

Response by Family and Parenting Institute

Introduction

The Family and Parenting Institute (FPI) is the UK's leading centre of expertise in families and the upbringing of children. We advocate for improved family and parenting services and we press for policy change to help address the challenges that families are facing.

We welcome this opportunity to comment on the CAP Code Review Consultation. Since our inception, the Family and Parenting Institute have been concerned about the growing commercial pressure on parents and children. Commercial pressures are ever-present in our lives and have only become more ubiquitous with the explosion of the internet. While TV advertising is heavily regulated, particularly with regard to foods high in sugar, salt and fat, far less regulation is applied to the internet and the regulation that does exist is less stringently enforced than on broadcast media.

While codes are in place that regulate discrete marketing communications to techniques and specific trading practices, these regulations are complex and not readily accessible to the general public. Families are unlikely to be aware of these rules or of the rights to protection that they can expect for their children.

It is important that self-regulatory codes are continually updated and policed. As technology moves on and new forms of marketing are developed in a competitive marketplace, the codes must be actively and constantly rethought and refined. Therefore FPI is pleased that CAP is currently undertaking this review and offers the following comments.

1. Overview

FPI has heard from many parents about the positive impact of pro-social messages, for example those encouraging recycling or driving at slower speeds. However, not all advertising messages are so healthy and 84 per cent of parents involved in a MORI poll commissioned by FPI told us that they felt companies targeted their children too much.

Of course neither parents nor children can 'escape' the commercial world, which offers benefits and opportunities as well as downsides. But parents have frequently told us about their despair as the weekly trip to the supermarket descends into tears and tantrums, and leaves them feeling like villains. Pester power is only too real for them and they wish the dice was a little less loaded.

Simultaneously, children's buying power is at an all time high. Under-18's in the UK spend £12 billion of their own money every year, in addition to which they are increasingly recruited by corporate companies to 'pester' their peers through online wish-lists and more insidiously recruitment as 'brand ambassadors' testing and promoting items amongst their friends. Recently, this method was reportedly used for an MP3 player. The increasing sexualisation of childhood is also a growing concern of parents, and FPI was pleased to see WH Smith withdraw their range of Playboy school stationary in early 2009.

The effects of commercialisation on young people have been paid more attention in recent years. The National Consumer Council, in their publication 'Watching, wanting and wellbeing: exploring the links' showed that those children who spend a lot of time watching TV, playing on the computer and engaging with adverts were more materialistic than children who engage in other activities. This was particularly striking in areas of relative deprivation compared to children growing up in more affluent areas. It was also suggested that

materialistic children tend to do less well at school and are less likely to help around the house.

However, the debate around marketing and children has yet to engage with the cumulative effect of commercialism on families as opposed to the isolated effect of one single advertising campaign on one individual child (Nairn, 2008). Commercialism affects a wide range of facets of a child's life, from relationships with parents and peers, to self-esteem and life satisfaction (ibid). Cumulative commercialism is a complex issue and the different aspects of it are interactive, with blurred boundaries between cause and effect.

2. Online marketing

The internet is fast becoming a feature in almost every family home in the UK. In 2007 over 80 per cent of all families went online each week, with the average weekly time spent online being 11.6 hours (European Interactive Advertising Association, 2008). It is becoming increasingly difficult for regulators to monitor commercial practice aimed at children online. It is also very difficult for parents to steer their children through the online commercial world (Nairn, 2008).

The internet is a heavily commercialised environment (Fielder *et al*, 2007) that is taking up an increasing number of hours of children's time (ChildWise, 2008). Nevertheless it remains much less well-regulated than T.V. In addition, it is estimated that spending on internet advertising will overtake spending on T.V. advertising in 2009 (Internet Advertising Bureau, 2007).

It is becoming apparent that children of all ages, including older age groups, have difficulty in distinguishing some forms of internet advertising from content (Fielder *et al*, 2007). Whereas on television, some clearer demarcation between programmes and advertisement breaks exist, the distinction between content and advert is often not so clear.

A particular problem is that of advergames. Advergames are advertising-sponsored video games which embed brand messages in animated adventures, created specifically by firms to promote one or more of its products. A study of food websites aimed at children in the UK, found 546 advergames on 77 sites (Nairn, 2008). Research in the UK suggests that even internet savvy 15 year old boys were not able to understand the persuasive intent of these advergames in entirety (Fielder *et al*, 2007).

In light of the proliferation of commercial pressures, FPI is also working with the business community to encourage more responsible practice and has published 'Business thinks Family', written for FPI by Dr Agnes Nairn, which asks business to work with families to ensure their online marketing is fair, transparent and plays by the rules.

3. 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.

FPI agrees that rule 5.7 should be included in the Code. Promotions that require a purchase to participate, and include a direct exhortation to make a purchase, should not be addressed to or targeted at children.

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.

FPI agrees that rule 5.5 should be included in the Code. Direct-response mechanisms that allow readers to place orders without face-to-face contact with the marketer should not be directed at children.

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.

FPI agrees that CAP's rules are necessary and easily understandable. However, FPI would like to see these rules given a greater prominence. They should be made more easily available to parents, without the need to wade through, what is essentially, a large and unwieldy document.

Parents will only be able to judge whether advertisers are adequately self-regulating by having access to the rules by which advertisers are supposed to monitor their own activity.

4. Section 8 Sales Promotions

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?

FPI is pleased to see that CAP is to retain rule 34.1c requiring all promotions addressed to or targeted at children include a closing date. FPI agrees with the proposal to exempt the requirement for promotional packs that include the promotional item or prize, because the only limit is the availability of the pack.

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.

FPI agrees that rules 8.33 and 8.33.9 correctly update the present rule 37.1(i). In the case of charitable organisations it may be harder for children to recognise the persuasive element in an advertisement as distinct from the charitable works the organisation does.

5. Section 9 Distance Selling

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.

There is slight confusion in that the question seems to be referring to the wrong rule.

Assuming that the question should be referring to rule 42.8 *Marketers should take particular care when packaging products that might fall into the hands of children*, FPI believes that the rule should remain. Although it may be a duplication of 8.8 that *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* within the promotional communications guidance, it certainly is not adequately covered by 1.3 *Marketing communications must be prepared with a sense of responsibility to consumers and to society* within guidance for marketing communications that are not promotional. A compromise could be to insert 'including children' after consumers in 1.3.

6. 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.

The ease with which children's information can now be collected on the internet has raised a whole new series of privacy issues which still require more coherent attention (Nairn and Monkogol, 2007). Although families technically have the right to complain to regulating bodies about marketing communications or privacy issues, few of them actually do in practice. This is possibly due to lack of knowledge of the codes that protect consumer information, including that of children, or who oversees them, or where to find the information.

FPI is concerned by the age limit of children under 12 from whom marketers must not knowingly collect personal information for marketing purposes without first obtaining the consent of their parent or guardian. Existing guidelines and legislation do not agree on the definition of a child. The Children and Young Person's Act defines a 'minor' as under 14 and a young person as aged between 14 to 18. The CAP Code itself considers a child as anyone under 16.

In this instance CAP appear to be following the Information Commissioner's view that children over 12 are capable of giving their consent to their details being collected by third parties. Given concerns over recent Government data security problems, 12 years old is a very young age at which to be considered mature enough to disclose information to a third party and understand the possible repercussions of this.

FPI's recommendation would be to raise the age from which marketers can collect personal information for marketing purposes without the consent of a parent or guardian to at least 14 and ideally 16.

References

ChildWise (2008) *The ChildWise Monitor Report 2007-2008*; Norwich: SMRC

European Interactive Advertising Association (2008) *Digital families*; <http://www.eiaa.net>

Fielder, A., Gardner, W., Nairn, A. and Pitt, J. (2007) *Fair Game? Assessing commercial activity on children's favourite websites and online environments*; London: NCC, Childnet International and EM-Lyon

Internet Advertising Bureau, IAB online adspend study, H-2 (2007) <http://www.iabuk.net>

Nairn, A. and Monkogol, D. (2007) 'Children and privacy online'; *Journal of Direct Data and Digital Marketing Practice* 9 (4)

Nairn, A. (2008) *Business thinks family*; London: Family and Parenting Institute

fpa welcomes the opportunity to comment on the proposals for changes to the Advertising Standards Codes. We have restricted the following comments to our areas of knowledge and expertise.

Family Planning Centres

fpa has welcomed the proposal for a rule specific to post-conception advice services as an important way of ensuring that women with unintended and unwanted pregnancies can easily access information about all of the options open to them. We believe it is vital that women are aware of whether pregnancy advice services will provide them with objective, accurate and up to date information about all of the options, including abortion, and whether services will signpost them to abortion services. The Royal College of Obstetricians and Gynaecologists states that the earlier an abortion takes place, the safer it is for the woman¹.

fpa is aware that some anti-choice organisations which are opposed to abortion deliberately seek to dissuade women from having an abortion, including by providing false information and will delay women's access to services. Research² conducted by the University of Kent and the University of Southampton around women seeking second trimester abortion found that a significant minority of women had been delayed by people they approached about having an abortion. The research showed that seven per cent of women said the first person they approached had made it difficult for them to get an abortion, four per cent of women were told by the first person they approached that they could not have an abortion and four per cent were told that the person they approached was opposed to abortion. These women were delayed in accessing services by between 14 and 21 days. Although it is not clear that these women were delayed by anti-choice counselling organisation, the research shows the significant impact that any delays can have on women trying to access services and the gestation when the abortion takes place.

fpa is aware that some services which are opposed to abortion provide women with misleading or false information in an effort to deter them from having an abortion rather than just delay their access. This can include using graphic videos of abortion or use other visual materials which cause distress. Some of the false information they provide exaggerates the possible physical or psychological impact of abortion, for example claiming there is a link between abortion and breast cancer, which the available evidence does not support. These services often over-emphasise the use of later abortion procedures, which are rarely used.

In addition, some of the misinformation provided by services which are opposed to abortion can have a long-term negative impact on women's health. For example, some anti-choice organisations claim that abortion can lead to infertility, although there is no evidence of a link between legal abortion and infertility. Consequently, some women who have received this information and do have an abortion believe wrongly that they are infertile and therefore do

¹ Royal College of Obstetricians and Gynaecologists, *The Care of Women Requesting Abortion* (London: RCOG Press, 2004)

² Ingham R et al, *Second Trimester Abortions in England and Wales* (Southampton; University of Southampton Centre for Sexual Health Research, 2007)

not use contraception, which puts them at risk of further unplanned pregnancies. The Independent Advisory Group on Teenage Pregnancy has identified concerns about myths around abortion and fertility as a possible factor in young women having repeat abortions³.

Consequently, **fpa** is concerned that the proposal for a specific rule on post-conception advice services is not replicated in the non-broadcast advertising code. We are aware that anti-choice organisations which claim to provide pregnancy counselling already advertise, for example on buses or telephone boxes, often in areas close to universities or where there are large numbers of, particularly young, women. We strongly recommend that the requirement to state whether organisations refer women for abortion is also applied to these non-broadcast advertisements to ensure that there is consistency across the codes and to ensure that the broadcast code requirements are not undermined.

³ Independent Advisory Group on Teenage Pregnancy, *Annual Report 2005/2006* (London: Department for Education and Skills, 2006)

Question 45

iii) Do you have other comments on this section?

14.5.2: To be consistent with our requirements, this should say: "The advertised products or services should be available only to clients who have demonstrated through a pre-vetting procedure compliant with the FSA's appropriateness test that they have relevant financial trading knowledge/experience;"

But our rules don't say that clients must be pre-vetted before contact, so I assume the Code is being deliberately tougher?

14.5.3 (and 9.5): Same thing. It should also refer to "knowledge/experience" and I agree the wording could usefully be consistent with 14.5.2.

CAP Code Review Consultation

Section 12: Medicines, Treatments, Devices and Health

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.

The policy objectives certainly seem sensible, and the current and revised rules would appear to support those objectives. It might have been helpful to see some analysis of the impact of the current rules, to evaluate whether all the proposed rules are necessary.

It seems to us that the existing rules, on offering specific advice (12.2 and 12.3) and prohibiting endorsements by health professionals (12.17) could be made clearer, to assist those trying to apply them in practice.

Rule 12.2 states that marketers must not offer specific advice on, diagnosis of or treatment for health conditions unless that advice, diagnosis or treatment is *conducted under the supervision of a suitably qualified health professional*. This might be understood as allowing unqualified people to give advice, diagnose or provide treatment for a condition, as long as they are 'supervised' by a health professional. Is this intended? It does not fit with what we regard as safe practice, or our understanding of the requirements for safe prescribing and supply of medicines.

Is the rule meant to restrict advertising to those services which only use qualified health professionals to provide specific advice, diagnosis and treatment? Reading across to the BCAP Code for broadcast advertising, I see that a revised rule is proposed (11.3) which states that advertisements for services offering personal advice will only be accepted if all the staff providing advice are suitably qualified, subject to regulation, have indemnity cover, and follow professional codes of conduct. It would seem important to have some consistency of practice across the different advertising media. And this proposed rule seems to offer greater protection to the public.

Certainly if rule 12.2 is meant to allow scope for services that are only 'supervised' by health professionals, it would be helpful to indicate what these services might be and the type of supervision arrangements that would not mislead and would protect the public from harm.

Rule 12.3 goes on to state that marketers offering individual treatments may be asked to provide details about the people supervising and administering the treatments. It might be helpful to require marketers to make this information accessible to the public, though not necessarily in their advertisements. You might want to bear in mind that we tell doctors who prescribe or treat patients 'remotely' (without access to the medical records or the patient's usual doctor) that they must provide their name and GMC registration number to their patients.

Rule 12.6 states that marketers 'should' not make false claims, in contrast to other rules that seem equally important but use 'must'. It would seem sensible to be consistent, even if it might then be necessary to allow a defence of not 'knowingly' making a false claim.

Rule 12.17 states that marketers must not use health professionals to endorse medicines. It would be helpful to say more about what 'endorsement' means, since health professionals do give advice about medicines in the non-broadcast media. Is the rule intended to prevent endorsement of branded medicines and avoid health professionals appearing in 'advertising' content as opposed to factual content?

The rule in the BCAP Code (11.5) for broadcast advertisements seems much clearer, in warning against 'implying' professional advice or recommendation.

BCAP Code Review Consultation

Section 11: Medicines, Medical Devices, Treatments, and Health

Services including clinics, establishments and the like offering advice on, or treatment in, medical, personal or other health matters

Question 59

Given BCAP's policy consideration, do you agree that rule 11.9 should be included in the proposed BCAP Code? If your answer is no, please explain why.

As you propose, it would seem helpful to ensure that services can provide credentials for themselves (e.g. registration with the relevant regulatory or inspection body) and the staff who will be offering advice or treatment. Certainly services should be expected to make this information accessible and readily available to potential clients. As we have commented on rule 12.3 of the CAP code, we expect doctors providing 'remote' services to provide their name and registration number to potential patients/clients. It is not easy for members of the

public to identify which advertised services are safe and reliable, so including essential information (such as whether a service is registered) in advertisements would be helpful.

The use of health professionals in advertisements

Question 61

i) Given BCAP's policy consideration, do you agree that, unless prevented by law, it is not necessary to maintain the present prohibition on the use of health professionals in TV advertisements for products that have nutritional, therapeutic or prophylactic effects and in radio advertisements for treatments? If your answer is no, please explain why.

ii) Given BCAP's policy consideration, do you agree that rules 11.6, 11.7 and 11.8 should be included in the proposed BCAP Code? If your answer is no, please explain why.

It seems to us that you present well founded arguments (paragraph 11.30 of the consultation document) to support the current Code's prohibition on the use of health professionals to advertise products with nutritional, therapeutic or prophylactic effect (in addition to the legal prohibition on their use in advertising medicines and food). Essentially this recognises a difficulty in distinguishing between claims of 'medicinal' benefit and 'health' benefit and the possibility of the public being misled by the involvement of a health professional.

It is difficult to see how, if the current wider restriction is removed, adequate protection would be provided by the Code's requirement that advertisements do not 'mislead' the public (section 3). The content of section 3 does not appear to bear on the public health and patient safety issues that arise in relation to products which claim to have a health benefit. In the absence of any arguments/evidence that marketers of 'health' products, or the public, are being disadvantaged by the current bar on using health professionals to advertise these products, the points made in paragraph 11.30 weigh in favour of retaining the current restriction.

Certainly, if the restriction is removed, it would seem necessary for you to publish advice about how marketers might avoid the problem of distinguishing between claims of health benefit and medicinal benefit. It would not be within our regulatory role, for example, to provide this sort of guidance to doctors or the marketers using their services.

However, we see no reason to object to permitting the use of health professionals in advertising non-health related products, subject (as proposed) to meeting the general

requirements in relation to testimonials and endorsements, declaration of any interests and not misleading the public.

Remote personalised advice

Question 64

- i) Do you think the additional requirement, that advice must be given in accordance with relevant professional codes of conduct should be extended to TV, in rule 11.13? If your answer is no, please explain why.
- ii) Do you think the additional requirement, that advice must be given in accordance with relevant professional codes of conduct should be extended to TV, in rule 12.3 in the Weight Control and Slimming Section? If your answer is no, please explain why.

It is not clear what the statement means or what it is intended to achieve.

Clinical advice, diagnosis and treatment should follow the standards for good clinical practice set out in, for example, the BNF, NICE and SIGN guidelines, guidance from the Medical Royal Colleges and national service frameworks established by the UK Departments of Health. Professional 'codes' of conduct will require health professionals, for example, to work within their level of competence; to take account of up to date clinical evidence or advice; to act in patients' interests; to protect patients from harm. The GMC does not publish a 'code of conduct'. We publish guidance which all registered doctors are expected to follow in their day to day practice, including where they are providing healthcare services online or by other 'remote' means.

Given that staff providing personalised advice must be registered (and/or accredited) with the appropriate regulator, they will be obliged by their professional code or guidance to act in ways that serve the interests of the person receiving personalised advice. So perhaps, in terms of the BCAP code, it might be sufficient to state that in giving advice staff must act in accordance with the obligations of their regulatory body.

Establishments offering medically supervised treatment

Question 73

Given BCAP's policy consideration, do you agree that advertisements for overseas clinics and other establishments offering medically supervised treatments are, in principle, acceptable if they are run in accordance with broadly equivalent

requirements to those established by the Department of Health's National Minimum Standards Regulations? If your answer is no, please explain why?

All establishments offering medically supervised treatment in UK jurisdictions must be registered (with MONITOR or the Care Quality Commission and similar bodies in Scotland, Wales and Northern Ireland). One of the requirements of registration is that the clinic etc must meet the national minimum standards relevant to the service they provide. This will include requirements relating to staff qualifications, experience and registration with their regulatory body, amongst other things. Therefore, it would seem more straightforward to state that only advertisements for registered organisations will be accepted. Then broadcasters' prior vetting arrangements presumably could be focused on checking the organisation's current status with the relevant registration body.

Code Policy Team
Committee of Advertising Practice
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19 June 2009

Dear Sir or Madam,

Thank you for the opportunity to comment on the proposed Committee of Advertising Practice (CAP) UK code of Non-Broadcast Advertising, Sales, Promotion and Direct Marketing and on the Broadcast Committee of Advertising Practice (BCAP) Broadcast Advertising Standards Code.

The Agency welcomes the work done to take account of food law, especially Regulation (EC) 1924/2006 on nutrition and health claims made on foods and the Infant Formula and Follow-on Formula Regulations 2007. We see this as an important step towards ensuring that there is consistency in the application of food law.

We have made specific comments on certain aspects of the proposed codes in the appendix to this letter and would particularly like to draw your attention to the following points:

- We are not aware of any evidence to demonstrate whether the current CAP non-broadcast rules or the BCAP radio rules have resulted in a reduction in

exposure of children to the advertising of 'non-healthy' foods. This is in contrast to the clear evidence of impact of TV advertising, and we therefore do not know whether these rules are sufficient to protect children.

- It would be helpful if the codes made it clear that health claims can only be used if they comply with Regulation (EC) 1924/2006 on nutrition and health claims made on foods. In addition, it would be useful if the codes provided advice on how to achieve this in advertising and made it clear that testimonials may fall within the legal definition of a health claim and if they do so they too must comply with Regulation (EC) 1924/2006.
- It is important that the codes refer especially to the additional controls on advertising of infant formula and follow-on formula put in place by the 2007 infant formula regulations.

We look forward to continuing to work with CAP and BCAP and the Advertising Standards Authority on the development and application of the advertising codes.

Yours,

Tim J. Smith
Chief Executive

APPENDIX

Food Standards Agency comments on proposed BCAP Broadcast Advertising Standards Code and proposed CAP code of non-broadcast advertising, sales promotion and direct marketing.

