

The BCAP Code Review

Consultation on the proposed BCAP Broadcast Advertising Standards Code

BCAP Consultation Document

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This document sets out the review of the existing BCAP Broadcast Advertising Standards Codes and proposes a new, single BCAP Broadcast Advertising Standards Code.

BCAP welcomes feedback on its proposed code. Please see Annex 3 for information on responding to this consultation.

The consultation ends at 5pm on Friday 19 June 2009.

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Part 1

1. Summary

- 1.i In 2004, the Broadcast Committee of Advertising Practice (BCAP) and the broadcast arm of the Advertising Standards Authority (ASA) assumed responsibility for the day-to-day regulation of broadcast advertisements. The office of communications (Ofcom) entrusted BCAP and the ASA with that responsibility in recognition of CAP and the ASA's successful regulation of non-broadcast advertisements for over 40 years and in line with better regulation principles.
- 1.ii BCAP is responsible for maintaining the broadcast advertising standards codes, which include rules on the content and scheduling of broadcast advertisements. The present television and radio advertising standards Codes were last reviewed in their entirety over six years ago; the television Codes in 2002 and the radio code in 2000. The Codes have changed since then in response to changes in society but they are otherwise unchanged from those published by the Independent Television Commission and the Radio Authority.
- 1.iii BCAP considers it is timely to conduct a major review of the broadcast Advertising Standards Codes to ensure the rules for broadcast advertisements are up to date and fit for purpose.
- 1.iv BCAP's general policy objective is to create a Code based on the enduring principles that advertising should not mislead, offend or harm. A Code that adequately protects children and others whose circumstances seem to BCAP to put them in need of special protection, yet retains an environment in which responsible broadcast advertising can flourish. BCAP intends its rules to be transparent, accountable, proportionate, consistent, targeted only where regulation is needed and written so they are easily understood, easily implemented and easily enforced.
- 1.v BCAP proposes to add to, delete, replace or amend existing rules in line with its general policy objectives. But proposed changes to the existing Codes are the exception and not the norm; most of BCAP's proposed Code includes standards established in the existing Codes, which have stood the test of time and continue to offer necessary protection for the public and a level playing field for the broadcast advertising industry.
- 1.vi As digital broadcast media converge, it is important, where justified, to have greater consistency in the setting of standards for broadcast advertisements. BCAP therefore proposes a single, user-friendly Code covering TV and radio advertisements for the benefit of the public and the broadcast advertising industry. The interpretation of the Code will continue to take into account the particular characteristics of TV and radio and other contextual factors that determine whether a broadcast advertisement complies with the Code.
- 1.vii In its pre-consultation review of the present codes, BCAP has held informal talks with people and organisations to fill gaps in its understanding and to gauge whether it is thinking in the right direction. BCAP has sought advice on its proposed Code changes from an expert consumer panel, the Advertising Advisory Committee (AAC).
- 1.viii BCAP has directly invited responses to this consultation from a wide cross-section of society and undertakes to look at each response carefully and with an open mind. BCAP intends to respond to all significant comments in its post-consultation evaluation of responses, which BCAP will make available on the cap website, www.cap.org.uk, on publication of BCAP's new Code.
- 1.ix The consultation will remain open for twelve weeks in line with regulatory best-practice guidelines and close at 5.00 pm on 19 June 2009.

Part 1

2. Introduction to BCAP and the ASA

The Broadcast Committee of Advertising Practice

- 2.i The Broadcast Committee of Advertising Practice (BCAP) is the regulatory body responsible for maintaining the BCAP Television Advertising Standards Code, the BCAP Rules on the Scheduling of Television Advertisements, the BCAP Advertising Standards Code for Text Services and the BCAP Radio Advertising Standards Code ('the BCAP Codes') under a contracting-out agreement with the Office of Communications (Ofcom).
- 2.ii Ofcom has statutory responsibility, under the Communications Act 2003, for maintaining standards in TV and radio advertisements. Ofcom entrusted BCAP and the broadcast arm of the ASA with the regulation of broadcast advertisements in 2004 in recognition of CAP and the ASA's successful regulation of non-broadcast advertisements for over 40 years and in line with better regulation principles.
- 2.iii The BCAP Codes regulate all advertisements on television channels and radio stations licensed by Ofcom and all advertisements on Sianel Pedwar Cymru (S4C) and S4C digital, including teleshopping channels and any additional television service (including television text services and interactive television services). The BCAP codes are enforced against Ofcom-licensed broadcasters, Sianel Pedwar Cymru (S4C) and S4C digital. Broadcasters are required by the terms of their Ofcom licence, and, for S4C, by statute, to observe the standards set out in the BCAP Codes.
- 2.iv The members that make up BCAP include broadcasters and trade associations representing advertisers, broadcasters and agencies. BCAP must seek advice on proposed code changes from an expert consumer panel, the Advertising Advisory Committee (AAC). In accordance with section 324 of the Communications Act 2003, BCAP must consult on proposed Code changes. BCAP strives to ensure that its rule drafting is transparent, accountable, proportionate, consistent and warranted, in accordance with the Communications Act 2003. Ofcom must approve Code changes before BCAP implements them.
- 2.v Information about BCAP and the AAC is available at www.cap.org.uk, which includes copies of the present BCAP codes. Information about Ofcom is available at www.ofcom.org.uk.

The Advertising Standards Authority

- 2.vi Through its broadcast arm, the Advertising Standards Authority ASA(B) is the independent body responsible for administering the BCAP Codes so that all television and radio advertisements are legal, decent, honest and truthful. The ASA receives and investigates complaints from the public and industry. Decisions on investigated complaints are taken by the independent ASA Council. The ASA Council's adjudications are published on the ASA's website, www.asa.org.uk, and made available to the media. An Independent Review Procedure exists for interested parties.
- 2.vii If the ASA Council upholds a complaint, the advertisement must be withdrawn or amended. In conjunction with ASA(B) BCAP conducts compliance, monitoring and research to enforce the ASA Council's decisions. In the event of serious or repeated breaches of the BCAP Codes, the ASA can refer the licensee concerned to Ofcom, which can invoke statutory sanctions. But that is rarely necessary.
- 2.viii The ASA's work in regulating broadcast advertisements is funded by a levy on the cost of advertising time administered by the Broadcast Advertising Standards Board of Finance (BASBOF). BASBOF operates independently of the ASA and that means there is no question of funding affecting the ASA's decision-making.
- 2.ix Information about the ASA is available at www.asa.org.uk. Information about BASBOF is available at www.basbof.co.uk.

Part 1

3. The Regulatory Framework of the BCAP Code

- 3.i** The Communications Act 2003 ('the Act') requires Ofcom to set and, from time to time, review and revise a code containing standards for the content of broadcast advertisements carried by TV and radio services licensed under the Broadcasting Acts 1990 and 1996.
- 3.ii** Ofcom has contracted-out its advertising standards codes function to BCAP under the Contracting Out (Functions Relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004. That function is exercised in consultation with and with the agreement of Ofcom. Provisions imposed on Ofcom by the Act are therefore relevant to BCAP.
- 3.iii** BCAP's proposed Code has been drafted to meet the relevant requirements set out in the Act. For example, BCAP's proposed Code includes rules best calculated by BCAP to secure the Act's "standards objectives" (s.319 (2)). Those relevant to advertisements are:
- (a) that persons under the age of 18 are protected;
 - (b) that material likely to encourage or incite the commission of crime or lead to disorder is not included in television and radio services;
 - (e) that the proper degree of responsibility is exercised with respect to the content of programmes which are religious programmes;
 - (f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from inclusion in such services of offensive and harmful material;
 - (h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;
 - (i) that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with [especially, for television, those obligations set out in Articles 3b, 3e, 10, 14, 15, 19, 20 and 22 of Directive 89/552/EEC (the Audiovisual Media Services Directive)]; ...
 - (l) that there is no use of techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred."
- 3.iv** The proposed Code gives effect to requirements relating to linear TV advertisements as set out in the Audio-visual Media Services Directive. Please see Appendix 2 of the proposed BCAP Broadcast Advertising Standards Code, which can be found in Annex 2 of the consultation documents. That and Appendix 1 set out the statutory framework for the regulation of Broadcast Advertisements and includes relevant extracts from the Communications Act 2003 and the Audio-visual Media Services Directive.
- 3.v** BCAP's proposed Code has been drafted in the light of the Human Rights Act 1998 and the European Convention on Human Rights. In particular, the right to freedom of expression, as expressed in Article 10 of the Convention, encompasses the audience's right to receive creative material, information and ideas without interference but subject to restrictions required by law and necessary in a democratic society.

Enforcement

- 3.vi** The proposed Code will apply to all broadcast advertisements (including teleshopping, content on self-promotional television channels, television text and interactive television advertisements) and

programme sponsorship credits on radio and television services licensed by Ofcom. An Ofcom broadcasting licence condition (and a statutory obligation for S4C and S4C digital) is that radio and TV broadcasters must comply with the standards set out in the Code. To meet that licence condition, many broadcasters use the Radio Advertising Clearance Centre (www.racc.co.uk) or Clearcast (www.clearcast.co.uk) to ensure that radio and TV advertisements that go on air, stay on air.

- 3.vii** Under its contracting out agreement with Ofcom, the broadcast arm of the Advertising Standards Authority has responsibility for the handling and resolution of complaints about broadcast advertisements.
- 3.viii** If it considers that the BCAP Code has been breached, the ASA can require the broadcaster not to repeat the advertisement in its present form. On those rare occasions that a TV channel or radio station continues to broadcast an advertisement that the ASA has found in breach of the BCAP Code, the ASA can refer the broadcaster to Ofcom, which can impose statutory sanctions on the broadcaster. Ofcom can fine the broadcaster and revoke the broadcaster's licence. For more information on the ASA's complaint- and investigations handling procedures, sanctions available to it and the ASA's independent review procedure, go to www.asa.org.uk. For Ofcom's outline procedures for statutory sanctions, go to www.ofcom.org.uk.

Part 1

4. The Code Review

Background

- 4.i The present BCAP Codes were last reviewed in their entirety over six years ago; the Television Codes in 2002 and the Radio Code in 2000. The Codes have changed since then in response to changes in society, for example to reflect changes in law or to address socio-political matters, but are otherwise unchanged from those published by the Independent Television Commission or the Radio Authority.
- 4.ii BCAP considers it is timely to conduct a major review of the UK's broadcast advertising codes to ensure the rules for broadcast advertisements are up to date and fit for purpose.

A single BCAP Broadcast Advertising Standards Code

- 4.iii BCAP presently has four Codes: the BCAP Television Advertising Standards Code, the BCAP Rules on the Scheduling of Television Advertisements, the BCAP Advertising Standards Code for Text Services and the BCAP Radio Advertising Standards Code ('the BCAP Codes'). BCAP's proposed Code will replace the present BCAP Codes.
- 4.iv BCAP considers there are compelling reasons to create a single BCAP Code. The present BCAP Codes commonly include general requirements that advertisements should not mislead, harm or offend and broadly equivalent rules covering the same categories of advertising, for example medicine advertisements. BCAP's proposed Code combines those similar or same requirements, providing a single, user-friendly point of reference for the benefit of the public and the broadcast advertising industry.
- 4.v As digital broadcast media converge and as multi-media advertising campaigns become more prevalent, it is important, where justified, to have greater consistency in the setting of standards for broadcast advertisements. The interpretation of the Code will continue to take into account the characteristics of television and radio and other contextual factors that determine whether an advertisement complies with the Code.
- 4.vi Radio has traditionally been regulated with a lighter touch. BCAP's policy is not to increase the regulatory burden on radio unless factors relevant to the review of an existing rule merit, in BCAP's opinion, a strengthening of the existing Radio Code.
- 4.vii BCAP's proposed Code generally includes rules for broadcast advertisements and, seldom, rules for television only and rules for radio only. BCAP has proposed to make or retain that distinction if BCAP considers the facts justify that approach. Facts that could justify a different approach for television or radio include, but are not limited to, the technical constraints of the medium, audience expectations, the visual aspect of television, research specific to TV or radio, including TV or radio advertisements and TV's place in the family home.

BCAP's general policy objectives

- 4.viii BCAP's proposed Code gives effect to requirements in broadcast legislation referred to in Chapter 3. In particular, BCAP has set standards to ensure 'that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented' (The Communications Act 2003, s.319 (2) (h)). Those are enduring advertising regulatory principles.
- 4.ix BCAP's general policy objective is to create a code that is based on those enduring principles, adequately protects children and others whose circumstances seem to BCAP to put them in need of special protection and yet retains an environment in which responsible broadcast advertising can flourish. BCAP intends its rules to be transparent, accountable, proportionate, consistent, targeted only where regulation is needed and written so that they are easily understood, easily implemented and easily enforced.

- 4.x** BCAP considers that users of the Code should feel confident that the Code does not conflict with the law or otherwise undermine it. BCAP's proposed Code includes rules that reflect general or specific provisions of recent legislation that are directly relevant to broadcast advertisements. BCAP intends those rules to help broadcasters and advertisers to comply with the Code's general requirement that broadcast advertisements must comply with the law.

Principles and definitions

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

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.) BCAP is not required to consult on guidance, which is non-binding, but BCAP will take into account responses to this consultation that raise concerns about the clarity of a rule and BCAP might produce guidance that addresses those concerns.
- 4.xiv** Some guidance notes in the present BCAP Codes have the force of a rule. In those cases, BCAP has either adopted the guidance as a rule in the proposed Code or, if it proposes to change or delete it (constituting a change in advertising policy and practice), reviewed the guidance as part of this consultation.

Managing readers' expectations

- 4.xv** A general Code Review provides an opportunity to tidy-up the BCAP Codes after year-on-year changes to them. BCAP has done that but it has, more importantly, undertaken a root-and-branch review of the legacy codes to assess whether the policy that underpins each rule is consistent with BCAP's general policy objectives. If it is not, BCAP has explained why and set out its rationale for deleting, amending or replacing that rule. BCAP has also proposed, in line with its general policy objectives, to add new rules that take account of changes in society. Here again, BCAP has explained its proposal, setting out the rationale.
- 4.xvi** Proposed changes to the existing Codes are the exception and not the norm; most of BCAP's proposed Code includes standards established in the existing codes but that remain relevant.
- 4.xvii** This review is the first thorough examination of the Television and Radio Advertising Standards Codes since the establishment of Ofcom in 2003 and of BCAP in 2004. In the main, therefore, the policies underlying the rules in the present Codes date back to the previous regulators, specifically the Independent Television Commission and the Radio Authority. In many cases the historical rationale for those policies is no longer clear. BCAP has therefore had to make some assumptions about the origins of rules and their underlying policies, as indicated in its analysis and review of some of the present rules.
- 4.xviii** In general, the present Television Code is more restrictive than the Radio Code. That probably reflects the reach of television, its place in the family home and its audio-visual impact, which, in combination, can have a powerful impact on society at large and on individuals. BCAP has proposed to make or retain a distinction between TV and radio advertisements if BCAP considers the facts justify that approach.
- 4.xix** BCAP has proposed to retain an existing rule if a review of the policy that underpins that rule does not merit, in BCAP's opinion, a significant change. Readers can assume, therefore, that proposed rules

that directly reflect or approximate rules in the present Codes have been thoroughly considered by BCAP and are, in BCAP's opinion, in line with its general policy objectives. BCAP has not explained why it has proposed to retain an existing rule unless exceptional circumstances relevant to that rule merit its discussion. If a rule has recently been subject to review, the consultation document directs the reader to that review for ease of reference.

