

PERIPATOS

Code Policy Team
Broadcast Committee of Advertising Practice
Mid City Place
71 High Holborn
London WC1V 6QT

Our PW
Ref:

Your
Ref:

18 June, 2009

BCAPcodereview@cap.org.uk

Dear Sirs,

Subject: The BCAP Code Review - Consultation on the proposed BCAP Broadcast Advertising Standards Code

We refer to the above consultation and would ask that you treat this letter as a formal response by Peripatos Limited in respect to the same.

Question 54

i) *Given its policy consideration, do you agree with BCAP's proposal to relax the present prohibition on TV advertisements for pornography products and allow them to be broadcast on encrypted elements of adult entertainment channels only?*

The use of the word "pornography" is very emotive and without qualification is likely to create in the mind of consumers a connotation with something that is distasteful or negative. It cannot reasonably be said that much of what appears on adult channels is "pornographic" in the modern day sense of that word. To that extent, the use of this word is misleading.

Question 97

i) *Given BCAP's policy consideration, do you agree to maintain the existing TV and radio requirements on advertisements for products or services concerned with the occult or psychic practices?*

Once again, the use of the word "occult" is very emotive. By combining the use of this word with the reference to psychic practices – as if to imply that they are one and the same thing – is misleading. Modern day psychic and tarot offerings on broadcast television are a highly popular programme genre. There can be no reasonable justification for a ban on advertising such services.

Question 122

Given BCAP's policy consideration, do you agree that proposed rules 22.1 to 22.6 and

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22.8 should be included in the proposed BCAP Code?

We cannot see why there is a need for BCAP to become involved in the regulation of premium-rate-services. These services are already subject to substantial regulation by PhonepayPlus.

Question 124

Given BCAP's policy consideration, do you agree that TV advertisements for PRS of a sexual nature should be allowed on encrypted elements of adult entertainment channels only?

We are concerned that information given to BCAP by Ofcom has either been inaccurate or that BCAP have failed to accurately present that information.

In support of this assertion we would refer to paragraph 22.43 of the consultation which states states "Between February 2006 and February 2009, Ofcom received around 200 complaints about Participation TV services" including complaints about "drunken female presenters".

At BCAP's suggestion, we wrote to Ofcom under the Freedom of Information Act requesting further details.

Ofcom confirmed that "the around 200 complaints" was in fact 153 complaints, almost 25% less than the figure cited by BCAP.

Of the 153 complaints, only 27 resulted in a finding of breach of the Ofcom Broadcasting Code of which sex/nudity comprised 24, use of premium rate numbers 1, inaccuracy/misleading 1 and scheduling 1.

Of the 27 breaches, 4 were for a breach of Licence Condition 11 – Failure to Supply a Recording (i.e. not relating to the content of the broadcast).

There was one complaint concerning "*drunken female presenters*". This one complaint did not result in breach of the Ofcom Code. Accordingly, there have been no Ofcom reports regarding "*drunken female presenters*".

The failure to accurately present key information is simply not acceptable.

Quite clearly the information presented by BCAP in paragraph 22.43 is neither accurate nor is it fairly presented.

We are of the view that this example must cast doubt on the veracity of all "evidence" presented by BCAP in the consultation document unless BCAP are able to unequivocally confirm that they took all reasonable steps to independently verify the accuracy of the information on which they have relied in support of their policy proposals and that having done so they believe the presentation of that information in the consultation document has been both fair and transparent.

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19th June 2009

Dear Sir/Madam

I am writing to you on behalf of the Church members that I pastor to express our serious concern about the two issues you are consulting about.

We are fully opposed to allowing abortion adverts on TV under any circumstances. In addition we feel it is inappropriate to allow condom adverts to be shown before the 9pm watershed.

Abortion is a highly emotive and controversial issue and we simply feel that adverts, by their very nature are entirely inappropriate to advertise such a service in a balanced and responsible way.

Advertising condoms before the 9pm watershed risk exposing children to inappropriate material. Parents must feel safe and confident in allowing their children to watch TV before the watershed and this proposal clearly challenges this position.

Thank you for considering our comments.

Yours faithfully,

Alastair Gray
Pastor,
The Wheatsheaf Christian Community Church

The WSTA is the UK lobbying organisation for the wine and spirit industry representing over 320 companies producing, importing, transporting and selling wines and spirits. We campaign to promote the industry's interests with governments at home and abroad. We work with our members to promote the responsible production, marketing and sale of alcohol.

We support the BCAP self-regulatory system and are pleased to respond to the consultation on the BCAP Code Review.

Due to the remit of our organisation we have limited our comments to the parts of the consultation that deal with alcohol. We have also incorporated our response to the BCAP Code Review Consultation Addendum concerning the SchARR review.

Responses to Consultation Questions

Question 111

We agree that rule 19.11 should be included in the proposed BCAP Code.

Question 112

We agree that rule 19.12 should be included in the proposed BCAP Code.

Question 113

We believe the aim of this proposed change is to bring the Code in line with the requirements of the European Regulation on Health Claims 1924/2006 which sets out the restrictions within which alcoholic drinks can be marketed on the basis of health or nutritional claims. This is entirely logical and we believe that the requirements of this Regulation sufficiently safeguard consumers. In our view it is important that there is consistency of application between the Code and the European Regulation and we are not entirely clear that the current proposal is completely in line with the Regulation.