Comments in relation to food marketing communications and children; nutrition and health claims made on food; slimming products; infant formula and follow-on formula

We note that the rules on non-broadcast food marketing to children were introduced by CAP in July 2007 in response to the Government's concern about the marketing of food to children.

BCAP introduced new radio rules on food advertisements in general and food advertisements targeted directly at children in particular on 17 September 2007.

In October 2008, the Department of Health published a report on the changes in food and drink advertising to children¹ which showed that TV is the only medium to have seen consistent annual reductions in child-themed ad-spend since 2003.

Healthy Weight, Healthy Lives includes a specific commitment to rebalance marketing, promotion, advertising and point of sale placement, by reducing the exposure of children to the promotion of foods that are high in fat, salt or sugar and increasing their exposure to the promotion of healthier options.

¹Changes in the nature and balance of food and drink advertising and promotion to children, from January 2003 to December 2007. *Department of Health, October 2008.*
http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_089129

We are not aware of any evidence to demonstrate whether the current CAP non-broadcast rules have resulted in a reduction in exposure of children to the advertising of 'less healthy' foods. Similarly, we are not aware of any evidence to demonstrate whether the BCAP radio rules have resulted in a reduction in exposure of children to the advertising of 'less healthy' foods. The FSA considers that the impact of the codes mentioned above, specifically to assess the impact of the rules to protect children from the advertising of 'less healthy' foods, should be reviewed.

CAP Annex 1 – section 3.47 and BCAP Annex 1 – Section 3.44

The codes state that “claims that are likely to be interpreted as factual and appear in a testimonial must not mislead the consumer”. The Agency’s view is that testimonials should be treated in the same way as claims. Therefore, the codes should indicate that if consumers could understand a testimonial about a food to state, suggest or imply that it has a benefit to health, it may fall within the definition of a health claim and so needs to comply with Regulation (EC) 1924/2006 and be authorised and listed.

CAP Annex 1 - Section 13.9

The code states that “marketing communications must not contain claims that weight or fat can be lost from specific parts of the body”. If, in future, such a claim were authorised for use on food under Regulation (EC) 1924/2006, this rule would be incompatible with the Regulation.

BCAP Annex 1 - Section 12.13.2

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 into line with Regulation 1924/2006 on nutrition and health claims made on foods and should be reflected in the BCAP code. To ensure that 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, the Agency suggests that reference is also made to the Foods Intended for Use in Energy Restricted Diets for Weight Reduction Regulations (Northern Ireland) 1997, as amended.

CAP Annex 1 – Section 15.1.1 and BCAP Annex 1 - Section 13.4

The codes state that “marketing communications that feature health claims filed with the relevant Home Authority and awaiting authorisation may be used with particular care. They must comply with all relevant rules”. It is unclear what is meant by ‘claims filed with the Home Authority’ as there is no requirement for this under Regulation (EC) 1924/2006, although claim applications must be made via the relevant National Competent Authority. However, this rule doesn’t seem to capture all the different types of claims and associated transition periods. For example, claims referring to the role of a nutrient in growth, development and functions of the body can continue to be used during the transition period regardless of whether an application has been made, whereas disease risk reduction claims cannot be made until they have been authorised. Perhaps this paragraph is not necessary at all since the previous paragraph refers to transition periods?

CAP Annex 1 – Section 15.2 and BCAP Annex 1 - Section 13.4.3

The codes state that “if a food product is a good source of certain nutrients that does not justify a generalised claim of a wider nutritional benefit”. Whilst true that the presence of a particular nutrient does not necessarily justify a claim about the food’s nutritional benefit, if a health claim for that nutrient has been authorised it can be used on any food meeting the conditions of use (and the nutrient profile, once agreed). This could be reflected by amending the rule to say that a wider claim is not *necessarily* justified.

CAP Annex 1 – Section 15.3 and BCAP Annex 1 – Section 13.5.1

The codes state that “comparative nutrition claims must show any differences between a product bearing a permitted nutrition claim and foods of the same category”. This doesn’t quite reflect Article 9 of Regulation (EC) 1924/2006 accurately, which says that the comparison should relate to a range of foods of the same category. For example, if a particular product claims to be “reduced fat”, it should be reduced (i.e. 30% less) compared to a range of other products of the same category. It is not necessary for other differences between the products to be stated, only the difference in the claimed nutrient. In fact, it may be misleading to make certain comparisons and thus be prohibited under Regulation (EC) 1924/2006.

CAP Annex 1- Section 15.6.3 and BCAP Annex 1 – Section 13.6.3

The codes state that “health claims that refer to the recommendation of an association are acceptable only if that association is a health-related charity or a national representative body of medicine, nutrition or dietetics”. This doesn’t seem entirely compatible with Regulation (EC) 1924/2006. The Regulation only controls recommendations by medical, nutrition or dietetic associations and health-related charities, but does not prohibit recommendations by any other associations. In fact, Article 11 of the Regulation doesn’t introduce any new controls on recommendations by health-related associations or charities but instead says that national rules apply. There are no specific national rules in place in the UK so we are looking at updating our guidance to the Regulation to include a section on this. It is likely to reflect the requirements of Regulation (EC) 1924/2006 and not put additional requirements in place (but we must await consultation before a final decision is taken).

CAP Annex 1 – Section 15.11 and BCAP Annex 1 – Section 13.8

The Agency supports the decision to reflect the infant formula and follow-on formula Regulations 2007 in the codes and in particular to explicitly mention that the advertising of infant formula is prohibited and that advertisements should not confuse between infant formula and follow-on formula. The rules governing the advertising of infant formula and follow-on formula are, however, more extensive than reflected in the amended codes. As currently drafted the text of the codes does not explicitly mention these or make reference to the fact that the Regulations put in place additional controls on the advertising of infant and follow-on formula. These

are important controls that both broadcasters and advertisers should be aware of. We would like to see these controls reflected in the codes.

The codes refer to The Infant Formula and Follow-on Formula Regulations 2007. These Regulations have now been amended by The Infant Formula and Follow-on Formula (England) (amendment) Regulations 2008. Reference to these Regulations should therefore read “The Infant Formula and Follow-on Formula (England) Regulations 2007, as amended” with equivalent parallel Regulations in Scotland, Wales and Northern Ireland²

CAP Annex 1 – Section 15.16 and BCAP Annex 1 - Section 13.10 and 13.14

The codes state that “licensed characters and celebrities popular with children may present factual and relevant generic statements about nutrition, safety, education or similar”. If characters or celebrities present statements about the nutritional or health benefits of a food within its advertising, and these fall within the scope of Regulation (EC) 1924/2006, they will need to comply with the Regulation.

Additional comments

Those sections of the codes on Food, Dietary Supplements and Associated Health and Nutrition Claims state, in several places, that “references to food apply also to soft drinks”. Regulation (EC) 1924/2006 applies to all food and drink, including juice, tea, coffee, milk, water etc. Referring only to soft drinks may lead people to think that the rules do not apply to other drinks – if this is what was intended then the codes are not entirely consistent with the Regulation.

² The Infant Formula and Follow-on Formula (Scotland) Regulations 2007 as amended by the Infant Formula and Follow-on Formula (Scotland) Amendment Regulations 2008 (SSI 2008/322).

The Infant Formula and Follow-on Formula (Wales) Regulations 2007 as amended by the Infant Formula and Follow-on Formula (Amendment) (Wales) Regulations 2008 (SI 2008/W.228).

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

Response from Glasgow Community and Safety Services

- **Introduction**

Routes Out of Prostitution and the Trafficking Awareness Raising Alliance (TARA) are based in Glasgow Community and Safety Services, a joint partnership between Glasgow City Council and Strathclyde Police which was set up to prevent crime, tackle anti-social behaviour and promote community safety in the city. Commercial sexual exploitation is regarded as being widespread in our society and takes many forms including prostitution, trafficking, lap dancing and pornography. It disproportionately involves men using vulnerable women and children for their own sexual gratification or financial gain. We hold the view that exploitation in this way is a clear form of violence against women and a barrier to gender equality.

In relation to the CAP Code Review we welcome the opportunity to comment due to the increased sexualisation of women and girls in the media, and specifically to this review, in advertising. We believe that this pornification of culture by the media acts as a conducive context for violence against women by normalising the portrayal of women and girls as sex objects, not people. The main argument against our critique of the UK advertising industry will undoubtedly centre on the right to “freedom of expression”. However, we overwhelmingly believe that when it comes to balancing these competing rights, the right of all women to live free from discrimination and sexist attitudes must take precedence.

Thus, we fully support CAP’s proposed policy objective that all non-broadcast marketing communications covered by the CAP code are legal, decent, honest and truthful and most crucially are prepared with a due sense of social and professional responsibility. In light of the huge influence that advertising and the media has on individuals, especially young people it is clear that the advertising industry must uphold their commitment to responsible advertising.

- **The harm caused by sexist advertising**

The sexual objectification of women through advertising can lead to a range of harms from body and self esteem issues to violence, sexist attitudes and racism. Images of thin, highly sexualised young women now saturate the advertising industry.

Impact:

- At an individual level sexualisation in the media can undermine body self-esteem and confidence which can result in increased incidence of eating disorders, the desire for plastic surgery and constant monitoring of appearance.
- Young people increasingly learn about sex and relationships through the media. The portrayal of women as objects and in provocative poses helps reinforce the views of young men that women are always sexually available. This grooms young men into

expecting the sexual acts normalised in pornography and impacts on their ability to build healthy, mutually respectful relationships.

- Adults exposed to sexually objectifying images of women from mainstream media are significantly more accepting of rape myths, sexual harassment, gender role stereotypes. Pornified images in the media, whereby women are reduced to body parts, ultimately creating the conditions where violence against women can thrive.
- BME women have historically suffered from stereotypes that focus on their sexuality and their bodies. This has been further amplified by the mainstreaming of pornography into popular culture e.g. porn stereotypes are now mainstream such as women of Asian origin being portrayed as sexually submissive.

- **Recommendations**

In light of the harms outlined by irresponsible, sexist advertising we are pleased the CAP has included a section in the Review (part 2, section 4), entitled “harm and offence”. In particular we support the commitment to ensuring marketing communications “contain nothing that is likely to condone or encourage violence or anti-social behaviour”. GCSS believes that these proposals outline a commitment to greater social responsibility in the media and we would hope these recommendations are adhered to.

There is the concern that voluntary codes can prove meaningless in relation to long term impact. Therefore we would recommend that gender equality be mainstreamed into media regulation – at present concerns relating to the sexualisation of women are judged solely on the grounds of obscenity and decency. We would suggest that this must be extended to gender equality by bodies such as OFCOM and ASA and this regulation is enacted via legislation in order to enhance its credibility.

Since 2003, Jobcentre Plus (JCP) has accepted and advertised jobs from within the adult entertainment industry such as positions for “lap dancers”, “strip webcam performers” and “escorts”. We are concerned that the sex industry is further attempting to mainstream and normalise its activities by advertising through the JCP and that JCP by agreeing to promote these adverts is offering an expedient pathway for vulnerable women to become part of the sex industry. Although it may be out with the remit of this Consultation paper, we still consider it important to reiterate once again the need for the Department for Work and Pensions to reverse this policy.

To conclude, we are happy that CAP are outlining a commitment to ensuring advertising materials do not condone or encourage violence and anti-social behaviour. Ideally, we would be in favour of legislative sanctions banning all forms of pornographic material and

adverts containing such objectifying images due to our belief that it is degrading to the women involved, harmful to users and complicit in violence against women both in its production and consumption. A society in which the dominant message is that female worth comes only from physical appearance is a harmful one and we would hope that CAP takes its obligation to ensure marketing communications are socially responsible seriously.

Sainsbury's response to the Consultation on the CAP and BCAP Codes

Sainsbury's welcomes the opportunity it has been given to respond to the consultation on the CAP and BCAP Codes.

1. Background:

1.1 *For context, I have included some key statistics on Sainsbury's:*

- 785 stores, of which 276 are convenience
- 153,000 employees
- Around 18.5 million customers a week
- We are a major advertiser both at national and local level. In 08/09 our reported spend was c£61 million. (Source: Nielsen Addynamix spend for national and regional advertising across Outdoor, Cinema, Online, Press, Radio and TV.)

1.2 Our corporate goal states "...*We will exceed customer expectations for healthy, safe, fresh and tasty food, making their lives easier every day*". It is not possible to achieve this goal without legal, decent, honest and truthful advertising.

1.3 We have 140 years of value based, principled retailing behind us and as our recent strapline states "Our Values Make Us Different".

1.4 With this in mind, we are absolutely in agreement with the overarching principles contained in the Codes. However, we have a number of fundamental issues with the Codes and some of the content which we have detailed below.

2. General concerns

2.1 Sainsbury's welcomes the reduction in the number of Codes but we would question why the reform could not have gone further, resulting in a single Code. This is particularly relevant given that the concept of misleading as defined in the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) is not media specific.

2.1.1 Where specific differences are required due to the nature of a specific media these could be included within the relevant section of a single Code. This approach has already been adopted in the proposed BCAP Code where the requirements for radio and TV are separated (e.g. Section 4).

This would ensure that a fully integrated approach is taken to advertising campaigns which often use more than one media type.

2.2 Both CAP and BCAP have stated in their consultation documents that the reason for the review to ensure that the Codes are fit for purpose and to reflect changes in the law.

The biggest change in the law since the Codes were last reviewed has been the introduction of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). This piece of legislation, which is a fully harmonised European directive, fundamentally altered consumer protection in the UK away from prescriptive rules to purposive, principled based legislation that allow many routes to the same end, namely that consumers should not be misled. Our concern is that by trying to adapt very detailed Codes to incorporate the new legislation they 'gold plate' the legislation and require adherence to rules and voluntary codes which the legislation itself does not require. We believe that following the recent ECJ judgment against the Government of Belgium that this approach may be unlawful.

2.2.1 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.

2.3 In Sainsbury's view the requirements set out in the CPRs alone should be used to judge whether an advert is misleading and the Codes in their present format should focus on questions of decency and taste.

2.4 We have additional concerns about the following elements of the Code:

- De facto compulsory nature of the Code
- 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

2.4.1 The fact that in certain circumstances the "voluntary" Codes go further than the CPRs and use different terminology to that legally defined when describing the factors to be considered when judging if a practice is misleading creates a tension and replaces the principle based legislation with de facto gold plating (see 2.1.1). The de facto element is introduced because it is impossible to place an advert unless it meets the criteria of the Code and in the case of TV and radio advertising is pre cleared against the Code.

2.4.2 Our concerns around lack of transparency relate to the methodology used in assessing complaints; the lack of an independent system of appeals; and the fact that help notes are not consulted on even though they are we believe taken into account when assessing adverts against the Code. This is highlighted by the fact that section 60 in the old Code "how the system works" does not appear to have been mapped across providing even less transparency than we currently have.

3.0 Specific comments

The specific comments we have made are in relation to the Code as written and are in no way intended to weaken the comments made in Section 2. We have not attempted to answer every specific question raised in the consultations on the two Codes. We have only commented where a particular issue with the wording of a rule.

3.1 CAP Code

3.1.1 Question 1

As already alluded to by our comments in Section 2, the introductory section should identify the role of the Code within the CPRs. Particular mention should be made that the definitive requirement, with respect to not misleading a consumer, is to abide by the CPRs and that the Code itself is voluntary.

The relevant 'sector specific rules' mentioned in 1.4 should be defined.

Section 1.6 refers to marketing communications respecting the principles of fair competition. The CPRs refer to professional diligence. It would be helpful if the Code used the same language or at the very least used wording which reflects this change.

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 rule 57. (See 2.4.1)

3.1.2 Question 3

No, whilst we recognise the intent behind this rule and the use of the words "only once"; we believe that this rule will be impossible to enforce and goes beyond the provisions of the CPRs. The CPRs apply to the average consumer defined as reasonably well informed, observant and circumspect. It may also have the unintended consequence of stifling 'teaser' campaigns where detail and understanding is built up over a period of time.

How would the ASA judge this when holding an advertiser to account?

3.1.3 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. The BCAP Code in Section 3.4 allows for obvious exaggerations ("puffery").

3.1.4 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.

3.1.5 Question 9

The new revised Code often uses the word 'must' instead of 'should'. This suggests that there is only one route to compliance when the CPRs. As mentioned previously, the CPRs is purposive legislation and adherence to it can be achieved in more than one way. Consequently, we can 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 the back door. The Guide itself says it can be ignored! The section should be re-phrased to make it clear it is 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.

3.1.6 Question 21

It would be helpful if there was clarity about whether or not information on a website counts as 'easily accessible.' We believe it should.

3.1.7 Question 24

We do not understand the logic behind the differences in verification required between local and national competitions. The same rules should apply to both.

3.1.8 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. There are many circumstances where it would be appropriate for the promoter to be the judge especially where the promoter's staff and their families are not allowed to enter the competition.

3.1.9 Question 28

Rule 8.12 is impractical. It is not possible simply to switch the promotion to another product given that we would have to hold massive additional stocks of alternative products "just in case". That would merely cause a problem for the supply of that product or in the event it was not needed, huge waste issues.

3.1.10 Question 34

It would be helpful to make this section technology neutral given the constant changes to, and innovation in, technology.

3.1.11 Question 43

Whilst section 13.10.1 is a correct copy out of the relevant section on the Nutrition and Health Claims Regulations. However, as the Food Standards Agency Guidance states the interpretation of this provision is not that straightforward. We believe that the provisions in the Codes should reflect that reference to terms such as 'rapid' or 'fast' could in certain circumstances be used.

3.1.12 Question 46

No.

15.1.1 - The Nutrition and Health Claims Regulation allows the use of any claim likely to have the same meaning in addition to the wording specified in the Annex to 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 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.

3.1.13 Question 52

No. See our response to question 43.

3.1.14 Question 55

Many of the many of the provision contained within the legislation are still to be enacted and are subject to long transition periods; some as long as 15 years. Therefore it is important that the Codes are kept up-to-date..

The Codes use a number of terms which have a defined meaning such as food product, low alcohol etc., it is clear that the definitions have to be the same as those in the Nutrition and Health Claims Regulation.

Whilst the Code explains the nutrition claims that can be used and the conditions for using these claims, the treatment of health claims is much sparser. Paragraph 15.1.1 states that authorised claims states that authorised claims in the Community Register may be used in marketing communications. Whilst this is true it is only part of the story for example, Article 10.3 health claims do not need to be authorised or included in the register. The Code should clearly cover the provisions under Nutrition and Health Claims Regulation applicable to all the different types of health claims. The Code should clearly cover the provisions under Nutrition and Health Claims Regulation applicable to all the different types of health claims.

3.1.15 Question 57

Although the Nutrition and Health Claims Legislation is a complex piece of legislation which came in to force in July 2007 many of the provision contained within the legislation are still to be enacted and are subject to long transition periods; some as long as 15 years. We believe that should be accurately reflected in the Code.

Additionally the Food Standards Agency and indeed the Commission are revising their guidance as the practicalities of the legislation become apparent.

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.

3.2 BCAP Code

It is slightly concerning that the BCAP code is considerably longer than the CAP Code. As already stated in 2.1 and 2.1.1 we believe that 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. For this reason many of the comments we have made in section 3.1 are relevant here especially those relating to the CPRs, the voluntary Pricing Practices Guide and health claims.

3.2.1 Question 6

It is difficult to understand the distinction being made between TV and radio here. Surely the same principle should apply to both media.

3.2.2 Question 8

This seems a sensible inclusion and should also apply to the CAP Code. Section 3.4 is at odds with the much stricter provisions we objected to in Section 3.11 (see response to question 4 above). However we would be concerned about the interpretation of “perception” and how in practice this would be judged.

3.2.3 Question 32

Yes. While we agree with the new provisions set out in 13.2 namely, “Advertisement must avoid anything likely to encourage poor nutritional habits or an unhealthy lifestyle, especially in children”. The remit of this provision should be made clear. It should clarify 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.

2.2.3 Question 80

The wording used for 13.5.1 is not as clear as it could be. Whilst the provisions have been correctly implemented we would suggest that the sentence: “Comparative nutrition claims may only be made between foods of the same category”, is clearer.

2.2.4 Question 84

Question 84 asks if we agree that BCAP has accurately reflected the relevant provisions on Regulation 1924/2006. The following comments refer to section 13.4 of the Code and its sub sections.

Whilst 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. Whilst this is true it is only part of the story for example, Article 10.3 health claims do not need to be authorised or included in the register. The Code should clearly cover the provisions under Nutrition and Health Claims Regulation applicable to all the different types of health claims.

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, not 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 goes beyond the provisions of the EU Nutrition and Health Claims 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.

The Code refers to food and soft drinks while the Nutrition and Health Claims Regulation applies to food and all drinks.

The HFMA (Health Food Manufacturers' Association) is a non-profit organisation that was founded in 1965 to represent the interests of manufacturers and suppliers of specialist health products in the UK. Our c.125 member companies include many suppliers of specialist food supplements and health foods.

