prepayment or Restricted Hours meters. Discounts not paid on final bills. Residential customers only. " A customer may not understand what this means for them on first sight. The most important aspect is that a customer who is interested has the relevant information available to assess if it is worth responding to the call to action.

2 |

## Exaggerated performance

### Question 4

Do you agree that rule 3.11 should be included in the Code? If your answer is no, please explain why.

*No – We currently market products to target audiences for example high users, this rule could restrict us from carrying out this legitimate marketing practice. If we were required to market solely based on “average” consumption this would understate the savings and therefore discourage switching. Providing a claim based on a usage which is different to normal is suitably qualified in the communication this should be permitted.*

## Restrictions on availability

### Question 5

Given CAP’s policy consideration, do you agree with the revisions made to rule 3.28.3? If your answer is no, please explain why.

*No – This must take into account the nature of the media, for example if we are advertising boiler care in a local newspaper of a geographical area that we cover, we should not need to put a qualification in the advert to the effect that geographical restrictions apply.*

## Testimonials

### Question 6

Given CAP’s policy consideration, do you agree that rule 3.45 should be amended to require documentary evidence and contact details only? If your answer is no, please explain why.

Yes

## Additional rights provided by guarantees

### Question 7

Given CAP’s policy consideration, do you agree that rule 17.2 should be deleted from the Code? If your answer is no, please explain why.

Yes

## The unavoidable cost of responding

### Question 8

Given CAP’s policy consideration, do you agree that marketing communications should not describe items as “free” if the consumer has to pay for packaging? If your answer is no, please explain why.

Yes

## Other questions

### Question 9

i) Taking into account CAP’s general policy objectives, do you agree that CAP’s rules on misleading are necessary and easily understandable? If your answer is no, please explain why.

Yes

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration?

No

iii) Do you have other comments on this section?

No

## Section 4: Harm and Offence

## Flashing images

### Question 10

Given CAP’s policy consideration, do you agree that rule 4.7 should be included in the proposed CAP Code? If your answer is no, please explain why.

Yes

## Other Questions

### Question 11

i) Taking into account its general policy objectives, do you agree that CAP’s rules, included in the proposed Harm and Offence section, are necessary and easily understandable? If your answer is no, please explain why.

Yes

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Harm and Offence rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

No

iii) Do you have other comments on this section?

No

## **Section 5: Children**

### **Promotions that contain a direct exhortation to buy a product**

#### **Question 12**

Given CAP's policy consideration, do you agree that rule 5.7 should be included in the Code? If your answer is no, please explain why.

Yes

### **Marketing communications that contain a direct exhortation to buy products via a direct-response mechanism**

#### **Question 13**

Given CAP's policy consideration, do you agree that rule 5.5 should be included in the Code? If your answer is no, please explain why.

Yes

### **Other questions**

#### **Question 14**

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Children section, are necessary and easily understandable? If your answer is no, please explain why.

Yes

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Children rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

No

iii) Do you have other comments on this section?

No

## **Section 6: Privacy**

### **Question 15**

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Privacy section, are necessary and easily understandable? If your answer is no, please explain why.

Yes

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Privacy rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

No

iii) Do you have other comments on this section?

No

## **Section 8: Sales Promotions**

### **Withholding prizes**

#### **Question 17**

Given CAP's policy consideration, do you agree that rule 8.27 should be included in the Code? If your answer is no, please explain why.

Yes

### **Promotions directed at children; the need for a closing date**

#### **Question 18**

Given CAP's policy consideration, do you agree that rule 8.17.4.b should be included in the Code? If your answer is no, please explain why?

Yes

### **Prizes and Gifts**

#### **Question 19**

Given CAP's policy consideration, do you agree that rule 8.17.6 should be included in the Code? If your answer is no, please explain why.

Yes

#### **Question 20**

Given CAP's policy consideration, do you agree that rule 8.17.6.a should be included in the Code? If your answer is no, please explain why.



Yes

### Significant conditions exception: limited by time or space

#### Question 21

Given CAP's policy consideration, do you agree that rule 8.18 should be included in the Code? If your answer is no, please explain why.

Yes

### Distinction between prizes and gifts: a significant proportion

#### Question 22

Do you agree that rule 8.19 should be included in the CAP Code? If your answer is no, please explain why.

Yes

### Supervising Prize Draws

#### Question 23

Given CAP's policy consideration, do you agree that rule 8.24 should be included in the Code? If your answer is no, please explain why.

Yes

### Auditing instant-win promotions

#### Question 24

i) Do you agree that the present requirement, in CAP rule 35.8, for a promoter to obtain an independently audited statement that all prizes have been distributed, or made available for distribution on a fair and random basis is disproportionate and should not therefore be included in the Code? If your answer is no, please explain why?

Yes

ii) Given CAP's policy consideration, do you agree that rule 8.25 should be included in the Code? If your answer is no, please explain why.

Yes

### Judging of prize promotions

#### Question 25

Given CAP's policy consideration, do you agree that rule 8.26 should be included in the Code? If your answer is no, please explain why.

Yes

### Receipt of prizes: time

#### Question 26

Given CAP's policy consideration, do you agree that rule 8.23.3 should be included in the Code? If your answer is no, please explain why.

Yes

### Appeal to children

#### Question 27

Given CAP's policy consideration, do you agree that rules 8.33 and 8.33.9 correctly updates present rule 37.1(i) to reflect the CPRs? If your answer is no, please explain why.

Yes

### Other questions

#### Question 28

i) Taking into account CAP's general policy objectives, do you agree that CAP's Sales Promotions rules are necessary and easily understandable? If your answer is no, please explain why.

Yes

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Sales Promotions rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

No

iii) Do you have other comments on this section?

No

## Section 9: Distance Selling

### Personal visits

#### Question 29

Given CAP's policy consideration, do you agree present rule 42.7 should not be included in the proposed Code? If your answer is no, please explain why.

Yes

### The packaging of products that might fall into the hands of children

**Question 30**

Given CAP's policy consideration, do you agree that present rule 42.7 should not be included in the Code? If your answer is no, please explain why.

Yes

**Other questions****Question 31**

i) Taking into account CAP's policy consideration, do you agree that CAP's rules on Distance Selling are necessary and easily understandable? If your answer is no, please explain why.

Yes

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?

No

iii) Do you have other comments on this section?