- 4.xx** BCAP welcomes comments on any rule included in or omitted from its proposed Code, not merely those that signify a change in advertising policy and practice. BCAP intends to respond to all significant comments in its post-consultation evaluation of responses, which BCAP will make available on the cap website, www.cap.org.uk, on publication of BCAP's new Code.
- 4.xxi** BCAP has undertaken to consider the impact of evidence emerging from recent public reviews, for example those on alcohol, children and television advertisements for HFSS products. BCAP's responses to some of those reviews are set out in the relevant chapters of this consultation document. BCAP's consultation document has referenced but not taken into account relevant ongoing reviews or reviews that have concluded too late in the day to allow BCAP sufficient time to consider their findings. BCAP will consider whether action is necessary after a proper consideration of those reviews' findings.
- 4.xxii** The Audio-Visual Media Services (AVMS) Directive revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989. The TVWF Directive applied to scheduled television broadcasting services only. The AVMS also applies to some on-demand services but this consultation is about advertisements in Ofcom-licensed scheduled broadcast services only.

Equality impact assessments

- 4.xxiii** BCAP has considered the impact of its proposals on race, disability and gender equality.
 - 4.i** After consideration, BCAP has not identified any significant impacts from its proposed changes on any of these areas. BCAP considers the impact of its proposals would not be felt more significantly by members of the public falling under the above categories or by one home nation over another.

Media literacy

- 4.ii** The promotion of media literacy is a responsibility placed on Ofcom by Section 11 of the Communications Act 2003. Ofcom's definition of media literacy is the 'the ability to access, understand and create communications in a variety of contexts'. 'Access' includes take-up of media devices, volume and breadth of use; 'Understand' includes interest and competence in using the features available on each platform, extent and levels of concern, trust in television and online content and use of television and internet security controls and 'Create' includes people's confidence in engaging with creative content and their interest in carrying out creative tasks, most notably using social networking sites.
- 4.iii** In BCAP's opinion, Ofcom's audits of child and adult media literacy in 2008¹ provide a relevant context to the review of the present BCAP Codes. The audits provide a timely snapshot of the extent to which the population's different age and socio-economic groups engage with media, place trust in their content and make use of media devices. Ofcom found that, although almost everyone engages with the media to some degree, age and socio-economic group play a pivotal role in the extent of a person's media literacy.
- 4.iv** BCAP has taken the audits into account in its review of the BCAP Codes and considered to what extent the level of media literacy today is relevant to the review of the present BCAP rules, most of which were agreed over six years ago. For readers' ease of reference BCAP reproduces here information from Ofcom's 2008 audits but encourages readers to consider the full reports, which are available on Ofcom's website, www.ofcom.org.uk.

¹ www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrss/ml_childrens08/, www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrss/ml_adult08/ and www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrss/ml_emg08/

Information from Ofcom's Media Literacy Audits, 2008

- 4.v** The proportion of people who have the internet, a mobile phone and digital television at home has increased from 39% in 2005 to 53% in 2007. Of those who have two platforms, a mobile phone and digital television is the most common combination. If a person has only one device, it is likely to be mobile or digital TV.
- 4.vi** The proportion of non-owners who intend to take-up digital television in the next 12 months has gone up from 15% to 27% since 2005. The number of people who say they do not have digital television because they cannot afford it has gone down from 37% of non-owners in 2005 to 12% in 2007. Ofcom attributes those trends to Freeview. It notes that an increasing number of people see no need to switch to digital or are happy with their existing analogue service.
- 4.vii** Ofcom's survey found a television in every household with children aged 8 to 15. Television is a presence in all children's lives from an early stage. The television is the "static device" most likely to be in a child's bedroom. 25% of 8 to 11s and 33% of 12 to 15s have digital television in their rooms. 12 to 15 year-olds were more likely to have a television in their bedroom by 2007 than in 2005 (81% up from 75%).
- 4.viii** 12 to 15 year olds have an average of six media devices in their bedrooms, 8 to 11 year olds have four and 5 to 7 year olds have two. The number of devices does not differ widely between socio-economic groups but the type of device does. ABC1 children are more likely to have MP3 players, digital cameras or Internet access whereas C2DE children are more likely to have television, DVDs or VCRs.
- 4.ix** The most popular device to use while watching television or using the Internet is a telephone, whether mobile or land line. 16 to 34 year-olds are more likely to use a mobile while watching TV; people 35 years are more likely to use a landline.
- 4.x** 78% of 12 to 15 year olds use another device while watching television. Mobiles are the most popular (58%) but landlines (38%), Internet (34%), gaming (36%) and MP3 players (28%) all score significantly.
- 4.xi** That type of media multi-tasking is less prevalent amongst younger children but nevertheless significant. 50% of 8 to 11s and 29% of 5 to 7s use another device while watching television. Talking on the landline is the most popular among 5 to 7s. Mobiles (18%), landlines (20%), Internet (16%) and gaming (25%) attract similar proportions of 8 to 11s.
- 4.xii** More than half of 8 to 15 year olds mostly watch television without an adult in the room either with other children or on their own. 39% of 12 to 15 year olds mostly watch television alone and 32% of 8 to 15s do, too. The figures show that one in six of all children aged 8 to 15 who watch television in their bedroom do so alone; a higher proportion of 12 to 15s and older boys do so.
- 4.xiii** Children who watch television or use the Internet in their bedroom are less likely to have parental rules or restrictions on that use than children who use the same devices in the living room. That is partly, but not wholly, accounted for by solitary users likely to be older. Also use those devices more. They are less likely to claim to have seen something that concerned them or that they felt was too old for them. The level of confidence of solitary users is no different from that of those who watch or surf accompanied by other children or parents.
- 4.xiv** Young children prefer television: as children get older, the Internet and mobiles become as important as television. Older girls prefer mobiles and television. Older boys prefer the Internet and gaming consoles.
- 4.xv** Parents of younger children are more likely to have rules for most devices. The Internet and television provoke comparatively high levels of restriction: radio causes least concern. ABC1 parents are more likely than C2DE parents to have rules on mobiles, gaming and television.
- 4.xvi** Time of day and content are both restricted by rules by around three in five parents of 8 to 11s and two in five of parents of 12 to 15s, according to parents. The length of time that children are allowed to watch television is restricted by only 26% of parents of young children and 19% of parents of older

children, again as far as the parents are concerned. The disparity between parents' and children's perspective on whether rules on content or length of time apply is pronounced for both age groups.

- 4.xvii** Despite an increase in the use of PIN protection or password-protection on digital television in households of young children, the use of such restrictions is limited. Households with young children are more likely than those with older children to have PIN or password controls.
- 4.xviii** Nine of ten 8 to 15 year olds live in households with digital television, whether accessed via satellite, cable, or a set-top box such as Freeview. Parents of children in those households were asked whether controls are set on their television service so that their child can watch certain channels or types of programmes once a PIN number or password is entered. Few parents are using such restrictions; just under a third of 8 to 15s with digital television have controls such as PIN, or password-protection. The use of PIN or password-protection on television in households with 8 to 11 year olds has significantly increased since 2005 and as a result that age group is now more likely than 12 to 15 year olds to have such restrictions to their television viewing. The increase in PIN-protection among 8 to 11s might be due to Sky having widely publicised its parental control features, which include PIN protection, over the last two years.
- 4.xix** Older children are more likely to watch television unsupervised and the general lack of PIN controls among that group means that they are more likely than young children to have totally unrestricted access to television. Those who have wholly unsupervised access to television (defined as those with no rules in place for their viewing, who mostly watch without an adult present and who do not have controls on their television), account for one in ten children aged 8 to 15. That figure increases to one in five children aged 12 to 15. The profile of children who are wholly unsupervised does not differ from the profile of all UK children who watch television.
- 4.xx** Interest in platform functionality is higher for the internet and mobile phones (which are task-oriented and more functional by definition) and lower for traditionally passive media (television and radio). Awareness of and confidence in the use of digital functions is greater among under-45s, men, ABC1s, those who work and those who have children at home.
- 4.xxi** The most popular and best-understood function available on digital television is the interactive button; the next most popular is the ability to set up a menu of favourite channels but few people understand how to do it. Two other functions elicit almost identical, significantly lower levels of interest and confidence: restricting access to programmes or channels by setting a pin code and selecting different viewing angles or matches during sporting events. 25% of people are confident they can set a pin code and 17% are interested but cannot do it with confidence. 57% are uninterested.
- 4.xxii** 79% of people understand that television's editorial content is regulated and 58% know about the regulation of radio's editorial content. People are more likely to be aware of broadcast editorial content regulation if they are ABC1, over 35, male and working.
- 4.xxiii** 91% of people are aware of a watershed on television, up 1% since 2005; 78% are aware that it is at 9.00pm, down 3% from two years previously.
- 4.xxiv** Ofcom asked respondents whether, for television, they agreed with the statements "content must be free to be expressive and creative" and "users must be protected from offensive and inappropriate content". A considerable proportion of respondents agreed with both statements.
- 4.xxv** Similar proportions of people broadly agree that users must be protected from offensive and unsuitable content in all media (76% for television, 79% for radio, 78% for Internet and mobile content). Although numbers are small, more people (14% for television, 10% for radio) oppose protective measures for broadcast media.
- 4.xxvi** Yet, even in connection with broadcast media, more people are neutral about or indifferent to creative freedom than they are when it comes to user protection (17% for television, 18% for radio) and although that hardly outweighs the broad support for creative freedom on television (72%) and radio (77%) people feel noticeably less strongly about creative freedom than protection.
- 4.xxvii** 58% of people know about radio regulation. Only 23% are aware that radio does not have a watershed. Ofcom asked respondents whether they agreed, for radio, with the statements "content must be free to be expressive and creative" and "users must be protected from offensive and inappropriate content". As for television, a considerable proportion of respondents agreed with both statements.

- 4.xxviii** Radio and internet use rise almost in tandem, from just above 40% of five year-olds to around 80% of 15 year olds. Young children listening to radio (48% of 8 to 15 year-olds) or using the Internet (50-% of 8-15 year olds) are more likely to be accompanied by an adult. 59% of 12 to 15 year old radio listeners are unaccompanied; 61% of child internet users surf the Internet on their own.
- 4.xxix** Asked whether they trust in what they see, hear or read when using a given medium, respondents show similar levels of trust in television and the Internet and much higher trust in radio.

Part 1

5. Key to the Review of each Code Section

- 5.i BCAP proposes to add to, delete, replace or amend existing rules. Providing a clear audit of changes between the four existing Codes and BCAP's proposed Code is a difficult task. BCAP has done that by providing mapping documents, which show all such changes (see Annex 2), and by discussing in Part 2 of this consultation document proposed changes to the existing Codes; specifically, amendments that amount to a change in advertising policy and practice or introduce an entirely new rule to the Codes.
- 5.ii Readers are invited to consider the mapping documents and to bring to BCAP's attention any changes that are likely to amount to a change in advertising policy and practice, are not discussed in Part 2 and should be retained or otherwise be given dedicated consideration.
- 5.iii The analysis of present rules in Part 2 is intended to give the reader the necessary information to consider BCAP's substantive proposals. The review of most Code sections will be presented in this way:

Background

The Law

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

Other relevant regulatory bodies

- 5.v BCAP, the broadcast arm of the ASA and Ofcom are the main bodies responsible for the regulation of broadcast advertisements. BCAP and ASA(B) are responsible for the day-to-day functions of code setting and the handling and resolution of complaints and investigations. Ofcom acts as the 'back-stop power'; it can impose sanctions, including fines or revocation of licence, on broadcasters that have been referred to it by BCAP or ASA(B) for serious or repeated breaches of the BCAP Codes. Ofcom has responsibility for final agreement of the Code.
- 5.vi 'Other relevant regulatory bodies' generally include a non-exhaustive list of bodies that are conferred with legal powers to act against the advertiser or to regulate the product or service that is the subject of the section under review. For example the Medicines and Healthcare products Regulatory Agency (MHRA) for medicine advertising.
- 5.vii This sub-section also includes a non-exhaustive list of bodies that play a significant role in the pre-broadcast regulation of a broadcast advertisement but are not conferred with legal powers to do so, for example Clearcast, the body that clears television advertisements for broadcast and the Radio Advertising Clearance Centre (the RACC), the body that does the same for radio advertisements.

Recent BCAP or Ofcom review of rules in this section

- 5.viii If a rule has recently been subject to review by BCAP or Ofcom readers are directed to that review.

Meeting the need to regulate categories of advertising and advertisements in general

- 5.ix In this sub-section, BCAP explains why it is necessary to maintain rules for the Code section under review. BCAP sets out in general terms the policy that underpins rules in that Code section and how the present codes and the proposed code regulate advertisements that fall under that section.

- 5.x** If a Code section contains rules that give effect to specific legal requirements, BCAP identifies those rule in this part of its review.

Proposed substantive changes

- 5.xi** Providing a clear audit of proposed substantive changes between the four existing Codes and BCAP's proposed Code is a difficult task. Proposed changes could include a BCAP proposal to revise a radio rule and to extend that rule to TV advertisements for the first time. To facilitate the reader's understanding of proposed substantive changes, BCAP has divided its proposals into 'New rules', 'Revised rules', 'Deleted rules' and 'Other'. BCAP intends those will serve as a reasonably accurate guide as to the effect of BCAP's proposal.

New rules

- 5.xii** A proposal to include a rule that is entirely new to the existing BCAP Television Codes, the existing BCAP Radio Code or to both.

Revised rules

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

Deleted rules

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

Other

- 5.xv** Any combination of the three or, in exceptional circumstances, an explanation of BCAP's decision to maintain a rule.

Part 2 - Section 1

Compliance

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

Background

The law

Communications Act 2003

- 1.1 The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objective to the Compliance Section of the BCAP Code is:

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

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

Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

- 1.3 The CPRs prohibit unfair trading practices and identify misleading and aggressive practices as forms of unfair practice. Because they are a trading practice, advertisements are subject to the CPRs. The CPRs set out in schedule 1 a list of commercial practices that are in all circumstances considered unfair; it includes practice 9:

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

- 1.4 This provision was reflected in the present Codes after a BCAP consultation in 2008.

- 1.5 Please see the full text of the CPRs at:
www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3480871

Other relevant regulatory bodies

- 1.6 Bodies that play a part in regulating a broadcast advertisement of relevance to this Section but are not conferred with legal functions to do so include: Clearcast, (www.clearcast.co.uk) and the RACC, (www.racc.co.uk).