The HFMA operates three long-standing codes of practice – for GMP, Labelling & Advertising and Upper Safe Levels for Supplements – to ensure that member companies adhere to high standards and offer good quality, safe products to UK consumers.

The HFMA is responding on the '**Medicines, Treatments, Devices and Health**' and '**Food, Dietary supplements and Associated Health and Nutrition claims**' sections of the revised code.

Our comments are as follows:

Section 12 – Medicines, Treatments, Devices and Health

We are in agreement with all of the questions with the exception of Q 39:

Under the Medicines (Advertising) Regulations, the essential information is only required where product claims are made, excluding any claims which can be seen on a genuine pack shot. Claims that a product is new and price claims are also permitted without necessitating the inclusion of the essential information.

For example, under the Medicines (Advertising) Regulations, it would be acceptable to have an advertisement which consists of a pack shot and no other information.

Section 15 – Food, Dietary supplements and Associated Health and Nutrition Claims

In the main we are agreement with this section, but have 2 comments:

Q 57 (iii) - In our opinion, use of the term 'Dietary Supplements' in the header and throughout the section is not correct from a legislative viewpoint and may cause confusion.

The use of the term 'dietary supplement' is not in accord with relevant UK/EU legislation relating to 'food supplements'; EC Directive 2002/46/EC and The Food Supplements Regulations 2003. The term 'dietetic/dietary' is reserved for certain foods for particular nutritional uses (ref FLR Schedule 8 Part 1). HFMA would consider that the term 'dietary supplement' should be replaced by 'food supplement'

Para 15.2 - we are unclear what the second sentence means and are unsure as to how it reflects the NHCR?

*‘Claims for the presence, absence or reduced content of a nutrient in a product must be able to show a beneficial nutritional or physiological effect and should be considered in the context of a balanced diet or lifestyle or both. **If a food product is a good source of certain nutrients that does not justify a generalised claim of a wider nutritional benefit**’.*

We would welcome the opportunity to discuss this more fully with you, and I trust that the above comments will be helpful.

Home Retail Group

CAP/BCAP Code Review Consultation

Please find attached our response to the CAP and BCAP code review consultation.

Home Retail Group is a significant force in the retail market, owning the Homebase and Argos Retail outlets, which are supported by a strong internet presence (Argos.co.uk, Homebase.co.uk) and a comprehensive home delivery operation.

We have contributed to the British Retail Consortium response on the Codes, however welcome the opportunity to respond in our own right.

In summary we believe that the regulatory framework delivered through the UK implementation of the Unfair Commercial Practices Directive, via the Consumer Protection from Unfair trading Regulations, requires a comprehensive review of the codes to align them with the spirit, principles and specific wording of the legislation.

To not do this perpetuates a prescriptive regime, which runs against the maximum harmonisation objective of the Directive, imposing burdens on UK business that should not exist.

We should be freed from these constraints subject to appropriate and proportionate checks and balances that are clearly provided by the regulatory framework.

I am more than happy to discuss this view further with representatives of CAP.

Yours faithfully

Paul Downhill

Consumer Affairs Manager

Home Retail Group

RESPONSE TO CONSULTATION ON THE CAP CODE

Our initial challenge would be whether the Code remains valid due to the implementation in the UK of the Unfair Commercial Practices Directive (UCPD).

The origins of the Code are in a voluntary measure with the objective of the self regulation of advertising.

At the time this was viewed as preferable to specific legislation regulating advertising (and the constraints they place on business)

Regulations now exist (the Consumer Protection from Unfair Trading Regulations, or CPRS, implementing the UCPD) extending the reach of the legislative framework to cover areas that traditionally were only covered in the code. The continuing existence of the code in these areas has to be questioned.

Our response therefore is a call to the CAP to reduce burdens on business and duplication of prescription by removing the sections of the code completely where the matter is adequately covered by the CPRs.

In effect that would result in matters relating to misleading actions, omissions, aggressive commercial practices, the banned practices etc in the code being repealed. Where the CPRs have no coverage e.g. matters of taste and decency the code would remain in place.

At this point it is worth pointing out that the cases that are investigated by the ASA where significant numbers of complaints are involved relate generally to taste and decency.

Matters that overlap with the CPRs (stock availability, descriptions, qualifying text being unclear etc) are usually measured in single complaints.

We feel very strongly about this as there are already examples where a matter has been assessed as being compliant with the CPRs (e.g by a Home Authority TSO) but upheld as a breach of the code.

Surely this potential for double jeopardy is not acceptable.

Our position therefore is the code should be repealed in all areas other than taste and decency.

Established means

It has been suggested that the CAP code is a perfect candidate for being an “established means” referred to in Regulation 19(4) of the CPRs.

This view is in particular promoted by the OFT, as they view it as the first stage in the process for their enforcement activity both under the CPRs and the Control of Misleading Advertisements Regulations (CMARs).

Clearly an argument can be constructed that the CAP code is a candidate for established means due to the fact that it has existed for a considerable period of time, and consumer awareness of its existence is relatively high.

The business perspective is however slightly different – the status of “the code” as “a code of practice” is peculiar in that those who are bound by its clauses (the business that wish to advertise) have not *directly* signed up to recognise its existence or have agreed directly to be bound by its provisions.

Historically its main sanction is to control the media where adverts appear and prevent non compliant adverts from being published, a sanction that is impossible to enforce when adverts are released into the public domain by other means of published media, e.g catalogues.

The outcome is advertisers find themselves at the mercy of the ASA – a non statutory body, who are in effect legislator (through the CAP), judge jury and executioner.

The point that this leads to is that the success of the code has been to a great extent due to the willingness of responsible retailers voluntarily abiding by its decisions.

Such voluntary acquiescence does not provide the code with the pedigree it requires to automatically assume the status of established means.

Legislative framework

There is a serious legal basis for these concerns.

If the Code is to assume a position as part of the legislative framework, it must respect the fact that the UCPD is a maximum harmonisation measure.

Individual member states are not permitted to “gold plate” the requirements – the legal framework must be a faithful reflection of the Directive.

As the CAP code currently goes much further than the requirements of the UCPD/CPRs then it cannot be part of the formal legal process, but must sit outside as voluntary, non binding guidance – a similar situation to the transition of the price code from code with a statutory footing to a set of guidance.

If the code is to continue, the recasting of the code must therefore be done in that context – the words must reflect the UCPD, and no more. Non compliance cannot be treated as matter that is contrary to the legislative framework, until due legal process has applied.

We would be more than happy to voluntarily co operate with an ASA enforced CAP code on the understanding that its adjudications were no more than advisory, matters resolved through the ASA were done so of the spirit of cooperation with identified established means and any residual matters not resolved would not be upheld and the “offender” named and shamed in the current manner, but referred to the appropriate enforcement body for further assessment under the appropriate legislation.

These bodies would have to apply Hamptonesque principles to their activities in particular recognising the importance of the Primary or Home Authority.

We would therefore suggest that

- The CAP code should be revised to remove all matters covered by CPRs and only cover matters of taste and decency OR
- The CAP code should be revised to only reflect the provisions of the CPRs/UCPD and no more. It must be positioned as an informal, voluntary mechanism to create an environment for the voluntary resolution of complaints about advertising that offend UCPD principles.

On that basis comments on the revision of the code will only be limited to the amendment of the text to reflect UCPD principles; any “gold plating” should be removed.

CAP CODE CONSULTATION SPECIFIC QUESTIONS

Q.1 Compliance Section

We believe this section needs to be simplified to the point that it sets the Code in the context of the Regulations.

The text should clearly acknowledge the existence of the CPRs, the fact that ASA/CAP have a duty to act only under the code and therefore involvement is non mandatory, based on voluntary co operation and set out the process for input of the OFT (and trading standards?) where necessary at the appropriate time for non compliances of the code.

Where compliance with the code is required through contractual relationships, we would question if these are permissible as additional measures contrary to the maximum harmonisation objective of the CPRs – it would be permissible to emphasize the voluntary nature of the code and compliance with it, however requiring a contractual agreement to comply would appear to be a restriction on trade.

The objective of the code to extend into areas beyond the content of advertisements e.g the administration of sales promotions, is an area covered by the broad remit of CPRs, therefore does not require prescriptive coverage in the code.

By all means the code can set out advice regarding good practice.

The CAP can issue help notes guidance etc but any further prescriptive measures both must surely contravene the maximum harmonisation objectives of the Directive.

Question 2

We have no problems with the code highlighting the relevant legal requirements to advertisers

Question 3

The proposal for 3.10 is not acceptable – the text in the CPRs regarding misleading omissions covers this point. It does not need further clarification in the code.

Any further clarification can only be cast as guidance on good practice, and not binding, otherwise this is “gold plating” of the Directive.

Question 4

Exaggerated claims are permitted by the legislation if **not** intended to be taken literally. We do not object to the proposed text in principle, to avoid the risk of someone making an exaggerated claim (intended to be taken literally) but qualifying it, which would in theory, be compliant with the CPRs. The specific point (limiting all claims to “normal use” however does come back to the central theme about the code being too prescriptive and interfering with the broad principles of the legislation.

Question 5

3.28 is a copy out of the CPRs so is acceptable, there is no need for the further qualification in 3.28.3 – this is gold plating.

Question 6

The CPRs contains the standard due diligence defence the code here is trying to specify what that due diligence should consist of – any responsible retailer using testimonials would have these details, I do not see why any degree of specificity is required.

Question 7

Agree should be deleted

Question 8

This is not in line with the CPRs – the requirement is that items must not be described as free if the customer has to pay anything other than the unavoidable cost of responding to the to the commercial practice and collecting or paying for delivery of the item.

Whether the cost of paying for delivery of the item is reasonable/realistic is not a matter for the code it would ultimately a matter for the court to decide.

A clear area where the code exceeds the requirements of the CPRs so a legal promotion could be judged to fall foul of the Code.

Question 9

No comments

Question 10 – 11

No comments

Question 12 – 14

I struggle with this (advertising to children) as the nature of the issues means it probably crosses over into an area not necessarily covered by law but a moral judgement.

The legislation does however contain some tests relevant to this – the professional diligence test, and the refinement of “average consumer” where advertising is specifically targeted, so there is a potential argument that whilst the CAP code can provide guidance on good practice its ability to adjudicate on such matters may compromise the principles of the legislation, unless that adjudication is completely a “moral” call, more akin to matters of taste and decency.

Question 15 - 16

No comments

Questions 17 – 28

No strong views on the section on prize promotions, other than the view already expressed that the operation of prize promotions is not automatically outside the CPRs (the legislation has moved into the area of “unfair” practices and “professional diligence”).

This is an area where the code could be valuable to provide guidance on good practice, and as such “must” should be changed to “should”.

Questions 29 – 31

No strong views on this.

Question 32

No strong views on this

Question 33

I am concerned that the code here is being used to prescribe more onerous requirements relating to Data Protection, is the code the most appropriate way to address these concerns?

Question 34

No comments

Question 35

This is gold plating – being more prescriptive on environmental claims, reading the proposed objective would be covered by the CPRs

Question 36

No comments

Questions 37 - 43

No comments other than any requirements should not undermine the broad principle based approach of the CPRs

Question 44 - 45

No comments

Question 46 – 57

No comments other than any measures should not go further than the CPRs or any other relevant directive.

Questions 58 – 61

No comments

Question 62 – 74 no comments.

19 June 2009

Cap and BCAP code consultation

ISBA is the representative body for UK advertisers. As such it is a member of both CAP and BCAP and served throughout the code revision process. We are not therefore responding in detail to the consultation but have highlighted the changes to advertisers and asked to be copied into their responses.

We believe that the revision process was thorough, that the discussions within the working groups and in the full committees were well informed and gave serious consideration to each revision.

There are issues that may deserve further consideration outside this consultation. For example there may need to be a CAP and BCAP assessment of how the code provisions are being interpreted by ASA Council, the secretariat, the investigations teams and others who use the codes to ensure that we the code owners have achieved the level of protection that we intended.

Additionally Lewis Silkin has made a widely publicised bid for two innovations in the ASA/CAP process. This consultation is clearly not the place to discuss either suggestion. Advertisers will however return to the nature of the appeals system through ISBA representation on ASBOF and BASBOF.

Ian Twinn

Director of Public Affairs

ISBA – the voice of British advertisers

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Independent Healthcare Advisory Services (IHAS) response to The CAP Code Review.

Introduction

The IHAS brings together members and specialists across the health care industry in all four countries, to share a unique level of knowledge, experience and understanding in order to:

- Facilitate effective communication between all its subscribers, the Government and external organisations
- Strive to develop and drive policy advancement through shared subscriber input and consultation
- Deliver focused, practical information and guidance in all areas of regulation and policy, sharing and distributing knowledge

The IHAS primary focus is in the area of operational policy and the regulation of the sector. As such it seeks to:

- Facilitate the development of operational policy, through consultation with its member organisations
- Provide its members with accurate and timely information regarding regulatory and policy matters
- Administer an independent complaints process
- Develop a range of quality initiatives to raise awareness of good practice within independent providers
- Represent independent health care providers to government, external organisations, and the public, providing a channel for effective communication and dialogue

The IHAS welcomes the opportunity to comment on The CAP Code Review. IHAS members include a range of healthcare providers who are all involved in promoting and advertising their services. This Code has particular relevance for a number of our members who provide a range of cosmetic surgery and injectable cosmetic treatments. In addition to our members adhering to the CAP Code the IHAS have also developed advertising policies for both cosmetic surgery and cosmetic treatments. Copies of the policy for Cosmetic Surgery and the non-surgical treatments policy are attached.

Following Ministers' decision not to regulate the provision of injectable non-surgical cosmetic treatments, the Cosmetic Surgery Working Group of the Independent Healthcare Advisory Services (IHAS) accepted a request from Lord Hunt to take the lead in assessing the feasibility of setting up a self-regulatory scheme. Developing this scheme has involved working with a range of providers and stakeholders and exposed the IHAS to examples of good and poor advertising practice. The IHAS response has focused on the implications of

these proposed changes for providers of cosmetic surgery and cosmetic treatments and any impact they might have on the Self- Regulation Scheme that IHAS Self-Regulation Group is developing.

In responding to this consultation the IHAS has recommended some amendments to the content and included suggestions for issues the IHAS would like to see included in The CAP Code.

Section 1 Compliance

Question 1

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?

Yes the IHAS agrees that CAP's rules included in the proposed Compliance Section are necessary but would like to see more clarity, explanation and examples in relation to stating or otherwise creating the impression that a product can legally be sold when it cannot. The IHAS has particular concerns in relation to advertising services which involve prescription only medicines for example Botox. Advertising prescription only medicines contravenes the Medicines Act yet there are an increasing number of advertisements appearing in the published media particularly in relation to 'Botox'.

The IHAS would like to see reference to professional regulation here particularly where it introduces further restrictions for clinical practitioners on Advertising e.g. Doctors, Dentists and Registered Nurses.

Section 2 Misleading

Question 3 Do you agree that rule 3.10 should be included in the code?

The IHAS supports the need for the new rule and agree that 3.10 - namely that Qualifications must be clear to consumers who see or hear the marketing communication only once should be included in the Code.

Question 4 Do you agree that rule 3.11 should be included in the code?

The IHAS agrees that 3.11 - namely that Marketing communications must not exaggerate the capability or performance of a product: claims must be based on normal use should be included in the Code.

Question 5 Given CAP's policy consideration, do you agree with the revisions made to rule 3.28.3?

The IHAS agrees that revised rule 3.28.3 - namely marketing communications must state restrictions on the availability of products, for example, geographical restrictions or age limits is included in the Code

Question 6 Given CAP's policy consideration, do you agree with the revision made to rule 3.45?

The IHAS agrees with the amendment to 3.45 - namely 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 9 Taking into account CAP's general policy objectives, do you agree that CAP's rules on misleading are necessary and easily understandable?

The IHAS agrees that the rules on misleading are necessary but do not agree that they are easily understandable. We would have liked to see further explanation of what is considered to be misleading, equally some acknowledgement of the need to take into consideration the guidance or requirements of other regulators.

Section 5 Children

The IHAS is disappointed that this section makes no reference to your definition of what / who is a child. The IHAS considers that anyone aged 18 and below should be protected under this section.

Section 8 Sales Promotion

Whilst accepting (IHAS Policy document) that there are seasonal variations in the demand for cosmetic surgery and/ or non surgical cosmetic treatments, and recognising the benefits to the patient and the provider of price discounts designed to boost activity levels during slack periods, the IHAS remains of the opinion that discounts for cosmetic surgery should not be placed in the published media.

However our approach differs in relation to non-surgical cosmetic treatments. Whilst there are similarities in that the demands for treatments varies seasonally our policy recognises the benefits to both patients and to the provider of price discounts designed to boost activity levels during seasonally slack periods. IHAS members acknowledge that these may appeal to and benefit those marginal purchasers who otherwise would not be able to afford the full cost of the treatment they desire. The IHAS policy contains clear advice relating to the content of this advertising.

Section 12 Medicines Treatments Devices and Health and Social Care

This section needs updating in the following areas.

Medicines Act 1968 prescription only medicines can now be prescribed by a Doctor, Dentist or Independent Nurse Prescriber. In addition a limited number of drugs can be prescribed by a Nurse Supplementary Prescriber.

Other regulatory bodies include reference to the Healthcare Commission. The Healthcare Commission ceased on 1st April 2009. The Registration and Regulatory body for Mental Health, NHS and Independent Healthcare is now the Care Quality Commission www.cqc.org.uk .

Poor Practice

The IHAS continues to see examples of poor practice in relation to advertising minimum and invasive procedures. The IHAS is concerned that the current Code and these proposed amendments to The Code will not address these. For example the IHAS recently received a

request for advice from a Health Education Environmental Officer regarding a mobile service being offered in her area. The advertisement for the service reads as follows:-

'Release the Younger You

Our speciality are Botox parties come along for a girlie, night have a laugh, and feel relaxed. We will explain how non surgical treatments work and how they can help you. You can take advantage of our discounted prices and have a treatment on the night or be a hostess and have a Botox party'

One of these practitioners describes herself as a registered qualified nurse and fully trained and fully insured to carry out these procedures. This advertisement places the nurse in breach of the NMC Code of Professional Practice, the Medicines Act in relation to advertising a prescription only medicine and in the IHAS opinion demonstrates the need for joint working with the professional regulators.

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Appendix 1

POLICY STATEMENT

ADVERTISING AND PROMOTION OF SURGICAL COSMETIC PROCEDURES

1.0 Advertising of Cosmetic Surgery Procedures by Providers

'Advertising' is defined as promotional graphics and literature in published media, including magazine advertisements or inserts and unsolicited mail shots ("published media"). It does not include direct follow-up promotion to people who have made contact with the provider, providers' websites or leaflets available in providers' clinics. The primary reason for advertising is to inform patients.

The IHAS recognises that advertising and promotion of the services offered by cosmetic surgery providers is a legitimate and reasonable business practice as a means of creating public awareness about the services available and the attributes of the provider. It also recognises that it is an important tool for enabling providers to differentiate themselves from their competitors and for developing their businesses, in common with providers in other service businesses. The IHAS believes that promotional advertisements should conform with the standards and codes of practice administered by the Advertising Standards Authority ("ASA"), the Healthcare Commission Standards and those documented in Good Medical Practice for Cosmetic Surgery/Procedures. **The IHAS recommends that all advertisements for cosmetic surgery procedures should adhere to the Committee of Advertising Practice Code or should be submitted to the CAP Copy Advice Team www.cap.org.uk/cap/codes/cap_code/ShowCode.** The IHAS maintains that the standards of probity, ethics and good taste applicable to the advertising and promotion of multiple cosmetic surgery procedures are no different from those applicable to cosmetic surgery generally.

The IHAS also believes that publishers should not accept advertisements for publication from entities who are not registered with the Healthcare Commission ("HC") or the appropriate regulatory body in the devolved countries and that all advertisements placed by those entities who are registered with the HC should carry the HC logo and the provider's registration number and reference to the HC website (to enable readers to confirm the provider's registration details). The IHAS is actively working with publishers to encourage them to support this position.

The IHAS has considered a number of specific issues that have been raised by patient and public interest groups with regard to the advertising of multiple cosmetic surgery procedures. The IHAS and its members have adopted the following policy positions on the relevant issues:

1.1 Promotional discounts

The IHAS recognises that demand for cosmetic surgery varies seasonally and it recognises the financial benefits, both to the patient and to the provider, of price discounts designed to boost activity levels during seasonally slack periods. In doing so, the IHAS recognises that these may appeal to and benefit those marginal purchasers who otherwise would not be able to afford the full cost of the treatment they desire. Advertising of such discounts should not be placed in the published media. However, it is acceptable for both the provider's website and direct mailing to people who have already contacted the provider to be used to create awareness of the existence and amount of such periodic discounts.