No

**Section 10: Database practice****Collection of data from children****Question 32**

Given CAP's policy consideration, do you agree that rules 10.15 and 10.16 should be included in the Code? If your answer is no, please explain why.

Yes

**Explicit consent of consumers: Bluetooth****Question 33**

Given CAP's policy consideration, do you agree rules 10.13.3 and 10.6 should explicitly exempt marketing communications sent by Bluetooth technology? If your answer is no, please explain why.

Yes

**Other questions****Question 34**

i) Taking into account CAP's general policy objectives, do you agree that CAP's Database Practice rules are necessary and easily understandable? If your answer is no, please explain why.

Yes

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Database Practice rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

No

iii) Do you have other comments on this section?

No

**Section 11: Environmental Claims****Question 35**

Given CAP's policy consideration, do you agree that rule 11.7 should be included in the Code? If your answer is no, please explain why.

Yes

**Other questions****Question 36**

i) Taking into account CAP's general policy objectives, do you agree that CAP's rules on Environmental Claims are necessary and easily understandable? If your answer is no, please explain why.

Yes

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration?

No

iii) Do you have other comments on this section?

No

On behalf of Edwin Coe LLP

We wish to comment on question 22 regarding proposed rule 8.19 which deals with the distinction needed between gifts and prizes in sales promotions.

### Summary

The proposed rule should not be included in its current form but should be amended to remove the prescriptive requirement for promoters to use the term “gifts” when describing items offered to a significant proportion of consumers in a promotion.

### Detailed Explanation

Paragraph 8.42 of the consultation document explains that proposed rule 8.19 is intended to close a loophole that CAP believes some promoters exploit in current rule 35.1 which reads as follows:

*Promoters should not claim that consumers have won a prize if they have not. The distinction between prizes and gifts should always be clear. Gifts offered to all or most consumers in a promotion should not be described as prizes. If promoters offer gifts to all or most consumers in addition to giving prizes to those who win, particular care is needed to avoid confusing the two. In such cases, it should be clear that consumers "qualify" for the gifts but have merely an opportunity to win the prizes. If promoters include a gift that consumers have qualified for in a list of other prizes, they should distinguish clearly between the two. – CAP Code Rule 35.1*

Specifically, the loophole that proposed rule 8.19 is intended to close is, as stated in paragraph 8.42, where a promoter complies with the letter of rule 35.1 but not the spirit; an example is given of a promoter who offers three separate low-value items to the respondents to its promotion, one item to each third of the total respondents. The promoter can describe each of these three low-value items as prizes as none are offered to “*all or most consumers*” in the promotion.

Proposed rule 8.19 closes this perceived loophole by replacing the term “*gifts offered to all or most consumers*” with the term “*a significant proportion*”.

We believe that the closure of this loophole, and the wording of proposed rule 8.19 to effect such closure, is reasonable.

However, where we believe that proposed rule 8.19 should be amended is where it prescriptively requires a promoter, when making the required distinction between gifts and prizes, to actually use the term “gifts” for those items offered to a significant proportion of respondents.

This goes beyond the requirements of Rule 35.1 which makes perfectly clear that promoters must not use the term “prize” to describe items of this type. However, the wording of Rule 35.1 permits promoters to choose how they comply with this aspect of the rule – that is to say – what term they choose to describe the items in question is left to them.

Proposed rule 8.19 represents an unnecessary restriction on promoters, removing the flexibility currently offered by Rule 35.1 in respect of how they choose to describe the items offered to a significant proportion of respondents. The restriction is not necessary to give effect to CAP's stated intention of closing the loophole referred to above.

For example, this firm acts for several clients who choose to comply with Rule 35.1 by describing such items as "awards" whereas the other items – which genuinely are prizes – are described as prizes. In this way, the distinction between the items is perfectly clear and there is no scope for consumers to be misled. This approach complies with both the letter and the spirit of Rule 35.1 but would breach proposed rule 8.19 as it is currently drafted.

Accordingly, we believe that the following wording should be adopted for proposed rule 8.19 in order to close the loophole identified by CAP while at the same time retaining the flexibility that Rule 35.1 currently provides:

*"Promoters must not claim that consumers have won a prize if they have not. The distinction between prizes and gifts must always be clear: items offered to a significant proportion of consumers in a promotion should not be described as prizes. If a promotion offers a gift to a significant proportion and a prize to those who win, special care is needed to avoid confusing the two: the promotion must, for example, state clearly that consumers "qualify" for the gift but have merely an opportunity to win the prize. If a promotion includes, in a list of prizes, a gift for which consumers have qualified, the promoter must distinguish clearly between the two."*

CP → Comms

CMS 114911/DC

Mr Andrew Brown  
Committee of Advertising Practice  
Mid City Place  
71 High Holborn  
LONDON  
WC1V 6QT



department for  
culture, media  
and sport

9 April 2009

Dear Mr Brown

Thank you for your letter of March 26<sup>th</sup> 2009 addressed to the Secretary of State for Culture, Media and Sport, the Rt Hon Andy Burnham MP, about the 12-week public consultation on the content of the United Kingdom Advertising Codes. Your letter has been transferred to me for response as this issue forms part of my Ministerial responsibilities.

The Government recognises the importance of the work being done by the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) to review the United Kingdom's advertising standards.

As you rightly say, it is essential that our advertising codes are fit for the 21<sup>st</sup> century and that they continue to provide the highest levels of consumer protection, particularly in the light of the rapid changes to the digital media environment we are experiencing.



improving  
the quality  
of life for all

We welcome the public consultation you have recently launched and we look forward to the outcome. In the meantime, my officials will continue to keep in close contact with CAP and BCAP as this work progresses.

Yours sincerely

A handwritten signature in dark ink, reading 'Barbara Follett'. The signature is written in a cursive style with a large, stylized 'B' and 'F'.

**BARBARA FOLLETT**  
**Parliamentary Under Secretary**

**Enable**

## **Annex 3**

# **Consultation questions**

You may respond to some or all of the consultation questions. This Annex is provided in Word format to enable you to copy and paste the questions into a document that should accompany your completed cover sheet, which is made available [here](#). See ‘Responding to this consultation’ in this Annex.

## **Section 1: Compliance**

### **Question 1**

- i) Taking into account CAP’s general policy objectives, do you agree that CAP’s rules, included in the proposed Compliance Section are necessary and easily understandable? If your answer is no, please explain why.