We also have a concern that whilst the aim of both the Regulation and the proposed Code clause is to restrict the promotion and marketing of alcoholic products on grounds of alcoholic strength that these rules have the possible unintended consequence of making it harder to market, promote and advertise a wider range of lower / reduced alcohol drinks and particularly wines.

In the United Kingdom there is interest in broadening the range of lower alcohol wines to provide the consumer with greater choice. The UK Government and the Scottish Executive are both seeking to encourage the Alcohol Drinks Industry to provide a wider range of lower alcohol products as are many health stakeholders. Research indicates that consumers are interested in having the option to choose lower alcohol wines¹. Most of the UK multiple retailers are seeking to list new lower alcohol products and some producers and agents are keen to supply them. According to Mintel, both the value and volume of sales of Low Alcohol Drinks in the UK have increased by around 10 per cent in the last two years.

We are concerned that this rule will inadvertently stifle the creative treatment that can be afforded to advertisements for such drinks and make it more difficult to promote lower / reduced alcohol products.

We do not believe measures that restrict the way products with reduced alcohol can be marketed is consistent with the policy aims of Government. We recognise the intent of the rule to restrict advertising of higher strength products on grounds of their alcoholic strength but we believe that as long as a product can cite a reference point for comparatively 'lower' alcohol levels it should be allowed the freedom to market products based on their reduced alcoholic strength.

Question 114

¹ WSTA / Wine Intelligence Consumer Intelligence Report May 2007.

We agree that rule 19.14 should be included in the proposed BCAP Code.

Question 115

We agree that rule 19.17 should be included in the proposed BCAP Code.

Question 116/117

We support the aim of creating consistency between the broadcast codes, while we believe there is merit of normalising the consumption of low-alcoholic drinks, especially among young adult drinkers.

Question 118

i) Subject to the issues raised in our answer to question 113, we believe that measures that fulfill directive 1924/2006 on health and nutrition claims are necessary in relation to lower alcohol drinks and that further action in this area is unnecessary and likely to hamper growth in the burgeoning market for drinks with lower alcohol levels.

ii) We have no further comments.

iii) We have no further comments on this section

Question 158 (Addendum)

We agree that the evidence contained in the ScHARR Review does not merit a change to BCAP's alcohol advertising content or scheduling rules.

Re: BCAP Code Review Consultation

Wyeth Consumer Healthcare 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 broadcast Advertising Standards Codes 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.

Wyeth Consumer Healthcare 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 amendment to allow sales promotions for medicines on radio.

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;

- extend list of target groups to whom vitamins and minerals can be advertised. The list is now much more closely aligned to current research and offers far more scope to enable companies to target supplements to those who are most likely to benefit.
- 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.

I am writing to respond to the BCAP Code Review consultation.

I would like to respond to the questions regarding family planning centres and condoms.

As a Governor of a local school, I believe it is essential that young children should be given the knowledge to protect them from experiencing sexually transmitted diseases and unintended pregnancies. As well as receiving relevant tuition in schools, children should also be able to access useful commercial information - provided the advertisements do not possess sensationalist or misleading content.

TV already advertises tampons and other medically-related products so I see no valid objection to the proposed family planning centres and condom advertisements.

Family planning centres

At a time when the UK is leading Europe in unplanned under-age pregnancies, I agree with BCAP's proposals on changing the rules on advertising of post-conception advice services:-

(1) to allow post-conception pregnancy advice services the freedom to advertise; and
(2) to ensure that advertisements for those services make clear whether the service refers a woman for abortion.

I agree with BCAP that it is important to make clear whether a service refers women for abortion because, for those women who opt for it, delay in performing an abortion could result in medical complications.

I would also recommend that within the non-broadcast advertising code, the rule requiring services to declare whether or not they refer women directly for abortion is replicated.

Condoms

In order to protect our young children from harmful sexually transmitted infections, I strongly agree with BCAP's proposals to remove restrictions preventing advertising condoms before the 9 p.m. watershed, except for preventing adverts for condoms taking place during or adjacent to programmes principally directed at or likely to appeal to children under the age of 10. Something has to be done to stop young women dying in their mid-20s and you are in a unique position to help save their lives.

Thank you,

John Dowdle
President
Watford Area Humanists

Welsh Assembly Response

I am writing on behalf of the Welsh Assembly Government in response to the Broadcast Committee of Practice (BCAP) Code Review Consultation in respect of alcohol, and in particular its proposed response to the findings of 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). The Welsh Assembly Government disagrees with the conclusion that the findings of the SchARR review do not merit a change to BCAP's alcohol advertising content or scheduling rules.

The Welsh Assembly Government is committed to taking strong action to tackle the harms associated with excessive consumption of alcohol, and our position is set out in our 10 year substance misuse strategy, 'Working Together to Reduce Harm', which calls for stricter controls on the promotion of alcohol.

Welsh Ministers set out our position on alcohol advertising in a recent letter to the UK Government. We believe that the controls on where, when and how alcohol can be advertised should be made more restrictive and that serious consideration should be given to a total ban on such advertising. We were encouraged to note the recent BMA resolution calling for a total ban.

Our view is that the SchARR review supports that position: amongst other things it found conclusive evidence of a small but consistent association of advertising with consumption at a population level, and evidence of small but consistent effects of advertising on consumption of alcohol by young people at an individual level. It also highlighted consistent evidence from longitudinal studies that exposure to TV and other broadcast media is associated with inception of and levels of drinking. Your conclusions do not appear to fully reflect the weight of the evidence statements in the SchARR review.