Recent changes to this section of the BCAP Code

- 1.7 In 2008, BCAP reflected the key provisions of the Consumer Protection from Unfair Trading Regulations 2008 into its Codes. Rule 1.3.1, which reflects schedule 1, practice 9 of the Regulations resulted from that consultation. That consultation can be found at:

www.cap.org.uk/cap/Consultations/closed/BCAP+CPRs+consultation/BCAP+CPRs+Consultation.htm

Meeting the need to ensure that broadcasters meet their obligations to comply with the BCAP Codes

- 1.8 The Compliance sections of the present Codes begin by establishing fundamental rules: broadcasters should comply with the law and the relevant BCAP rules, not merely the letter of them but also the spirit. This is accompanied by background text that discusses regulatory obligations more generally.
- 1.9 This Code Section includes rules common to both television and radio, an over-arching principle, background compliance information and fundamental rules that frame the Code that follows.

Proposed substantive changes

New rules

Social responsibility

- 1.10 'Corporate Social Responsibility' is at the heart of the advertising self-regulatory system, which is committed to achieving standards that go beyond the law and ensuring the integrity of broadcast advertisements in the interests of the consumer and the advertising trade. In part to express that commitment, BCAP proposes to introduce a new rule that ensures broadcast advertisements must be prepared with a sense of responsibility to the audience and to society. The present BCAP Codes and the proposed Code include a number of rules that may, in practice, ensure that advertisements are socially responsible. For example, advertisements must:
- not cause serious or widespread offence;
 - contain nothing that is likely to result in the physical, mental or moral harm of children;
 - not prejudice respect for human dignity;
 - contain nothing that might provoke anti-social or violent behaviour.
- 1.11 BCAP's sister body, the Committee of Advertising Practice (CAP) contains similar rules in its non-broadcast advertising Code but those are supplemented by a rule that ensures marketing communications must be prepared with a due sense of responsibility to consumers and to society. CAP's social responsibility rule gives the ASA the flexibility and necessary means to react proportionately to emerging public concerns and to find against unacceptable advertising practices that are not explicitly or adequately covered by other rules in the Code, for example an advertisement that glamorised knife crime² and an advertisement for a device that detects roadside speed recording equipment and implied that drivers could speed with impunity³.
- 1.12 BCAP considers a social responsibility rule is in keeping with its general policy objectives and, both in its expression in the Code and in its application will prevent irresponsible broadcast advertisements. BCAP proposes to introduce:

1.2

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

Question 1

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.

² www.asa.org.uk/asa/adjudications/Public/TF_ADJ_42118.htm

³ www.asa.org.uk/asa/adjudications/Public/TF_ADJ_43718.htm

Revised rules

1.13 None

Deleted rules

1.14 None

Other Questions

Question 2

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

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

iii) Do you have other comments on this section?

Part 2 - Section 2

Recognition of Advertising

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

Background

The law

Communications Act 2003

- 2.1 The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objective to the Recognition of Advertising Section of the BCAP Code is:

319(2)(h) that the inclusion of advertising which may be *misleading*, harmful or offensive in television and radio services is prevented. [emphasis added]

- 2.2 See the full text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

Audiovisual Media Services (AVMS) Directive

- 2.3 AVMS revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989. The TVWF Directive applied to scheduled television broadcasting services only. AVMS also applies to some on-demand services but this consultation is about advertisements in scheduled broadcast services only. Article 10 of TVWF has been revised in AVMS to state:

1. Television advertising and teleshopping shall be readily recognisable and distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means.

2. Isolated advertising and teleshopping spots, other than in transmissions of sports events, shall remain the exception.

- 2.4 See the full text of the Directive at:
eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF

Consumer Protection from Unfair Trading Practices Regulations 2008 (CPRs)

- 2.5 The CPRs prohibit unfair trading practices and identify misleading and aggressive practices as forms of unfair practice; because they are a trading practice, advertisements are subject to the CPRs. The CPRs sets out in schedule 1 a list of commercial practices that are in all circumstances considered unfair; it includes practice 11:

Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).

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

Other relevant regulatory bodies

- 2.7 Bodies that play a part in regulating a broadcast advertisement of relevance to this section but are not conferred with legal functions to do so include: Clearcast (www.clearcast.co.uk), and RACC (www.racc.co.uk).

Meeting the need to ensure that advertisements are recognised as such

- 2.8 European TV broadcasting legislation and the UK's regulation of radio broadcasting have long held that broadcast advertisements should be readily recognisable as such and distinguishable from editorial content. Advertisements that are not recognisable as such have the potential to mislead or otherwise be unfair; the audience should know when it is subject to a commercial message.
- 2.9 The present Codes require broadcast advertisements to be recognisable as such and separate from programmes. The Television Code achieves that through a general rule and numerous specific prohibitions on the content of advertisements. The Radio Code is far more reliant on a general rule.
- 2.10 BCAP's proposed approach, which includes rules common to TV and radio and rules specific to each media includes the principle that advertisements must be recognisable as such and retains detailed rules to support that principle.

Proposed substantive changes

Background Policy Consideration

- 2.11 BCAP has considered the extent to which the proposed Code should proportionately restrict the content and scheduling of broadcast advertisements to ensure that the audience is not potentially misled or otherwise unfairly treated by advertisements that are not recognisable as such. (See Section 32: Scheduling, for BCAP's review of the scheduling rules, which ensure separation between advertisements and programmes.)
- 2.12 Factors important to the recognition of a broadcast advertisement include the audience's ability to recognise parts of a broadcast service as advertising and to identify the broadcast content as an advertisement. If the audience can easily identify a part of a broadcast service as advertising (for example, a 'commercial break') there is, arguably, less need to maintain rules that prohibit the content of advertisements from using editorial references, which might otherwise confuse the audience about the nature or purpose of the broadcast material. Conversely, maintaining, in some form, existing content rules that prohibit the content of advertisements from using editorial references might be justifiable if, for example, the audience does not intuitively identify the part of a broadcast service as advertising.
- 2.13 In 2007 Ofcom published 'An independent report on Participation TV – quizzes, adult chat and psychic readings - Viewer research summary'⁴ prepared by Essential, an independent research agency. As part of that research, viewer perceptions of content were investigated. Respondents were asked to place a variety of cards showing a range of television programmes, channels or advertisements along an axis with 'entertainment' and 'advertising or sales' at opposite extreme ends of the range. This qualitative research showed that almost unanimously the viewer research group placed the cards at either end of the range of the 'entertainment' and 'advertising or sales' axes. For example, TV game shows and TV shows were placed at the 'entertainment' end of the scale and television advertising and product promotions on teleshopping channels were placed at the 'advertising or sales' end⁵. The research shows that viewers are instinctively able to differentiate traditional TV from advertising from TV programmes.

4 www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf

5 www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf section 5.2

- 2.14** Research indicates that the UK public is significantly more media literate than when the present Codes were last revised about nine years ago. Media literacy includes the ability to analyse and evaluate media in a variety of forms⁶. Please see Part 1 (4) for more information about UK adults' and children's level of media literacy. Because it is better able to analyse and evaluate media, the audience is arguably better able to recognise a broadcast advertisement as such; both through its improved critical understanding of commercial messages and its recognition of advertising in the broadcasting schedule.
- 2.15** The content of advertisements has the potential to confuse the audience about the nature or purpose of the broadcast material if it includes presentation or references that the audience is likely to associate strongly with programme content. Mindful of the evidence presented above, BCAP has considered whether that potential detriment justifies maintaining some of the existing prohibitions on the content of advertisements that are found in the Television Code in particular. BCAP has identified those prohibitions that, on balance, it considers disproportionately restrict the creative content of advertisements and proposes either to revise or delete them, nevertheless ensuring that an adequate level of consumer protection is maintained.

New rules

- 2.16** None

Revised rules

TV advertisement content prohibitions

- 2.17** The present BCAP Television Code states:

2.1.2

Advertisements must not:

- a) Use expressions reserved for important news and public service announcements (eg 'news flash')
- b) Use a situation, performance or style reminiscent of a programme in a way that might confuse viewers as to whether they are watching a programme or an advertisement

2.2.2

Advertisements must not:

- (c) include extracts from any recent or current programme (with limited exceptions)
- (d) include titles, logos, sets or theme (ie start/end) music from any programme (with limited exceptions)

- 2.18** BCAP considers its 'background policy consideration' is relevant to the review of those existing TV prohibitions.
- 2.19** Those rules prohibit TV advertisements using editorial treatments with the intention that advertisements are recognisable as such and, through 2.2.2 (c) and (d), that a perception is prevented that a programme is subject to commercial influence. BCAP has weighed up, on the one hand, the protection those rules afford to the audience and, on the other, the level of restriction placed on the creative content of advertisements.
- 2.20** On balance, BCAP considers those prohibitions are not proportionate but should be maintained in a form that urges caution and not prohibits, in all circumstances, the use of content specified in the rules.

⁶ www.ofcom.org.uk/advice/media_literacy/of_med_lit/whatis/

BCAP considers it should be perfectly acceptable to use extracts from a programme, for example, if the audience quickly recognises the message as an advertisement. BCAP considers that advertising rules intended to prevent a perception that a programme is subject to commercial influence offers no significant protection for the consumer and unjustifiably restricts the creative content of advertisements.

2.21 BCAP proposes to replace rules 2.1.2 (b) and 2.2.2 (c) with:

2.1

Advertisements must be clearly distinguishable from editorial content, especially if they use a situation, performance or style reminiscent of editorial content, to prevent the audience being confused between the two. The audience should quickly recognise the message as an advertisement.

2.22 BCAP proposes to replace rule 2.2.2 (d) with:

2.3

The use of a title, logo, set or music associated with a programme that is broadcast on that medium needs special care. The audience should quickly recognise the message as an advertisement.

2.23 Those rules would apply to television and radio.

Question 3

i) Given BCAP's policy consideration, do you agree that rule 2.1 should replace present TV rules 2.1.2 (b) and 2.2.2 (c), be applied to TV and radio and be included in the proposed BCAP Code? If your answer is no, please explain why.

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

Extra consideration of rule 2.1.2(a)

2.24 BCAP has taken into account that rule 2.1.2 (a) might protect the audience from, for example, unnecessary distress caused by the use of expressions reserved for important news and public service announcements ('news flash'). BCAP considers that potential detriment does not merit a ban on the use of such expressions in all circumstances. It should be perfectly acceptable to use those expressions in certain contexts and BCAP's proposed rule 4.8, 'Advertisements must not distress the audience without justifiable reason...' would, in BCAP's opinion, adequately prevent those expressions being used in a context that is likely to distress the audience.

2.25 BCAP proposes to replace rule 2.1.2 (a) with:

2.2

If used in an advertisement, an expression or sound effect associated with news bulletins or public service announcements (for example "news flash") needs special care. The audience should quickly recognise the message as an advertisement.

Question 4

Given BCAP's policy consideration, do you agree that rule 2.2 should replace present TV rule 2.1.2 (a), be applied to TV and radio and be included in the proposed BCAP Code? If your answer is no, please explain why.

Deleted rules

Editorial independence: television

2.26 The present Television Code states:

2.2.1

Broadcasters must retain editorial independence and responsibility for the content and scheduling of programmes.

2.2.2

Advertisements must not:

- a) refer to the use or appearance of any product or service in any programme.

2.27 The legacy rules that BCAP has reviewed were maintained by the Independent Television Commission and the Radio Authority; bodies that were responsible for the regulation of broadcast advertising *and* programmes.

2.28 Today, BCAP and ASA(B) are responsible for the day-to-day regulation of broadcast advertisements and Ofcom is responsible for the regulation of broadcast programmes. BCAP has taken into account that clear delegation of responsibility and proposes to delete TV rule 2.2.1 because maintaining responsibility for the scheduling and content of television programmes is Ofcom's responsibility; rule 10.1 of the Ofcom Broadcast Code requires broadcasters to maintain the independence of editorial control over programme content.

2.29 Rule 2.2.2 (a) is primarily intended to prevent a perception that a programme could have been, contrary to rules in the Ofcom Broadcasting Code, distorted for commercial purposes. The rule is specific to TV; advertisements on radio or in non-broadcast media may include, for example, 'As seen on The Technology Show', without obvious detriment to the audience. BCAP considers no obvious detriment would result from a TV advertisement using a similar advertising message and therefore it proposes to delete TV rule 2.2.2 (a).

Question 5

i) Given BCAP's policy consideration, do you agree that present TV rule 2.2.1 should not be included in the proposed BCAP Code? If your answer is no, please explain why.

ii) Given BCAP's policy consideration, do you agree that present TV rule 2.2.2 (a) should not be included in the proposed BCAP Code? If your answer is no, please explain why.

Impartiality of station presenters and newsreaders

2.30 The present Radio Code states:

Section 2, Rule 18

Station presenters may not make personal testimonials within advertisements on stations on which they appear (see also Section 2, Rule 24 Presenters in Advertising).

Section 2, Rule 24

Station presenters/newsreaders... may not be used to advertise products which may be seen to compromise the impartiality of their programming role.

2.31 Those rules are, in the main, intended to preserve the impartiality of radio station presenters and newsreaders and to prevent the audience from being misled.

The Communications Act 2003, s.319 (2)(c), requires 'that news included in television and radio services is presented with due impartiality'. That provision relates to programmes and not advertisements on Ofcom-

licensed television and radio channels. BCAP considers that the use of newsreaders in advertisements does not necessarily render an advertisement misleading or otherwise unfair, for example, by taking advantage of the unbiased reputation of the newsreader's programming role. Nevertheless BCAP is concerned not to undermine the value that both the Act and the public place on broadcast news services. It therefore proposes to prevent the use of radio and TV newsreaders in advertisements for products that may be seen compromise their programming role. However, BCAP considers that to maintain that restriction for station presenters who do not currently and regularly read the news is disproportionate because neither the Act requires nor the audience expects that station presenters remain impartial. In addition BCAP proposes to delete Radio rule 18, of section 2; the ban on station presenters making personal testimonials within advertisements on stations which they appear. The potential for that type of advertisement to confuse the audience is prevented by BCAP's requirements that the audience should quickly recognise the message as an advertisement. The potential for testimonials to mislead is prevented by rule 3.44: Testimonials or endorsements used in advertising must be genuine, unless they are obviously fictitious, and be supported by documentary evidence. Testimonials and endorsements must relate to the advertised product or service. Claims that are likely to be interpreted as factual and appear in advertisements must not mislead.

2.32 On the basis of that consideration, BCAP proposes:

2.5 – Radio only

A person who currently and regularly reads the news on radio or television may voice radio advertisements but must not advertise products or services that could be seen to compromise the impartiality of their news-reading role.

2.33 BCAP proposes to retain that rule for radio only and, for TV only, to maintain the existing TV rule in:

2.4 – Television only

Television advertisements, except for programme promotions, must not:

(ii) feature, visually or orally, anyone who currently and regularly presents news or current affairs on television

2.34 BCAP considers, in the absence of known problems with the present radio rule, for example through the number of complaints, a proposal to strengthen the present radio restriction on newsreaders to a ban on the use of newsreaders in all circumstances in line with the Television Code is not merited. BCAP proposes to maintain the present TV restriction, which is stricter than for radio, because it considers the potential to undermine the value that both the Act and the public place on broadcast news services is greater because of the audio-visual aspect of TV.