1.3 Marketers should deal fairly with consumers - However, continually need to express that consumers

Good to have but why not include the various laws available to promoters to prosecute those “gold diggers” who are trying to undermine the promotion. Its not a one way tunnel – great to protect consumers but what about indicating the teeth available when promotions are undermined  
Code 3.15 Honest & truthful works both ways

- ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Compliance rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

- iii) Do you have other comments on this section?

## **Section 2: Recognition of marketing communications**

### **Question 2**

- i) Taking into account its general policy objectives, do you agree that CAP’s rules, included in the proposed Recognition of Marketing Communications Section, are necessary and easily understandable? If your answer is no, please explain why.

- ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Recognition of Marketing Communications rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

- iii) Do you have other comments on this section?

## Section 3: Misleading

### Clarity of qualifications

#### Question 3

Do you agree that rule 3.10 should be included in the Code? If your answer is no, please explain why.

**Also believe in this the penalties for failure to adhere to the rules need to be clearly communicated**

### Exaggerated performance

#### Question 4

Do you agree that rule 3.11 should be included in the Code? If your answer is no, please explain why.

**Yes but as above it's a two way sword where the consumer cannot exaggerate there interest from that contained within the code and highlighted in the T&C's**

### Restrictions on availability

#### Question 5

Given CAP's policy consideration, do you agree with the revisions made to rule 3.28.3? If your answer is no, please explain why.

### Testimonials

#### Question 6

Given CAP's policy consideration, do you agree that rule 3.45 should be amended to require documentary evidence and contact details only? If your answer is no, please explain why.

**Do not see why a signature of acceptance or similar as a sign off on the bottom of the e-mail documentation that everything is true even cannot be requested**

### Additional rights provided by guarantees

#### Question 7

Given CAP's policy consideration, do you agree that rule 17.2 should be deleted from the Code? If your answer is no, please explain why.

**As long as the full text of 3.54 stands then ok**

### The unavoidable cost of responding

#### Question 8

Given CAP's policy consideration, do you agree that marketing communications should not describe items as "free" if the consumer has to pay for packaging? If your answer is no, please explain why.

**Agree**



## Other questions

### Question 9

i) Taking into account CAP's general policy objectives, do you agree that CAP's rules on misleading are necessary and easily understandable? If your answer is no, please explain why.

They could be clearer perhaps but using examples

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

## Section 4: Harm and Offence

### Flashing images

#### Question 10

Given CAP's policy consideration, do you agree that rule 4.7 should be included in the proposed CAP Code? If your answer is no, please explain why.

Agree

### Other Questions

#### Question 11

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Harm and Offence section, are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Harm and Offence rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

I am sure there are other factors that ought to be included in this area – just can't think of any currently

## Section 5: Children

### Promotions that contain a direct exhortation to buy a product

#### Question 12

Given CAP's policy consideration, do you agree that rule 5.7 should be included in the Code? If your answer is no, please explain why.

### Marketing communications that contain a direct exhortation to buy products via a direct-response mechanism

### Question 13

Given CAP's policy consideration, do you agree that rule 5.5 should be included in the Code? If your answer is no, please explain why.

### Other questions

### Question 14

- i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Children section, are necessary and easily understandable? If your answer is no, please explain why.

Believe they need to be as clear and concise as possible with no doubt over message

- ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Children rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

XXXXXX

- iii) Do you have other comments on this section?

## Section 6: Privacy

### Question 15

- i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Privacy section, are necessary and easily understandable? If your answer is no, please explain why.

With mobile phone cameras and other mechanisms of taking photographs it is vital that the individual is protected

- ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Privacy rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

XXXXXXXX

- iii) Do you have other comments on this section?

## Section 7: Political Advertisements

### Question 16

- i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Political Advertisements Section, are necessary and easily understandable? If your answer is no, please explain why.

- ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Political Advertisements rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

## **Section 8: Sales Promotions**

### **Withholding prizes**

#### **Question 17**

Given CAP's policy consideration, do you agree that rule 8.27 should be included in the Code? If your answer is no, please explain why.

The concern Enable have is that unless a) the terms and conditions are watertight and b) the correct policing and auditing methods are in place, there are numerous occasions when participants have not won in the spirit of the code

I would like to see some of these individuals prosecuted, when possible. After all we are homing in on Promoters and Retailers to be fair in their interpretation of the code, why not force consumers to be honest and play fair as well

### **Promotions directed at children; the need for a closing date**

#### **Question 18**

Given CAP's policy consideration, do you agree that rule 8.17.4.b should be included in the Code? If your answer is no, please explain why?

Believe this needs a little more clarification – i.e. Prizes on reverse of labels, inside of packs etc – Are we saying that a closing date is not required ? What if it is linked to an event where we want the prize to be guaranteed?

### **Prizes and Gifts**

#### **Question 19**

Given CAP's policy consideration, do you agree that rule 8.17.6 should be included in the Code? If your answer is no, please explain why.

Definitely, but must be used in conjunction with answer to the question below

#### **Question 20**

Given CAP's policy consideration, do you agree that rule 8.17.6.a should be included in the Code? If your answer is no, please explain why.

I believe it should go a step further to explain how the prizes are seeded thus making it clear to the consumer what opportunity they have to win and more importantly the fact that a significant number of the prizes will not be won, but are available to be won

### **Significant conditions exception: limited by time or space**

#### **Question 21**

Given CAP's policy consideration, do you agree that rule 8.18 should be included in the Code? If

your answer is no, please explain why.

One assumes that this is available to consumers before purchase?

### Distinction between prizes and gifts: a significant proportion

#### Question 22

Do you agree that rule 8.19 should be included in the CAP Code? If your answer is no, please explain why.

Definitely

### Supervising Prize Draws

#### Question 23

Given CAP's policy consideration, do you agree that rule 8.24 should be included in the Code? If your answer is no, please explain why.

Provided the verified random computer process is regularly checked and audited. Also believe reference to the standards of the T&C's need to be included in this process. I.e there needs to be a manual check to ensure genuine prizes go to genuine consumers

Believe prize winners selected by this route must be rigorously checked

### Auditing instant-win promotions

#### Question 24

i) Do you agree that the present requirement, in CAP rule 35.8, for a promoter to obtain an independently audited statement that all prizes have been distributed, or made available for distribution on a fair and random basis is disproportionate and should not therefore be included in the Code? If your answer is no, please explain why?