We accept that there are some remaining uncertainties in respect of some aspects of the evidence. However, given the very significant harms that are associated with excessive consumption of alcohol, we believe that there is sufficient evidence for more restrictions on advertising, particularly to reduce the exposure of young people to alcohol advertising as far as is reasonably practical. Tackling alcohol misuse requires a range of interventions that can deliver a cumulative impact, as was the case with initiatives to tackle smoking. We do not accept the view that each individual element of such a multi-faceted approach has to have a large effect. There will always be uncertainties in the evidence base for any form of intervention in this area, but our firm view is that the extent of the harms associated with alcohol are such that we should be taking a precautionary approach, rather than using the uncertainties in the evidence as an excuse for inaction.

In conclusion, it is our firm view that a range of interventions are required if we are to effectively tackle the harms associated with alcohol misuse, and more restrictive controls on the extent of alcohol advertising must form part of a co-ordinated approach to reducing the excessive consumption of alcohol across the UK.

Yours sincerely

Joanna Jordan

Director, Community Safety Division

Consultation response

BCAP Code Review

Code Policy Team

Broadcast Committee of Advertising Practice

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BCAPcodereviewquestions@cap.org.uk

DATE: 19th June 2009

TO: Code Policy Team

RESPONSE BY: 'Pula Houghton

Economic Policy Manager

Which?

2 Marylebone Rd

London

NW1 4DF

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

Submission by Which?

INTRODUCTION

Which? is an independent, not-for-profit consumer organisation with around 700,000 members and is the largest consumer organisation in Europe. Which? is independent of Government and industry, and is funded through the sale of Which? consumer magazines, and books.

A) GENERAL COMMENTS

Thank you for this opportunity to respond to this important consultation. We are broadly supportive of the work that the ASA does through the CAP and BCAP codes. On the positive side we are encouraged that membership is near universal and the complaints handling procedure has been improved in recent years. We were also encouraged to read in the recent annual report that the ASA has been effective in increasing the number of upheld rulings in cases that have been subject to formal investigation. However, whilst this is encouraging, it is a concern that the number of complaints has continued to rise. We also have a number of specific concerns about complaints handling and sanctions.

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In addition to our views on the operation of the codes, we also have a number of comments to make on the detail of the codes. Whilst we believe that the CAP and BCAP codes are robust in many respects, there are some areas where we believe they need to be strengthened. We have not commented on all of the questions in the consultation but have kept our comments to the areas in which we have specific experience. In particular, this includes environmental issues, cosmetic surgery, food marketing and responsible lending.

B) OPERATION OF THE CODES

Complaints Handling

We believe that the complaints process has improved over the years. The internet has helped with this and it is welcome that complainants surveyed by the ASA say that the ASA is easy to contact. This is clearly reflected in the high levels of traffic via e-mail and the online complaints form on the ASA website. Whilst these improvements are welcome, we have been disappointed on a number of occasions with the way that some of our complaints have been dealt with. Our concerns in this area focus on both the way in which decisions are made and also with their speed.

On decision making, we are concerned that the ASA's decision-making process seems to focus too heavily on the company being complained about. From our

experience, the advertiser can throw considerable resource into defending themselves to the ASA while the complainant is excluded from the discussion process, only being informed of the final result. We have also had occasional concerns about the evidence that is used in order to come to a conclusion. Our recent complaint that a Rice Krispies advertisement was misleading was not upheld. The most surprising aspect of this was a refusal by the ASA to take account of Food Standards Agency advice on what is classed as high in fat, sugar or salt. It instead based its decision on the arguments put forward by the company concerned, Kellogg's. In light of this, we would like some thought to be given to the independence and transparency of the experts that the ASA consults when adjudicating on technical matters, the breadth of that advice and the weight given to existing advice given by relevant government departments.

Our other concern on complaints relates to speed. In the case of the Ferrero Nutella complaint it took over 5 months for the ASA to reach a final decision. By that point any damage caused by the advertisement was irreversible and the firm in question had been able to generate considerable revenue in the interim. We believe that it is essential that those who flout the rules are dealt with briskly and firmly. Not only are campaigns frequently long finished by the time the ASA makes a ruling, the

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ruling can take so long that there's not even a memory of the campaign left in public memory. We would like to see consideration of a time limit for decisions to be completed. This would stop companies dragging out the process to minimise impact on their business if a ruling is made against them.

Sanctions

On sanctions, we are of course aware of the range of sanctions available to deal with transgressors and we are broadly supportive of these. In particular, we believe the power to name and shame is an essential and particularly effective tool. However, we are concerned that in some cases by the time a complaint has been made, investigated and ruled upon, the advertisement has often run its course and so any publication of the adjudication and call for removal of the advert will have little impact. To remedy this, we would like the ASA to consider requiring advertisers to put as much resource into corrective advertising as they have spent on the original campaign. Further to this, in cases of expensive products, advertisers should be required to contact individual consumers directly to correct misleading impressions.

Scope

Our final point on process relates to the scope of the Codes. In particular, we are concerned that areas such as product packaging, sponsorship and company websites are not covered. As stated in the annual report, it is concerning that the ASA were unable to investigate 65% of the 3,571 complaints it received about internet advertising because they were on company websites and therefore outside its remit. Consideration should be given to how to ensure that the information given on these other non-broadcast channels, to which marketing successfully drives ordinary consumers, is legal, decent, honest and responsible.