Question 6

i) Given BCAP's policy consideration, do you agree that radio rule 18, section 2, should not be included in the proposed Code? If your answer is no, please explain why.

ii) Given BCAP's policy consideration, do you agree that radio station presenters who do not currently and regularly read the news should be exempted from the rule that restricts presenters from featuring in radio advertisements that promote a product or service that could be seen to compromise the impartiality of their programming role? If your answer is no, please explain why.

Other questions

Question 7

i) Taking into account BCAP's general policy objectives, do you agree that BCAP's rules on the Recognition of Advertising 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 Advertising rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here or in Section 32 on Scheduling and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 - Section 3

Misleading

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

Background

The law

Communications Act 2003

- 3.1 The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The standards objectives most relevant to the Misleading Section of the BCAP Code are:

319 (2) (h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;

319 (2) (l) that there is no use of techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred.

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

Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

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

Business Protection from Misleading Marketing Regulations 2008 (BPRs)

- 3.5 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.
- 3.6 The BPRs implement European Directive 2006/114/EC. You can read the full text of the BPRs at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3480825

Audiovisual Media Services Directive (AVMSD)

- 3.7 AVMSD revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989. The TVWF Directive applied to scheduled television broadcasting services only. AVMSD also applies to some on-demand services but this consultation is about advertisements in scheduled broadcast services only.

- 3.8** AVMSD imposes a specific prohibition on surreptitious or subliminal techniques in TV broadcast advertising:

Article 3e

1. Member States shall ensure that audiovisual commercial communications provided by media service providers under their jurisdiction comply with the following requirements:

a. audiovisual commercial communications shall be readily recognizable as such. Surreptitious audiovisual commercial communication shall be prohibited;

e. audiovisual commercial communications shall not use subliminal techniques.

- 3.9** See the full text of AVMSD at: eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF

Other relevant regulatory bodies

- 3.10** Bodies that play a part in regulating a broadcast advertisement of relevance to this section but that are not conferred with legal functions to do so include Clearcast (www.clearcast.co.uk) and the RACC (www.racc.co.uk).

Recent changes to this section of the BCAP Code

- 3.11** The CPRs came into force on 26 May 2008. Advertisements are a form of trading practice and are therefore subject to the CPRs. BCAP amended its Codes to ensure that they were in line with the new legal requirements and held a public consultation to seek stakeholders' opinions on whether BCAP's proposed amendments accurately reflected the new legal requirements. The amended Codes came into force on 21 November 2008. Full details of the consultation can be found here: www.cap.org.uk/cap/Consultations/closed/BCAP+CPRs+consultation/BCAP+CPRs+Consultation.htm

Meeting the need to ensure that the inclusion of advertising which may be misleading in television and radio services is prevented

- 3.12** The Television Code and Radio Code have long held that advertisements should not mislead either directly or by implication, that evidence be held in support of any objective claim made, that important qualifications to an offer should be made clear and that comparative advertisements should be presented fairly. The CPRs introduced more detailed provisions to the Codes relating to unfair practices defined in legislation.
- 3.13** Because broadcasters are responsible for ensuring that the advertisements they broadcast comply with the Code, broadcasters usually require advertisers to supply evidence for their claims before accepting the advertisement for transmission.

Proposed substantive changes

New rules

Puffery and subjective claims

- 3.14** The present Codes address factual claims and objective evidence directly, but they implicitly recognise that advertising also uses claims and treatments that the audience will understand to be exaggerated or untrue, for effect. Advertisements may also feature opinions, either on the goods or services featured or on an idea or cause. It is important to balance the need to promote truthfulness in advertising and the need to protect creative freedom and freedom of speech and to be vigilant in dealing with claims that promote an objective view of a product under the guise of an opinion.

- 3.15** To ensure that a proper distinction is made between claims that require substantiation and those that do not, BCAP proposes the following rules:

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.

3.5

Subjective claims must not mislead the audience; advertisements must not imply that expressions of opinion are objective claims.

Question 8

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.

Significant division of informed opinion

- 3.16** The present Codes require that broadcasters hold documentary evidence in support of claims that are capable of objective substantiation. Advertisements that promote new or ‘breakthrough’ products, or that address a contemporary issue about which there is a significant body of evidence, must be prepared with caution to avoid misleading by implying consensus where none exists. BCAP proposes the following rule to address that point:

3.13

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

- 3.17** This rule should not prevent advertisements from referring to disputed claims altogether but should merely prevent them from claiming universal acceptance.

Question 9

Given BCAP’s policy consideration, do you agree that rule 3.13 should be included in the Code? If your answer is no, please explain why.

Prices claims “from” or “up to”

- 3.18** The ASA frequently receives complaints alleging that “up to” or “from” price claims mislead consumers because the advertised prices are not available. The BCAP Codes do not explicitly address price claims “from” or “up to” a given amount. BCAP proposes the following rule to address such claims:

3.23

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

- 3.19** In practice, the ASA allows “up to” and “from” claims, in both broadcast and non-broadcast advertisements if at least 10% of the items included in the offer are available at the “from” price (or represent the “up to” saving). That is consistent with BERR’s Pricing Practices Guide, which states that ‘General notices saying, for example “half price sale” or “up to 50% off” should not be used unless the maximum reduction quoted applies to at least 10% of the range of products on offer at the commencement of the sale’.

- 3.20** Adding the rule to the BCAP Code maintains existing practice but makes clear to advertisers and broadcasters requirements in regard to “up to” and “from” claims.

Question 10

Given BCAP’s policy consideration, do you agree that rule 3.23 should be included in the Code? If your answer is no, please explain why.

Estimates of demand

- 3.21** The present Codes seek to protect consumers not only from financial loss but also from wasting their time making enquiries about offers of which they are unlikely to be able to take advantage because the offer is not available or availability is unreasonably limited. If it is found that the product offered in an advertisement was not available in sufficient amounts to satisfy demand and the advertisement had not made clear any reasonable grounds the advertiser might have for believing that they might not be able to supply it, it is not an adequate defence, in BCAP’s view, for the broadcaster to state they had no idea how many people would respond and therefore had no reasonable grounds to believe they would run out. The advertiser should be able to demonstrate to the broadcaster and, if necessary, to the ASA that, on the basis of previous similar promotions for example, a reasonable estimate had been made. BCAP therefore proposes the following rule to make that clear:

3.27

Broadcasters must be satisfied that advertisers have made a reasonable estimate of demand.

- 3.22** BCAP understands that there are circumstances where an advertiser may wish to use an advertisement to assess demand for a new product. BCAP considers that is acceptable, provided the advertisement makes clear that the product in question is not yet available. To provide for such circumstances, BCAP proposes the following rule:

3.28

if the advertiser does not intend to fulfil orders, because the purpose of the advertisement is to assess potential demand, the advertisement must make that clear.

Question 11

i) Given BCAP’s policy consideration, do you agree that rule 3.27 should be included in the Code? If your answer is no, please explain why.

ii) Given BCAP’s policy consideration, do you agree that rule 3.28.2 should be included in the Code? If your answer is no, please explain why.

Recommended Retail Prices (RRPs)

- 3.23** The Codes do not offer guidance on the use of RRPs and similar in advertisements that make a price comparison. The Consumer Protection from Unfair Trading Regulations 2008 lay down the statutory framework for indications of price, price comparisons and reductions and BERR has issued a Pricing Practice Guide⁷. To address circumstances where a product is routinely offered at a price that is significantly lower than the RRP, such that a reference to the RRP is likely to mislead the audience as to the extent of the saving they might make by purchasing the product at the quoted price, BERR’s guidance warns against the use of RRPs except where they reflect the general retail price. BCAP proposes to introduce a rule to the Code that reflects BERR’s Guide:

⁷ <http://www.berr.gov.uk/files/file46254.pdf>

3.39

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

Question 12

Given BCAP's policy consideration, do you agree that rule 3.39 should be included in the Code? If your answer is no, please explain why.

Revised rules**Subliminal techniques**

3.24 The present Television Code states:

5.4.5 Subliminal advertising

No advertisement may use images of very brief duration, or any other technique which is likely to influence viewers, without their being fully aware of what has been done.

3.25 The present Radio Code contains no similar provision. Appendix 1 of the Code provides a list of the standards objectives from the Communications Act that are relevant to BCAP, among which is Section 319 (2) (I), which rule 5.4.5 reflects. The objective refers to 'viewers and listeners' and BCAP considers that it is therefore relevant to radio as well as to TV. BCAP therefore proposes to extend the rule to radio.

Question 13

Given BCAP's policy consideration, do you agree that the rule on subliminal advertising is relevant to radio and should, therefore, be apply to radio as well as TV advertisements? If your answer is no, please explain why.

VAT-exclusive prices

3.26 The present Television Code states:

5.3.3 Pricing requirements

Notes to 5.3.3(a):

(2) Television advertising is regarded by the ASA and BCAP as generally being a business-to-consumer medium. Advertising quoting only VAT exclusive pricing would be appropriate only in exceptional circumstances.

3.27 Section 2 rule 17.1 (Accurate pricing) in the Radio Code states:

In addition, all prices quoted in advertisements must include VAT, except for business-to-business advertisements, where it must be made clear that prices are exclusive of VAT.

3.28 The inclusion of taxes in advertisements that include prices is required by CPRs (5(4)(d)(i)). The inclusion of fees and charges is not legally required but long-standing advertising regulatory policy has required, for example, airline advertisers to quote prices inclusive of booking charges and fuel surcharges, as well as taxes; in other words, the price must include all non-optional charges. BCAP

proposes the following rule to clarify the circumstances in which VAT-exclusive prices may be acceptable:

3.18

Quoted prices must include non-optional taxes, duties, fees and charges that apply to all or most buyers. VAT-exclusive prices may be given only if all or most consumers pay no VAT or can recover VAT; advertisements that quote VAT-exclusive prices must prominently state the amount or rate of VAT payable if some consumers are likely to pay VAT.

- 3.29** The rule is intended to allow VAT-exclusive prices in situations where buyers pay no VAT, for example, tax-free shopping or products bought in bond, and in situations where the buyer pays but can subsequently reclaim VAT, for example, VAT-registered business customers.

Question 14

Given BCAP's policy consideration, do you agree that rule 3.18 should be included? If your answer is no, please explain why.

Tax-exclusive prices

- 3.30** The present Television Code states:

5.1.4

For advertisements that quote prices for advertised products, material information includes:

(c) the price of the advertised product, including taxes; or where the nature of the product is such that the price cannot be calculated in advance, the manner in which the price is calculated.

- 3.31** Section 2 rule 3.1 in the present Radio Code states:

For advertisements that quote prices for advertised products, material information includes:

iv) the price of the advertised product, including taxes.

- 3.32** BCAP notes that some airline advertisers have quoted tax-exclusive prices on the basis that they were quoting a single 'from' price for a variety of destinations and the taxes payable vary according to the destination. BCAP considers that tax-exclusive prices are permissible only if the advertisers are genuinely unable to calculate taxes or charges in advance and not simply because an advertiser has chosen to make an over-generalized price claim. BCAP proposes the following rule to clarify that position:

3.19

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

- 3.33** The rule allows that, for example, mandatory delivery charges might not be included in the headline price if the charge depends on the number of items that the customer orders.

Question 15

Given BCAP's policy consideration, do you agree that rule 3.19 should be included in the Code? If your answer is no, please explain why.

Price offers that depend on other commitments

3.34 The present Television Code states:

5.3.1 Accurate pricing

Indications of actual or comparative prices, or the manner in which a price is to be calculated, must be accurate and must not mislead by omission, undue emphasis or distortion.

3.35 Section 2 rule 17.1 in the Radio Code states:

Actual and comparative prices quoted must be accurate at the time of broadcast and must not mislead.

3.36 Those rules establish the basic principle of accurate pricing: however, BCAP is aware that offers such as monthly subscriptions that are subject to a one-off set-up fee or services that are available only to subscribers at additional cost have the potential to mislead consumers by omitting to inform them of the extent of the commitment they must make to obtain the advertised price. In practice, that is covered by the present rule but, to make the requirements explicit, BCAP proposes the following rule:

3.22

If the price of one product or service depends on another, advertisements must make clear the extent of the commitment consumers must make to obtain the advertised price.

Question 16

Given BCAP's policy consideration, do you agree that rule 3.22 should be included in the Code? If your answer is no, please explain why.

Use of the word "free"

3.37 CAP and BCAP published joint guidance on use of the word "free"⁸ in November 2007, following a series of ASA adjudications that drew attention to the differently worded provisions on that subject in the CAP and BCAP Codes.

3.38 The present Television Code states:

5.2.11 Use of the word 'free'

Advertisements must not describe an offer as 'free', or similar, if there are costs to consumers other than actual postage or carriage, non-premium rate telephone charges or reasonable travel required to collect the offer. Advertising must make clear the extent of the consumer's liability for any costs.

Notes to 5.2.11(a):

1) Trials can be described as free even if the customer has to pay the costs of returning the goods, provided this is made clear in the advertising.

2) Making clear the extent of liability would include, for example, explaining the need to collect tokens, or to travel a considerable distance to redeem an offer.

b) No element of an offer may be described as 'free' if viewers are likely to be misled as to whether it is genuinely additional to the offer.

3.39 Section 2 rule 20.1 in the Radio Code states:

⁸ www.cap.org.uk/NR/rdonlyres/F0E69FAA-AAD6-402B-A390-5001C41FF4FE/0/use_of_free.pdf

Advertisements must not describe products or samples as ‘free’, or similar, unless they are supplied at no cost or no extra cost (other than postage or carriage) to the recipient.

A trial product may be described as “free” provided that any subsequent financial obligations from the customer are specified in the advertisement, eg. the cost of returning the product in the case of dissatisfaction or the cost of the product at the end of the trial period.

- 3.40** BCAP proposes the following rule to help clarify the principle that only genuinely additional elements of an offer may be described as free:

3.25

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

- 3.41** Under the ITC and Ofcom, “free trial” claims were allowed for “satisfaction or your money back offers”. The CAP Code, which regulates non-broadcast advertisements, prohibits that practice. The ASA has not adjudicated on such offers since BCAP and CAP’s joint Guidance on Free was published but BCAP considers that it is not within the spirit of the joint position on use of the word “free” to continue to allow such offers to be described as free. It proposes the following rule to address that:

3.26

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

Question 17

i) Given BCAP’s policy consideration, do you agree that rule 3.25 should be included in the Code? If your answer is no, please explain why.

ii) Given BCAP’s policy consideration, do you agree that rule 3.26 should be included in the Code? If your answer is no, please explain why.

Geographical restrictions

- 3.42** The present Television Code states:

5.2.3 Qualifications

All important limitations and qualifications must be made clear

Note:

Important limitations and qualifications include those on availability, particularly where failure to mention such conditions is likely to lead viewers to assume that an advertised offer is available on equal terms to all who might see it. Such restrictions might include geographical restrictions, limited numbers of purchases per person, age or sex restrictions etc.