1.2 Exhibition, Conference and Trade Show Discounts

Discounts that are conditional upon the consumer 'signing up' for the procedure on the day of an event should not be offered to attendees of conferences, exhibitions and trade shows. Implicit in this stance is the IHAS view that prospective patients must have adequate time to reflect on all the implications of the proposed treatment, free from the pressure of a short time constraint or a short lived financial inducement.

1.3 Sponsorship of Exhibitions, Conferences and Trade Shows

Cosmetic surgery/procedures providers may sponsor conferences, exhibitions and trade shows whose purpose is to facilitate the dissemination of information about cosmetic surgery/procedures either to the medical profession or to providers and the public at large.

1.4 Advertising aimed at Teenagers

The IHAS is adamantly opposed to any cosmetic surgery/procedures advertising in media targeted at teenagers below the age of eighteen. Marketing communications should not be directed at people under 18 through the selection of media, style of presentation, content or context in which they appear.

1.5 Gift Vouchers

Gift Vouchers, which cover part or all of the cost of a non-surgical cosmetic procedure, should not be advertised in the published media but may be advertised on the provider's own website on the Internet. Gift vouchers should not be available for surgical cosmetic procedures.

1.6 Loyalty Cards

'Loyalty' cards, are cards which may be given by a specific provider to any of its patients which typically entitle the patient to a discounted price for future treatment by that provider. Loyalty cards are considered an acceptable way of rewarding patients for returning to the same provider for future or ongoing treatment. If any member of the IHAS does offer loyalty cards, the availability of such loyalty cards should not be advertised in any published media but may be advertised on the provider's own Internet website. They may also be mentioned or offered to patients or prospective patients at any time that they present themselves to a provider for a consultation.

1.7 Price Lists

Prices for cosmetic surgery procedures/treatment should not be advertised in the published media but prices for individual procedures (but not for multiple procedures) may be displayed on providers' Internet websites.

1.8 Competitions and Prizes

IHAS members will not participate directly or indirectly in competitions for which the cost of a cosmetic surgery procedure or procedures will be paid by the competition organiser or sponsor as a prize for winning the competition. IHAS members will also not sponsor any such competitions.

1.9 Advertising of Multiple Procedures by Cosmetic Surgery Providers

In addition to its general policies on the probity of advertising, the IHAS believes that advertising copy for multiple procedures should not be worded in such a way that a patient who would not otherwise do so might be induced to opt for a multiple procedure. In particular, advertisements (in any medium) for multiple procedures should not offer discounts or any other financial inducement for multiple procedures.

December 2007

Appendix 2

ADVERTISING AND PROMOTION OF NON SURGICAL COSMETIC TREATMENTS

1.0 Advertising of non-surgical cosmetic treatments by Providers

‘Advertising’ is defined as promotional graphics and literature in published media, including magazine advertisements or inserts and unsolicited mail shots (“published media”). It does not include direct follow-up promotion to people who have made contact with the provider, providers’ websites or leaflets available in providers’ clinics. The primary reason for advertising is to inform patients.

The IHAS recognises that advertising and promotion of the services offered by providers is a legitimate and reasonable business practice as a means of creating public awareness about the services available and the attributes of the provider. It also recognises that it is an important tool for enabling providers to differentiate themselves from their competitors and for developing their businesses, in common with providers in other service businesses.

The IHAS believes that promotional advertisements should conform to the standards and codes of practice administered by the Advertising Standards Authority (“ASA”) and those documented in Good Medical Practice for Cosmetic Surgery/Procedures 2009. **The IHAS recommends that all advertisements for non surgical cosmetic treatments should adhere to the Committee of Advertising Practice Code or should be submitted to the CAP Copy Advice Team**
www.cap.org.uk/cap/codes/cap_code/ShowCode.

The IHAS and its members have adopted the following policy positions on the relevant issues. The overriding concern underpinning these policy positions is the primacy of the safety and welfare of patients. In this respect they are intended to reflect the values shared between the IHAS and the British Academy of Cosmetic Practice and the adoption of a stance of ethical leadership on issues related to advertising. In particular, the IHAS is concerned that advertising should not induce people to decide to proceed with treatment on the basis of price before they have had a consultation with an appropriately trained professional.

1.1 Promotional discounts

The IHAS recognises that demand for nonsurgical cosmetic treatments varies seasonally and it recognises the financial benefits, both to the patient and to the provider, of price discounts designed to boost activity levels during seasonally slack periods. In doing so, the IHAS recognises that these may appeal to and benefit those marginal purchasers who otherwise would not be

able to afford the full cost of the treatment they desire. Advertising of such discounts should be in accordance with paragraph 1.2 below.

1.2 Price Lists

Prices, including discounted prices, for non-surgical cosmetic treatments may be advertised in the published media and may be displayed on providers' Internet websites. In the case of discounted prices the price itself may be published together with the saving to the patient when compared to the normal treatment price. Advertisements may set a time limit on the period that consultations for treatment are available however guidance must be observed in allowing sufficient time between consultation and treatment for the client to consider consent. All prices in advertisements should be linked to a footnote stating that these are the prices prevailing at the time of publication.

1.3 Exhibition, Conference and Trade Show Discounts

Discounts that are conditional upon the consumer 'signing up' i.e. contracting for the procedure on the day of an event should not be offered to attendees of conferences, exhibitions and trade shows. Implicit in this stance is the IHAS view that prospective patients must have adequate time to reflect on all the implications of the proposed treatment, free from the pressure of a short time constraint or a short lived financial inducement.

1.4 Sponsorship of Exhibitions, Conferences and Trade Shows

Cosmetic treatment providers may sponsor conferences, exhibitions and trade shows whose purpose is to facilitate the dissemination of information about non surgical cosmetic treatments either to the medical profession or to providers and the public at large.

1.5 Advertising aimed at Teenagers

The IHAS is adamantly opposed to any non surgical cosmetic treatment advertising in media targeted at teenagers below the age of eighteen. Marketing communications should not be directed at people under 18 through the selection of media, style of presentation, content or context in which they appear.

1.6 Gift Vouchers

Gift Vouchers, which cover part or all of the cost of non-surgical cosmetic treatments, may be advertised in the published media and also advertised on the provider's own website on the Internet and point of sale literature in the clinics. However it must be clearly stated in the terms and conditions that the voucher is redeemable against cash should the recipient prefer or if the recipient is not suitable for treatment.

1.7 Loyalty Cards

'Loyalty' cards are cards which may be given by a specific provider to any of its patients which typically entitle the patient to a discounted price for future treatment by that provider. Loyalty cards are considered an acceptable way of rewarding patients for returning to the same provider for future or ongoing treatment. If any member of the IHAS does offer loyalty cards, the availability of such loyalty cards should not be advertised in any published media but may be advertised on the provider's own Internet website. They may also be mentioned or offered to patients or prospective patients at any time that they present themselves to a provider for a consultation.

1.8 Competitions and Prizes

IHAS members will not participate directly or indirectly in competitions for which the cost of a non surgical cosmetic treatment will be paid by the competition organiser or sponsor as a prize for winning the competition. IHAS members will also not sponsor any such competitions

We have read *The CAP Code Review : Consultation on the proposed CAP Code* and considered any implications that it has with the Data Protection Act 1998 (DPA98).

Clearly, most of the document is not relevant to the DPA98. However, we draw your attention to section 10.19 which covers rules about the collection of data from children. We welcome the inclusion of our guidance in your review, but it is important to clarify that our use of the over 12 age limit refers in particular to subject access requests. It is not intended to be a precise marker for decision making about products and services that affect children. For example, there are likely to be advertising campaigns where it is inappropriate to make a decision about the intended audience based on whether the children in this audience are under or over 12.

Our guidance reflects the legal position that there is no specific legal age of general majority although ages are set for driving, voting, marriage, and so on.

In other words, we are not setting an age limit. Our approach is not to promote a hard and fast rule, but more to promote that personal data is collected and processed fairly, and, naturally, there are very particular considerations here when dealing with children, as you also acknowledge in your review.

To sum up, our view is that the 12 age divide can be a useful starting point where children are affected, but may not be appropriate in every instance, so campaigns should be carefully planned on a case by case basis.

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.

Answer

The IAS welcomes the emphasis, towards the end of this paragraph, on restricting marketing communications that "imply that a drink may be preferred because of its alcohol content or intoxicating effect."

In order to strengthen this important message, we suggest that the phrase "may... make a factual strength comparison with another product" be supplemented by the phrase "only when the comparison is with a higher strength product of a similar beverage."

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.

Answer

The IAS considers that no exception should be made for low-alcohol drinks and that all the Alcohol rules should apply to all drinks above 0.5% alcohol.

The Licensing (Low Alcohol Drinks) Act 1990 defined low alcohol liquor as "any liquor which is of a strength not exceeding 0.5% at the time of the sale or other conduct in question." The Licensing Act 2003 makes no reference to low alcohol drinks at all. The special category of low-alcohol drinks as being between 0.5% and 1.2% alcohol dates back to the 1964 Licensing Act. To retain this category in the Advertising Codes would be an anachronism.

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

Answer

Not in its current form. The IAS welcomes the first two rules under 18.12. However, permitting the linkage with “sporting and other physical activities” (even with the restriction that such communication “must not imply that those activities have been undertaken after the consumption of alcohol”) potentially contradicts 18.14 – the appeal to youth by association with youth culture, of which sport is a major component, 18.17 – the link with fitness – and 18.7 “Marketing communications must not imply that alcohol can enhance mental or physical capabilities, for example by contributing to professional or sporting achievements.”

This principle applies equally to the effect of alcohol on performance at work and it is our opinion that the link between alcohol consumption and all work-related activity should not be permitted even in exceptional circumstances (18.13).

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?

Answer

On consideration of the mapping document in Annex 2, the IAS would wish to make the following observations:

1 56.2/18.1

The protection of the young, the immature and those who are mentally or socially vulnerable is paramount and in this respect it would be important to note that even moderate drinking (not only excessive drinking) can increase the vulnerability of these groups. This is particularly true of situations where even small amounts of alcohol can lead to impairment, such as when driving, during pregnancy, at work and in certain social situations.

The current CAP and BCAP Code Reviews provide an opportunity to reflect increasing public concern regarding the inappropriate sales and promotion of alcoholic drinks, particularly in respect of marketing communication to the young and other vulnerable groups. The proposed changes to the Codes do go some way towards providing greater consumer protection and this is to be welcomed. Several recent reports have also highlighted the contribution that stricter regulation of marketing of alcoholic drinks can have in the task of improving the nation’s health and social wellbeing.

In terms of significant change in advertising policy and practice, the IAS sees potential benefit in introducing a greater emphasis on restricting marketing communications to people under 18 “through the selection of media or in the context in which they appear.” (18.15) The proposal that “No medium should be used to advertise alcoholic drinks if more than 25% of its audience is under 18 years of age” does not reflect current UK population trends. A more realistic percentage in this case would be 10 – 15%. In the US, 15% is recommended by the National Research Council and Institute of Medicine, the US Surgeon General and 20 State Attorneys General. Only 8.6% of the UK population is now aged between 12 and 18 years old, and 16.4% is aged between 5 and 18 years old.

It is known that there is a wide diversity in the advertising activity of alcohol producers and their respective brands, with a minority being responsible for a large percentage of the total promotional activity. Overexposure, due to a disproportionate placement of alcohol advertisements in youth-orientated programmes and media needs to be monitored and guarded against in traditional and

new media. Consumer protection, particularly to reduce overall youth exposure to alcohol advertisements, will, in our opinion, require new and effective legal provisions replacing existing voluntary arrangements with new statutory Codes.

We also welcome the proposed introduction of 1.10 and 3.28.3 "Marketing communications must state restrictions on the availability of products, for example, geographical restrictions or age limits". Maintaining the profile of age limits on the sale of alcohol is important in a society where many young people drink alcohol before they are legally allowed to do so and where reported experiences of being drunk at an early age (12 and 13 years old) is among the highest in Europe (ref: HBSC report – Inequalities in young people's health, Currie et al for WHO, 2008 and the 2007 ESPAD report – Substance use among students in 35 European countries, Hibell et al, for the Swedish Council for Information on Alcohol and other Drugs, 2009). It will be interesting to note how these proposed changes will influence the marketing practice of the alcoholic beverage producers.

iii) Do you have other comments on this section?

We feel that 1.1 d and 1.2 q are not sufficient to determine which as-yet-unconceived forms of website content are covered by the Code. Specifically, 1.2 q excludes anything not explicitly listed in 1.1 d, which will tend to narrow the scope of the Code as new forms of content are developed. We propose that in 1.1 q, 'not covered by ('The Code applies to (d)')' should be deleted, and these rules should be supplemented by a principle to which reference can be made in cases not explicitly listed. We suggest the following principle:

The Code applies to website content produced by or on behalf of manufacturers or retailers of products which has the purpose of promoting the sale or consumption of those products.

We would also like to point out that, given the extent of the harm caused by alcohol, any advertising of alcohol is inconsistent with the principle that advertising should not harm.

Response to the Consultation on the proposed CAP Code from the ISP

The UK Code of Advertising, Sales Promotion and Direct Marketing

1. The ISP is the representative body of the UK Sales Promotions industry. It has members covering promoters, agencies and service providers. Members agree to operate under a Code of Ethics and to follow all relevant Codes, include of course CAP Code. The proposed Code changes therefore have a direct impact on members' businesses. We welcome the opportunity to comment on the changes.

2. Response to Code Questions

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

The ISP firmly agrees with the principle of all marketing communications being Legal, Decent and Honest and that the CAP Code in its proposed format is a fair reflection of this principle and is clear and easy to understand.

There are no major elements of compliance that have not been covered in the new Code.

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

- i) Yes
- ii) No
- iii) None - however we favour the word "Advertorial" to differentiate editorial from advertising content.

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.

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

Yes

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

- i) Yes
- ii) No**
- iii) None

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

Considering that individual sensitivity to "flashing images" will vary and be subject to medical opinion the ISP suggests that the term "not to include" be replaced with "avoid where possible".

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 but guidance would be welcomed on the meaning of 'direct exhortation' and what is and what is not acceptable.

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

Yes

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 .

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

Yes

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

YES but suggest that it is amended to '*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, conducted independently or under the supervision of an independent observer.*'

This allows for draws to be conducted by the independent person, not just having them as the observer of some process conducted by the promoter or their agency.

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
YES

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 26

YES although it is difficult for anyone to be sure that they are independent of anybody who might have entered the promotion. We would also ask for more detail in a Guidance Note to determine who is regarded as Independent – as per previous advice from the Sales Promotion Panel.

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

Yes

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

Yes. The rules of CAP should reflect ICO guidance so that people complying with the CAP Code do not fall foul of the ICO and data protection legislation. 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

Yes. There is no accepted Opt In list or method for those with Bluetooth devices, so unless this exemption is included it will be very difficult for marketers to use the technology.

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

The ISP is happy to support the proposed re draft of the Codes and feel that they will assist marketers in producing work that is both legal and fair to the consumer.

We do feel that greater clarity is possible in two areas : those that overlap with PPP, primarily the use of Premium Rate Services, and those that overlap with BCAP, eg those that run promotions on Broadcast media. This is to prevent Double Jeopardy or worse, a gap in regulation.

Statement of Representation

This document has been prepared by members of the ISP closely involved with the ASA and Regulatory Affairs, supported by the ISP Board and Secretariat. ISP Members have also had the opportunity to comment on the proposed Code change.

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? [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? [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 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. [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? [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

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. [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? [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. [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? [No](#).

Addendum – ScHARR Review

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. [Yes](#).

Background

The International Association for the study of Obesity and its sister organization The International Obesity TaskForce are pleased to take this opportunity to comment on the proposed revisions to the CAP and BCAP codes. IASO is a 10,000-strong membership organization, with some 50 national and regional member associations, headquartered in the UK. IOTF is a policy think tank partnered with the IASO and also based in the UK. As the UK has taken a significant lead in controlling marketing messages affecting children, and is being watched by many other countries, we would like to ensure that the positions taken in the UK maximise public health and minimise the risk of encouraging any obesity-related ill-health.

Regarding the consultation documents, we are concerned that they are difficult to follow, are poorly numbered and structured, and that the questions asked do not necessarily allow full opportunities to comment on the proposals. We fear that this may have inadvertently led to barriers to comments during this consultation period. We have endeavoured to make sense of them and comment on them herewith:

1. CAP CODE CONSULTATION

Response to specific questions

Part 2 Section 15 Food, Dietary supplements and Associated Health and Nutrition Claims Proposed rule 15.6.3

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

Response to question 53

Health messages are all too easily subverted by marketing messages so that they become partial and potentially misleading. We prefer there to be no endorsement by NGOs of any sort. The appropriate authorities for making rules regarding health claims and their presentation is the Food Standards Agency. The appropriate body for recommending the nature and substance of health messages is the SACN.

Proposed rule 15.11.1

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

Response to question 56

We are concerned that the marketing of any product which may undermine breastfeeding is wrong. Follow-on milks are likely to replace breastfeeding at a time when breastfeeding plus weaning onto solids should be protected. Follow-on milks are breastmilk substitutes and should be controlled as strongly as formula milks and related products, as defined by the WHO-UNICEF International Code on Marketing of Breastmilk Substitutes.

Response to Question 57 and the section to which it relates

There seems to us to be no justification for proposing different rules for TV compared with other media, such as radio, print and internet. All of these are found in the home and need to be consistent and subject to similar control. Outside the home, we believe that any location where children are gathered – such as kindergartens, schools, clinics, parks, cinemas and leisure centres – should be commercial-free areas, so that children are not exposed to inducements towards unhealthy behaviour.

Internationally we have proposed that the definition of ‘child’ should be based on national definitions of the age of majority, and in the UK we would prefer an age of 18 years, but we recognise the UK age of 16 years as being the Ofcom criterion for defining exposure to marketing measures. Before the age of 16 children are making their own purchasing decisions and should be protected from inducements towards making unhealthy choices.

We are impressed by the UK nutrient profiling model for regulating marketing messages, and the recent FSA review that found it fit for purpose, and we recommend that this model should be applied consistently across all media. This will ensure clarity for consumers and for food companies alike in knowing that a single standard is being applied to products permitted to be advertised.

We believe that brand equity characters should be included within the BCAP and CAP rules. We do not accept that they are ‘qualitatively different’ from celebrities or licensed. Brand equity characters are used for promotional effect to children and so should conform to the controls applying to advertising in all media.

Part 2 Section 21 Tobacco, Rolling Papers and Filters

Response to Question 73 and the related section

There are links between the risk of child obesity and maternal smoking during pregnancy, and we therefore welcome the strong rules on marketing of tobacco and related products in the UK. We see no justification to continue to permit advertising of any tobacco-related products, and we recommend that CAP’s present rules are strengthened to ensure that the marketing of rolling papers and filters is not permitted in any media.

2. BCAP CODE CONSULTATION

Proposed rule 13.8.1

Response to Question 85.

We are concerned that the marketing of any product which may undermine breastfeeding is wrong. Follow-on milks are likely to replace breastfeeding at a time when breastfeeding plus weaning onto solids should be protected. Follow-on milks are breastmilk substitutes and should be controlled as strongly as formula milks and related products, as defined by the WHO-UNICEF International Code on Marketing of Breastmilk Substitutes.

Response to Question 87 (other comments on this section)

As with the Ofcom scheduling rules, we believe that the BCAP content rules should explicitly offer protection to all children under 16. We also believe there should be consistency in the nature of advertising controls, and do not agree that radio rules should be substantively different from TV rules within a single BCAP code.

We believe that brand equity characters should be included within the BCAP and CAP rules. We do not accept that they are 'qualitatively different' from celebrities or licensed. Brand equity characters are used for promotional effect to children and so should conform to the controls applying to advertising in all media.

Part 2 Section 12

Concerning the section on Weight Control and Slimming we have not had a chance to consult our members on this important section, and would welcome a longer period for consultation. Please include us in your mailing as an interested party.

The Kao Brands Company would like to thank you for this opportunity to comment on the proposed revisions to the Advertising Codes. We find the revisions to be very positive and are appreciative of the Committee's efforts to consolidate and simplify the codes increasing clarity and transparency. Overall the rules appear quite reasonable and our company agrees with the rules in principle. However, as indicated in our response to question 1 below, we are concerned with the implementation of the codes and look forward to future discussions with CTPA, ASA and Clearcast on this topic. Please find Kao Brands Company's responses to specific questions below.

Question 1 - Social responsibility (pages 18 & 214)

Given BCAP's policy consideration, do you agree that rule 1.2 should be included in the proposed BCAP Code? If your answer is no, please explain why.