Think sound practice should be encouraged for all promotions

ii) Given CAP's policy consideration, do you agree that rule 8.25 should be included in the Code? If your answer is no, please explain why.

Think the requirement is ambiguous. Basically Instant win prizes are allocated by an independently verified process

### Judging of prize promotions

#### Question 25

Given CAP's policy consideration, do you agree that rule 8.26 should be included in the Code? If your answer is no, please explain why.

Definitely

### Receipt of prizes: time

#### Question 26

Given CAP's policy consideration, do you agree that rule 8.23.3 should be included in the Code? If your answer is no, please explain why.

Fine

### Appeal to children

#### Question 27

Given CAP's policy consideration, do you agree that rules 8.33 and 8.33.9 correctly updates present rule 37.1(i) to reflect the CPRs? If your answer is no, please explain why.

Fine

### Other questions

#### Question 28

i) Taking into account CAP's general policy objectives, do you agree that CAP's Sales Promotions rules are necessary and easily understandable? If your answer is no, please explain why.

Believe they could be clearer and perhaps examples of how each clause relates included

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Sales Promotions rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

XXXX

iii) Do you have other comments on this section?

## Section 9: Distance Selling

### Personal visits

#### Question 29

Given CAP's policy consideration, do you agree present rule 42.7 should not be included in the proposed Code? If your answer is no, please explain why.

Believe there is no harm in keeping it in. Just because there were no complaints does not justify being taken out

### The packaging of products that might fall into the hands of children

#### Question 30

Given CAP's policy consideration, do you agree that present rule 42.7 should not be included in the Code? If your answer is no, please explain why.

Guess you mean 42.8

### Other questions

#### Question 31

i) Taking into account CAP's policy consideration, do you agree that CAP's rules on Distance Selling are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy

and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

## Section 10: Database practice

### Collection of data from children

#### Question 32

Given CAP's policy consideration, do you agree that rules 10.15 and 10.16 should be included in the Code? If your answer is no, please explain why.

YES

### Explicit consent of consumers: Bluetooth

#### Question 33

Given CAP's policy consideration, do you agree rules 10.13.3 and 10.6 should explicitly exempt marketing communications sent by Bluetooth technology? If your answer is no, please explain why.

Why specifically take it out, especially as it is covered elsewhere. By putting an exclusion in, it might confuse

### Other questions

#### Question 34

i) Taking into account CAP's general policy objectives, do you agree that CAP's Database Practice rules are necessary and easily understandable? If your answer is no, please explain why.

- iii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Database Practice rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

xxxxx

iii) Do you have other comments on this section?

## Section 11: Environmental Claims

#### Question 35

Given CAP's policy consideration, do you agree that rule 11.7 should be included in the Code? If your answer is no, please explain why.

ok

### Other questions

#### Question 36

i) Taking into account CAP's general policy objectives, do you agree that CAP's rules on Environmental Claims are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

## **Section 12: Medicines, Treatments, Devices and Health**

### **Traditional Herbal Medicinal Products**

#### **Question 37**

Given CAP's policy consideration, do you agree that rule 12.20 should be included in the Code? If your answer is no, please explain why.

### **Medicinal claims**

#### **Question 38**

Given CAP's policy consideration, do you agree that rule 12.1 should be included in the proposed CAP Code? If your answer is no, please explain why.

### **Other questions**

#### **Question 39**

i) Taking into account CAP's general policy objectives, do you agree that CAP's rules, included in the proposed Medicines, Treatments, Devices and Health Section are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Medicines, Treatments, Devices and Health rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

## **Section 13: Weight Control and Slimming**

### **Targeting the obese**

#### **Question 40**

Given CAP's policy consideration, do you agree it is justified to allow marketing communications for non-prescription medicines that are indicated for obesity and that require the involvement of a pharmacist in the sale or supply of the medicine to target people who are obese? If your answer is no, please explain why?

## Loss of weight or fat from specific parts of the body

### Question 41

Given CAP's policy consideration, do you agree that marketing communications for surgical clinics, establishments and the like that can remove fat from specific parts of the body may make claims about losing weight or fat from specific parts of the body but that those advertisers must not refer to the amount of weight that can be lost? If your answer is no, please explain why?

## Very Low-Calorie Diets (VLCDs)

### Question 42

Given CAP's policy consideration, do you agree that rule 13.7 should reference 'Obesity: the prevention, identification, assessment and management of overweight and obesity in adults and children' (2006) published by the National Institute for Health and Clinical Excellence' and not Government COMA Report No.31, The Use of Very Low Calorie Diets? If your answer is no, please explain why?

## Other questions

### Question 43

i) Taking into account CAP's general policy objectives, do you agree that CAP's rules, included in the proposed Weight Control and Slimming Section are necessary and easily understandable? If your answer is no, please explain why?

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Weight Control and Slimming rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

## Section 14: Financial products Individual Voluntary Arrangements (IVAs)

### Question 44

Given CAP's policy consideration, do you agree that the underlined wording should be included in the Background to CAP's rules on Financial products? If your answer is no, please explain why.

## Other questions

### Question 45

i) Taking into account CAP's policy consideration, do you agree that CAP's rules on financial products are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?



## **Section 15: Food, Dietary supplements and Associated Health and Nutrition claims**

### **Permitted nutrition and health claims**

#### **Question 46**

Do you agree CAP has correctly reflected the requirements of Articles 8(1), 10(1) and 28 of the NHCR in CAP's proposed rules 15.1.1 and 15.1.2? If your answer is no, please explain why.

### **Give rise to doubt the safety or nutritional adequacy of another product**

#### **Question 47**

Do you agree CAP has correctly reflected the requirements of Article 3(b) of the NHCR in proposed rule 15.6 and 15.6.5? If your answer is no, please explain why.

### **Comparative nutrition claims**

#### **Question 48**

Do you agree CAP has correctly reflected the requirements of Article 9 of the NHCR in proposed rules 15.3 and 15.3.2? If your answer is no, please explain why.

### **Comparison with one product**

#### **Question 49**

Do you agree CAP has correctly reflected the requirements of Article 9 of the NHCR and the European Commissions' guidance in proposed rule 15.3.1? If your answer is no, please explain why.