- 3.43** The present Radio Code does not include an explicit requirement that geographical restrictions to an offer should be stated. BCAP proposes that the following rules should apply to TV and radio advertisements:

3.28

Advertisements that quote prices for featured products must state any reasonable grounds the advertisers have for believing that they 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

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

Question 18

Given BCAP's policy consideration, do you agree that rule 3.28.3 should apply to TV and radio advertisements? If your answer is no, please explain why.

Imitation or replica of competitor's trade mark

3.44 Rule 5.4.6 in the present Television Code states:

5.4.6 Comparative advertising

There must be no realistic likelihood that viewers will be misled as a result of any comparison, whether about the product or service advertised or that with which it is compared

Notes: A comparative advertisement is acceptable if:

(g) it does not present goods or services as imitations or replicas.

3.45 Section 2 rule 6.1 in the present Radio Code states:

The [BPRs] ... require that comparative advertising ... shall, as far as the comparison is concerned, be permitted only when the following conditions are met:

h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.

3.46 The legal requirement in the Business Protection from Misleading Marketing Regulations 2008⁹ (BPRs) 4(i) relates only to imitations or replicas of products that bear a protected trade mark or trade name, as the Radio Code more correctly reflects. BCAP proposes to include the requirement, which presently appears in the Codes as a guidance note, as a separate rule in the proposed Code and to state:

3.43

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

Question 19

Given BCAP's policy consideration, do you agree that the proposed amendment in 3.43 correctly reflects the BPRs 4(i) requirement? If your answer is no, please explain why.

Deleted rules

Animal testing

⁹ www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3480825

3.47 Rule 5.2.7 in the present Television Code states:

Claims that a product has not been tested on animals are unlikely to be acceptable

- 3.48** BCAP considers that the rule merely highlights the difficulty broadcasters are likely to face in substantiating such claims and does not have the force of a rule. Complaints to the ASA on the subject of animal testing could be considered under the general principle that advertisements must not materially mislead. BCAP considers that the rule does not help advertisers, broadcasters or the ASA to decide whether an advertisement is misleading and therefore proposes to delete it.

Question 20

Given BCAP's Policy consideration, do you agree that rule 5.2.7 should not be included in the Code? If your answer is no, please explain why.

Advertisements for solicitors and advertisements for conditional fee arrangements which claim, 'no win no fee'.

3.49 Section 3, Rule 19 in the present Radio Code states:

Advertisements by or on behalf of solicitors should comply with the Solicitors' Practice Rules and the Solicitors' Publicity Code where this applies.

Advertisements for conditional fee arrangements which claim 'no win, no fee' must not mislead listeners into believing that they will not incur any costs at all. Such claims should be suitably qualified if the client is (or may be) required to pay any costs or fees (including those of the other party), such as insurance premiums or disbursements.

Radio advertisements by or on behalf of solicitors

- 3.50** Solicitors are now regulated by the Solicitors Regulation Authority under the 'Solicitors Code of Conduct'¹⁰, which has replaced the Law Society's 'Solicitors Practice Rules' and 'Solicitors Publicity Code'. It is not an explicit legal requirement that advertisements by or on behalf of solicitors must comply with the Solicitors Code of Conduct. Because the BCAP Code should avoid, where possible, referencing an external code of conduct in the BCAP rules (because the ASA cannot interpret those codes) and because the Solicitors Code of Conduct does not offer a level of consumer or business protection beyond that offered by BCAP Misleading rules (see section 3), BCAP proposes to delete radio rule 19, of Section 3.

Question 21

Given BCAP's policy consideration, do you agree that it is not necessary to include in the BCAP Code the requirement for advertisements by or on behalf of solicitors to comply with the Solicitors Code of Conduct? If your answer is no, please explain why?

Radio advertisements for conditional fee arrangements which claim 'no win, no fee'

¹⁰ www.sra.org.uk/solicitors/code-of-conduct.page

- 3.51** In the light of concern about advertisements for claims management companies (CMCs), the ASA co-funded research¹¹ with the Government (published in 2006) into advertisements by compensation services for personal injury cases. The research identified ‘no win no fee’ claims as a particular area of concern; consumers understood that claim to mean a client would pay no charges at all and consumers did not understand the need for a third party to be at fault or that a claim might entail a lengthy legal process. The Government, through the Ministry of Justice (MoJ), has since established a regulatory regime for CMCs. The Compensation Act 2006 and regulations made under it¹² ensure that when a potential client makes an initial enquiry with a CMC, all charges and significant conditions are made clear at the outset. Under the Conduct of Authorised Persons Rules 2007 CMCs are expressly required to comply with the CAP and BCAP Codes.
- 3.52** Research suggests that ‘no win, no fee’ claims are potentially misleading by the omission of significant conditions. BCAP considers that its Misleading rules (see Section 3) adequately address that concern, especially:

3.2

Advertisements must not mislead consumers by omitting material information. They must not mislead by hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner.

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

- 3.53** Because it is adequately regulated by rules that prevent misleading advertisements, BCAP proposes to delete the requirement that advertisements for conditional fee arrangements which claim ‘no win, no fee’ must be suitably qualified if the client is (or may be) required to pay any costs or fees (including those of the other party), such as insurance premiums or disbursements.

Question 22

Given BCAP’s policy consideration, do you agree that it is not necessary to maintain, in BCAP’s proposed Code, a rule that requires advertisements for conditional fee arrangements which claim ‘no win, no fee’ to suitably qualify if the client is (or may be) required to pay any costs or fees (including those of the other party), such as insurance premiums or disbursements? If your answer is no, please explain why.

Other questions

Question 23

i) Taking into account BCAP’s policy consideration, do you agree that BCAP’s rules in the Misleading 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 Misleading 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?

¹¹ www.asa.org.uk/NR/rdonlyres/DC59B829-D6DC-4585-81C7-8A6D7BC5494F/0/ClaimsadvertisingreportFINAL080506.pdf

¹² www.claimsregulation.gov.uk/

Part 2 – Section 4

Harm and Offence

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

Background

The law

Communications Act 2003

- 4.1 The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objectives to the Harm and Offence section of the BCAP Code are:

319(2)(a) that persons under the age of eighteen are protected;

319(2)(b) that material likely to encourage or to incite the commission of crime or lead to disorder is not included in television and radio services;

319(2)(f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

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

Audiovisual Media Services Directive (AVMS) Directive

- 4.3 The Directive revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989. The TVWF Directive applied to scheduled television broadcasting services only. AVMSD also applies to some on-demand services but this consultation is about advertisements in scheduled broadcast services only. The Directive states:

Article 3b Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.

Article 3e1 Member States shall ensure that audiovisual commercial communications provided by media service providers under their jurisdiction comply with the following requirements:

(c) audiovisual commercial communications shall not:

(iv) encourage behaviour grossly prejudicial to the protection of the environment

- 4.4 Please see the text of the Directive at: eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF

Other relevant regulatory bodies

Equality and Human Rights Commission (EHRC)

- 4.5 The EHRC is responsible for eliminating discrimination, reducing inequality and protecting human rights. Part of its duties, therefore, is to ensure that advertisements do not discriminate on the grounds of sex, race, disability, age, sexual orientation or religion or belief, principally in relation to advertisements for employment, education and training opportunities and accommodation, goods, facilities and services provided to the public. The EHRC does not regulate advertisements on a day-to-day basis, and it recognises CAP and BCAP as the bodies that set standards for advertisements. The EHRC is a non-departmental public body accountable for its public funds but independent of Government; it was established under and gained enforcement powers from the Equality Act 2006 to guarantee people's equality and it has a mandate to promote understanding of the Human Rights Act. The EHRC's website is www.equalityhumanrights.com.
- 4.6 Bodies that play a part in regulating a broadcast advertisement of relevance to this section but are not conferred with legal functions to do so include: Clearcast (www.clearcast.co.uk) and the RACC (www.racc.co.uk).

Recent changes to the Harm and Offence section of the BCAP Television Code

- 4.7 In 2007, BCAP consulted and subsequently revised its rule on Sound Levels in TV Advertisements. The rule was revised to take account of technological advancements that made the setting and measurement of loudness levels in TV advertisements simpler. Details of the consultation can be found here: www.cap.org.uk/cap/Consultations/closed/TV_ad_sound_levels/

Meeting the need to ensure that broadcast advertisements do not cause harm or serious or widespread offence

- 4.8 The proposed Code, and the present BCAP Codes, enshrine in rules some of the legal requirements of the Communications Act and Broadcasting Acts. Those rules make clear the general, overarching principle that advertisements must not harm or cause serious or widespread offence to the audience, for example, by offending against generally accepted moral, social or cultural standards. That principle has been, and should continue to be, applicable to all broadcasters and advertisers to ensure that generally accepted standards in broadcast advertising are upheld.
- 4.9 BCAP is aware that its duty to protect the audience from the inclusion of harmful or offensive material in advertising must be balanced with advertisers' fundamental right to freedom of expression. BCAP considers it reasonable to restrict that right if it is necessary to protect the audience from harm or serious or widespread offence.

Proposed substantive changes

New rules

Crime and anti-social behaviour

- 4.10 Section 319 (2)(b) of the Communications Act 2003 states:

that material likely to encourage or to incite the commission of crime or to lead to disorder is not included in television and radio services.

- 4.11 BCAP proposes to reflect that provision in its Code to compliment the general principle that advertisements must not include harmful material. BCAP proposes:

4.7

Advertisements must not condone or encourage violence, crime, disorder or anti-social behaviour.

Question 24

Do you agree that rule 4.7 should be included in the proposed BCAP Code? If your answer is no, please explain why.

Protection of the environment – radio

- 4.12 The present Radio Code does not include a rule on the protection of the environment. BCAP proposes to extend the TV rule to cover radio advertisements. BCAP proposes:

4.10

Advertisements must not condone or encourage behaviour grossly prejudicial to the protection of the environment.

- 4.13 BCAP considers the proposed rule ensures that no advertisement condones or encourages deliberate actions that would be detrimental to the environment; arguably, the Radio Code already implicitly prevents such creative treatments.

Question 25

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

Revised rules

- 4.14 None.

Deleted rules

- 4.15 None.

Other

Harm

- 4.16 The present Radio Code includes a rule titled Harm:

Rule 10, section 2

Harm

Advertising must not harm listeners nor exploit, either personally or financially, their vulnerability. No advertising is acceptable from those who practise or advocate illegal or harmful, or potentially harmful behaviour.

No advertisement may encourage or condone behaviour which is harmful or prejudicial to health and safety. This does not preclude responsible advertisements for products and services, which used to excess or abused, could endanger health or safety.

- 4.17** The present Television Code does not include an equivalent rule that prevents harm in general. Instead, it relies on numerous other rules that deal with specific types of harm that may result from TV advertisements.
- 4.18** BCAP proposes to adopt the TV approach. BCAP proposes not to include a rule that prevents 'general harm' because it considers that one is not necessary: the proposed Code includes a rule that protects children from harm and many other rules that protect all audience members from physical, mental, moral, financial and social harm. BCAP makes this proposal mindful of the fact that the ASA has not upheld a complaint about an advertisement under the Radio Harm rule (rule 10, Section 2), presumably because other specific harm rules in the present Radio Code were considered more relevant in the investigation of complaints about harmful radio advertisements.
- 4.19** BCAP cannot envisage a form of harm that might realistically derive from broadcast advertising that is not adequately prevented by the proposed Code, either by rules that address specific types of harm or by BCAP's proposed new rule 1.2: 'Advertisements must be prepared with a sense of responsibility to the audience and to society'. The Principle in section 1, Compliance, states: 'The overarching principles of this Code are that advertisements should not mislead, cause serious or widespread offence or harm, especially to children or the vulnerable'. Because it is not necessary, and therefore not in line with BCAP's general policy objectives (see Part 1 (4)), BCAP proposes not to include a rule that prevents 'general harm' in the proposed Code. BCAP considers that that proposal does not amount to a change in advertising policy and practice for the reasons given.

Question 26

Taking into account its policy consideration, do you agree with BCAP's proposal not to include in the proposed Code the present radio Harm rule (rule 10, section 2 of the present Radio Code)? If your answer is no, please explain why.

Other questions

Question 27

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

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

iii) Do you have other comments on this section?

Part 2 - Section 5

Children

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

Background

The law

Communications Act 2003

- 5.1 The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The standards objectives most relevant to the Children Section of the BCAP Code are:

319(2)(a) that persons under the age of eighteen are protected;

319(2)(f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

- 5.2 See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

Audiovisual Media Services (AVMS) Directive

- 5.3 The AVMS Directive revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989. The TVWF Directive applied to scheduled television broadcasting services only. The AVMS Directive also applies to some on-demand services but this consultation is about advertisements in scheduled broadcast services only. Article 3e1(g) of the AVMS Directive states:

audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.

- 5.4 See the full text of the Directive at: eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF

Consumer Protection from Unfair Trading Practices Regulations 2008 (CPRs)

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

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

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

Management of Health and Safety at Work Regulations 1999

- 5.7 The Regulations implement health and safety provisions and place duties on employers of young persons.
- 5.8 See the text of the Regulations at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=2745786

Children and Young Persons Act 2008

- 5.9 The Act reformed the statutory framework for the care system for children and young persons in England and Wales to ensure that high-quality care and services focused on the needs of the child or young person are delivered.
- 5.10 See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3530049

Children (Performances) Regulations 1968 (as amended)

- 5.11 The Regulations provide for the maximum length of time in which a child may take part in a continuous performance or rehearsal without a break, the time in which children may be present at the place of performance or rehearsal and education provisions for child performers.
- 5.12 Please contact the Stationery Office for a copy of the Regulations:
www.tso.co.uk/contact/ordersandenquiries/

Other relevant regulatory bodies

- 5.13 Bodies that play a part in regulating a broadcast advertisement of relevance to this section but are not conferred with legal functions to do so include: Clearcast (www.clearcast.co.uk) and the RACC (www.racc.co.uk).

Meeting the need to ensure that advertisements do not harm children

- 5.14 The present BCAP Television and Radio Codes include rules intended to prevent advertisements that have the potential to cause physical, mental or moral harm to children. BCAP considers that, to secure the relevant Communications Act standard objectives, a dedicated section of rules relating to children and advertising should continue to be included in the Code. On that basis, BCAP's proposed Children section reflects many of the present rules, which provide important and necessary protection to children from potentially harmful, distressing and misleading advertisements.

Proposed substantive changes

New rules

Exploitation of trust

- 5.15 The AVMS Directive states 'audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not... exploit the special trust minors place in parents, teachers or other persons'.

5.16 BCAP considers that that provision compliments the present TV and radio rules that prevent advertisements from causing mental, moral or social harm to children. BCAP proposes to reflect the AVMS provision for the sake of clarity. BCAP considers that it would be suitable to apply that rule to both TV and radio advertisements – despite radio services not being subject to the AVMS Directive – because the requirement supports the general Harm rule in the Children section. The proposed rule is therefore a clarification rather than an additional restriction on either television or radio advertisers and broadcasters.