C) COMMENTS ON CONTENT

Chapter 2: Recognition of Advertising

Question 3

ii) Given BCAP's policy consideration, do you agree that rule 2.3 should replace present TV rule 2.2.2 (d), be applied to TV and radio and be included in the proposed BCAP Code? If your answer is no, please explain why.

We are concerned about the proposed replacement to rule 2.1.2(a). In our view, the change of wording to "needs special care" is vague and far too subjective.

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Chapter 4: Harm and Offence

Question 25

Do you agree that proposed rule 4.10 should be included in the proposed BCAP Code? If your answer is no, please explain why.

We agree in principle with adding rule 4.10. However, we question the use of the word 'grossly'. We note that the reason for this appears to be to reflect the wording in the Audiovisual Media Services Directive. If the word 'grossly' is not required for this reason, we would recommend that it be removed. Otherwise, advertisers have too much leeway in terms of creating advertisements that could be said to encourage environmentally-damaging behaviour.

Chapter 5: Children

Question 31

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

i) TV rule 7.3.4

ii) Radio rule 11.11 a), section 2

iii) Radio rule 11.11 b), section 2

iv) Radio rule 11.12, section 2

Whilst there may be some truth to the notion that in principle children are protected by other legislation, we are concerned that children are more vulnerable (as are the children listening / watching other children). Children are far more easily influenced and for that reason we consider that removing these sections from the code is neither justified nor necessary.

Question 35

Given BCAP's policy consideration, do you agree that the proposed Code should not require 'generic advertising for news media' to be immediately withdrawn if a complaint is registered that a TV advertisement of that type has featured an individual without his or her prior permission? If your answer is no, please explain why.

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We are supportive of this proposal in principal. However, there are risks associated with it. As such, we would support the provision not to require the immediate withdrawal of 'generic advertising' on the condition that the ASA commit to fast tracking any individual complaints and committing to making a decision within a max of 7 days. It would not be acceptable for an individual to suffer ongoing harm for longer than this timeframe.

Chapter 8: Distance Selling

Question 42

Given BCAP's policy consideration, do you agree that present TV rule 11.2.3 (a) and (b) and present Radio rule 21.1 j) (i)-(ii) of section 2 should not be included in the Code? If your answer is no, please explain why.

We do not share the view that data protection law will protect the consumer.

These are two separate issues. Data Protection laws will protect the consumer from a company misusing their personal data but the consumer should still be advised that a representative may turn up at their home as it is intrusive and is central to the terms of the advertisement.

Chapter 9 Environmental Claims

General Comments

It is important that consumers are able to trust environmental claims but, at present, they have a low level of trust. 59% of Which? members agreed with the statement that 'Green claims made by products are just marketing hype with little or no substance'¹.

A 2009 survey by Which? found that only 21% of members trust that the green claims made by products/companies are always true. Despite this low level of trust in green claims, 56% of people are more likely to buy a product with a green claim than without². Our survey also found that 63% of members agreed that 'there are so many green claims made that I don't know which ones I should respond to'. IPSOS

¹ Which? online panel omnibus survey 10B 23908. A total of 2,500 online panel members completed the survey and fieldwork took place between 21 and 29 February 2008.

² Survey carried out using the Which? online panel omnibus in February 2009. A total of 1,981 members completed the survey.

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Mori research too found that 78% of people agree that it is difficult to know which products are better for society and the environment³.

Consumer confidence in green claims needs to be increased and greenwash needs to continue to be tackled. Doing so will also help marketers given that the majority of consumers are more likely to buy products with green claims. The ASA recognises that 'ambiguous, misleading or exaggerated claims risk generating scepticism and undermine the genuine initiatives that many businesses are taking to be greener'⁴. Green claims are becoming more prevalent and many recent ASA adjudications relate to green claims. The ASA has also seen a rising trend in the number of green complaints (although the number of complaints in 2008 was less than in 2007). The ASA has an important enforcement role, giving fair and considered adjudication judgments which strengthen consumer trust. Which? welcomes the increasing emphasis that the ASA has given to green claims in recent years. The training seminars on green claims that it runs and the Copy Advice Service are both useful.

Problems of Duplication

One key concern that we have in this area relates to the overlap and duplication in the rules surrounding green claims. Specifically, we highlight the need to look at the CAP/BCAP Codes and Advice Online, in addition to the Government's Green Claims Code and its accompanying Practical Guidance too as well as international standard ISO 14021 and the Carbon Trust Code of Good Practice. This makes it hard for us, and indeed for consumers, to know where to look for clarity. We would also question whether it is also confusing for the industry.

Which? considers it preferable that the Codes are, and are seen as, the primary source of rules in this area, functioning on a stand-alone basis. However, the Green Claims Code is wider than the CAP and BCAP Codes because it has a wider purpose, applying to all sorts of environmental claims (in addition to advertisements), including labels on products. As the Green Claims Code is currently being revised too, the ASA and Defra, working together, must ensure that the two code review processes deliver Codes that are consistent with each other. They must not be considered separately.