### **Prohibitions**

#### **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.

#### **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.

#### **Question 52**

Do you agree CAP has correctly reflected the requirements of Article 12(b) of the NHCR in proposed rule 15.6 and 15.6.6? If your answer is no, please explain why.

### **The use of health professionals**

#### **Question 53**

Do you agree CAP has correctly reflected the requirements of Article 12(c) and Article 11 in proposed rule 15.6 and 15.6.3? If your answer is no, please explain why.

### Food labelling Regulations (1996) (FLRs)

#### Question 54

Do you agree CAP has correctly reflected the requirements of Article 14 of the NHCR and Schedule 6 Part 1(2) of the FLRs in CAP's proposed rule 15.6 and 15.6.2? If your answer is no, please explain why.

#### Question 55

Do you agree that CAP has correctly reflected the relevant provisions of Regulation (EC) 1924/2006 on Nutrition and Health Claims on Foods in the proposed CAP Code? If your answer is no, please explain why.

### Infant and follow-on formulae

#### Question 56

i) Do you agree CAP has correctly reflected the requirements of Regulation 21(a) of the Infant Formula and Follow-on Formula Regulations 2007 (as amended) in CAP's proposed rule 15.11? If your answer is no, please explain why.

ii) Do you agree CAP has correctly reflected the requirements of Regulation 19 of the Infant Formula and Follow-on Formula Regulations 2007 (as amended) in CAP's proposed rule 15.11.1? If your answer is no, please explain why.

iii) Do you consider CAP has correctly reflected the relevant provisions of the Infant Formula and Follow-on Formula Regulations 2007 (as amended) in the proposed CAP Code? If your answer is no, please explain why.

### Other questions

#### Question 57

i) Taking into account CAP's general policy objectives, do you agree that CAP's rules, included in the proposed Food, Dietary supplements and Associated Health and Nutrition claims Section are necessary and easily understandable? If your answer is no, please explain why?

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

## Section 16: Gambling

### Consistency: principle

#### Question 58

Given CAP's policy consideration, do you agree in principle that National Lottery and society and

local authority marketing communications should be regulated by the same rules? If your answer is no, please explain why.

### Consistency: rules

#### Question 59

Given CAP's policy consideration, do you agree that the rules included in the Lottery Section of the Code are in line with CAP's general policy objectives (see Part 1 (4) of this consultation document) and should be applied to marketing communications for the National Lottery as they presently are to marketing communications for other lotteries? If your answer is no, please explain why and, if relevant, please identify those rules that should not be applied to marketing communications for the National Lottery.

### Participating in a lottery in a working environment

#### Question 60

Given CAP's policy consideration, do you agree that lottery marketing communications should be able to feature participation in a lottery in a working environment? If your answer is no, please explain why.

### Other questions

#### Question 61

i) Taking into account CAP's policy consideration, do you agree that CAP's rules on Gambling and Lotteries are necessary and easily understandable? If your answer is no, please explain why?

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this Section?

## Section 18: Alcohol

### Alcoholic strength

#### Question 62

Given CAP's policy consideration, do you agree that rule 18.9 should be included in the Code? If your answer is no, please explain why.

### Provision for low-alcohol drinks

#### Question 63

i) Given CAP's policy consideration, do you agree that CAP rule 56.15 should not be included in the present Code? If your answer is no, please explain why.

ii) Given CAP's policy consideration, do you agree that, with the exception of the rule that prevents preference based on alcoholic strength, marketing communications for low-alcohol drinks should be subject to all the Alcohol rules? If your answer is no, please explain why.

#### **Question 64**

Given CAP's policy consideration, do you agree that rule 18.12 should be included in the Code? If your answer is no please explain why

#### **Other questions**

#### **Question 65**

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Alcohol Section, are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Alcohol rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

### **Section 19: Motoring**

#### **The legal requirements of the Highway Code**

#### **Question 66**

Given its policy consideration, do you agree with CAP's proposal to include rule 19.2 in the Code? If your answer is no, please explain why.

#### **Prices in motoring marketing communications**

#### **Question 67**

Given its policy consideration, do you agree with CAP's proposal not to include present rule 48.7 in the Code? If your answer is no, please explain why.

#### **Other questions**

#### **Question 68**

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Motoring section, are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Motoring rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

### **Section 20: Employment, Homework Schemes and Business Opportunities**

## Employment businesses

### Question 69

Given its policy consideration, do you agree with CAP's proposal to extend the requirements of the present rule on marketing communications by employment agencies to cover marketing communications by employment businesses? If your answer is no, please explain why.

## Required information in marketing communications for homework schemes

### Question 70

Given its policy consideration, do you agree with CAP's proposal to require all marketing communications for homework schemes to include limitations or conditions that might influence consumers before their decision to participate and to state whether the marketers will buy any products made? If your answer is no, please explain why.

## Vocational training and instruction courses

### Question 71

Given its policy consideration, do you agree with CAP's proposal to require marketing communications for vocational training and other instruction courses to make clear significant conditions for acceptance and significant conditions likely to affect a consumer's decision to embark on a course? If your answer is no, please explain why.

## Other Questions

### Question 72

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Employment, Homework Schemes and Business Opportunities section, are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Employment, Homework Schemes and Business Opportunities rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

## Section 21: Tobacco, Rolling Papers and Filters

### Question 73

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Tobacco, Rolling Papers and Filters section, are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Tobacco, Rolling Papers and Filters rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

## **Section 22: Other comments**

### **Question 74**

Do you have other comments or observations on CAP's proposed Code that you would like CAP to take into account in its evaluation of consultation responses?

ELSPA (the Entertainment and Leisure Software Publishers Association) is the trade association for video games publishers in the UK. ELSPA was formed in 1989 to establish a specific and collective identity for the country's video games industry and has grown to its current membership to almost 40 companies.

ELSPA works to protect, promote and provide for its members' interests via a number of activities including IP crime enforcement, research, sales charts and reports and political lobbying. It also ensures its members publish games which are responsibly age-rated with the pan-European PEGI ratings system to ensure parents can make informed choices when purchasing games for their children. ELSPA also helps organise a number of key gaming events in the UK including the annual London Games Festival, staged every October. For more information, visit [www.elspa.com](http://www.elspa.com).

ELSPA welcomes the opportunity to input into these reviews, and has consulted with its membership on the proposed changes particularly in relation to those directly impacting upon the advertising of video games in both broadcast and non-broadcast media. ELSPA's members broadly support the proposals and will of course endeavour diligently to comply with future codes as they already do with the current codes.