5.17 BCAP's proposed TV and radio rule is:

5.7

Advertisements must not exploit the special trust children place in parents, guardians, teachers or other persons.

Question 28

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

Revised rules

Expensive products of interest to children

5.18 The present BCAP Television Code states:

7.1.4 Expensive toys

Except in the case of television services carrying advertising directed exclusively at non-UK audiences, advertisements for expensive toys, games and comparable children's products must include an indication of their price.

Notes:

i) For this purpose, a product will not be regarded as 'expensive' if it, plus any essential accessories, are reasonably widely available at a retail price below a figure specified by ASA and BCAP. (At September 2002, this was £25 but is subject to change.)

ii) Where a range of products is featured in an advertisement, only the most expensive item need be priced.

iii) Where it is impossible to show a precise cost, because retail prices are likely to vary, an approximation is acceptable so long as it is presented as simply indicative. For example, 'Around £x' or 'Costs between £y and £z'.

5.19 That rule requires price information to be included in TV advertisements, which could assist parents and guardians to cut short pleas by children for expensive products of interest to them; the aim is to prevent children from pestering adults about advertised products. BCAP proposes to extend the rule to advertisements broadcast on all Ofcom-licensed television channels, not only those broadcast to UK audiences, because it considers that the policy underpinning the rule is equally relevant to non-UK audiences.

5.20 BCAP considers the rule is merited for TV because the audio-visual impact of television and the scheduling of toy and game advertisements around children's TV programmes. Those factors are not relevant to radio and BCAP therefore does not propose to extend the rule to radio.

5.21 When the Television Code was last reviewed in 2002, the ITC redefined an 'expensive' children's toy, game or comparable children's product as being £25 or more; before that, it had been £20. BCAP

proposes that that figure should now be £30, which takes into account the rise in inflation since the rule was last reviewed¹³.

5.22 BCAP's proposed television rule is:

5.14 – Television only

Advertisements for an expensive product or service of interest to children must include a statement of the product or service's price or, if it is not possible to include a precise price, an approximate price. BCAP considers a product or service of interest to children costing £30 or more to be expensive.

Question 29

i) Given BCAP's policy consideration, do you agree rule 5.14 should be applied to advertisements broadcast on all Ofcom-licensed television channels and not only those broadcast to a UK audience? If your answer is no, please explain why.

ii) Given BCAP's policy consideration, do you agree rule 5.14 should define an 'expensive' product of interest to children to be £30 or more? If your answer is no, please explain why.

iii) Given BCAP's policy consideration, do you agree rule 5.14 should be included in the Code? If your answer is no, please explain why.

Competitions

5.23 The present BCAP Radio Code states:

Section 2, rule 11.8

Competitions

References to competitions for children are acceptable provided that any skill required is appropriate to the age of likely participants, and the values of the prizes and the chances of winning are not exaggerated;

The published rules must be submitted in advance to the Licensee and the principal conditions of the competition must be included in the advertisement (see also Section 2, Rule 23 Competitions, Lotteries, Betting and Gaming).

5.24 The likely purpose of that rule is to prevent children from being misled by radio advertisements for competitions. That purpose is, in BCAP's opinion, applicable to TV advertisements for competitions targeted at children. On that basis, BCAP proposes a rule on promotions targeted at children, which would replace those radio rules, and apply to TV and radio.

5.25 To provide clarification to advertisers and broadcasters, the proposed rule specifies some of the ways in which an advertisement for a promotion must not mislead children. Also, because of the CPRs' ban on directly exhorting children to buy an advertised product (or directly exhorting children to ask others to buy a product for them)¹⁴, BCAP considers that it would be useful to highlight in the proposed rule

¹³ BCAP compared the relative value of £25 in 2002 and today against the Retail Price Index (RPI), which produced an equivalent value of £29.31 at the time BCAP reviewed the rule. BCAP used the RPI because it considers it to be the most familiar general-purpose domestic measure of inflation in the UK. BCAP proposes to round that figure up to £30.

¹⁴ Prohibited practice number 28 in Schedule 1 of the Consumer Protection from Unfair Trading Regulations 2008: Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.

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

5.26 BCAP's proposed TV and radio rule is:

5.15

Advertisements for promotions directly targeted at children:

5.15.1

must include all significant qualifying conditions

5.15.2

must not include a direct exhortation to buy a product

5.15.3

must make clear if adult permission is required for children to enter.

Advertisements for competitions directly targeted at children are acceptable if any skill required is relevant to the age of likely participants and if the values of the prizes and the chances of winning are not exaggerated.

Advertisements for promotions directly targeted at children should comply with Section 28: Competitions.

Question 30

i) Given BCAP's policy consideration, do you agree that rules 5.15 adequately replaces rule 11.8, section 2, of the Radio Code? If your answer is no, please explain why.

ii) Given its policy consideration, do you agree with BCAP's proposal to introduce a rule that prohibits advertisements for a promotion directly targeted at children if they include a direct exhortation to buy a product? If your answer is no, please explain why.

iii) Given BCAP's policy consideration, do you agree that rule 5.15 should apply to television and radio advertisements? If your answer is no, please explain why.

iv) Given BCAP's policy consideration, do you agree that rule 5.15 should be included in the Code? If your answer is no, please explain why.

Deleted rules

Children as presenters in advertisements

5.27 The present Television Code states:

7.3.3 Children as presenters

Children in advertisements must not comment on product or service characteristics in which children their age would not usually be interested.

5.28 The present BCAP Radio Code states:

Section 2, rule 11.11

Child Voiceovers and Presentation

a) Children may take part in radio commercials, subject to all relevant legal requirements.

However, they must not feature in advertisement in ways which might cause them moral harm, give concern about their welfare or be regarded as commercial exploitation;

b) Children employed in commercials must not be used to present selling messages and calls to action about products or services which are likely to be beyond their understanding or which the law prevents them from buying themselves.

The exception to this Rule may be where a child acts out a role, although particular care should be taken in these circumstances to ensure that the child actor is not exploited or morally harmed in any way (see also Section 2, Rule 9 Good Taste, Decency and Offence to Public Feeling).

Section 2, rule 11.12

Testimonials

Children must not personally testify about products and services. They may, however, give spontaneous comments on matters in which they would have an obvious natural interest.

- 5.29** The purpose of those rules is twofold. Firstly, they make clear that a child actor should not be harmed as a result of featuring in an advertisement and that the advertiser or broadcaster has satisfied all legal requirements in connection to featuring that child. Secondly, the rules ensure that child members of the audience are not exploited as a result of placing their trust in a child presenter, with whom they might identify for being a similar age or because they aspire to be like that child.

Harm

- 5.30** BCAP considers that the first of those likely purposes goes beyond the scope of a Code that is intended to lay down standards for the content of advertisements, not their production. Advertisers and broadcasters are in any case bound by legal requirements when featuring child actors in advertisements to ensure that they are not harmed and that their working conditions are adequate. Examples of law governing children's working conditions are The Management of Health and Safety at Work Regulations 1999, the Children and Young Persons Act 2008 and The Children (Performances) Regulations 1968 (as amended). BCAP considers that, as such, the welfare of child presenters is adequately protected by law and it is unnecessary for the proposed BCAP Code to impose, in this regard, requirements on broadcasters that extend beyond the regulation of advertising content. If the audience is offended because it believes a child has been harmed or exploited as a result of being featured in an advertisement, the ASA may consider if that advertisement had caused serious or widespread offence under the rules in the proposed Harm and Offence section of the Code.
- 5.31** BCAP therefore proposes to delete the Radio Code's present requirement that children may feature in advertisements subject to all relevant legal requirements and that they must not be caused harm or be commercially exploited.

Exploiting credulity

- 5.32** BCAP considers that the other likely purpose of the present rules – that is, to prevent advertisements taking advantage of the credulity of children in the audience because they are likely to place their trust in a child presenter with whom they identify – is suitably met by other proposed rules. Rule 5.1 (Harm) prevents advertisements from containing anything that could cause physical, mental, moral or social harm to children and rule 5.10 states that child actors may feature in advertisements but care must be taken to ensure that those advertisements neither mislead nor exploit children's inexperience, credulity or sense of loyalty.
- 5.33** BCAP considers that an advertisement that featured a child commenting on a product or service characteristic in which he or she would be unlikely to be interested (for example, a car's anti-lock brakes) would not be inherently offensive, harmful or misleading. If that advertisement took advantage of child members of the audience, it would breach rules in the proposed Children section, most notably 5.1 (Harm), 5.9 (Credulity) and 5.10 (Child Actors). If the audience believed that a child in an advertisement had been harmed or commercially exploited, again that advertisement could be considered under rules in the proposed Harm and Offence section; alternatively, the advertiser or broadcaster could be subject to legal scrutiny.

- 5.34** BCAP therefore proposes to delete TV and radio rules that prevent children in advertisements from commenting on product or service characteristics that are likely to be beyond their understanding.

Testimonials

- 5.35** Rule 11.12, section 2 of the present Radio Code states that children must not testify about products in advertisements but may give spontaneous comments. BCAP considers that that requirement is intended to prevent children in advertisements from giving false testimonials; in other words, to prevent an advertisement from including a selling message on behalf of the advertiser that is masqueraded as a child's genuine testimony. BCAP considers rules in the Misleading section would prevent advertisements from including false testimonials, including:

3.44

Testimonials or endorsements used in advertising must be genuine, unless they are obviously fictitious, and be supported by documentary evidence. Testimonials and endorsements must relate to the advertised product or service. Claims that are likely to be interpreted as factual and appear in advertisements must not mislead.

- 5.36** BCAP therefore proposes to delete radio rule 11.12, section 2.

Question 31

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

- i) TV rule 7.3.4
- ii) Radio rule 11.11 a), section 2
- iii) Radio rule 11.11 b), section 2
- iv) Radio rule 11.12, section 2

Other

Children's health and hygiene

- 5.37** The present BCAP Radio Code states:

Section 2, rule 11.10

Health and Hygiene

- a) Advertising must not condone inappropriate health standards for children;**
- b) Advertising must not suggest that confectionary and snack food products may be substituted for balanced meals.**

- 5.38** BCAP considers that b) is adequately covered by rules in the proposed Food and Soft Drink Product Advertising to Children part of the Food, Dietary Supplements and Associated Health and Nutrition Claims section, especially rule 13.2:

13.2

Advertisements must avoid anything likely to condone or encourage poor nutritional habits or an unhealthy lifestyle, especially in children.

- 5.39** BCAP therefore proposes not to include rule 11.10b) from Section 2 of the present Radio Code in the Children section of the proposed Code.

Question 32

Given BCAP's policy consideration, do you agree that rule 11.10 b) of Section 2 of the present Radio Code should not be included in the proposed Code? If your answer is no, please explain why.

- 5.40** BCAP considers rule a) protects child members of the audience from harm and is pertinent to TV and radio advertisements and should be maintained.

- 5.41** BCAP's proposed TV and radio rule is:

5.4

Advertisements must not condone or encourage practices that are detrimental to children's health.

Question 33

Given BCAP's policy consideration, do you agree that rule 5.4 should be included in the Code? If your answer is no, please explain why.

Other questions

Question 34

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

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

iii) Do you have other comments on this section?

Part 2 - Section 6

Privacy

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

Background

The law

Communications Act 2003

- 6.1 The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The standards objectives most relevant to the Privacy Section of the BCAP Code are:

319(2)(a) that persons under the age of eighteen are protected;

319(2)(f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

- 6.2 Section 3 of the Act requires Ofcom, and BCAP and the ASA under the contracting-out agreement, to secure:

3(2)(f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both -

unfair treatment in programmes included in such services; and

unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.

- 6.3 See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

Audiovisual Media Services (AVMS) Directive

- 6.4 The Directive revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989. The TVWF Directive applied to scheduled television broadcasting services only. AVMSD also applies to some on-demand services but this consultation is about advertisements in scheduled broadcast services only.

- 6.5 See the text of the Directive at: eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF

Other

- 6.6 BCAP understands that featuring someone in an advertisement without his or her consent is not, in and of itself, a breach of his or her rights in the UK, but that person might have a legal case.

Other relevant regulatory bodies

- 6.7 Bodies that play a part in regulating a broadcast advertisement of relevance to this section but are not conferred with legal functions to do so include: Clearcast (www.clearcast.co.uk) and the RACC (www.racc.co.uk).

Meeting the need to ensure that advertisements do not include unwarranted infringements of people's privacy

- 6.8 Advertisements that feature a living person have the potential to infringe that person's privacy if his or her permission has not been obtained. The present BCAP Television Code includes a rule, in the Harm and Offence section, which is intended to preserve the protection of privacy and prevent exploitation of the individual. The present Radio Code includes a similar rule with the same intention. The two sets of rules are subtly different, which perhaps reflects the relatively greater potential of TV to infringe peoples' privacy.
- 6.9 BCAP proposes to replicate those rules in the BCAP Code in a dedicated Privacy section.

Proposed substantive changes

New rules

- 6.10 None.

Revised Rules

- 6.11 None.

Deleted rules

Generic advertising for news media

- 6.12 The present BCAP Television Code states:

Protection of privacy and exploitation of the individual

With limited exceptions, living people must not be portrayed, caricatured or referred to in advertisements without their permission

Note:

Exceptions are made only for:

(b) generic advertising for news media. Prior permission is not required if it would be reasonable to expect that the individuals concerned would not object. If they do object, however, the advertising must be suspended immediately pending resolution of the complaint.

- 6.13** BCAP considers that note (b) has the force of a rule; unusually, it requires the broadcaster to suspend immediately – without consideration of whether the complaint is justified – an advertisement for generic advertising for news media (for example, an advertisement for a tabloid or TV news service) if a person featured in that advertisement registers a complaint. The note is intended to prevent the potential for undue distress, offence or harm being caused to the individual from repeated broadcasts of a spot advertisement. No equivalent provision exists for radio or, indeed, advertisements for any other product or service.
- 6.14** BCAP has weighed up whether or not that requirement is necessary given the mandatory pre-clearance regime for TV broadcasters and the ability of the ASA to suspend immediately an advertisement pending investigation.
- 6.15** The mandatory pre-clearance regime for TV broadcasters means that advertisements must be checked for compliance against the Code before broadcast. If it judges that an advertisement is likely to offend or defame an individual, a television broadcaster would not carry that advertisement to ensure compliance with present TV rule 6.5.
- 6.16** In exceptional circumstances, for example those in which the continued transmission of an advertisement is likely to result in harm to members of the audience or the public, the ASA may direct a broadcaster (or broadcasters), via Clearcast and the RACC if either party cleared it, to suspend an advertisement immediately pending investigation and adjudication by the ASA Broadcast at a later date¹⁵. The ASA makes such a direction only when it considers that there is prima facie evidence of a serious breach of the Codes¹⁶.
- 6.17** On balance, BCAP considers note (b) to TV rule 6.5 is disproportionate and unnecessary in the light of the ASA's powers to suspend an advertisement pending investigation. BCAP considers the rule has the clear potential for abuse: a person could register a frivolous or vexatious complaint about such an advertisement, which would then have to be pulled off air despite the broadcaster having pre-cleared it against the Code before broadcast. That would, in BCAP's opinion, incur unnecessary costs or loss to the broadcaster and the advertiser if the complaint were not subsequently upheld by the ASA. The ASA would reserve the right to fast-track a complaint if it considered it necessary to adjudicate on an advertisement as quickly as possible to minimise the harm or serious or widespread offence that advertisement could cause. BCAP therefore proposes to delete the requirement set out in note (b) to TV rule 6.5.
- 6.18** BCAP proposes to maintain this rule, which would apply to television advertisements:

Television

6.1 – Television only

With limited exceptions, living persons must not be featured, caricatured or referred to in advertisements without their permission.