³ http://www.ipsos-mori.com/_assets/reports/turning-point-or-tipping-point.pdf

⁴ ASA Environmental Claims Survey 2008, page 5 <http://www.asa.org.uk/NR/rdonlyres/363BF883-0686-45AE-BEA0-D1D99507869E/0/EnvironmentalClaimsSurvey2008.pdf>

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The proposed CAP and BCAP Codes state that advertisers need to 'take account of' the Green Claims Code. It must be made clear what this means. Does this mean that the ASA will find a breach of the CAP/BCAP Code if it sees clear evidence that advertisers have departed from the Green Claims Code? Which? prefers this, because, if not, the principle is meaningless in terms of consumer protection. It won't give consumers any protection if an advertisement complies with the 'spirit' of the GCC, and not the 'letter'; and advertisers will not need to pay much attention to the GCC because they can't be found in breach.

If it does mean this, there will be a stronger system but, in light of the nonstatutory basis for the GCC, we question how it will work in practice. Key questions relate to the level of awareness and understanding of the GCC amongst advertisers. We would also question how to ensure that all of these codes stay up-to-date in this fast-moving area. In particular, we recognise the challenges that the ASA already face in this area due to insufficient "benchmarks, clear advice or guidance from Government"⁵. We would support the call for the Government to provide clarity at a national level. One reason why consumers are confused is that terms such as 'carbon neutral' are poorly defined and therefore understood. The Government needs to do more to ensure that there are definitions⁶, and the ASA, CAP and BCAP

need to ensure that the new Code mechanisms take account of changes in such definitions.

We also wonder whether more could be done to bring clarity to the ASA's own guidance. In particular, we sometimes find it confusing to navigate around the various pieces of guidance, including: the entries in the ASAs' AdviceOnline database, which currently includes nine entries specifically on environmental claims; the ASA Checklist for Green Advertisers; the International Standard ISO 14021 on Environmental Labels and Declarations; Defra sector-specific guidance on green claims; the Chartered Institute of Public Relations Best Practice Guidelines for Environmental Sustainability Communications; and the Carbon Trust Code of Good Practice for Product GHG Emissions and Reduction Claims.

One option for the ASA, CAP and BCAP would be to consolidate all of their guidance into one online environmental claims section on the ASA website. Split into

⁵ ASA Event Report – Environmental Claims in Advertising: Is green a grey area, report of a stakeholder consultation seminar held in June 2008, available at <http://www.asa.org.uk/NR/rdonlyres/DF623BCD-B9B0-4AAE-A075-2478DFABA0E9/0/EnvironmentalClaimsSeminarReport.pdf>

⁶ The Government is currently consulting on the definition of the term carbon neutral, for example, and states that it will include the outcome of the consultation in the revised Green Claims Code. See page 5, http://www.decc.gov.uk/en/content/cms/consultations/open/carbon_neutrality/carbon_neutrality.aspx

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sections, it would be easier to navigate, allowing updates to be made to particular documents and with links to the relevant parts of the CAP and BCAP Codes. As a public database, this could be accessed by advertisers, consumers and consumer organisations alike.

Finally, we would like to ensure that there is an appropriate mix of principles, rules and examples. It is important that general principles are sufficiently broad to cover all types of claims. However, in some cases, they must be more explicit (see detailed comments below) to provide clearer guidance. To support this, more illustrative examples of green claims interpretation would be useful as would making clear that there is additional illustrative guidance available (e.g. in the AdviceOnline database).

It is important that the ASA is given and applies sufficient resources to environmental claims to enable what are often quite technical assessments (e.g. the recent adjudication on the sustainability of biofuels⁷) to be properly evaluated, applying environmental and scientific expertise where appropriate. Where the ASA does not have internal expertise, it must continue to seek independent external expert advice. There may be scope for the ASA to form a panel of experts they can use on a regular basis.

Question 45:

(i) Given BCAP's policy consideration, do you agree that it is justifiable to take the approach of the present Radio Code and provide detailed rules on environmental claims in a dedicated section of the BCAP Code? If your answer is no, please explain why.

We agree with this proposal. It is important that the BCAP, like the CAP, includes detailed rules to be strong and robust. Which? considers that 'greenwash' is a significant issue. Not only is there a high number of complaints to the ASA about environmental claims, but many consumers find claims confusing. Evidence includes:

> In a Which? survey of members in February 2008, 59% agreed with the statement that 'Green claims made by products are just marketing hype with little or no substance'⁸

⁷ Adjudication of 14 January 2009 http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_45582.htm

⁸ Which? online panel omnibus survey 10B 23908. A total of 2,500 online panel members completed the survey and fieldwork took place between 21 and 29 February 2008.

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> In a more recent survey by Which? only 21% of members trust that the green claims made by products/companies are always true. Despite this low level of

trust in green claims, 56% of people are more likely to buy a product with a green claim than without⁹.

> Our survey also found that 63% of members agreed that 'there are so many green claims made that I don't know which ones I should respond to'. IPSOS Mori research too found that 78% of people agree that it is difficult to know which products are better for society and the environment¹⁰.

> Nearly 60% of consumers say that green claims of the retailers and manufacturers they buy from are either 'not very' (46%) or 'not at all' (11%) credible¹¹.

> The BCAP 2007 research shows a high level of consumer scepticism about environmental claims.

> The House of Commons Environmental Audit Committee, in its recent report on Environmental Labelling, concluded that there is a growing problem with greenwash¹².

The Radio Code approach seems sufficiently detailed to provide consumers with a reasonable level of protection and advertisers with reasonable certainty about the rules. Also, it is not too detailed to constitute an unreasonable burden on advertisers. It is appropriate for the new rules to be outside Section 3 because advertisements should not just avoid being misleading but should also be relevant, specific and unambiguous (as set out more fully in the Defra Green Claims Code Practical Guidance).