One proposal that caused some debate is the BCAP Code Review Consultation proposed rule 5.14 Television Only, concerning the advertising of expensive products and services. It is suggested by some that the notes for this Rule should make it clear that when a publisher, manufacturer or distributor advertises a product or service, they may refer to an RRP or similar price, since of course, they are not allowed to dictate retail prices. Retailers are of course in a better position to refer to actual selling prices.

Additional concerns were raised by Sony Computer Entertainment Europe (SCEE), and are summarised below.

### **CAP Proposal 5.5**

This seems very wide. Under the proposed new rule, it would seem that an advertiser would be prevented from sending an email to anyone under 16 years (the definition of a child under the CAP Code) which contained products and prices. However, the scope seems even wider than that. The rule might also catch a poster for a 3+ game containing a statement: "available via the PlayStation Store". Would that poster be deemed to be "directly targeted at children"?

Further, the existing rules in relation to "marketing communications" seem to be limited to the food and soft drink product advertisements section only (existing rules [47.12](#)). There is a similar existing rule in [47.7\(a\)](#) which states that although children might be expected to exercise some preference over the food they eat or drink, marketing communications should be prepared with a due sense of responsibility and should not directly advise or ask children to buy or to ask their parents or other adults to make enquiries or other purchases for them.

Under the existing rules, CAP does not currently have the wide power which is proposed under rule [5.5](#) as is claimed in the consultation documentation.

The existing rules do not seem to contain any provisions involving a "direct exhortation", but instead refer to marketing communications generally which directly advise, appeal to or ask children to buy products.

The meaning of “direct exhortation” is unclear. However, 5.5 would seem very wide and it is possible that most advertisements would be considered a direct exhortation to buy.

#### **CAP Proposal 5.7**

The wording in paragraph 5.11 of the consultation proposals is more limited than the actual proposed rule in that 5.11 requires “a purchase to participate”. There is an inconsistency here since the wording in proposed rule 5.7 only addresses a promotion and does not state that a purchase is required to participate. The meaning of promotion is also ambiguous although it would suggest a special offer is required. Is this clearly defined elsewhere in the Code?

Given that the promotion can be “addressed” to (as well as “targeted” at) a child, query whether a promotional banner with a price would within the proposed rule.

#### **BCAP Proposal 5.14**

This is wider than the existing rule which was limited to toys and games and could now extend to consoles and online services. SCEE would not necessarily put prices in all advertisements for products or services which may be of “interest to children”.

#### **BCAP Proposal 8.3**

There are exceptions to the DSR

([http://www.ofc.gov.uk/advice\\_and\\_resources/resource\\_base/legal/distance-selling-regulations/regulation-exceptions](http://www.ofc.gov.uk/advice_and_resources/resource_base/legal/distance-selling-regulations/regulation-exceptions)). Presumably the proposals do not apply to these exceptions. However, this point is not dealt with in the Code review.

There is a concern that the proposed Rule 8.3.6 over-simplifies the law with the result that the protection for consumers is extended beyond what was legislated for by the EU and Parliament. In doing so, it seems that the ASA step outside their remit.

It is also questionable whether this proposal is practicable. How can a broadcaster police whether or not their advertisers give consumers the appropriate cancellation periods. Should the broadcaster also be policing every other aspect of the advertiser's business?

This rule may be appropriate if television broadcast is actually the medium for the distance selling contract (eg. home shopping channels), but not for other distance selling contracts (eg. purchase of download from PlayStation Store) which may be advertised on television.

The exceptions to the Distance Selling Regulations which are not accommodated by Rule 8.3.6. In particular (and of relevance to SCEE), there is an exception in the case of services, where the services begin with the agreement of the consumer before the end of the cancellation period. Digital downloads are likely to be characterised as services. The download is normally delivered to the consumer instantaneously. Thus the service has begun and there is no 7-day cancellation period.



## **1. About Alcohol Concern**

**1.1** Alcohol Concern is the national agency on alcohol misuse campaigning for effective alcohol policy and improved services for people whose lives are affected by alcohol-related problems.

**1.2** Alcohol Concern is a membership body working at a national level to influence alcohol policy and champion best practice locally. We support professionals and organisations by providing expertise, information and guidance. We are a challenging voice to the drinks industry and promote public awareness of alcohol issues.

## **2. Introduction**

**2.1** We welcome the opportunity to comment on the Committee's review of the advertising Code and will also submit to the Broadcast Committee's review of the advertising Code.

## **3. Section 18: Alcohol**

### **Alcoholic strength**

#### **Question 62**

**Given CAP's policy consideration, do you agree that rule 18.9 should be included in the Code? If your answer is no, please explain why.**

We agree that Rule 18.9 should be included in the Code.

### **Provision for low-alcohol drinks**

#### **Question 63**

**i) Given CAP's policy consideration, do you agree that CAP rule 56.15 should not be included in the present Code? If your answer is no, please explain why.**

We agree that rule 56.15 should no longer be included in the Code. We agree that all alcohol rules must also be applied to low-alcohol drinks, other than the rule which allows implication of preference based on alcoholic strength. This will allow the promotion of low-alcohol drinks based on their strength and encourage interest among consumers in these drinks. Low-alcohol drinks should be clearly defined as those containing between 0.5% and 1.2% alcohol.

**ii) Given CAP's policy consideration, do you agree that, with the exception of the rule that prevents preference based on alcoholic strength, marketing communications for low-alcohol drinks should be subject to all the Alcohol rules? If your answer is no, please explain why.**

Yes. Low alcohol drinks should be subject to all the alcohol rules.

#### **Question 64**

**Given CAP's policy consideration, do you agree that rule 18.12 should be included in the Code? If your answer is no please explain why**

While we believe that new rule 18.12 is preferable to current Rule 56.14, being broader in scope, we do not believe that 18.12, in its current draft is appropriate.

We believe that proposed rule 18.12 should be amended to read:

*Marketing communications must not link alcohol with activities or locations in which drinking would be unsafe or otherwise.*

*Marketing communications must not link alcohol with the use of potentially dangerous machinery or driving. Marketing communications may not feature sporting or other physical activities.*

There should be no link made whatsoever between alcohol and sporting activity, even if it is not implied that the consumption of alcohol has taken place before those activities. The rule as proposed allows, however, for the consumption of alcohol after sport or physical activity which we would argue could create a misleading impression that alcohol is an appropriate beverage for hydration. Alcohol is a diuretic, therefore its consumption can result in temporary dehydration of the body. In any way to imply that it might hydrate would be misleading and potentially dangerous.