- Rule 1.2 - "Advertisements must be prepared with a sense of responsibility to the audience and to society"

As stated above, Kao Brands Company agrees with this statement in principle and already strives to be respectful and responsible in the development of our advertisements. Our concern is that the statement is quite broad and the subjective nature of interpretation may be exploited in the implementation of the codes. Some of this concern may be alleviated with adoption of revised post-broadcast review and appeal processes as parties within the community are proposing.

Question 8 - Puffery and subjective claims (pages 29 & 218)

Given BCAP's policy consideration, do you agree that rules 3.4 and 3.5 should be included in the Code? If your answer is no, please explain why.

- Rule 3.4 – "Obvious exaggerations ("puffery") and claims that the audience is unlikely to take literally are allowed provided they do not affect the accuracy or perception of the advertisement in a material way."
- Rule 3.5 – "Subjective claims must not mislead the audience; advertisements must not imply that expressions of opinion are objective claims."

Kao Brands Company agrees that rules 3.4 and 3.5 should be included in the Code. It is appreciated that puffery claims are expressly acknowledged within the Code and welcome the clarification given at the end of Rule 3.4.

Question 45 – Environmental Claims - New rules for television (pages 66 & 237)

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.

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?

Question 46 – Environmental Claims - Life cycle of the product (pages 66 & 237)

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? If your answer is no, please explain why?

- Rule 9.2 – “The basis of environmental claims must be clear. Unqualified claims could mislead if they omit significant information.”
- Rule 9.3 – “The meaning of all terms used in advertisements must be clear to consumers.”
- Rule 9.4 – “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 or service provides a total environmental benefit over that of the advertiser's previous product or service or competitor products or services and the basis of the comparison is clear.”
- Rule 9.5 – “Environmental claims must be based on the full life cycle of the advertised product or service, unless the advertisement states otherwise, and must make clear the limits of the life cycle. If a general claim cannot be justified, a more limited claim about specific aspects of a product or service might be justifiable. Claims that are based on only part of an advertised product or service's life cycle must not mislead consumers about the product or service's total environmental impact.”
- Rule 9.6 – “Advertisements must not suggest that their claims are universally accepted if a significant division or scientific opinion exists.”
- Rule 9.7 – “If a product or service has never had a demonstrably adverse effect on the environment, advertisements must not imply that the formulation has changed to improve the product or service in the way claimed. Advertisements may, however, claim that a product or service has always been designed in a way that omits an ingredient or process known to harm the environment.”
- Rule 9.8 – “Advertisements must not mislead consumers about the environmental benefit that a product or service offers, for example, by highlighting the absence of an environmentally damaging ingredient if that ingredient is not usually found in competing products or services by highlighting an environmental benefit that results from a legal obligation if competing products are subject to the same requirements.”

Kao Brands Company agrees with BCAP's approach to environmental claims in principle. However, we do have several concerns as outlined below.

- Rule 9.3 - As stated within BCAP's Consultation Document, "both the politics and the technology relating to the environment are developing quickly." Although the intention of the Environmental Rules is to provide general principles, there is concern that this rule may be interpreted in an over-prescriptive manner. As the technology and terminology is changing rapidly, not all consumers will be abreast of new developments which may preclude usage of new claims and terms. It is proposed that the rule be restated to avoid this possibility: "The meaning of all terms used in advertisements must be clear to reasonable consumers aware of environmental concerns. If a term is new and not currently used widely by the general public, the general meaning of the term should be adequately conveyed within the context of the advertisement."
- Rule 9.5 – Kao Brands Company agrees that the full life cycle is important when considering the environmental impact of products. However, as BCAP stated within the Consultation Document there are portions of the life cycle that the advertiser has no control over and may not be able to quantitate. There is concern that as written, the advertiser may not be allowed to make the limited claim in the absence of an exhaustive life cycle calculation. It is proposed that the rule be restated to avoid this possibility: "... Claims that are based on only part of an advertised product or service's life cycle must not mislead consumers about the product or service's total environmental impact as can reasonably be determined by the advertiser."

Question 60 - Medicinal claims (pages 88 & 243)

Given BCAP's policy consideration, do you agree that rule 11.4 should be included in the proposed BCAP Code? If your answer is no, please explain why.

- Rule 11.4 – "Medicinal claims may be made for a medicinal product that is licensed by the MHRA or EMEA, or a medical device that contains medicinal substances that act on the body in a manner ancillary to the device only. A medicinal claim is a claim that a substance or combination of substances can be used with a view to making a medical diagnosis or can treat or prevent disease, including an injury, ailment or adverse condition, whether of body or mind, in human beings by restoring, correcting or modifying physiological functions by exertion of a pharmacological, immunological or metabolic action."

Kao Brands Company is in agreement with CTPA concerning the potential implication that cosmetic products could no longer advertise secondary medicinal claims. We support CTPA's proposal to revise the rule to state: "... by exertion of a pharmacological, immunological or metabolic action. Secondary medicinal claims made for cosmetic products as defined in the appropriate European legislation should be backed by evidence."

Question 61 - The use of health professionals in advertisements (pages 89 & 244)

i) Given BCAP's policy consideration, do you agree that, unless prevented by law, it is not necessary to maintain the present prohibition on the use of health professionals in TV advertisements for products that have nutritional, therapeutic or prophylactic effects and in radio advertisements for treatments? If your answer is no, please explain why.

ii) Given BCAP's policy consideration, do you agree that rules 11.6, 11.7 and 11.8 should be included in the proposed BCAP Code? If your answer is no, please explain why.

- Rule 11.6 – “Advertisements other than those for medicinal products may feature or refer to health professionals covered by 11.5.1, if those professionals are suitably qualified in the relevant subject.”
- Rule 11.7 – “Unless it is obvious from the context, advertisements that include a health professional must make clear if he or she has a direct financial interest, or equivalent reciprocal interest, in the sale of the advertised product of service.”
- Rule 11.8 – “Testimonials or endorsements by health professionals must be genuine and supported by documentary evidence. Fictitious testimonials must not be presented as genuine. Any statement in a testimonial that is likely to be interpreted as a factual claim must be substantiated.”

Kao Brands Company agrees that Rules 11.6, 11.7 and 11.8 should be included within the codes. We welcome the opportunity to utilize health professionals within advertisements in a responsible manner as outlined in the Rules.

Question 99 - Requirement to identify charities (pages 137 & 274)

Given BCAP's policy consideration, do you agree that it is proportionate to replace the requirement for advertisements that include reference to a charity to include, in that advertisement, a list of charities that may benefit from donations with proposed rule 16.5.2? If your answer is no, please explain why.

- Rule 16.5.2 – “Advertisements that include an offer to donate money to charity must identify the charity that will benefit and explain the basis on which the amount to be donated will be calculated, for example “£1 per sale” or “10% of the purchase price”. If several organisations will benefit, a generic identification may be given but the advertisement should make clear where the audience can obtain a list of the charities that will benefit.”

Kao Brands Company agrees that the proposal in Rule 16.5.2 is a proportionate replacement for the prior rule. We agree that identifying where a list can be located in the case of multiple charities is beneficial to the consumer. We also agree with the principle that the audience should understand the basis of the donation amount.

Question 157 (page 208)

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

Kao Brands Company agrees that the revised codes are overall clear and transparent. We also appreciate BCAP's statement within the Consultation Document “Guidance 4.xiii BCAP proposes that the Code will be supplemented by guidance, which will be made available separately from the code. The guidance is to help users of the Code to interpret rules. (Because a BCAP objective is to ensure that each rule is easily understood, BCAP anticipates that guidance on the interpretation of a rule will not generally be considered necessary.)” Kao Brands Company has been using the CTPA Guide to Advertising Claims which was developed in conjunction with ASA and Clearcast. Our company has found the guidelines to be useful and appreciates the collaborative spirit which led to the

issue of the guidelines. In agreement with CTPA, we propose to have the guidelines specifically referenced within the Codes. A suitable position may be within the Introductory Section on Compliance Background within the second paragraph which mentions Clearcast.

We would like to thank you again for the opportunity to comment on the proposed revisions to the Advertising Codes. We appreciate the scope of this undertaking and the benefits that all parties will receive.

In response to Question 9, I 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.

The Report of the House of Commons Science and Technology Committee on the Scientific Developments Relating to the Abortion Act 1967 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.'

The BCAP code Review proposes a new Rule 11.11 which covers this point, and I strongly believe that this should be extended to be clearly included on the revised CAP Code, therefore ensuring that printed advertisements and posters will meet the same criteria.

Kraft Foods is broadly supportive of the positive changes proposed to both the CAP and BCAP codes. However, we but would like to raise a small number of specific points as follows:

1. CAP and BCAP Codes: Comparative Nutrition Claims

Proposed substantive change BCAP Code 13.5.1 / CAP Code 15.28

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

We would ask for clear alignment with EU Guidance in this area, which allows comparison between *foods that are similar in terms of nutritional content*, rather than restricting the comparison to foods within the same category.

This approach would provide greater clarity to advertisers, as neither the EU Regulation nor the CAP/BCAP codes provide a definition of food categories.

2. CAP Code only

PART 2 - SECTION 8

"YES" to all consultation questions, except:

QUESTION 20 - SECTION 8.38 (ref Proposed rule 8.17.6.a)

NO - We believe this additional rule would over-complicate promotional communications. We believe the distinction is obvious to participants. For example in lucky ticket/winning code type promotions, it is well understood by consumers that the prizes will only be won *if* the winning ticket/code is found. This change would provide no additional material protection or benefit for the consumer and could add over complication to consumer communications.

QUESTION 24(ii) - SECTION 8.51 (ref proposed rule 8.25)

We very much support the main change proposed here but do not feel the extra auditing requirement re national promotions is workable, or necessary for consumer protection.

All promoters should operate on a level playing field and if the process has been independently verified that should be sufficient for all promotions. The national promotions auditing requirement should therefore be deleted as it is unfair and would cause many difficulties in application and interpretation. For example many "national" promotions are run by smaller companies and local promotions run by bigger ones so the distinction is not practical and would not have the impact of benefitting or protecting consumers. Also what is meant by national, does it mean the whole of the UK or GB only or just England/Wales etc? National *promotions* or national *promoters*?

QUESTION 28(iii) OTHER COMMENTS

Referring to Section 8.8 above (Northern Ireland) it would be useful if the ASA could work with the legislative to bring laws on instant wins/ free prize draws in Northern Ireland into line with those applying in the rest of the UK (i.e. Great Britain) since the changes made in the Gambling Act 2005. The current distinction and inconsistency causes unnecessary administrative burden on promoters and does not benefit consumers. There seems no consumer benefit or logical reason for this distinction.

3. BCAP Code only

PART 2 - SECTION 28

"YES" to all consultation questions, except:

QUESTION 157

We would support the submission by Lewis Silkin Solicitors LLP calling for the ASA to give serious consideration to setting up a new appeals process in respect of television advertisements which have been cleared by CLEARCAST but subsequently banned by the ASA. Given all the arguments raised by Lewis Silkin including in particular the financial implications for advertisers, it seems a reasonable and fair step to develop such an appeals procedure.

Thank you for inviting comments on the revision of the CAP Code. Our comments are principally in relation to adult weight management and in particular the use of very low calorie and low calorie diets.

LighterLife, founded in 1996, is a successful weight loss and weight management programme using Very Low Calorie Diets (VLCDs) for people who are obese (a typical VLCD patient comes to us with a BMI of 37). Recently we have also introduced a Low Calorie Diet (LCD) for patients who have a BMI from 25 to 29.9.

Our programmes have been developed with two main components:

- Nutritionally complete Foodpacks which are used in place of conventional food; and
- Techniques from cognitive behavioural therapy (CBT) and transactional analysis (TA) delivered by Edexcel-accredited weight management counsellors.

Whilst on a LighterLife Programme, the objective is not only to lose weight but also to explore why clients overeat; they also learn effective ways to deal with problems, feelings and difficult situations without turning to food.

LighterLife works within the guidelines set by Government, Trading Standards and Advertising Standards Authority regulations. Its programmes are compliant with the National Institute for Health and Clinical Excellence's guidance on VLCDs and commercial weight-management 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?

LighterLife welcome this step in the right direction but feels that this rule does not go far enough. If the CAP would allow medical products to target obese people, it should also allow for food products to target obese people. Stricter criteria should apply to medical products, and not to food products.

We understand and agree with your reasoning for this policy, i.e. to ensure that people who respond to marketing communications are properly assessed to gauge their suitability for the programme at each stage of the programme and thereby avoiding, as far as possible, the potential for harm. LighterLife feel that they do have the appropriate provisions in place to comply with this reasoning.

Before commencing the LighterLife Programme, clients undergo a rigorous process to ensure their health and safety whilst on the programme. This process includes screening by the LighterLife Medical Department and in the case of the VLCD, a brief health questionnaire which is completed by a suitable healthcare professional. Those who are on certain medications or have particular medical conditions are excluded from the programme at this stage. In addition, while being on the programme, clients undergo clinical supervision, as they have an Ongoing Check-up Form completed by a GP or Healthcare Professional every 28 days.

Therefore we see no reason why our food products, which fall under article 9 of European Directive on Foodstuffs for Particular Nutritional Uses and are especially designed to provide obese people that are trying to lose weight with at least a 100% of their daily nutritional requirement, should not be targeted at obese people.

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?

LighterLife feels it is appropriate that reference is being made to the most up to date guidance currently available in the UK.

Having said that, we would like to point out that while the NICE Guidance suggests that VLCDs less than 600kcal/day should only be used under "clinical supervision", it does not define what constitutes such supervision. This lack of a proper definition leads to uncertainty for companies wishing to advertise their products, a situation which needs to be resolved. However, as it is a guidance issued by NICE, we think it appropriate that NICE would provide the definition when they next update their Obesity Guidance.

We would also like to point out that the NICE Guidance refers to VLCDs as “diets (less than 1000 kcal/day)”, despite European legislation (Commission Directive 96/8/EC) on low-calorie diets indicating that VLCDs are diets below 800 kcal/day (as the bottom cut-off point for low-calorie diets is 800 kcal/day). We have already highlighted this inaccuracy to NICE in previous correspondence, but so far no corrective action has been taken. We hope that NICE will correct this inaccuracy, next time they update their guidance. In the mean time we hope that the ASA will apply the VLCD definition in line with the applicable European legislation.

In addition to the above, we would like to repeat that not only before, but also during our programme, clients are clinically supervised to ensure their health and safety.

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) LighterLife would like to note that all our products comply with all legislative requirements and best practice. We work within the guidelines set by Government and Trading Standards. We would also like to stress that while on one of our programmes, the objective is not only to lose weight, but also to explore why clients overeat. They also learn effective ways to deal with problems, feelings and difficult situations without turning to food.

Our food products are carefully formulated to provide our clients with at least 100% of their daily nutritional requirements, based on up to date and extensive scientific research.

As obesity is a major and growing problem in the UK, it inevitably leads to the growing prevalence of health risks associated with obesity. NICE themselves acknowledge that there is a place for commercial weight loss programmes to help the government in reversing this trend as the health care system simply does not have the resources in place to deal with this growing problem effectively. Given this situation, it does not make sense that responsible traders cannot advertise to obese people about the availability of their products.

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.

LighterLife is in agreement that the Code provides a correct interpretation of the requirements of Article 12(b) of the NHCR.

We think it appropriate however, that when the ASA is scrutinising a company's advertising in relation to the aforementioned rules, the ASA would liaise with the local TSO of the concerned company. We think the TSO's involvement is appropriate as they are the enforcement agency in charge of the correct implementation of the Nutrition and Health Claims Regulation. As a responsible company, we have also already been in touch with our TSO on this issue, to ensure that we operate within the rules.

Introduction

The Low Carbon Vehicle Partnership (LowCVP) welcomes the 2009 consultation on the Review of the UK Advertising Codes.

The Partnership's interest, and basis for this submission, lies solely with the review of Environmental claims. The Partnership therefore welcomes the proposal for the code to include an additional rule in the environmental section of the non-broadcast code to prevent marketers from exaggerating the environmental benefits of their products.

Additionally, the Partnership supports the proposal to introduce for TV ads, an environmental claims section in the broadcast code that reflect the requirements of the present radio and non-broadcast Codes.

Overall LowCVP welcomes the proposed code changes and the intention to make the code's requirements more specific and less tolerant of ambiguity.

Review of the CAP code

Question 35

Given CAP's policy consideration, do you agree that the (proposed new) rule 11.7 should be included in the code?

If your answer is no, please explain why

11.7

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

Yes, we support the inclusion of this rule.

Question 36

1. 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.

Broadly yes. Please see comments on the specific rules under 3 below.

2. 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 see comment under 3 below.

3. Do you have other comments on this section?

LowCVP supports the proposed code principle on Environmental Claims, ie. that marketers should take account of Government guidance including the Green Claims Code published by Defra and BERR.

The secretariat of CAP and BCAP will be aware of Defra's current review to update its Green Claims code. LowCVP, in partnership with SMMT, UKPIA and the Advertising Association, will be working over the coming months to develop a Best Practice Guide to green claims in marketing vehicles and fuels. Defra is aware of this project and are keen to endorse this as part of their project.

With specific regard to car advertising, the Passenger Car regulations (Fuel Consumption and CO2 Emissions Information Regulations¹) requires information on CO2 and fuel economy to be included in all promotional material, including primarily graphical advertisements. Such advertising is

monitored for compliance by the Vehicle Certification Agency. Schedule 4 of the Regulations requires that “All information on the official fuel consumption and official specific emissions of CO₂ shall be easy to read and easily understandable and shall be no less prominent than the main part of the information provided in the promotional literature. Specifically, fuel consumption and CO₂ data should not be in a smaller font size than other text giving information on the vehicle eg. specification, performance, price. LowCVP believes the current regulations and guidance on car advertising only provides a ‘bare minimum’ requirement for CO₂ information, and that there is considerable potential for the industry to incorporate more CO₂ information in advertising. LowCVP will therefore look closely at this issue when it develops the Best Practice Guide. It will also look at how green messages are positioned and communicated to consumers; research last year for the Newspaper Marketing Agency found that only 54% of consumers were confident that they understand what CO₂ emissions meant, while 37% hadn’t heard of or didn’t understand g/km.

11.1

The basis of environmental claims must be clear. Unqualified claims could mislead if they omit significant information.

Agree

11.2

The meaning of all terms used in advertisements must be clear to consumers.

Agree. In this context, there must be a question as to whether the provision of CO₂ and fuel economy figures on car adverts, on a standalone basis, are clear and understandable to consumers.

11.3

Absolute claims must be supported by a high level of substantiation. Comparative claims such as “greener” or “friendlier” can be justified, for example, if the advertised product provides a total environmental benefit over that of the marketer’s previous product or competitor products and the basis of the comparison is clear.

Agree in principle. The difficult area here lies with the source from which any comparison derives, ie. what is the basis for it being ‘credible’? Government produced or endorsed data may generally be perceived as most credible, though any data used in claims should be capable of being substantiated by verifiable and accountable sources. Eg. a car being given a ‘green award’ by a motoring magazine may not in itself be considered credible without further substantiation. This is a subject area that LowCVP will examine as part of its best practice review.

11.4

Marketers must base environmental claims on the full life cycle of the advertised product, unless the marketing communication states otherwise, and must make clear the limits of the life cycle. If a general claim cannot be justified, a more limited claim about specific aspects of a product might be justifiable. Marketers must ensure claims that are based on only part of the advertised product’s life cycle do not mislead consumers about the product’s total environmental impact.

LowCVP does not have a definitive view on this rule given its broad range of members which include manufacturers of products as diverse as vehicles, transport fuels, tyres, safety equipment and other components. However, some members have suggested that where appropriate, comments relating to a product’s lifecycle are consistent with the requirements laid out in ISO

standards and that such claims should be based on whole of the lifecycle analysis.

11.5

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

The definition of 'significant' in this context is crucial though LowCVP has difficulty in suggesting how this might be quantified. For example, biofuels are controversial both in terms of scientific and social impact, though there is no universally accepted means of measuring such impact.

11.6

If a product has never had a demonstrably adverse effect on the environment, marketing communications must not imply that the formulation has changed to improve the product in the way claimed. Marketers may, however, claim that a product has always been designed in a way that omits an ingredient or process known to harm the environment.

Agree.

In brief, we believe that on balance the advertising industry has got these revisions right and support the amendments to the Codes.

Proposed amendments

We propose one amendment to Question 48 (CAP) and Question 80 (BCAP) which relates to the Nutrition and Health Claims Regulation.

Article 9.1 of the Regulation states "...The difference in the quantity of a nutrient and/or the energy value shall be stated and the comparison shall relate to the same quantity of food". It does not expressly state where the percentage/value information must appear.

In comparison, the amendments to the Codes require that "The difference in the quantity of a nutrient or energy value must be stated **in the marketing communication/in the advertisement** and must relate to the same quantity of food."

Therefore, we propose deleting the words in bold to accurately reflect the wording of the Regulation.