We consider that the former (i.e. present) Television Code approach, by contrast, does not go far enough. Any calls from advertisers to maintain the current approach should therefore be resisted. In particular, it calls only for green claims to be substantiated and for adverts not 'to encourage or condone behaviour prejudicial to the environment'. This is aimed at prohibiting advertisements that condone/encourage environmentally damaging behaviour (e.g. to drive an off road vehicle through a nature reserve) but is not relevant to ruling on green claims about a particular product. Therefore additional rules are required.

⁹ Survey carried out using the Which? online panel omnibus in February 2009. A total of 1,981 members completed the survey.

¹⁰ http://www.ipsos-mori.com/_assets/reports/turning-point-or-tipping-point.pdf

¹¹ Research by YouGov for LEK Consulting in 2007, 2,039 UK consumers were interviewed online for the LEK Carbon Footprint Report

http://www.lek.com/UserFiles/File/Carbon_Footprint.pdf

¹² <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmenvaud/243/243.pdf>

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It is proposed to remove the statement that "licensees must satisfy themselves that any departure from this best practice [i.e. ISO 14021 and Defra Green Claims Code] is justified". We do not agree with this deletion. The consultation does not explain why this statement has been removed. Either this statement should remain or it should be made explicit that 'take account' means that it must be followed or otherwise an advertisement will be in breach.

At the same time, we agree with the ASA that a lack of official definitions of terms such as 'carbon neutral' has made assessments of green claims difficult.

Government must do more to generate and update official definitions of terms such as this in common use and the ASA, CAP and BCAP need to ensure that the new Code mechanisms take account of changes in such definitions.

(ii) Taking into account BCAP's general policy consideration, do you agree that BCAP's rules on Environmental Claims are necessary and easily understandable? If your answer is no, please explain why?

We agree that these rules are necessary and understandable. However, the proposed rules do not provide sufficient consumer protection because it is not clear that they are sufficiently comprehensive. Detailed comments are as follows.

In rules 9.2 and 9.3, it is good to see that the onus is on the advertiser to use terms that consumers understand and that the basis of the environmental claim must be made clear. This is an important provision.

We find rule 9.7 confusing and suggest some alternative wording.

The first sentence does not recognise the reality that any product has some adverse effect on the environment, of varying degrees. Some products have environmental benefits too. For example, a solar panel generates energy but its production also uses energy, raw materials and causes pollution. This means that the second part of the sentence is unclear too. We suggest an alternative first sentence: "Marketing communications must not imply that the changing of a formulation to improve the product has an environmental benefit unless the basis for improved total environmental benefit over that of the marketer's previous product is clear". The key is to ensure that changes in formulation are only marketed as green when they do lead to a genuine environmental improvement.

We also have concerns about the second sentence: "Marketers may, however, claim that a product has always been designed in a way that omits an ingredient or process known to harm the environment". The damaging ingredient or process

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omitted might be insignificant in terms of the overall environmental impact of the product. The rule should only allow claims that are about changes that are significant in terms of the overall environmental impact of the product (and should be consistent with the proposed rule 9.5 on life cycle impacts). We also suggest that the rule should only allow claims where competitors' products use that damaging ingredient or process. Otherwise there is surely a risk that this rule will allow irrelevant claims about insignificant environmental impacts.

In rule 9.8, the scope of "Marketing communications must not mislead consumers about the environmental benefit that a product offers", with two illustrative examples, is not clear. This rule is one of the more fundamental ones and its scope and application should therefore be spelt out. Yet it is not clear on the face of it whether it applies to claims of:

- > A product being the cleanest in its class but yet that product class is inherently damaging to the environment;
- > A product is e.g. biodegradable, but all products used for that purpose share that characteristic.
- > A product 'contains twice as much recycled content than before', if the original amount of recycled material was very small.

We consider that the Code should clarify that this Rule is intended to prohibit a broad range of misleading claims, including claims that are not relevant to the product and the environmental issues connected with it. Additional examples would be useful. Or fuller examples could be included in the separate Help Notes or Guidance.

Our final suggestion is around benefits. Green claims generally market green benefits, however on occasion they may relate to environmental 'costs' e.g. to reduction of the adverse impact of the advertiser's own product or the adverse impact of competing products. Which? suggests that the proposed new rule 9.8 be widened to "Marketing communications must not mislead consumers about the environmental benefit or adverse impact of a product" to cover these situations.

Question 46:

Do you agree that, provided the claim is thoroughly explained and does not mislead consumers about the product's total environmental impact, it is reasonable to allow a claim about part of an advertised product's life cycle?

We agree with rule 9.5. It is much clearer than the existing rule (BCAP Radio Code 5a)).

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It is unrealistic to rule out claims that deal only with part of the lifecycle (e.g. the energy efficiency of a television or the water used by a dishwasher). Which? agrees that environmental claims should be based on the full lifecycle, and, if not, that the advertisement must make this clear. We agree that in these cases it is

important to ensure that the marketing communication states that the claim is based on part only of the life cycle. Another key provision, that we strongly support, is that 'Marketers must ensure claims that are based on only part of the advertised product's life cycle do not mislead consumers about the product's total environmental impact'.

Question 47

i) 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?

ii) Do you have other comments on this section?