## Other questions

### Question 65

**i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Alcohol Section, are necessary and easily understandable? If your answer is no, please explain why.**

Yes, we agree that the proposed CAP rules are necessary and easily understandable.

**ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Alcohol rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that you believe should be retained or otherwise given dedicated consideration?**

number of the rules in their proposed form. We would therefore like to make recommendations on the following rules -

**18.15 - Marketing communications must not be directed at people under 18 through the selection of media or the context in which they appear. No medium should be used to advertise alcoholic drinks if more than 25% of its audience is under 18 years of age.**

We believe that proposed rule 18.15 should be amended to read:

*Marketing communications must not be directed at people under 18 through the selection of media or the context in which they appear. No medium should be used to advertise alcoholic drinks if more than 10% of its audience is under 18 years of age.*

We believe that 10% is a more appropriate percentage in this case and will reduce the number of children exposed to alcohol advertising. The World Health Organisation's European Charter on Alcohol states that:

"All children and adolescents have the right to grow up in an environment protected from the negative consequences of alcohol consumption and, to the extent possible, from the promotion of alcoholic beverages."<sup>1</sup>

Several studies have shown that young people are increasingly adept at interpreting the cultural messages contained in alcohol advertisements. Research undertaken at the University of Strathclyde<sup>2</sup> in attitudes to alcohol advertising among 10-17 year olds indicate that 88% of 10-13 year olds and 96% of 14-17 year olds were aware of alcohol advertising and 76% of these (across the whole age range) could identify three or more advertisements when the brand name was masked.

A report from the US National Bureau of Economic Research found that alcohol advertising (the majority of which focuses on beer and spirits rather than wine) had a positive effect on the decisions young people make on whether to drink and how much they consume.<sup>3</sup>

A long-term national study in the U.S.<sup>4</sup> published in 2006 concluded that for each additional dollar per capita spent on alcohol advertising in a local market, young people drank 3% more.

<sup>1</sup> World Health Organisation European Charter on Alcohol (1995)-

[http://www.euro.who.int/Document/EUR\\_ICP\\_ALDT\\_94\\_03\\_CN01.pdf](http://www.euro.who.int/Document/EUR_ICP_ALDT_94_03_CN01.pdf)

<sup>2</sup> Aitken, P.P et al (1988) *Television advertisements for alcoholic drinks do reinforce under-age drinking*, British Journal of Addiction, Vol 83, no 12, pp.1399-1419

<sup>3</sup> *Alcohol Advertising and Alcohol Consumption by Adolescents* (National Bureau of Economic Research, Working Paper No. 9482: 2004).

4. L.B. Snyder et al (2006) *Effects of alcohol advertising exposure on drinking among youth*, Archives of Paediatrics and Adolescent Medicine 160: 18-24

5. <sup>5</sup> British Academy of Medical Sciences (2004) 'Calling Time – The Nation's Drinking as a Major Health Issue'

6. <sup>6</sup> Clinical Medicine, Journal of the Royal College of Physicians, Volume 9, Number 2, April 2009, pp. 121-124(4)

7. The Academy of Medical Sciences report Calling Times demonstrates a clear link between spending on alcohol advertising and children's drinking, as can be seen from Figure 1 below.

8. **Figure 1**

9. In his review of alcohol advertising research published in Clinical Medicine April 2009, Public Health Consultant Peter Anderson concluded that 'young people with more positive affective responses to alcohol advertising hold more favourable drinking expectancies, perceive greater social approval for drinking, believe drinking is more common among peers and adults and intend to drink more as adults'.<sup>6</sup>
10. **18.6** - *Marketing communications must not imply that alcohol might be indispensable, take priority in life or that drinking alcohol can overcome boredom, loneliness or other problems.*
11. We believe that proposed rule 18.6 should be amended to read:
12. *Marketing communications must not imply that alcohol might be indispensable, take priority in life or that drinking alcohol can overcome boredom, loneliness or other problems. Nor must they imply that drinking is an essential or normal part of daily routine.*
13. on a daily basis is not normalised, due to the long term health risks associated with frequent alcohol consumption.
14. **18.16** - *People shown drinking or playing a significant role must neither be nor seem to be under 25. People under 25 may be shown in marketing communications, for example in the context of family celebrations, but must be obviously not drinking.*
15. We believe that proposed rule 18.6 should be amended to read:
16. *People shown must neither be, nor seem to be, under 25.*
17. We believe that no-one who is under 25 or a child should be featured in advertisements in any capacity and that no exceptions should be made for advertisements that feature families socializing responsibly.
18. **18.5** - *Marketing communications must neither link alcohol with seduction, sexual activity or sexual success nor imply that alcohol can enhance attractiveness*
19. We believe that the wording of current rule 56.9 should be retained, which states that:
20. *Marketing communications must neither link alcohol with seduction, sexual activity or sexual success nor imply that alcohol can enhance attractiveness, masculinity or femininity.*
21. An alteration to this rule, as has been proposed, will allow advertisers to imply that alcohol can enhance masculinity or femininity. We do not agree that this is appropriate, as such attributes may not necessarily be included under the term 'attractiveness'.
22. **18.17** - *Marketing communications may give factual information about product contents, including comparisons, but must not make any health claims, which include fitness or weight control claims.*
23. We believe that proposed rule 18.17 should be amended to read:
24. *Marketing communications may give factual information about product content, including comparisons, but must not make any physical or mental health or wellbeing claims, which include fitness or weight control claims, or claims to enhance overall quality of life.*
25. We recommend a broader approach to the matter of the relationship between alcohol and health, which encompasses mental health. There should be no claims made that alcohol can promote wellbeing. There is increasing evidence to suggest that alcohol misuse can have a negative effect on an individual's mental as well as physical health. For many people, there can be a link between

problem drinking and

- 26.<sup>7</sup> Royal College of Psychiatrists factsheet, Alcohol and Depression - <http://www.rcpsych.ac.uk/mentalhealthinfoforall/problems/alcoholanddrugs/alcoholdepression.aspx>
- 27.<sup>8</sup> Knight, Robert G, *Neurological Consequences of Alcohol Use*, Chapter 7, International Handbook of
28. Alcohol Dependence, 2001, ed. Heather N, Peters T J, Stockwell in Institute of Alcohol Studies Factsheet, 'Alcohol and Mental Health'
29. psychiatric disorders. For example, the Royal College of Psychiatrists states that 'alcohol affects the chemistry of the brain, increasing the risk of depression.'<sup>7</sup> One US study found that 19.9% of the general population had one or more psychiatric disorders, but in those with alcohol abuse or dependence the figure rose to 36.6%<sup>8</sup>.