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.

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?

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.

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?

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.

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.

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.

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.

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?

WITH REGARD TO PROPOSED ADVERTISING OF ABORTION SERVICES, THE USE OF DESCRIPTIVE TERMS LIKE "REPRODUCTIVE HEALTH OR CHOICES" IS MISLEADING AS ABORTION TAKES PLACE AFTER REPRODUCTION HAS TAKEN PLACE AND IS NEITHER CONDUCTIVE TO WOMEN'S HEALTH NOR OFFERS ANY CHOICE TO THE OTHER LIFE INVOLVED – THE UNBORN CHILD WHOSE LIFE IS ABOUT TO BE ENDED. THERE ARE NUMEROUS EVIDENCE BASED TRIALS DETAILING THE ADVERSE EFFECTS OF ABORTION ON WOMEN'S PHYSICAL AND MENTAL HEALTH.

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.

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?

UNDER THE EQUALITIES ACT AND INTERNATIONAL HUMAN RIGHTS LAW, THE PUBLIC ADVERTISING OF ABORTION SERVICES WHICH CAUSE HARM TO WOMEN AND DEATH TO THE UNBORN CHILD, IS BOTH HARMFUL AND OFFENSIVE TO THOSE NATIONS AND FAITH GROUPS IN THE UNITED KINGDOM WHO OPPOSE THE TAKING OF HUMAN LIFE AT ALL STAGES OF DEVELOPMENT.

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.

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?

CHILDREN SHOULD NOT BE SUBJECTED TO THE PUBLIC ADVERTISING OF ABORTION SERVICES, MASQUERADING AS HEALTH INITIATIVES.

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?

Advertising of Abortion Services as if the procedure enhanced women's reproductive health or offered a choice in reproductive health, would be both Misleading and Dishonest.

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?

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.

Annex 3

Consultation questions

The Medicines and Healthcare products Regulatory Agency (MHRA) is responsible for ensuring that medicines and medical devices work and are acceptably safe. The MHRA has a statutory responsibility for regulation of medicines advertising. This response relates to these responsibilities.

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.

A – 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.

A - Yes, and the MHRA confirms it is content with the definition of a medicinal claim given in the rule.

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.

A – 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?

A - No

iii) Do you have other comments on this section?

A – 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?

A – Yes, the MHRA and EMEA will have taken into account the professional support required before licensing any product for the treatment of obese people available through pharmacies.

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?

A – Not for MHRA

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?

A – Not for MHRA

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?

A - 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?

A - No

iii) Do you have other comments on this section?

A - 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?

A - No

Introduction

Formed in 2000, the Mobile Entertainment Forum (MEF) is the global trade association of the mobile media industry, working on behalf of its diverse membership to drive mobile entertainment adoption, shape regulation and deliver competitive advantage to its members. MEF's membership base spans the entire range of mobile entertainment activities, including music, film, TV and video companies who create and package content; publishers, retailers, service providers and technologists who sell and deliver content and network operators who get the content to the end users.

With global headquarters and an EMEA branch in London, a Hollywood-based Americas secretariat and an Asian chapter in Hong Kong, MEF's member network encapsulates a comprehensive list of leading mobile entertainment businesses and entrepreneurs from across the value chain. For more information and a full list of members please visit: www.m-e-f.org.

General Overview

MEF welcomes the opportunity to respond to the CAP Code Review Consultation and agrees that it is timely to conduct a major review of its Code to ensure the rules for non-broadcast advertisements, sales promotion and direct marketing communications are up to date and fit for purpose.

MEF agrees with:

- CAP's general policy objective to ensure that all non-broadcast marketing communications covered by the CAP Code are legal, decent, honest and truthful and prepared with a due sense of social and professional responsibility and with
- CAP's intention that its Code be based on the enduring principles that marketing communications should not mislead, harm or offend.

In particular, MEF supports CAP's objective to ensure that the Code adequately protects children and others whose circumstances seem to CAP to put them in need of special protection, yet retains an environment in which responsible advertising can flourish.

We support the need for all regulatory Codes to be in keeping with the five principles of good regulation. The principles state that any regulation should be:

- transparent
- accountable
- proportionate
- consistent
- targeted – only at cases where action is needed

General Response

We would like to congratulate and commend the CAP review team on doing such a thorough job of reviewing the Code of Practice. We have provided responses to only those questions and sections of the consultation that have a direct bearing on our members.

The CAP Code review has highlighted several potential conflicts with other regulatory Codes of Practice and also inconsistencies with the BCAP Code. MEF believes that CAP must consider other regulatory Codes that exist and developments that have either recently taken place or are currently being consulted on. Without taking into account the regulatory overlap which occurs, the regulatory burden on MEF members runs the serious risk of becoming disproportionate and contrary to the goals of the five principles of good regulation. We believe that the key developments that CAP should take full account of are:

- Prior permission requirements for certain mobile services from PhonepayPlus⁴
- The Ofcom Scope Review⁵ which is seeking to ensure the current PRS regulatory regime meets the needs of consumers, affords an appropriate level of consumer protection and, at the same time, supports an innovative and changing PRS industry.
- The process of forming a new regulator in the UK for video on demand services⁶. This is being led by the DCMS and Ofcom.

All the above issues have specific impacts on the content and promotion of mobile media services. MEF would urge CAP to ensure it is engaging fully in discussions with Ofcom, the DCMS and PhonepayPlus to ensure proposals considered and implemented will not cause a direct conflict between Codes and/or create any unnecessary overlap of provisions and responsibilities. There is a real need for a clear demarcation of responsibilities between regulators and now is a perfect time to explore the opportunities as part of the Ofcom Scope Review. Ultimately, such a clear demarcation will benefit the consumer who will be able to clearly identify the regulator they need to approach or be referred to the most appropriate regulator.

Specific Response to Questions

- **Part 2 - 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.

⁴ This rule came into effect on 22 January 2009: <http://www.phonepayplus.org.uk/upload/SPPNOTICE.pdf>

⁵ http://www.ofcom.org.uk/consult/condocs/prs_scope/

⁶ http://www.culture.gov.uk/reference_library/consultations/5309.aspx/

MEF Response:

We agree. However, as you will see in our responses below, there is a desperate need for clear guidance to be provided by CAP that supplements the Code provisions which indicate to the stakeholder how the rules will be applied in practice. The provision of examples that do not form part of the Code would be of considerable use to MEF members and can be adapted quickly without the need for considerable consultation with the industry.

Part 2 – Section 2 (Recognition of Marketing Communications)**General comment:**

Whilst 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, there needs to be a recognition that other regulators also assert their authority over the same areas. Particularly, PhonepayPlus as an agency of Ofcom is tasked with the regulation of premium rate services which includes both their content and promotion. There are provisions in the CAP (and BCAP) Codes that specifically cover promotions advertising premium rate services. In order to ensure regulatory certainty, we would like the ASA to refer all complaints about the advertising of premium rate services to PpP in the first instance unless the issue is one purely of advertising.

- **Part 2 – 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.

MEF Response:

We agree that qualifications must be clear to consumers who see or hear the marketing communication. The provision seems to apply to those qualifications which can only be heard or seen once or are only allowed to be seen or heard once. As such, the provision as drafted needs to reflect this and should not apply to non-broadcast advertising media that allows a consumer to view or see the marketing communication again.

Question 4

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

MEF Response:

We agree that marketing communications must not exaggerate the capability or performance of a product and that claims must be based on normal use. However, this would fall under the general duty to not mislead – any exaggeration will be misleading by act or omission. As such, we would query the need to have this provision included.

The general duty to not mislead consumers can cover a number of provisions including so it may be feasible to incorporate these in supplementary guidance rather than as Code provisions:

Para 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:

Para 3.28.3

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

Para 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.

We would recommend that the Code contain a general duty to not mislead by act or omission which is then supplemented with clear practical examples of what would be considered to be misleading.

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.

MEF Response:

While we agree with the sentiment of this provision, there is the possibility of conflict and confusion if the promotion relates to a product or services obtained by engaging a premium rate number.

The PhonepayPlus Code states:

5.11 Use of the word 'free'

"No premium rate service or product obtained through it may be promoted as being free unless:

- a. a product or service has been purchased by the consumer using a premium rate service and a second product or service of an equal or greater value is provided at no extra charge, or
- b. a product is provided through the premium rate service and the cost to the user does not exceed the delivery costs of the product and the promotional material states the maximum cost of the call."

As can be seen, the above PpP provision differs from the proposed provision in the CAP Code. This is likely to cause confusion and multiple rules for similar services paid for with different mechanisms. Where services are paid for using a premium rate mechanism, only one set of rules should apply to avoid any confusion and double jeopardy.

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?

MEF Answer:

We would like to reiterate that there is a general duty to not mislead consumers which can cover a number of provisions including so it may be feasible to incorporate these as supplementary guidance notes rather than as Code provisions.

So, a practice is unfair if:

- The conduct itself is not professionally diligent; and
- The practice materially distorts – or is likely to materially distort, the economic behaviour of average consumers in relation to the products concerned.

This can be followed by examples of how this works in practice.

- **Part 2- Section 4 (Harm and Offence)**

The Consumer Protection from Unfair Trading Regulations 2008 implement in the UK the EU Unfair Commercial Practices Directive 2005/29/EC. To give consumers greater confidence to shop, the Directive aims to harmonise consumer protection legislation to a high common standard across the EU. The Directive should also make it easier for businesses to market and sell their products to consumers across the EU. The Regulations introduce, for the first time, not only a general prohibition against unfair commercial practices, but also specific prohibitions against misleading and aggressive practices. It also introduces a blacklist of 31 specific practices that will always be banned as they are inherently unfair.

The OFT and local authority Trading Standards are the main enforcers of the Regulations. They have extensive investigatory powers in addition to their powers to take civil and criminal enforcement action. The OFT can use a range of tools to get traders to comply, including through education, advice, guidance, codes of conduct and alternative means, such as self-regulation.

The OFT may, for example, refer practices concerning the phone-paid services market, to be dealt with under the PhonepayPlus code of practice. Equally, matters falling within its area of expertise may be referred to the Advertising Standards Authority. Where remits overlap, and two or more enforcers can take action, they are expected to work together with a view to bringing one coordinated action.

MEF requires, as a matter of urgency, that CAP/ASA liaise with PpP to set out very clearly for the industry their respective jurisdictions and under which circumstances they intend to take action.

All enforcement bodies must have regard to the principles of transparency, proportionality, accountability and consistency and with the changes proposed (see below) this will no longer hold true.

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.

MEF Answer:

Rule 5.7 states that “Promotions that contain a direct exhortation to buy a product must not be addressed to or targeted at children.”

At Paragraph 5.11, the consultation document states 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.”

This is not true. The inclusion of Rule 5.7 is a significant departure from the previous provision which stated:

“47.5a

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

47.5c

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

The new provision seems to state that you cannot target children if you are asking them to purchase any products or services regardless of price points.

The inclusion of the new rule is also in direct conflict with the current PpP Code of Practice which states:

“7.5.1 Definition of children’s services

Children’s services are services which, either wholly or in part, are aimed at or should have been expected to be particularly attractive to children, who are defined for the purposes of this Code as people under 16 years of age.”

The PpP Code goes on to state that:

“7.5.2 Promotional material for children’s services must clearly state:

- a. the usual cost of the service,
- b. that the service should only be used with the agreement of the person responsible for paying the phone bill.

7.5.3 Children’s services, and any associated promotional material, must not:

- a. contain anything which is likely to result in harm to children or others or which exploits their credulity, lack of experience or sense of loyalty,
- b. include anything which a reasonable parent would not wish their child to hear or learn about in this way,
- c. make direct appeals to children to buy or donate, unless the product, service or donation is one which they could reasonably be expected to afford for themselves,
- d. encourage children to use other premium rate services or the same service again.

7.5.4 Children’s services must not:

- a. generally cost more than £3, or in the case of subscription services (see paragraph 7.12), more than £3 per month,
- b. involve competitions that offer cash prizes or prizes readily converted to cash.”

These paragraphs are seemingly incompatible with the new wording set out in the CAP Code and create a conflict between rules applicable to the advertising for the services falling under the jurisdiction of the two regulatory bodies. This is, in our opinion, unacceptable and creates serious regulatory uncertainty.

There is also general uncertainty as to what the practical implications of the proposed rule in 5.7 would mean. Does it mean, for example, that you can sponsor products targeted at children but not ask them to purchase? What about editorials for certain products or services? At what point is an advertisement considered to be a ‘direct exhortation’?

MEF would urge the CAP and PpP to discuss the inclusion of rule 5.7 with the industry further and consider carefully how the services and promotions for premium rate services should be regulated to avoid uncertainty and multiple rules. We would strongly request that CAP provide clear guidance as to how rule 5.7 will be interpreted and might be enforced in practice.

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.

Our response to this question replicates the concerns listed above.

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?

ii) Do you have other comments on this section?

MEF Answer:

The proposed rules need to be clearly set out with example provided in supplementary guidance.

- **Part 2 – 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.

MEF Answer:

Agreed.

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?

MEF Answer:

Agreed - 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 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.

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.

Question 22

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

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.

MEF Answer:

Agree with above— though this is again a good example of where a general duty to not mislead consumers could be applied rather than having specific and prescriptive provisions in the CAP Code.

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.

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.

MEF Answer:

The remit of the CAP Code relates to regulating the content of advertisements in print, on posters, in new media and the cinema. It covers all sales promotions, the use of personal data for direct marketing and the delivery of mail order goods or refunds. The provisions relating to question 24 and 25 seem outside the remit of the CAP Code and relate more to substantiation.

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.

MEF Answer:

Agreed.

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.

MEF Answer:

Agreed. However, again, this leads to a conflict with the PpP Code of Practice that needs to be resolved.

- **Part 2 – Section 10 (Database practice)**

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.

MEF Answer

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

The main question we have is how a marketer is likely to know. If the service is targeted specifically at children then it is clear (subject to limitations set out in the Code). However, if it is a general promotion (which is non adult) then how is a marketer to know that a child has 'subscribed' or taken part? What can the stakeholder do to ensure it has complied? MEF would like clear guidance on this matter.

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.

MEF Response

We agree with CAP as 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.

Conclusion

MEF seeks a meeting with CAP as soon as possible to discuss the proposals.

If you need any more information or have any questions, please do not hesitate to contact Suhail Bhat at Suhail@m-e-f.org

Thank you for the opportunity to respond to the consultation on the proposed changes to the CAP code.

Molson Coors takes its social responsibility obligations extremely seriously. We were founder members of the Portman Group when it was set up in 1989 and also provide substantial financial support for the Drinkaware Trust. We set out to comply fully with the letter and the spirit of all legislation and self regulatory codes around the sale and promotion of alcohol. The need to promote our brands responsibly is specifically highlighted in the Molson Coors Code of Conduct. All our marketing staff and marketing agencies receive regular training from the Portman Group on how to comply with industry self regulatory codes. Carling worked in partnership with the Scottish Government and Old Firm Football Clubs to be the first beer brand to run dedicated responsibility adverts on UK television. We also took a lead in removing Carling branding from children's replica shirts in Scotland, ahead of the Portman Group guidelines.

Molson Coors already complies with the vast majority of the proposed changes to the code relating to the promotion of alcohol drinks as a result of our compliance with the Portman Group's self regulatory code and our internal standards for responsible marketing. We have only one area of concern about the proposals relating to alcohol.

With the development of our brand C2, Molson Coors pioneered the creation of the "mid-strength" beer category in the UK. C2 is half the strength of mainstream lagers in the UK and we promote it as a 2% beer that tastes great. The mid-strength beer category is still a recent development with a relatively small proportion of the total UK beer market, but in other countries it commands a significant market share. For instance in Australia mid-strength beers make up 13% of beer sales. We believe that it would be in direct conflict with the interests of social responsibility to introduce controls that would limit the ability of companies to develop and market lower strength alternatives to existing strength products.

Therefore in response to Question 63, Molson Coors would not support any changes that would limit the communication of the benefits of consuming alcohol drinks with a lower alcohol content than would be normal for the category – even if the alcohol content was in excess of the legal definition of a low alcohol drink, which is 1.2% alcohol.

Response on behalf of the National Heart Forum

19 June 2009

Introductory remarks

The National Heart Forum (NHF) welcomes opportunity to comment on proposed code revisions to the CAP and BCAP rules. We feel that the consideration of public interest input in shaping advertising regulations is long-overdue and we welcome this requirement now on CAP do to so. However, it is disappointing that the format in which CAP has chosen to present its rules, proposed revisions and questions is opaque and probably off-putting to many interested parties which may have useful contributions to make.

As an alliance of 60 organisations working to reduce the risk of avoidable chronic diseases including coronary heart disease, stroke, cancer and diabetes, the NHF, restricts its comments to those aspects of the Code review where we recognise a public health impact of advertising rules, specifically around food and drink advertising to children, the marketing of breast-milk substitutes and the marketing of tobacco-related products. (Comments on the alcohol-related rules will follow under separate cover by 10 July).

The opinions expressed in this submission are consensus-based and do not necessarily reflect the views of all individual members of the NHF. This submission responds to both the CAP and the BCAP code consultations.

1. CAP CODE CONSULTATION

Response to specific questions

Part 2 Section 15 Food, Dietary supplements and Associated Health and Nutrition Claims

Proposed rule 15.6.3

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

Response to question 53

It appears that there are no 'relevant national rules' that currently apply in the UK and that the proposed revision to the CAP code might be construed as such. In the interests of public protection, it is vital that any claims or information presented to consumers should be free of commercial bias and guaranteed to be of the highest scientific quality. We are concerned that the wording of 15.6.3 is open to interpretation and could encourage the creation of 'health-related charities' or 'national representative bodies' for the purpose of fronting commercially-motivated recommendations in marketing communications.

We recommend that it should be the Food Standards Agency in consultation with the Scientific Advisory Committee on Nutrition that should – as the appropriate, competent authorities – determine rules around such endorsements. This should not be determined by CAP.

Proposed rule 15.11.1

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

Response to question 56.

We believe that the current provision is inadequate. To ensure the avoidance of confusion, advertising of follow-on formula should be subject to at least the same restrictions as infant formula.

In our view, follow-on milks will have the effect of substituting for breastfeeding after 6 months, and thereby **are** breastmilk substitutes and should comply with all the restrictions applicable to formula milk and all other breastmilk substitutes.

Response to Question 57 (other comments on this section)

We do not accept the justifications given under 15.10 for why restrictions equivalent to the TV food advertising rules should not apply in other media.

The argument that TV rules should be treated differently because of “TV’s place in the family home” would, in our view suggest that other media “in the family home” should attract similarly, robust (not weaker) regulation including radio, magazine and press advertising and the internet. Arguably, the opportunity for mediation by parents is particularly low in the case of internet marketing communications to children when studies show that children are very likely to be watching the screen alone.

We believe the CAP rules should differentiate between high fat, sugar and salt foods (HFSS) and non-HFSS foods using the nutrient profiling model (NPM) developed by the Food Standards Agency. We support the decision by Ofcom to require that BCAP rules apply to HFSS foods, as this enables and encourages advertisers to advertise healthier foods or to reformulate existing products to achieve a healthier profile. There are no scientific or nutritional reasons why the NPM cannot be adapted for use in other settings beyond the Ofcom rules. Indeed there are examples where this is already the case (eg. FSA Australia and New Zealand proposals for health and nutrition claims).

We are also concerned that an undifferentiated approach in the CAP rules creates an uneven regulatory playing field between broadcast and non-broadcast advertisers.

We believe that, in common with the Ofcom scheduling rules, non-broadcast advertising rules should explicitly offer protection to all children under 16. The application of rules only to products aimed at ‘primary-aged’ children is both inconsistent with TV scheduling rules and, in our view, inadequate. Ofcom’s own research suggested that as children grow up and develop an understanding of the purpose of advertising, they do not necessarily acquire a greater ability to resist or defend against the messages of advertising.ⁱ In many ways, older children are more vulnerable than younger children to the persuasive power of advertising since they are able to make their own food and drink purchases and are likely to be more influenced by peer pressure. To reduce the impact of HFSS advertising on children, restrictions must be applied which reduce children’s response to advertising whether or not they understand the promotional intent.

We see no justification to exclude brand equity characters from the BCAP or CAP rules. The argument that they are ‘qualitatively different’ from celebrities or licensed characters is not supported by any evidence. Brand equity characters are used for promotional effect to children and as such should be within the scope of restrictions applying to HFSS foods advertised in **all** media.

Part 2 Section 21 Tobacco, Rolling Papers and Filters

Response to Question 73 (other comments)

There is no justification to continue to permit advertising of tobacco-related products. It is acknowledged that doing so has the potential to indirectly promote tobacco products which may not be advertised to the public. We recommend that CAP's present rules are strengthened to ensure that the marketing of rolling papers and filters is not permitted in any media. A notion of 'responsible' marketing of rolling papers and filters seems an oxymoron as any marketing of these products is a clear encouragement to smoke.