Exceptions are made only for brief and incidental appearances, such as crowd scenes, and advertisements that refer to a person featured in publications, programmes, films and the like, providing that the reference to or portrayal of that person is neither offensive nor defamatory.

Question 35

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

¹⁵ <http://www.asa.org.uk/NR/rdonlyres/1CC0407B-210C-488A-B5D1-71EB6A25AAC9/0/BroadcastComplaintHandlingProcedures25Jan08.pdf>

¹⁶ For example, this 2004 adjudication against a TV advertisement for Tango: http://www.asa.org.uk/NR/rdonlyres/C28460CC-0E05-48C3-822B-5DE2C57A6328/0/ASA_Broadcast_Advertising_Adjudications_24Nov2004.pdf

Other questions

Question 36

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

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

iii) Do you have other comments on this section?

Part 2 - Section 7

Political and Controversial Issues

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

Background

The law

Communications Act 2003

- 7.1 The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objective to the Political and Controversial Issues section of the Code is:

319 (2) (g) that advertising that contravenes the prohibition on political advertising set out in section 321 (2) is not included in television or radio services

- 7.2 In section 321, the Act makes clear how an advertisement would contravene the prohibition on political advertising and what is understood by the terms political nature and political advertising. That section and the relevant provisions included in it are not reproduced here as BCAP proposes to reflect those in the BCAP Code rules
- 7.3 See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

Other relevant regulatory bodies

- 7.4 The Office of Communications (Ofcom) is the independent organisation which regulates the UK's broadcasting, telecommunications and wireless communications sectors. Its main legal duties, as set out in the UK Communications Act 2003, ensure that people who watch television and listen to the radio are protected from harmful or offensive material. It is responsible for licensing all UK commercial television and radio services.
- 7.5 The setting of standards and investigations of complaints in relation to political advertising have not been contracted out to BCAP and the ASA and remain matters for Ofcom. The ASA refers complaints about political advertising to Ofcom. Ofcom has nonetheless agreed that BCAP should consider the rules on Political and Controversial Issues as part of the Code Review process.
- 7.6 You can find out more about Ofcom at: www.ofcom.org.uk

Meeting the need to regulate broadcast advertisements for Political and Controversial Issues

- 7.7 The law prohibits political advertising on television and radio services licensed by Ofcom. The present rules reflect section 321(2) of the Communications Act 2003. Ofcom has advised BCAP that it also takes account of 321(3) when considering complaints about political advertisements.

Proposed substantive changes

- 7.8 BCAP is not proposing any change in advertising policy and practice to this section.

Reflecting the Act

- 7.9** Because Ofcom has regard to section 321(3) of the Communications Act when it interprets the BCAP rules on political advertising and controversial issues, BCAP proposes to better reflect that section of the Act in BCAP's Code. BCAP's proposed television and radio rule is:

7.1 Radio Central Copy Clearance

Radio broadcasters must seek central clearance for advertisements that might fall under this Section on the grounds of either the advertiser's objectives or the content of the advertisement.

7.2

No advertisement may

7.2.1

be inserted by or on behalf of a body whose objectives are wholly or mainly of a political nature

7.2.2

be directed towards a political end

7.2.3

relate to an industrial dispute, unless it is a public service advertisement by a Government department, or

7.2.4

show partiality in matters of political or industrial controversy or public policy.

Note:

Objectives of a political nature and political ends include:

- influencing the outcome of elections or a referendums;
- bringing about changes of the law or otherwise influencing the legislative process;
- influencing policies or decisions of local, regional or national governments;
- influencing the policies or decisions of persons on whom public functions are conferred by or under law;
- influencing the policies or decisions of a person on whom functions are conferred by or under international agreements;
- influencing public opinion on a matter that, in the United Kingdom, is a matter of public controversy and
- promoting the interests of a party or other group of persons organised for political ends.

7.3

This rule does not prohibit Trade Union advertisements that are not politically or industrially contentious. Advertisements by Trade Unions may recruit members and promote the services they provide, including legal advice, insurance and meetings, but must not advertise for support in a ballot or refer to an employer.

Questions

Question 37

i) Given Ofcom's practical application of the present rule, do you agree that it is appropriate to reflect 321(3) of the Communications Act 2003 in BCAP's proposed rule on Political and Controversial Issues? 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 and Controversial Issues rules that you consider are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 - Section 8

Distance Selling

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

Background

The law

Communications Act 2003

- 8.1 The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The standards objective most relevant to the Distance Selling Section of the BCAP Code is:

319 (2) (h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;

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

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

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

Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

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

Audiovisual Media Services Directive (AVMSD)

- 8.9 AVMSD revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989. The TVWF Directive applied to scheduled television broadcasting services only. AVMSD also applies to some on-demand services but this consultation is about advertisements in scheduled broadcast services only.

8.10 AVMSD defines teleshopping:

(l) 'teleshopping' means direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment;

8.11 AVMSD imposes specific restrictions on teleshopping for medicinal products and medical treatment (see section 11, Medicines, Medical Devices, Treatments and Health).

Other relevant regulatory bodies

8.12 Bodies that play a part in regulating a broadcast advertisement of relevance to this section but are not conferred with legal functions to do so include Clearcast (www.clearcast.co.uk), the RACC (www.racc.co.uk) and ERA UK (www.eraeurope.org/index.html?current=3&page=3&page2=3&lang=en).

Meeting the need to ensure that direct offers broadcast to the public with a view to the supply of goods or services in return for payment meet distance selling obligations and do not mislead the consumers or otherwise treat them unfairly

8.13 Distance selling advertisements are those that invite consumers to buy specific products without face-to-face contact with the advertiser. They include, but are not confined to, advertisements that invite consumers to place orders for the advertised product by mail order or by telephone. All teleshopping is, by definition, distance selling.

8.14 The law offers consumers specific protections and the Code seeks to reflect those protections. That allows consumers to seek redress through the ASA, which is almost always a quicker and cheaper way to resolve complaints than bringing a legal case.

8.15 The Code does not simply reproduce the law, however. It offers some protections over and above those required by the DSRs: for example, the requirement for advertisers to make samples available for pre-transmission inspection.

8.16 Most of the rules in the proposed Code relate to the content of advertisements, not to other parts of the sales process. The advertising element of direct offers broadcast to the public with a view to the supply of good or services is less easily distinguished from other parts of the sales process, however. For this reason, BCAP proposes to maintain existing rules that go beyond advertising content into trading practices.

8.17 One significant difference between the law and the Code is that the law applies to traders whereas the Code applies to broadcasters. Many of the rules in this section are therefore drafted in the form 'broadcasters must satisfy themselves that the advertisers ...'. This makes broadcasters responsible for the conduct of their advertisers; broadcasters cannot, however, vouch for the trading practices of third parties. The approach of the present Codes and the proposed Code is to require broadcasters to satisfy themselves that advertisers will meet the standards set out in the Code. Broadcasters can do this by seeking a signed assurance from the advertisers that they meet those standards, for example. That has the effect of drawing the requirements to the advertiser's attention. BCAP believes broadcasters might reasonably rely on such an assurance unless evidence comes to light that the advertisers do not operate in line with the assurance. If, for example, a large number of complaints to the ASA resulted in upheld adjudications, that would provide reasonable grounds for a broadcaster to reject an assurance and refuse to carry that advertiser's advertisements.

Proposed substantive changes

New rules

Substitute products

8.18 The DSRs state:

7. - (1) Subject to paragraph (4), in good time prior to the conclusion of the contract the supplier shall –

[...]

(b) inform the consumer if he proposes, in the event of the goods or services ordered by the consumer being unavailable, to provide substitute goods or services (as the case may be) of equivalent quality and price; [...]

8.19 To reflect that requirement BCAP proposes to include a rule that would apply to TV and radio:

8.3

Broadcasters must be satisfied that the advertisers:

8.3.4

tell consumers if they intend to supply substitute products if the advertised product becomes unavailable;

8.20 Because traders are already required, by the law, to inform consumers if they intend to supply substitute products, the new rule does not extend the advertiser's obligations. It does, however, introduce a new measure to provide consumer protection, because it allows broadcasters to refuse to carry advertisements if they have reason to believe the advertiser is sending consumers substitute goods without properly informing them.

Question 38

Given BCAP's policy consideration, do you agree that rule 8.3.4 should be included in the Code? If your answer is no, please explain why.

Cancellation within seven days

8.21 The DSRs state:

Cancellation period in the case of contracts for the supply of goods

11. - (1) For the purposes of regulation 10, the cancellation period in the case of contracts for the supply of goods begins with the day on which the contract is concluded and ends as provided in paragraphs (2) to (5).

(2) Where the supplier complies with regulation 8, the cancellation period ends on the expiry of the period of seven working days beginning with the day after the day on which the consumer receives the goods.

8.22 To reflect that requirement BCAP proposes to include a rule that would apply to TV and radio:

8.3

Broadcasters must be satisfied that the advertisers:

8.3.6

give a refund within 30 days if the consumer:

8.3.6.a

cancels, for any reason, within seven days of receiving goods or seven clear days from the conclusion of a contract for services

- 8.23** BCAP proposes to reflect the DSRs' requirement in the Code because it will considerably increase the protection that the Code offers to consumers. The ASA will be able to ask broadcasters to ensure either that their advertisers refund consumers, as required by the law, or that they cease to broadcast advertisements if they have reason to believe the advertiser does not give refunds to consumers who are entitled to them.

Question 39

Given BCAP's policy consideration, do you agree that rule 8.3.6a should be included in the Code? If your answer is no, please explain why.

Revised rules**Prompt delivery**

- 8.24** The present Codes require broadcasters to satisfy themselves that advertisers will fulfil orders within 28 days. The DSRs allow businesses up to 30 days to fulfil orders (Regulation 19). BCAP proposes to bring the Code into line with the law by specifying 30, not 28, days as the time within which orders must be fulfilled. The Code can and does go beyond the law in circumstances where BCAP considers it is necessary to fulfil the Communications Act's standards objectives; in this case, BCAP does not believe that is the case.

- 8.25** BCAP's proposed TV and radio rule is:

8.3

Broadcasters must be satisfied that the advertisers:

8.3.5

fulfil orders within 30 days unless the nature of the product makes it reasonable to specify a longer period in the advertisement; for example, advertisements for made-to-measure products, plants that are out of season, or products that are supplied on an instalment basis may reasonably specify a longer period

Question 40

Given BCAP's policy consideration, do you agree it is reasonable to extend the period within which orders must be fulfilled from 28 to 30 days? If your answer is no, please explain why.

Protection of consumers' money

- 8.26** The present Codes require the broadcaster to ensure that distance selling advertisers have arrangements in place to ensure that consumers' money is protected. The TV rule confines itself to that principle and gives examples of how a broadcaster can ensure compliance with the rule. The Radio Code, however, is more prescriptive. The present Radio Code states in rule 21.1 f) of section 2:

licensees must be satisfied that fulfilment arrangements are in operation whereby monies sent by consumers are only released to the advertiser on receipt of evidence of despatch (unless licensees are satisfied that adequate alternative safeguards exist);

8.27 BCAP has weighed up, on the one hand, the protection the rule affords to the consumer and, on the other, the administrative burden that compliance with that rule places on the advertiser and the radio broadcaster. On balance, BCAP proposes to rely on the general principle that broadcasters 'must be satisfied' that advertisers have made adequate arrangements to protect consumers' money. Evidence of bank guarantees or fulfillment arrangements that protect consumers' money, as required by the present Codes, would be possible ways to ensure compliance but broadcasters have discretion as to how they satisfy themselves that advertisers have made adequate arrangements to protect consumers' money. A significant number of complaints or type of complaint to the broadcaster or the ASA, or ASA upheld adjudications, would be reasonable grounds for a broadcaster to withdraw the advertising because it could not be satisfied that the advertiser had in place adequate arrangements for the protection of consumers' money. The proposed rule goes beyond the requirements of the DSRs but BCAP considers that is proportionate given the potential for financial harm that could result from distance selling advertisements.

8.28 BCAP's proposed TV and radio rule is:

8.3

Broadcasters must be satisfied that the advertisers:

8.3.1

have made adequate arrangements to protect consumers' money

Question 41

Given BCAP's policy consideration, do you agree that present radio rule 21.1 f) of section 2 is unnecessarily prescriptive in the light of BCAP's proposed rule 8.3.1? If your answer is no, please explain why.

Deleted rules

Personal calls from sales representatives

8.29 The present Television Code (rule 11.2.3) and the present Radio Code (section 2, rule 21.1 j (i)-(ii)) require broadcasters to ensure that, if a distance selling advertiser intends to send a sales representative to call personally on consumers who respond to the advertisement, that is either made clear in the advertisement or when consumers respond. The Radio Code also requires advertisers to give consumers an opportunity to decline the call.

8.30 The present Television Code states:

11.2.3

If the advertiser is likely to send a representative to call on people who respond to the advertisement, either

(a) that must be made clear in the advertising or

(b) the licensee must obtain an assurance that respondents will be informed in advance

8.31 The present Radio Code states:

21.1

j) advertisers who intend to send a sales representative to a respondent's home or place of work must ensure that this intention is made clear either in the advertisement or at the time of response and that the respondent is given an adequate opportunity of refusing such a call.

8.32 BCAP proposes to delete the rule because it does not relate to the content of advertisements and has little bearing on consumer's perception of distance selling advertisements. BCAP notes Data

Protection law requires advertisers to tell consumers how they intend to use the personal data supplied by the consumer: if the advertiser intends to send a representative to visit the consumer, that should be made clear when the consumer's address information is collected. The ASA has received no complaints about personal calls from sales representatives since it has been regulating broadcast advertisements, which suggests that consumers do not look to the ASA to ensure they are protected from unexpected calls from sales representatives.

Question 42

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

Other

Sending goods without the authority of the recipient

- 8.33** The present Television Code, not the Radio Code, requires broadcasters to obtain an assurance:

11.2.2

(g) that the advertisers do not send the goods advertised, or additional goods, without the authority of the recipient

- 8.34** BCAP considers that unjustifiably prevents advertisers from sending consumers free gifts and the mischief the rule was intended to capture was advertisers sending unsolicited items and invoicing consumers for them. CPRs Schedule 1, practice 21, prohibits:

Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not.

- 8.35** BCAP proposes to reflect that provision in a rule that ensures that advertisers are not unnecessarily prevented from sending free gifts to consumers.