We agree with inclusion of the principle to take account of the Green Claims Code. But BCAP proposes to remove the statement that "licensees must satisfy themselves that any departure from this best practice [i.e. ISO 14021 and Defra Green Claims Code] is justified". As stated in the response to question 45, we not agree with this deletion, and nor is it clear why it is being made. Either this statement should remain or it should be made explicit that 'take account' means that it must be followed or otherwise an advertisement will be in breach.

Chapter 10: Prohibited Categories

Question 48

i) Given BCAP's policy consideration, do you agree that unregulated collective investment schemes should be a prohibited category of broadcast advertisement, with the caveat that, if a broadcaster can demonstrate compliance with COBS 4.12, BCAP may grant an exemption? If your answer is no, please explain why.

ii) Do you agree that rule 10.1.9 should be included in the new BCAP Code? If your answer is no, please explain why.

We do not agree that BCAP should grant an exemption for unregulated collective investment schemes if they can demonstrate compliance with COBS4.12. TV

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advertisements often have the potential to be misleading and we would be concerned about granting an exemption if it did not come with specific requirements for TV advertisement relating to finance - such as clear terms / time that the significant terms must be shown on screen.

Question 49

i) Given BCAP's policy consideration, do you agree that the ban on TV and radio advertisements for betting tips should be relaxed? If your answer is no, please explain why.

ii) Given BCAP's specific policy objectives to protect under 18s and the vulnerable and to prevent misleading and irresponsible claims in betting tipster advertisements, do you agree that BCAP's proposed rules are necessary and easily understood? If your answer is no, please explain why.

We remain to be convinced that bans on TV and radio advertisements for betting tips should be relaxed. People who are interested in betting tips can find out the information they require in other ways. There is a clear need to maintain a proper balance between potential harm versus the benefits.

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.

Consumer or personal problems could involve serious financial or mental health concerns. We are not convinced that there is any need to change rules where potential harm to the consumer from inadequate advertisements is obvious and

where complaining under the codes will not be able to rectify the damage caused.
Question 54

i) Given its policy consideration, do you agree with BCAP's proposal to relax the present prohibition on TV advertisements for pornography products and allow them to be broadcast on encrypted elements of adult entertainment channels only? If your answer is no, please explain why.

ii) Given its specific policy objective, do you agree that BCAP's proposed rules are necessary and easily understood? If your answer is no, please explain why.

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iii) Given BCAP's policy consideration, do you agree that advertisements for R18-rated material should be permitted to be advertised behind encrypted elements of adult entertainment channels only but that the content of those advertisements themselves must not include R18- rated material or its equivalent? If your answer is no, please explain why.

We remain to be convinced that the case has been made to relax the decision to prohibit TV advertisements for pornography products. If people are interested in those types of products they are able to source them in other ways (on the internet / shops). If they have already been able to sign up to an encrypted TV channel they will be able to locate the products that they want without the TV codes being relaxed.

Chapter 12: Weight Control and Slimming

Question 70

Given BCAP's policy consideration, do you agree that advertisements for establishments that provide immediate weight loss surgery are acceptable but those must not refer to the amount of weight that can be lost? If your answer is no, please explain why?

We are concerned that the phrase 'broadly equivalent requirements' is too vague. It is not clear how this would be interpreted.

Question 74

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

We remain to be convinced that just because you have a BMI over 30 it is safe to advertise non-prescription medicines that require the involvement of a pharmacist. Pharmacists are not doctors. They inform of side affects and how to take the medicine but they do not take any previous medical/ family history or assess mental suitability before dispensing treatments.

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Chapter 13: Food, Dietary supplements and Associated Health and Nutrition Claims

Which? welcomed the adoption of EC Regulation 1924/2006 on nutrition and health claims made on foods. This included several aspects which should ensure that consumers are not misled by health and nutrition claims on food, including:

- > defining the criteria for use of nutrition claims within an annex to the Regulation

- > ensuring that health claims have to be independently assessed by the European Food Safety Authority (EFSA) and approved by the European Commission and Member States

- > requiring the establishment of nutrient profiles to ensure that health and nutrition claims cannot misleadingly suggest that foods high in fat, sugar or salt, for example, are beneficial for health.

We therefore support the inclusion of the provisions of the Regulation within the

review of the CAP and BCAP Codes as they are a legal requirement. The situation is complicated as the Regulation has still not been fully implemented and some aspects, such as the development of nutrient profiles, which should have been agreed by now, are still under discussion. This makes it difficult to be categorical within the Codes at this stage and means that they may need to be updated again shortly to reflect the legal situation. We therefore agree with the proposed wording which advises advertising industry stakeholders to take advice on the effect of the Regulation on their products and associated health claims.

However, although reference is made to the requirements of Articles 8(1), 10(1) and 28; Article 3; Article 9; Article 12, Article 11 and Article 14 are systematically considered in the review, we are concerned that no reference is made to Articles 4, 5, 6 and 7 and believe that these also need to be addressed as:

- > Article 4 establishes conditions for the use of nutrition and health claims in the form of nutrient profiles.

- > Article 5 establishes general conditions ie. the conditions that have to be met for health and nutrition claims to be permitted (eg. that the nutrient or other substance for which the claim is made is contained in the final product in a significant quantity or is in a form that is available to be used by the body).

- > Article 6 explains the level of scientific substantiation required for nutrition and health claims.

- > Article 7 requires nutrition information to be provided if a nutrition or health claim is made.