2. BCAP CODE CONSULTATION

Proposed rule 13.8.1

Response to Question 85.

Please see response to Question 56 under CAP code review (above).

Proposed rule 13.6.3

Response to Question 86.

Please see comments in response to Question 63 under CAP code review (above).

Response to Question 87 (other comments on this section)

We believe that, in common with the Ofcom scheduling rules, BCAP content rules should explicitly offer protection to all children under 16. The application of rules only to products aimed at 'primary-aged' children is both inconsistent with the scheduling rules and, in our view, inadequate. (For argumentation, please response to question 57 above).

We do not agree that radio rules should be substantively different from TV rules within a single BCAP code. The argument that TV rules should be treated differently because of "TV's place in the family home" would, in our view suggest that other media that are clearly "in the family home" should attract similarly, robust (not weaker) regulation, including radio.

We see no justification to exclude brand equity characters from the BCAP rules. The argument that they are 'qualitatively different' from celebrities or licensed characters is not supported by any evidence. Brand equity characters are used for promotional effect to children and as such should be within the scope of restrictions applying to HFSS foods advertised in **all** media.

**NATIONAL LOTTERY COMMISSION REPONSE
TOTHE COMMITTEE OF ADVERTISING PRACTICE CONSULTATION ON THE
PROPOSED UK CODE OF NON-BROADCAST ADVERTISING, SALES AND DIRECT
MARKETING**

June 2009

1. Introduction

1.1 In 1993, Parliament passed The National Lottery etc. Act which set up a National Lottery together with its own dedicated regulator and a system of distributing its proceeds to specified good causes. The first draw was held on 19 November 1994 since which time more than £63 billion of tickets have been sold, over £29 billion has been paid out in prizes and more than £23 billion has been raised for good causes.

1.2 The National Lottery Commission ('the Commission') is the regulator of the National Lottery – sponsored by the Department for Culture, Media and Sport. It has specific statutory duties to exercise its functions in the manner most likely to secure:

- That the National Lottery is run with all due propriety;
- That the interests of players are protected; and
- Subject to the above two duties, that the returns to good causes are as great as possible.

1.3 The Commission requires, under its own regulatory regime, that Camelot complies with the dedicated National Lottery Advertising and Sales Promotion Code of Practice. Under this Code, Camelot is also required to comply with the CAP and BCAP Codes. Failure to do so may result in sanctions for breach of Camelot's operating licence, in addition to any sanctions applied by CAP or BCAP under their codes. The Commission notes that, to date, there has been very little incidence of breach of the provisions of either code.

1.4 The Commission welcomes the opportunity to respond to this consultation. The Commission responded to CAP and BCAP's 2006 consultation on gambling advertisements and also responded to BCAP in November 2007 with regard to its proposed National Lottery specific provisions within the Television and Radio Codes. These proposals were deferred until this wider review of the two codes took place.

1.5 The Commission accepts in principle that it is appropriate for there to be separate, lottery specific provisions in the CAP Code. However, the Commission believes that the existing provisions should only be extended where there is a clear case for doing so, and that the Better Regulation principle of proportionality is as relevant as the principle of consistency. The Commission is not clear that the case has been made for the extension of provisions in respect of the National Lottery on the basis of evidence, risk, or better regulation.

2. Commission Response

Question 58

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

2.1 The Commission has previously highlighted the clearly established demarcation between the National Lottery and SLA lotteries. Government established discrete arrangements for the regulation of the National Lottery and gambling and these were reaffirmed during the passage of the Gambling Act 2005. This demarcation acknowledges the differing way that the National Lottery and SLAs are licensed and regulated, the controls and commercial freedoms on each and their scale of operation.

2.2 It is therefore conceivable that at some point in the future it may be necessary to make changes to the lottery section of the Code as a result either of changes in regulatory arrangements or of concerns about the nature of the product and the way it was promoted. In such circumstances, the Commission believes that the Code should retain the flexibility (should circumstances justify it) to apply different provisions to the National Lottery than those applied to SLAs. In particular, neither the National Lottery nor SLA lotteries should suffer tougher provisions solely as a consequence of concerns which are specific to the other product.

2.3 Whilst the Commission accepts that, in present circumstances, it is reasonable for the same rules to apply in practice to both the National Lottery and SLA lotteries, it does not agree in principle that National Lottery and SLA lottery marketing communications should automatically be regulated by the same 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 BCAP's general policy objectives 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?

2.4 The Commission supports CAP's general policy objectives as set out in Part 1(4) of the consultation document.

2.5 As set out at paragraph 1.5 above, the Commission does not believe that the case has been made for the extension of provisions in respect of the National Lottery on the basis of evidence, risk or better regulation. The Commission believes that the better regulation principle of proportionality is as relevant as the principle of consistency, and notes that:

- the National Lottery has been advertising and marketing National Lottery products for well over ten years and has been subject to both BCAP and CAP general requirements and a detailed Code of Practice which is approved by the Commission;
- there have been few, if any, issues arising as a result of National Lottery advertising and marketing and that players have been properly protected during this period.

Question 60

Given CAP's policy consideration, do you agree that lottery marketing communications should be able to feature participation in a working environment?

2.6 Yes. This recognises the fact that National Lottery syndicates have operated in working environments for many years, with no detriment to players or employers.

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?

2.7 This consultation response sets out why the Commission does not believe that CAP's proposals in respect of the National Lottery are necessary.

2.8 The Commission does agree that CAP's rules in relation to Lotteries are easily understandable with the exception of rule 17.17 – *'Marketing communications for lotteries must not exploit cultural beliefs or traditions about gambling or luck'*. It is not clear to the Commission what type of imagery or messaging this would cover, and specifically whether general references to the concept of luck would be prevented.

(ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that 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?

2.9 No.

On behalf of Nestle UK Ltd we would like to reply to your request for consultation feedback on your proposed revisions to the CAP and BCAP codes.

As a major advertiser in the UK we are supportive of the self-regulatory environment and as such we forwarded all the proposed changes to our expert approvers in the various functions within the Nestle Group and below you will find our consensus feedback.

We have now reviewed all the appropriate documents and sections in your consultation documents in their entirety and overall we find these changes to be both constructive and positive.

In a few specific cases we have singled out below, we have either specific comments and/or a few minor detail issues which we would like to have considered as part of your consultation which represent in our opinion as advertising practitioners matters worth further consideration:-

- **Part 2 Section 1 Compliance - Social Responsibility new rule**

1.2 'Advertisements must be prepared with a sense of responsibility to the audience and to society.'

We welcome this new addition to the code

- **Section 13 Food Dietary supplements and associated Health and nutritional claims- EU Health & Nutrition claims Regulation** We welcome the alignment with the EU Health & Nutrition claims Regulation, this correctly reflects the requirement of the NHCR (subject to the comments we have raised below about the 'transitional periods' and 'contains' claims), removing uncertainty and creates a true level playing field for making nutrition and health claims in advertisements.
- **Ref Question 78 / Section 13 -Nutrition and Health Claims**

- **Page 109 of full document 13.36 ref point 13.4** We understand the transitional period for health claims applies to health claims made before 1 July 2007 (not 19 Jan 2007 as stated in your proposed code)

- Also please note that a transitional period also exists for products bearing trade marks or brand names existing before 1 Jan 2005 which do not comply with the Reg but may be marketed until 19 Jan 2022 (this is not recognised in the proposed code)

- **13.4.1.** 'contains' claims apply to named nutrient or other substance - we believe this is not limited to just vitamins or minerals (as indicated in the proposed code).

- **New media concepts** - We welcome the introduction into the codes of new media concepts (e.g. viral marketing, texting, etc)
- **Sales Promotions** section -The current Codes of Practice are working well for Sales Promotion we agree with all the proposed changes
- **General rules** - *Any unreasonable delay in responding to the ASA's enquires may be considered a breach of the Code.* This is in the current code but we believe it would be useful to provide clarification to advertisers on what constitutes an "unreasonable delay"? In our experience preparing documents to respond to an ASA challenge can be time-consuming.
- **Substantiation** - *The ASA may regard claims as misleading in the absence of adequate substantiation* - We wish to clarify that full substantiation does not always need to be provided in the actual advert provided we hold this on file and have provided it in advanced clearance process with Clearcast

- **Truthfulness** - *claims must be based on normal use (of a product)* - We wish to clarify that our interpretation of this is this would mean normal use in line with manufacturers instructions/expectations for use of the product

We trust the above feedback on your code revisions will prove useful and remain at your disposal should you require further clarification on any of the above points.

Re: Consultation on CAP Code June 2009.

I am writing to you as Women's Campaign Officer on the part-time executive of the Oxford University Student Union. My role involves working with women in the University to improve gender equality and tackle issues related to women's rights. The Oxford University Student Union (OUSU) has official pro-choice policy, passed by elected student representatives from every college in OUSU Council. We are proud of our long-standing history of supporting the pro-choice movement. We offer confidential non-directional advice to students through the Student Advice Service, including information on how to get an abortion.

I am writing in response to the CAP code consultation, June 2009. The Student Union believes that a woman's right to choose and to have control over her own body is integral to building a world which is equal and fair. We see the right to abortion as a defining achievement in the struggle to end the oppression of women. We believe that pregnant women are especially vulnerable to exploitation, and that we must do everything in our power to give full information and support women to make what they believe the best choice is for themselves. Consequently, women must have full access to information about abortion services as soon after conception as possible. Pregnancy counselling services which do not offer referrals to abortion cost vulnerable women crucial time, as the longer one waits to have an abortion the greater the risks to their health and well-being.

I would like to respond specifically to Question 9.

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?

I 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.

The Report of the House of Commons Science and Technology Committee on the Scientific Developments Relating to the Abortion Act 1967 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.'

The BCAP code Review proposes a new Rule 11.11 which covers this point, and I strongly believe that this should be extended to be clearly included on the revised CAP Code, therefore ensuring that printed advertisements and posters will meet the same criteria.

I urge you to adopt the changes outlined above,

Response to CAP Code Review Consultation – Pet Advertising Advisory Group

Background

The Pet Advertising Advisory Group (PAAG) was set up with a mission to “promote responsible

pet advertising”.

The group is supported by a very broad church of constituent members including:

The Blue Cross

Battersea Dogs and Cats Home

Cats Protection

Dogs Trust

The Kennel Club

The RSPCA

Wood Green Animal Shelters

Plus specific interest groups for rabbits, fish and exotics

The group is also supported by DEFRA the Metropolitan Police, the Veterinary profession and some industry magazines; most specifically Loot, Ad Trader and Exchange and Mart.

Our focus is two pronged: firstly to encourage prospective pet owners to seek out advertisements

that portray a true and honest description of the pet they are interested in purchasing; guiding them through the pitfalls of where the advertiser may be being less than honest with their product, and suggesting questions that they might ask the advertiser, in order to get to the point where they feel

they can make a valued judgement. Secondly, our aim is to keep advertisers up to date with the

plethora of laws that surround pets and in order to help them to keep their advertisements legal.

PAAG members are cognisant of the variety of Codes that exist in other fields and feel that

companion animals, which not only generate large amounts of column inches in local and specialist journals, but are also now generating a large number of specific websites, should have their own set

of Rules in order to guide the public as well as the publishers.

The group has recently produced a new website: www.paag.org.uk and will be launching this officially

in the near future.

We welcome the opportunity to comment on the Consultation document, in brief:

- a) PAAG believes that the CAP Code should include, under the definition of “product”, the term “animals”.
- b) Most marketers will ask for a licence to be given when advertisers fall within the scope of the Breeding and Sale of Dogs (Welfare) Act. These are often denoted by P (private) and T (trade). But there are many Trade people masquerading as private individuals in order to sell their progeny under a false premise.

We would wish to see the production of a licence, to marketers, extended to Pet Shops and other

places where pets are sold. This could be best served by the inclusion, in the CAP Codes, of a Best Practice Guide on buying and selling an animal and these should include the animal’s legal status,

where appropriate. Please see PAAG guidelines for each specific animal that could be utilised with

a link through to this website.

PAAG is concerned that the Dangerous Dogs Act specifies a number of dogs that are illegal in the

UK yet we still see “pitbulls” advertised. Dogs with docked tails became illegal in xxxx, subject to a

few anomalies, these anomalies should be accepted or rejected, by the marketers, at the time of

placing the advertisement. A number of publishers are unaware of this fairly new law and are often

found to be advertising these “illegal” dogs.

The CAP codes state that all advertisements should be legal, decent, honest and truthful. PAAG

believes that the above information, with relevant links to their website would cover many of the

Codes, such as: 1.9; 1.10.1; 2.3; 3.3; 3.5.

Q1

The Pet Advertising Advisory Group (PAAG) are in agreement with the wording of Rule 1.10.1.,

which specifically states that “marketers must not state or imply that a product can legally be sold if

it cannot” and this would specifically apply to those pets currently being sold illegally, as illustrated

above.

Q2

PAAG agrees to the inclusion of Rule 2.3 “ Marketing and Communications must not falsely.....

context”. PAAG reiterates its previous concerns about trade and business being too closely

utilised without specific requirements to state the honesty of the advertisement.

Q3; Q 4; Q5; Q6; Q7; Q8

PAAG has no comment

Q9

PAAG agrees that “Material Manner” should be included. In order for purchasers to

make an informed decision on whether to, or how to, buy the “product/ animal” that they are

considering purchasing.

Q 10; Q11

PAAG has no comment

Q16

PAAG has no comment

PhonepayPlus' response to the CAP and BCAP Code consultations issued in March 2009

Issued by PhonepayPlus on 29 June 2009

Contents

Section		Page
Section 1	Introduction	3
Section 2	List of questions asked by CAP or BCAP, and PhonepayPlus responses	5

Section 1

Background

The Executive of PhonepayPlus welcomes the opportunity to respond to the consultations arising from reviews of the existing CAP and BCAP Codes of Practice..

PhonepayPlus regulates the content, promotion and operation of premium rate services in their entirety. Whilst the majority of the CAP and BCAP Codes does not impact upon us, there are areas of overlap relating to the marketing of phone-paid services. Where such overlaps occur, the ASA and PhonepayPlus have always worked together to provide consistency of approach and interpretation and at the present time are in active discussions about how we best harmonise this overlap to ensure consistency of approach to the benefit of industry and consumers alike.

In light of this consideration, we have chosen not to comment on much of the content within the two documents. However we have responded to questions where we feel it is appropriate to do so given our regulatory expertise in the market for which we are charged with responsibility by Ofcom.

About us

PhonepayPlus (previously ICSTIS), an agency of Ofcom, is the body responsible for day-to-day regulation of premium rate – phone-paid – services that are accessible in the UK. We have also been recognized by the OFT as the “Established Means” for regulating these services. Our primary task is to set standards for the content and marketing of phone-paid services. These standards include an Ofcom approved Code of Practice that sets rules for the marketing and content of such services. The Code covers many areas including those about how the cost of such services should be communicated to consumers. Further information on PhonepayPlus’ work, and the Code of Practice, can be found at:

www.phonepayplus.org.uk.

About Phone-paid services

Phone-paid services offer information and entertainment via platforms such as phone, fax, PC (e-mail, Internet, bulletin board), mobile (SMS/WAP) or interactive digital TV. Services range from sports, voting and adult entertainment lines to competition, directory enquiry, chat and business information services, and currently vary in cost from 10 pence per call to £1.50 per minute (from a BT network). The money paid for the call is shared between the telephone company carrying the service and the organisation providing the content.

Uniquely therefore, PhonepayPlus regulates a range of platforms as described above, including products (or services) and a micro-payment mechanism which will increasingly compete with other payment mechanisms that may emerge in the mobile/online markets.

UK-based phone-paid services must normally be marketed on and paid via five digit mobile short codes, '090' dialling codes and Directory Enquiry (DQ) services on 118xxx codes. With technological developments it is becoming possible to charge the cost of services and goods to a communications account online and on the mobile web without a phone number being needed.

Section 2

In view of the highly detailed nature of the consultation documents, and our relatively expert role as the regulator of premium rate phone-paid services, we have responded only to the questions that we consider relevant to our role and the market for which we are responsible.

The proposed new CAP Code

Question 8 – Do you agree that marketing communications should not describe items as “free” if the consumer has to pay for packaging?

Agreed, save that paragraph 5.11 of the 11th PhonepayPlus Code allows for the normal data costs of the downloading of electronic content to a handset.

Question 32 – Do you agree that rules 10.15 and 10.16 [as regards parental consent for marketing to children under 12, and no third party marketing to anyone under 16] should be included in the Code? If your answer is no, please explain why.

Whilst we are mindful of CAP's consideration of the ICO guidance on the Privacy and Electronic Communication Regulations, we would observe that the proposed rules may be difficult to practically enforce in respect of content purchased using a mobile handset.

At present the only age verification procedures which exist around mobile handsets are those which distinguish whether the handset belongs to someone over or under the age of 18. Therefore there is currently no accurate way of ensuring that anyone under the age of 12 is automatically required to signal parental consent for future marketing. In addition, it is difficult to see how verified parental consent can be provided during a transaction involving a mobile handset.

Similarly, there is no way of currently checking whether verifiable consent for third-party marketing has been provided by someone under the age of 16.

As such, the current proposed rules may inadvertently prevent any future marketing to any mobile handset registered as belonging to someone under the age of 18. A further consideration here is that not all mobile handsets owned by under 18s will be registered as belonging to an under 18. This is due to the not uncommon practice of parents passing their previously-owned mobile handset onto their children. If the parent does not inform the mobile network that this has happened, then the handset is unlikely to be re-classified.

Question 34 iii) – Do you have any other comments on this section?

In respect of proposed rule 10.6 [around clear methods of opt-out which must be presented to the consumer], we would ask CAP to be mindful that PhonepayPlus may require a shortcode as the method of opt-out for certain types of premium rate service.

The proposed new BCAP Code

Question 49 ii) – Do you agree that BCAP’s proposed rules [around betting tipster services] are necessary and easily understood? If your answer is no, please explain why.

Whilst this is not specific to premium rate services as a consideration, we would highlight that proposed rule 21.3 may cause confusion about the advertising of specific outcomes to an event where money back is guaranteed (e.g. “if England draw 0-0 we’ll refund your original stake!”).

In respect of proposed rule 21.4, we would ask what evidence or benchmark broadcasters will use to satisfy themselves that a recorded message is brief. The 11th edition of the PhonepayPlus Code of Practice would require that such a service was not unnecessarily prolonged or delayed, but would not set a limit as to how long a recorded message could be, providing the information contained within it was relevant.

Question 122 – Do you agree that proposed rules 22.1 to 22.6 and 22.8 [around PRS] should be included in the proposed BCAP Code? If the answer is no, please explain your reason why?

PhonepayPlus regulates the content, marketing and operation of premium rate services in their entirety. In practice, this means that there is a slight overlap between our remit and that of the ASA’s in its enforcement of the CAP and BCAP Codes. Where such overlaps occur, the ASA and PhonepayPlus have always strived to work together to provide consistency of approach and interpretation with regard to phone paid services.

In light of the common goal our organisations share, to ensure consumer trust and confidence in the promotion of phone paid services and a consistent set of messages to the industry, we would suggest that the approach BCAP proposes may not be the most suitable to ensure those objectives continue going forward.

As CAP/BCAP are aware, we will consult on a revision to our current Code of Practice later in 2009. The new version of the Code is likely to remove or alter some of the requirements to which the proposed rules 22.2 to 22.6 and 22.8 refer. As we cannot be certain at this time of the exact requirements our new Code will impose, we would suggest that the new BCAP Code removes rules 22.2 to 22.6 and 22.8, and instead alters rule 22.1 to approximate to as follows:

“Advertisements that include a premium rate telephone number must comply with the edition of the PhonepayPlus Code of Practice which is relevant at the time of their broadcast. The ASA (B) will reserve its right to interpret the rules in the relevant PhonepayPlus Code as part of any investigation, subject to close consultation with PhonepayPlus prior to a decision being reached.”

Question 124 – Do you agree that TV advertisements for PRS of a sexual nature should be allowed on encrypted elements of adult entertainment channels only?

We have no comment to make, other than to re-affirm the need for the ASA and PhonepayPlus to work together as regards such services. Regardless of the outcome of Ofcom’s review of the use of PRS in programmes, PhonepayPlus will still need to deal with any consumer complaints relating to the content and operation of those services as those matters are not covered by the BCAP Code.

Question 126 – Do you agree that BCAP’s rule should not define PRS of a sexual nature as those operating on number ranges designated by Ofcom?

We agree with the BCAP assessment that there is no guarantee the number ranges will not change again. In addition we would observe that such services may, in future, be provided over VoIP networks on numbers which would not necessarily require Ofcom allocation.