32. **18.9** – *Marketing communications may give factual information about the alcoholic strength of a drink or make a factual strength comparison with another product but, except for low-alcohol drinks which may be presented as preferable because of their low-alcoholic strength, must not otherwise imply that a drink may be preferred because of its alcohol content or intoxicating effect.*

We believe that proposed rule 18.9 should be amended to read:

35. *Marketing communications may give factual information about the alcoholic strength of a drink but must not imply that a drink may be preferred because of its alcohol content or intoxicating effect. They may not make a factual strength comparison with another product, except for low-alcohol drinks which may be presented as preferable because of their low-alcoholic strength.*
36. We believe that strength comparisons with other products should not be made, even if there is no implication that the drink is preferred because of its alcohol content and intoxicating effect. This is because the presentation of a strength comparison automatically infers that the product is preferable, even without the addition of further methods to imply that higher strength is preferable. For example, an advertisement which simply states that a type of beer is higher in strength than other beers, whilst using no additional techniques to imply that this is preferable, would be allowed under the new rule. We do not think that this is acceptable.
37. **18.3** - *Marketing communications must not imply that drinking alcohol is a key component of the success of a personal relationship or social event. The consumption of alcohol may be portrayed as sociable or thirst-quenching.*

38. We believe that proposed rule 18.3 should be amended to read:

39. *Marketing communications must not imply that drinking alcohol is a key component of the success of a personal relationship or social event. The consumption of alcohol may be portrayed as sociable, however alcohol should not be portrayed as superior in this regard to non-alcoholic drinks. Alcohol should not be portrayed as thirst quenching.*
40. Under the current wording, it could be possible for an advertisement to present an alcoholic drink as preferable to a soft drink in sociable situations. For example, we do not think it acceptable that a character should be seen to choosing an alcoholic drink over a non-alcoholic drink. We do not think that

alcoholic drinks should be portrayed

41. <sup>9</sup>Office for National Statistics – Alcohol-related deaths by occupation, England and Wales 2001-2005 -

[http://www.statistics.gov.uk/articles/hsg/Alcohol\\_related\\_deaths\\_by\\_occupation.pdf](http://www.statistics.gov.uk/articles/hsg/Alcohol_related_deaths_by_occupation.pdf)

42. as thirst-quenching in any instance. Alcohol is a diuretic, therefore their consumption can result in temporary dehydration of the body. We therefore feel that the presentation of alcoholic drinks as thirst-quenching is misleading, as this may be interpreted by the viewer as having hydrating properties, which would be an incorrect and unsafe conclusion.

43. **18.10** - *Marketing communications that include a sales promotion must not imply, condone or encourage excessive consumption of alcohol.*

44. We believe that proposed rule 18.10 should be amended to read:

45. *Marketing communication must not include sales promotion information.*

46. The advertising of alcohol sales promotions implicitly encourages higher sales and therefore greater consumption by the individual. At the very least, it promotes the message that it is desirable to buy, and therefore consume, large quantities of alcohol. There should be no promotion of alcohol which is being sold at a discount as part of a multi-buy promotion.

47. **18.13** - *Only in exceptional circumstances may marketing communications feature alcohol being drunk by anyone in their working environment.*

48. We believe that proposed rule 18.13 should be amended to read:

49. *Marketing communications must not feature alcohol being drunk by anyone in their working environment.*

50. We believe that there should be no exceptional circumstances in which an individual may be shown drinking in his/her working environment. We believe that only in a very small number of cases would this be appropriate and that it is an unnecessary exception, creating a vague rule which may be open to misinterpretation. Furthermore, we are concerned that such an exception seems to condone drinking in working environments in which alcohol is the norm, for example the retail drinks industry. Statistics show that alcohol-related deaths are higher among bar staff and publicans than among any other group surveyed. For example, male bar staff, publicans and managers of licensed premises have twice the proportion of alcohol-related deaths of men in England and Wales as a whole<sup>9</sup>. It is therefore unwise to promote the consumption of alcohol by anyone in their working environment.

This letter constitutes the response from the Department of Health to the consultation Addendum on proposed BCAP and CAP Codes of Advertising Practice. We have consulted the Department for Children, Schools & Families, who will also respond.

Our comments are as follows.

The consultation suggests that the Sheffield University review “does not offer persuasive evidence to support a proposal to further strengthen the alcohol advertising rules”.

Although the analysis in the Addenda appears to acknowledge the evidence statements in the Sheffield review, the conclusion does not appear to reflect the weight of the evidence statements and it appears that these may have been misunderstood. This is particularly the case for evidence statement 10, which found that:

“There is consistent evidence from longitudinal studies that exposure to TV and other broadcast media is associated with inception of and levels of drinking [by young people]”

It is also disappointing that the Addenda have not reviewed other recent developments in the evidence-base. We would like to bring to your attention the review by the European Alcohol & Health Forum’s Science Group whose findings were consistent with Sheffield’s conclusions. The Group also identified a dose response relationship between alcohol advertising and consumption by young people, finding that changes in exposure lead to proportionate changes in consumption.

We are also aware of other studies, which have taken place in recent years.

In light of recent evidence and the wider evidence base available, as well as taking into consideration growing public concern on this issue, at the very least we might expect:

- some discussion of research gaps and how they might potentially be filled
- whether the absence of a strong evidence base for particular interventions, particularly where little research has taken place, necessarily means that no impact should be expected from such interventions
- Further discussion of whether the evidence of a link between alcohol advertising and drinking of alcohol by young people requires an approach that looks to reduce the exposure of young people to alcohol advertising. Currently, the framework seeks to prevent targeting of young people. Even if such a change was thought premature, some discussion to indicate what nature and level of evidence might justify a different approach should, surely, be expected

I would be very grateful if you could consider the issues raised in this letter as part of the consultation process.