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Advertising and promotion of foods to children

Section 15 of the CAP review and Section 13 of the BCAP review both refer to concerns about the advertising and promotion of foods high in fat, sugar and salt (HFSS) to children.

The CAP Code Review (15.8-15.12) refers to the revisions that were made to the CAP Code in 2008 and states that 'these changes took account of clear sociopolitical concerns about the marketing of foods to children and to pre-school and primary school children in particular'. The consultation document refers to the specific changes that were made to the CAP Code (ie. specific prohibitions on the use of celebrities, licensed characters and promotions in food marketing communications targeted directly at pre-school and primary school children). CAP notes 'the overwhelming and explicit political impetus to tackle TV food advertising to children; the role that dedicated TV programmes and TV channels played in justifying the scheduling restrictions on TV HFSS food advertisements; the audio-visual impact of television and its place in the family home; the significant spend on TV advertising and the comprehensive qualitative and quantitative research that had supported Ofcom's decision to intervene in TV HFSS food advertisements.' It states that these factors are not relevant to non-broadcast marketing communications and do not, in themselves, justify equivalent restrictions in other media.

The BCAP Code Review (13.13-13.22) refers to the revised content rules included within the television and radio codes which came into force from 1 July 2007 and 16 December 2007 respectively. No proposals are made to extend these restrictions further.

Although we appreciate the enormous amount of debate that there has already been around this issue and recognise that CAP and BCAP have responded by bringing in new rules, we are concerned that the changes do not go far enough. The Code review does not formally request comments on this issue, but we are concerned that we should not be complacent. Advertising and broader marketing restrictions on HFSS foods targeted at children are just one of many measures that need to be included within a broader strategy to tackle the high rates of obesity and diet-related disease in the UK. This has been recognised within government policy,

including for example 'Healthy Weight' Healthy Lives' the obesity strategy for England which sets out a range of areas where action is needed, including broadcast and non-broadcast marketing to children.

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When dealing with a problem that requires a multi-faceted solution, it is all too easy to question the validity of taking action in specific areas that fall within a broader strategy. But failure to take effective action across the many barriers that make it difficult to make healthier choices, will limit the overall public health outcome. This applies as much to action on school meals, food labelling, product labelling – and to the many actions needed to make it easier to be more physically active – as it does to food marketing to children.

We consider that there is a need to go further in relation to both broadcast and non-broadcast marketing.

BCAP Code

We are concerned that despite the new Ofcom scheduling restrictions and the revised BCAP content rules, HFSS foods can still be advertised using child-appealing techniques such as child-friendly cartoon characters during the programmes BARB data show younger and older children watch in the greatest numbers during family viewing time in the evenings. We therefore hope that the review of the BCAP Code can be used as an opportunity to introduce additional restrictions on the use of child-appealing creative techniques. We cannot, for example, see how the differentiation between licensed and brand-equity cartoon characters can be justified. We are also concerned that even where specific restrictions on certain techniques are included, they only apply to younger children (eg. the use of celebrities) although Ofcom has recognised the need to protect children up to 16.

We support the proposed changes to make the BCAP and CAP wording consistent.

We are, however, concerned that some of the detailed notes previously included within the BCAP Code have been removed. This includes notes clarifying the general requirement that 'Advertisements must avoid anything likely to condone or encourage poor nutritional habits or an unhealthy lifestyle in children'. The additional advice, such as 'portion sizes or quantities of food shown should be responsible and relevant to the scene depicted, especially if children are involved' has been removed which in our view further weakens the BCAP Code leaving the general requirement even more open to different interpretations.

The changes that we consider are needed in order to give consumers greater confidence that food advertisers are taking a responsible approach to the way they target their products at children are:

- > The content rules tightened to extend the HFSS food restrictions to children up to 16.

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- > The scope of techniques used to target children extended so that childappealing techniques cannot be used to target children during programmes that they are most likely to be watching (eg. all cartoon characters).

These changes would help to ensure that the creativity of food advertisers and the industry was instead further focused on helping to promote healthier food choices to children.

Chapter 14: Financial Products

Responsible Lending

In personal finance, responsibility for advertising is fairly complex. In most product areas, including investments (including pensions), mortgages and insurance, the advertising is controlled by the FSA based on rules in the Conduct of Business handbooks. In contrast, most consumer credit adverts are dealt with by the OFT and fall under Consumer Credit legislation. However, there is a role for the Codes, particularly in terms of non broadcast credit or loan products. We have, on numerous occasions, highlighted in the magazine a number of examples of bad

practice and we believe that the Code could do more to promote responsible lending practices.

As stated, our key wish in this area is that we would like the Code to pay particular attention to the issue of responsible lending. As a general point, we believe all marketing of credit must be 'socially responsible' and should 'contain nothing that is likely to lead people to adopt styles of borrowing that are unwise'. In this context, 'unwise' could be further defined as 'a lack of judgment', 'imprudent', 'incautious' or 'rash'.

Chapter 22: Premium Rate Services

Question 124

Given BCAP's policy consideration, do you agree that TV advertisements for PRS of a sexual nature should be allowed on encrypted elements of adult entertainment channels only? If your answer is no, please explain why.

We remain to be convinced of the merits of this proposal for the same reasons as given in question 54 above. If people are interested in those types of products they are able to source them in other ways (on the internet / shops). If they have already been able to sign up to an encrypted TV channel they will be able to locate the products that they want without the TV codes being relaxed.