Therefore we agree with BCAP’s view.

Question 145 – Do you agree that proposed rules 32.2.6 and 30.20.8 [as regards premium rate services on television text and interactive advertisements] should be included in the proposed BCAP Code?

Rule 30.20.8 refers to “premium rate services that cost more than the normal national premium rates (higher rate premium services)”. In light of the fact that PhonepayPlus will regulate numbers in the 0871, 2, and 3 ranges from 1st August 2009, which cost between 5 and 10p per minute, we would query where BCAP proposes the threshold between “higher” and “national” premium rate services should sit.

PORTMAN GROUP RESPONSE TO CAP CODE REVIEW CONSULTATION

INTRODUCTION

The Portman Group (TPG) is the dedicated social responsibility organisation for UK drinks producers¹. Our role involves:

- Encouraging and challenging the industry to promote its products responsibly, mainly through the operation of the Code of Practice on the Naming, Packaging and Promotion of Alcoholic Drinks;
- Demonstrating leadership on best practice on alcohol social responsibility through the actions of member companies;
- Speaking on behalf of members on these issues to inform public opinion and policy.

We support the CAP self-regulatory system and our Code of Practice complements the CAP/BCAP Codes. We welcome this review and the opportunity to comment on the proposed code changes.

Because of our particular area of interest, we have commented only on the Code rules relating specifically to alcohol. We have also incorporated our response to the CAP Code Review Consultation Addendum concerning the SchARR review (Question 75).

RESPONSES TO CONSULTATION QUESTIONS

Question 62

We agree that rule 18.9 should be included in the Code.

It should be recognised that a number of health stakeholders are calling for the industry to develop and promote more drinks with a lower alcoholic strength and that this rule will stifle the creative treatment that can be afforded to advertisements for such drinks. On balance, however, we consider it is better for advertisements for drinks of relatively low strength (but above 1.2% ABV) simply to provide factual information about the strength and allow the consumer to infer any advantage for that drink rather than for advertisers to risk confusion by claiming a particular advantage.

We have a concern, however, that the proposed rule would allow an advertisement for a drink of relatively high strength to make the factual information the main message of the advertisement, thereby implying heavily that the drink should be preferred because of its relatively high strength. In our view, this would be irresponsible marketing. Such an approach is disallowed under our Code and under the wording of the current television and radio advertising standards codes. To guard against this, we recommend the addition of a further sentence to rule 18.9 as follows:

In the case of a drink with a relatively high strength, the factual information should not be given undue emphasis.

In determining relatively high strength, a drink should be judged in the context either of any comparison in the advertisement (for example, with a previous formulation) or of the typical strength of the sector. For example, for beer a drink above 5% ABV might be regarded as

¹ Current member companies are Bacardi-Martini, Beverage Brands, Brown-Forman Brands, Carlsberg, Diageo, Inbev, Molson-Coors, Pernod Ricard, Scottish & Newcastle

relatively strong whereas for spirits a drink above 40% ABV might be regarded as relatively strong.

Question 63

We agree that rule 56.15 should not be included in the Code and 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.

Question 64

We agree that rule 18.12 should be included in the Code and that this wording helps clarify the intent of the requirement.

Question 65

i) We agree that CAP's proposed rules for the Alcohol section of the Code are necessary and easily understandable.

ii) On consideration of the mapping document in Annex 2, we consider there is a slight error in the "Definition" section which currently states "*Alcoholic drinks are defined as drinks containing at least 1.2% alcohol ...*". We believe that this should state "*Alcoholic drinks are defined as drinks containing at least 0.5% alcohol; low-alcohol drinks are defined as drinks containing between 0.5% and 1.2% alcohol.*" This is necessary to reflect CAP's intent to make low-alcohol drinks (which still contain alcohol, albeit in low quantities, and whose sale is subject to normal liquor licensing requirements) subject to all the alcohol advertising rules, except where stated.

iii) We have no further comment on this section.

Question 75 (Addendum)

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

Consultation questions

Section 1: Compliance

Question 1

- i) [Yes](#)
- ii) [No](#)
- iii) [No](#)

Section 2: Recognition of marketing communications

Question 2

- i) [Yes](#)
- ii) [No](#)
- iii) [No](#)

Section 3: Misleading

Question 4

[Yes](#)

[Restrictions on availability](#)

Question 5

[Yes](#)

[Testimonials](#)

Question 6

[Yes](#)

[Additional rights provided by guarantees](#)

Question 8

[Yes](#)

[Other questions](#)

Question 9

- i) [Yes](#)
- ii) [No](#)
- iii) [No](#)

Section 4: Harm and Offence

Flashing images

Question 10

[Yes](#)

Other Questions

Question 11

- i) [Yes](#)
- ii) [No](#)
- iii) [No](#)

Section 5: Children

[Marketing communications that contain a direct exhortation to buy products via a direct-response mechanism](#)

Question 13

[Yes](#)

Other questions

Question 14

[Yes](#)

Section 6: Privacy

Section 7: Political Advertisements

Section 8: Sales Promotions

Withholding prizes

Question 17

[Yes](#)

Promotions directed at children; the need for a closing date

Question 18

Yes

Prizes and Gifts

Question 19

Yes

Question 20

Yes

Significant conditions exception: limited by time or space

Question 21

Yes

Distinction between prizes and gifts: a significant proportion

Question 22

Yes

Supervising Prize Draws

Question 23

Yes

Auditing instant-win promotions

Question 24

i) Yes

Judging of prize promotions

Question 25

Yes

Receipt of prizes: time

Question 26

Yes

Appeal to children

Question 27

Yes

Other questions

Question 28

- i) Yes
- ii) No
- iii) No

Section 12: Medicines, Treatments, Devices and Health

Traditional Herbal Medicinal Products

Question 37

Yes

Medicinal claims

Question 38

Yes. I assume CAP has taken advice from MHRA regarding this wording.

Other questions

Question 39

- i) Yes to all except paragraph 12.12 (part 2).

12.12 reads:

“Marketing communications for a medicinal product must include the name of the product, an indication of what it is for, text such as “Always read the label” and the common name of the sole active ingredient, if it contains only one.

Marketing communications for a traditional herbal medicinal product or a homeopathic medicinal product must include mandatory information, which can be found in the MHRA’s The Blue Guide: Advertising and Promotion of Medicines in the UK at www.mhra.gov.uk.”

The Medicines (Advertising) Regulations 1994 (as amended) requires the above details to be included wherever a ‘product claim’ is made. This allows companies to produce simple brand reminder advertising which may state that a product is new, the price and/or include a brand-related image without requiring the particulars above. (The image itself must not constitute a product claim). A genuine pack shot may also be included without necessitating the inclusion of the mandatory information.

PAGB has recently amended its code to be more closely in line with MHRA’s requirements for mandatory information in consumer advertising. Having considered many examples of advertisements which do not include product claims, PAGB has concluded that insisting on the particulars above is unnecessary in these cases. We have also found that to have the codes out of alignment with the regulation serves to cause confusion amongst advertisers.

PAGB recommends that CAP amends the wording of rule 12.12 (part 2) in order to be in line with the Medicines (Advertising) Regulations 1994, and the MHRA. We realise that CAP may wish to consider (a) advertisements with no product claims and (b) advertisements with no product claims apart from those on a genuine pack shot as two separate cases.

To avoid any confusion, PAGB is not suggesting that the advertising materials referred to in (a) and (b) do not fall under the CAP Code (and the PAGB Code); but merely that the requirement for the customary consumer medicines information does not apply in these circumstances. PAGB are happy to supply examples if this would be helpful.

ii) No

iii) No

Section 13: Weight Control and Slimming

Targeting the obese

Question 40

Yes.

Loss of weight or fat from specific parts of the body

Question 41

Yes

Very Low-Calorie Diets (VLCDs)

Other questions

Question 43

i) Yes

ii) No

iii) No.

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

Permitted nutrition and health claims

Question 46

Yes but the last paragraph of 15.1.1 says:

“Marketing communications that feature health claims filed with the relevant Home Authority and awaiting authorisation, may be used with particular care.”

The reference to Home Authority is likely to cause confusion. Food manufacturers seek advice from their Trading Standards Departments under the Home Authority Principle.

PAGB recommends amending this to “...health claims awaiting authorisation may be used...”

I am unsure as to why these require “particular care”? At present, all claims are awaiting sign off from the EC and presumably all require equal care.

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

Question 47

Yes

Comparative nutrition claims

Question 48

Yes

Comparison with one product

Question 49

Yes

Prohibitions

Question 50

Yes

Question 51

Yes

Question 52

Yes

The use of health professionals

Question 53

Yes

Food labelling Regulations (1996) (FLRs)

Question 54

Yes

Question 55

Yes. However, rule 15.8 requires a minor amend.

“A well-balanced diet should provide the vitamins and minerals needed each day by a normal, healthy individual. Marketers must not state or imply that a balanced or varied diet cannot provide enough nutrients in general and individuals should not be encouraged to swap a healthy diet for supplementation. Marketers may offer vitamin and mineral supplements to certain groups as a safeguard to help maintain good health but must not, unless the claims are authorised by the European Commission, imply they can be used to elevate mood or enhance normal performance. Claims about a higher vitamin or mineral intake for a specific function are permitted if authorised by the European Commission. Without well-established proof, no marketing communication must suggest that a widespread vitamin or mineral deficiency exists.”

The underlined text prohibits vitamin and mineral supplements from implying they can elevate mood

or enhance normal performance. This should apply equally to all food supplement ingredients. It could be reworded to:

Marketers may offer vitamin and mineral supplements to certain groups as a safeguard to help maintain good health. Dietary supplements but must not, unless the claims are authorised by the European Commission, imply they can be used to elevate mood or enhance normal performance.

Other questions

Question 57

- i) Yes
- ii) No
- iii) No

Section 16: Gambling

Consistency: principle

Question 58

Yes

Consistency: rules

Question 59

Yes

Participating in a lottery in a working environment

Question 60

Yes

Other questions

Question 61

- i) Yes
- ii) No
- iii) No

Section 18: Alcohol

Alcoholic strength

Question 62

Yes

Provision for low-alcohol drinks

Question 63

i) Yes

ii) Yes

Question 64

Yes

Other questions

Question 65

i) Yes

ii) No

iii) No

Section 21: Tobacco, Rolling Papers and Filters

Question 73

i) Yes

ii) No

iii) Rule 21.4 states "Marketing communications must not depict anyone smoking." I presume from the 'scope' paragraph at the top of this section that the prohibition does not apply to nicotine replacement therapy products? Advertisements for such products would not feature smoking in any favourable light but may, none the less show someone smoking.

i

Livingstone S. Childhood Obesity – Food Advertising in Context. 2004.

Office of Fair Trading (OFT) response to the Committee on Advertising Practice consultation on the CAP Code

Detailed comments from the OFT

June 2009

OFT 1097

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CONTENTS

Chapter/Annexe	Page
1 Introduction	4
2 Responses to questions listed below	6

1 INTRODUCTION

- 1.1 The Advertising Standards Authority (ASA), through its application of the CAP Code, has long been considered by the OFT an established means for ensuring compliance with consumer protection legislation on misleading advertising, first under the Control of Misleading Advertising Regulations 1988 (CMARs), and now under The Consumer Protection from Unfair Trading Regulations 2008 (CPRs), and the Business Protection from Misleading Marketing Regulations 2008 (BPRs), which have replaced the CMARs.
- 1.2 The CPRs and the BPRs now explicitly provide a role for 'established means' as an effective enforcement mechanism, and require the OFT and Trading Standards Services, in determining how to comply with their duty of enforcement, to have regard to the desirability of encouraging control of unfair commercial practices by such established means as they consider appropriate.
- 1.3 Generally speaking, as an 'established means' the ASA is recognised as the first port of call for resolving complaints about unfair commercial practices in advertising and business to business misleading marketing, and tackling non-compliance where it is anticipated that action by the ASA is likely to be effective.
- 1.4 The integrity and effectiveness of the CAP Code, and its ability to accurately reflect and reinforce the consumer protection legislation with which all marketers must comply, is of course crucial to the ongoing 'established means' status of the CAP Code and the ASA as its enforcement body.
- 1.5 We make, below, a targeted response to the consultation, focusing only on areas where there are specific issues in relation to which we believe it would be helpful to make a comment or note our view.
- 1.6 We would make one general comment in relation to the CPRs and the BPRs, which between them have particular relevance to marketing and promotions, of all types, across the board. Bearing this particular relevance in mind, we are of the view that insufficient prominence is given in the drafting of the proposed new Code to the need, generally, for marketers to comply with the provisions of the CPRs and the BPRs.

- 1.7 We would like to see this given greater emphasis in the compliance section of the code, with a link to the summary of the CPRs requirements that appears in Appendix 1 and to a summary of the BPRs which we would suggest should also be included in Appendix 1 or as a separate Appendix. Individual sections, as currently drafted, often refer to specific legislation affecting or governing the issues dealt with in the section concerned, but do not generally refer to the CPRs/BPRs. This could appear to imply that the issues are governed only by the specific legislation referred to. We believe that each section should contain a reference to the additional requirements of compliance with the CPRs/BPRs.
- 1.8 More specifically, the section on 'misleading' is a key section in this regard. However, we would suggest that the CPRs and/or BPRs may also have particular relevance to the sections on 'children'; 'sales promotions'; 'distance selling'; 'environmental claims'; 'medicines, medical devices, health-related products and beauty products'; 'weight control and slimming'; 'financial products'; 'food, dietary supplements and associated health or nutrition claims'; 'lotteries'; 'motoring'; and 'employment, homework schemes and business opportunities'.
- 1.9 We note, in particular, that the paragraph on 'principles' in the section on 'misleading' does not specifically refer to the need for marketers to comply with the CPRs and the BPRs – which we would suggest it ought to do. It does refer to the CPRs as a factor that ASA will take into consideration when adjudicating on complaints, but we would suggest that this alone is insufficient.

2 RESPONSES TO QUESTIONS LISTED BELOW

Section 1: Compliance

Question 1

iii) Do you have other comments on this section?

- 2.1 Rule 1.10.1 restates the equivalent provision contained in the CPRs (that marketers mustn't state or imply that a product can legally be sold if it cannot). We comment only, in relation to this rule, that there may be some room for differing views as to the breadth of the scope of this provision in the CPRs, which is unlikely to be resolved until there is clarification from the courts.
- 2.2 As referred to in our introductory comments above, we would like to see a reference in this section to the need for marketers to comply with the CPRs and the BPRs, and a cross-reference to the summary information on the CPRs provided in Appendix 1 (as well to similar summary information on the BPRs).

Section 3: Misleading

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.

- 2.3 We would agree that rule 3.45, as amended, seems appropriate. We would make the comment, in addition, that the Code could usefully also make some reference (both here and in Appendix 1) to the fact that the courts may require substantiation of claims under the CPRs.

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.

- 2.4 We would support the adoption of this provision.

Question 9

iii) Do you have other comments on this section?

- 2.5 The 'Principle' section under the sub-heading 'Prices' in Section 3 on 'Misleading' should draw attention to the need for marketers to comply with all other relevant sector specific rules relating to pricing (e.g. there are rules in the Air Services Regulation, Article 23).
- 2.6 In relation to rules 3.23 – 3.26 it is worth considering that there appear to be differing views in other Member States regarding the scope of the ban on the use of the word 'free' which is contained in the CPRs, Schedule 1 Practice 20. Bearing this in mind, and depending on the interpretation which is given by the courts to this provision (and its equivalent in other Member States) when the matter comes before them, these code rules may have to be revisited.
- 2.7 In our view the paragraph on 'principles' in this section should make it clear that the CPRs and the BPRs, which deal with – amongst other things – misleading marketing, must be complied with as well as the code's provisions. It should also be clear that the code complements the regulations, and should be read in conjunction with them, and does not replace them (similar wording to that for the Consumer Protection (Distance Selling) Regulations 2000, as amended (DSRs) in the section of the code on distance selling). This section (as well as the information contained in Appendix 1 to the Code) should also, in our view, contain some reference to the fact that failure to comply with the provisions of the CPRs/BPRs not only involves civil breaches of the regulations, but that the regulations also create prosecutable offences in relation to most of the prohibitions.
- 2.8 It might be helpful if rule 3.1 clarified 'materially mislead' to make it clear that this includes the giving of false or deceptive information, and – even if all of

the information given is factually correct – creating a misleading impression through the overall manner of presentation of the marketing communication concerned.

- 2.9 The wording of rule 3.2 does not appear to us to accurately reflect the provisions of the CPRs in relation to ‘puffery’. The exclusion for ‘puffery’ provided by the CPRs appears as part of the vulnerable consumer provisions (sections 2.5 and 2.6 of the Regulations). It is used to set a limit on the extent to which consumers should be considered to be vulnerable in relation to claims that are clearly not intended to be taken literally. The use, in the proposed code text, of specifically permissive language defining what is ‘allowed’, and the adoption of an ‘across the board’ exclusion for ‘puffery’ is not in our view helpful. It might therefore be preferable to simply include a qualification to rule 3.1 to the effect that marketers’ claims that are clearly not intended to be taken literally would, in general, not be considered misleading. The test is whether consumers are likely to be misled in any material way.
- 2.10 The wording of rule 3.3 that seeks to explain what comprises material information would more properly reflect the requirements, and scope, of the CPRs if it referred to “information that the consumer needs in order to make informed decisions **in relation to a product**”, rather than the current formulation “information.....decisions **about whether or how to buy a product**”.
- 2.11 The wording of rule 3.5 could perhaps be clarified by more precise drafting. For example, it could be redrafted to say that marketing communications must make clear the identity of the marketer where required to do so by law, and must not omit this information if such omission is likely to mislead consumers.
- 2.12 The inclusion of a code provision that directs advertisers to the BERR pricing guidelines, with a suggestion that they should consider them, is in our view useful.

Section 8: Sales Promotions

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.

- 2.13 We support the inclusion of this rule which we would view as providing further clarity in an area where consumers have previously been misled.

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.

- 2.14 Again, we support the inclusion of this rule which we would view as providing further clarity in an area where consumers have previously been misled.

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.

- 2.15 We support the inclusion of this rule which we would view as useful in helping to clarify some of the requirements that marketers must comply with.

Question 22

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

- 2.16 We support the inclusion of this rule which we would view as providing further clarity in an area where consumers have previously been misled.

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.

- 2.17 It would be preferable, and in our view more correct, for the proposed new rule 8.33.9 to say 'not directly encourage.....any product' rather than referring, as currently proposed, only and specifically to a product that promotes charitable purposes.

Question 28

iii) Do you have other comments on this section?

- 2.18 The introductory text under the heading 'definition' at the beginning of this section refers specifically to 'buy-one-get-one-free' offers as being one form of sales promotion that "can provide an incentive for the consumer to buy". Bearing in mind our comments above, at paragraph 2.6, regarding the uncertainties around practice 20 contained in Schedule 1 to the CPRs we would suggest that the reference to this form of promotional offer should be replaced with a more neutral form e.g. 'two for the price of one'.

Section 9: Distance Selling

Question 31

iii) Do you have other comments on this section?

- 2.19 The second 'principle' section refers to the fact that most distance selling contracts are subject to the DSRs. As referred to in our introductory comments above, we take the view that there is a strong need for clarification here that they will also be subject to the CPRs.
- 2.20 Rule 9.1.1 is permissive in its language regarding what need not be done. This could conflict with what is, or might be in individual circumstances, required under the CPRs (in light of the CPRs provisions on omissions). Because of that, it would be better to use alternative language that makes it clear that these are some of the requirements that must be complied with, and others may also apply.

- 2.21 Our interpretation of the provisions in the CPRs that Rule 9.1.1 seeks to reflect is that traders must, under the CPRs, give their geographical address regardless of what type of response mechanism is used by an advertisement, where an invitation to purchase is made.
- 2.22 In rule 9.1.6 there appears to be a rogue reference to old numbering '42.6' rather than to the correct numbering under the proposed new code.

Section 19: Motoring

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.

- 2.23 We take the view that the present rule 48.7 that specifies that prices quoted should correspond to vehicles illustrated and that it is, for example, not acceptable to feature a top of the range model whilst quoting a starting price represents a useful illustration of the more general rules contained in the CPRs. It is true that proposed rules 3.1 and 3.3 cover the general principles on omission of material information, and distortion of price statements. However, we consider that it might nevertheless be useful to slightly adapt and retain the car example so as to use it to illustrate rules 3.1 and 3.3 (e.g. "thus, whilst this will depend on all the circumstances of an individual advertisement, it will generally be unlikely to be acceptable to feature.....").

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?

- 2.24 We suggest that Appendix 1 to the proposed new Code, which summarises the provisions of the CPRs, should have words added to it which cover the inclusion in the CPRs, Schedule 1, of 31 practices which are banned outright.