- 8.36** BCAP's proposed TV and radio rule is:

8.3

Broadcasters must be satisfied that the advertisers:

8.3.7

will not seek payment for products that are sent without the recipient's authority.

Question 43

i) Given BCAP's policy consideration, do you agree that present TV rule 11.2.2(g) should not be included in the Code? If your answer is no, please explain why.

ii) Given BCAP's policy consideration, do you agree that 8.3.7 should be included in the Code? If your answer is no, please explain why.

Other questions

Question 44

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

Part 2 - Section 9

Environmental Claims

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

Background

The law

Communications Act 2003

- 9.1 The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objective to the Environmental Claims Section of the BCAP Code is:

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

- 9.2 See the full text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

Audiovisual Media Services Directive (AVMSD)

- 9.3 AVMSD revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989. The TVWF Directive applied to scheduled television broadcasting services only. AVMSD also applies to some on-demand services but this consultation is about advertisements in scheduled broadcast services only. Article 3e 2 of AVMSD states that:

(c) audiovisual commercial communications shall not:

(iv) encourage behaviour grossly prejudicial to the protection of the environment.

- 9.4 See the full text of AVMSD at:

eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF

Other relevant regulatory bodies

Ofgem

- 9.5 Ofgem's responsibilities include protecting consumers by promoting competition, wherever appropriate, and regulating the monopoly companies that run the gas and electricity networks. Under Section 5 of the Energy Act 2008, Ofgem must contribute to the achievement of sustainable development to protect the interests of consumers now and in the future.¹⁷ Ofgem has published guidelines on how suppliers should market green electricity tariffs that will form the basis for an independent accreditation scheme for those tariffs.
- 9.6 For more information please see: www.ofgem.gov.uk

¹⁷ www.ofgem.gov.uk/Media/FactSheets/Documents1/greentariffsfs.pdf

- 9.7 Other bodies that play a part in regulating a broadcast advertisement of relevance to this section but that are not conferred with legal functions to do so include Clearcast (www.clearcast.co.uk) and the RACC (www.racc.co.uk).
- 9.8 Readers should note that the Department for Environment, Food and Rural Affairs (Defra) has published The Green Claims Code, which sets out the standard of information that the public can expect to be given about the environmental impacts of consumer products and incorporates the international standard on environmental claims, ISO 14021, which has been developed by standards bodies around the world.
- 9.9 Defra also produce “Green Claims – Practical Guidance. How to make a good environmental claim”, which is available at: www.defra.gov.uk/environment/consumerprod/pdf/genericguide.pdf

Meeting the need to ensure that environmental claims in advertisements do not mislead, harm, or encourage behaviour grossly prejudicial to the protection of the environment

- 9.10 The present Television Code addresses environmental claims in Section 5 on Misleading Advertising and Section 6 on Harm and Offence. Section 5 requires that ‘advertisements must not make unsubstantiated claims about environmental impact’ and refers broadcasters to Defra’s Green Claims Code and the international standard on environmental claims ISO 14021. Section 6 requires that “advertisements must not encourage or condone behaviour prejudicial to the environment”. The Radio Code makes more detailed provisions for environmental claims in Section 2 – General Rules. For example, it requires the full life-cycle of the product to be taken into account when making claims about the product’s environmental benefit and warns against categorical claims like ‘environmentally friendly’ while outlining the circumstances where comparative claims such as ‘friendlier’ may be acceptable.
- 9.11 BCAP’s proposed approach is to include detailed provisions in a section dedicated to environmental claims.

Proposed substantive changes

Background policy consideration

- 9.12 BCAP proposes to include rules in a section headed ‘Environmental Claims’. BCAP considers those rules should not be included in Section 3, ‘Misleading’ because rules on environmental claims are needed not to prevent socially irresponsible advertising as well as misleading advertising.
- 9.13 For example, the claim ‘all our bags are biodegradable’, if it were untrue, would be objectionable not only on the grounds that it might cause environmentally-concerned consumers to choose that shop, which would be misleading, but also on the grounds that it might cause consumers to throw the bags away in the countryside, which would constitute social harm.
- 9.14 Increased public concern about the environment offers a further reason to provide detailed rules on that topic. BCAP notes that the number of complaints to the ASA about environmental claims has increased markedly over the past two years. In 2006, the ASA received approximately 117 complaints about 83 advertisements; during 2007 it received 561 complaints about 410 advertisements. Research carried out for BCAP in 2007 showed a high level of consumer scepticism about environmental claims.
- 9.15 While BCAP recognises the need to provide more detailed rules than are presently given in the Television Code and consequently proposes to adopt the Radio Code’s approach, it notes, too, that both the politics and the technology relating to the environment are developing quickly. Mindful that rules that relate to specific concerns tend to become quickly out of date, BCAP proposes to include general principles but avoid overly-prescriptive rules. Help Notes or Guidance may then be used to give up-to-date advice on points of detail.

New rules

New rules for television

- 9.16** With one revision (see 'Revised rules') BCAP proposes to extend the present Radio Code's environmental claims rules to television. BCAP considers those rules spell out what is presently required for TV advertisements under its present rules that prevent misleading advertising, for example: '**5.1.1** No advertisement may directly or by implication mislead about any material fact or characteristic of a product or service' and '**5.1.2** No advertisement may mislead by omission about any material fact or characteristic of a product or service or advertiser' and '**5.2.6** Advertisements must not make unsubstantiated claims about environmental impact'.
- 9.17** BCAP's proposed rules are:

9.1

Radio broadcasters must ensure advertisements subject to this Section are centrally cleared.

9.2

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

9.3

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

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.

9.5 (See 'Revised rules' below)

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.

9.6

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

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.

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.

Question 45

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

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?

Revised rule

Life cycle of the product

9.18 The present BCAP Radio Code states:

5 a)

Generalised claims for environmental benefit must be assessed on a 'cradle to grave' basis. The complete life-cycle of the product and its packaging, the environmental effects of its manufacture, use, disposal and all other relevant aspects must be taken into account.

9.19 BCAP considers there is value in allowing advertisements to make claims on the basis of part of the product's life cycle only. Often, advertisers are able to quantify the environmental impact of their products for part of their life cycle, for example, the energy used in the factory that manufactures the product or the typical emissions generated by the product in use. Other aspects of the product's environmental impact might be harder to quantify, for example, the impact of disposing of the product depends in part on the way the consumer disposes of it, which the advertiser cannot control. A rule that simply required all claims to be based on the full life cycle of the product would make it difficult for advertisements to make quantified claims, because advertisers are rarely able to account completely for all aspects of the product's life cycle.

9.20 BCAP proposes to replace rule 5 a) with:

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.

9.21 In referring to 'generalized claims', the present Radio Code implicitly allows more specific and qualified claims to be made about part of an advertised product or service's life cycle. However, the proposed rule more clearly allows advertisers to make quantified claims even if they cannot produce a definitive overall figure, provided that the claims are thoroughly explained and the advertiser can realistically estimate the impact of the product over the rest of its life cycle and show that it does not cancel out the claimed benefit.

Question 46

Do you agree that, provided the claim is thoroughly explained and does not mislead consumers about the product's total environmental impact, it is reasonable to allow a claim about part of an advertised product's life cycle? If your answer is no, please explain why?

Deleted rules

9.22 None.

Other Questions

Question 47

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

ii) Do you have other comments on this section?

Part 2 - Section 10

Prohibited Categories

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

Background

The law

Communications Act 2003

- 10.1** The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objectives to the Prohibited Categories of Advertising and Indirect Promotion section of the proposed BCAP Code are:

319(2)(a) that persons under the age of eighteen are protected;

319(2)(b) that material likely to encourage or to incite the commission of crime or lead to disorder is not included in television and radio services;

319(2)(f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

- 10.2** So that those standards objectives can be secured, the Act states that the standards code:

321(1)(b) may include provision prohibiting advertisements and forms and methods of advertising or sponsorship (whether generally or in particular circumstances).

- 10.3** See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

Audiovisual Media Services (AVMS) Directive

- 10.4** The Directive revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989. The TVWF Directive applied to scheduled television broadcasting services only. The AVMS Directive also applies to some on-demand services but this consultation is about advertisements in scheduled broadcast services only. Relevant to the Prohibited Categories of Advertising and Indirect Promotion section of the proposed BCAP Code are:

Article 3e1(d): all forms of audiovisual commercial communications for cigarettes and other tobacco products shall be prohibited;

Article 3e1(f): audiovisual commercial communication for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls shall be prohibited.

- 10.5** See the text of the Directive at: eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF

Directive 2003/33/EC on Tobacco Advertising and Sponsorship

- 10.6** The Directive prohibits any form of commercial communication with the aim or direct or indirect effect of promoting a tobacco product in the press, other printed publications, information society services or on the radio; the Directive does not apply to TV. Most relevant to the Prohibited Categories of Advertising and Indirect Promotion section of the proposed BCAP Code is:

Article 4(1) all forms of radio advertising for tobacco products shall be prohibited.

- 10.7** See the text of the Directive at: eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32003L0033&model=guichett

Firearms Act 1968 (as amended)

- 10.8** The Act states that it is an offence to sell a firearm or ammunition (as defined by Section 1 of the Act) or a shotgun unless the vendor is registered as a firearms dealer and sells that firearm, ammunition or shotgun to a person with a firearms certificate.
- 10.9** See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=1628564

Obscene Publications Act 1959 (as amended)

- 10.10** The Act states that it is an offence to publish an obscene article whether or not for gain. The Act defines an article as 'containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures'. It defines obscene as something that has the 'effect ... such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it'.
- 10.11** See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=1128038

Violent Crime Reduction Act 2006

- 10.12** The Act makes provision about real and imitation firearms, ammunition, knives and other weapons. Although it does not deal with the acceptability of advertising them, it states that it is an offence to manufacture or sell a realistic imitation firearm or cause one to be brought into Great Britain.
- 10.13** See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=2922565

Consumer Protection from Unfair Trading Practices Regulations 2008 (CPRs)

- 10.14** The CPRs prohibit unfair trading practices and identify misleading and aggressive practices as forms of unfair practice. Because they are a trading practice, advertisements are subject to the CPRs. The CPRs sets out in schedule 1 a list of commercial practices that are in all circumstances considered unfair; it includes practice 14:

Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.

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

Other relevant regulatory bodies

Financial Services Authority (FSA)

- 10.16 The FSA is the regulator for the financial services industry and regulates conduct of business, including advertising, for investment products, including structured deposits where capital is subject to market risk. It also regulates the advertising of insurance, including the activities of insurance intermediaries (for example, motor, home and travel insurers). It is responsible for the regulation of most first-charge mortgage lending and selling.
- 10.17 Please see: www.fsa.gov.uk

British Board of Film Classification (BBFC)

- 10.18 The BBFC is the independent regulator for the film and cinema industry; it is a non-governmental body. It was established in 1912 to classify cinema films and has been classifying videos since the passing of the Video Recordings Act 1984.
- 10.19 Please see www.bbfc.co.uk

Other

- 10.20 Bodies that play a part in regulating a broadcast advertisement of relevance to this section but are not conferred with legal functions to do so include: Clearcast (www.clearcast.co.uk) and the RACC (www.racc.co.uk).

Meeting the need to prohibit, as necessary, broadcast advertisements for categories of products and services

- 10.21 Some categories of advertising are prohibited by the present Codes because they are proscribed by law. There is therefore no scope to relax those prohibitions so there is no further discussion of those categories in this section.
- 10.22 The Communications Act 2003 provides that the regulator may prohibit particular categories of advertising if that is necessary to secure the Act's standards objectives, which include that persons under 18 are protected and that advertising which may be harmful or offensive is prevented.
- 10.23 The present Television Code explains the historical justification for prohibiting advertisements for certain products and services: 'The advertising of a number of products and services is not permitted either because there is a statutory prohibition, or because there is the potential for harm from the power of television advertising being used to promote them. In some areas, for example, it is not possible for the broadcaster to make a judgement about harm or misleading claims because the services are of an individual and personal nature.'¹⁸
- 10.24 The need to protect the audience by preventing the inclusion of broadcast advertisements that have the clear potential to harm or cause serious or widespread offence must be balanced with advertisers' fundamental right to freedom of expression.

¹⁸ www.cap.org.uk/cap/codes/broadcast_codes/tv_code/Section+3+-+Unacceptable+Products+and+Services.htm

- 10.25** BCAP's proposed approach to this Code section is to establish the principle that informs the list of prohibited product and service categories that follows. That matches the approach in the present Television Code and is broadly equivalent to the present Radio Code.

Proposed substantive changes

New rules

The acquisition or disposal of units in collective investment schemes not authorised or recognised by the Financial Services Authority

- 10.26** The present BCAP Television Code states:

9.5

(a) Except on specialised financial channels, the following categories of advertising are not acceptable:

(2) advertisements recommending the acquisition or disposal of an investment in any specific company other than an investment trust company listed on the London Stock Exchange.

- 10.27** BCAP notes that this rule seeks to distinguish between readily realisable investments and illiquid investments that pose a higher risk and are subject to less regulatory oversight. However, the rule does not take into account changes in the nature and regulation of investment schemes since the Codes were last revised.
- 10.28** Section 238 of the Financial Services and Markets Act 2000¹⁹ prohibits authorised persons from communicating invitations or inducements to participate in a collective investment scheme with certain exceptions, including unit trusts and authorised (regulated) open-ended investment companies. Since the last review of the TV Advertising Code in 2002, many unit trusts have converted to open-ended investment companies or Investment Companies with Variable Capital (ICVCs) as they are known in the Conduct of Business Sourcebook (COBS). Because of the range of investment vehicles that are available, BCAP considers it preferable to make a general distinction between regulated collective investment schemes (including ICVCs) and unregulated collective investment schemes, in line with the distinction made in COBS.
- 10.29** COBS section 4.12 details the exceptional circumstances in which a firm may communicate an invitation or inducement to participate in an unregulated collective investment scheme without breaching the restriction on promotion in section 238 of FSMA. The exceptions are granted for narrowly targeted promotions only: for example, a firm may communicate an invitation to clients of another firm in the same group, or to a person admitted to membership of the Society of Lloyd's, or a professional client.
- 10.30** BCAP considers it unlikely that broadcasters will be able to advertise unregulated collective investment schemes legally unless they operate very limited subscription services and hold detailed information about their subscribers. BCAP therefore proposes to list unregulated collective investment schemes in Section 4 of the Broadcast Code as a prohibited category, with the caveat that, if a broadcaster can demonstrate compliance with COBS 4.12, BCAP may grant an exemption. BCAP proposes the following wording:

10.1.9

Advertisements for products or services coming within the recognised character of or specifically concerned with these are not acceptable:

the acquisition or disposal of units in collective investment schemes not authorised or recognised by the FSA, without the prior approval of BCAP.

¹⁹ See Section 13, Financial products, services and investments for further details of the Act and of COBS. You may read the Act here: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=2927341

COBS may be found here: fsahandbook.info/FSA/html/handbook/COBS

Question 48

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

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

Revised rules

Betting tips

- 10.31** The present Codes presently prohibit advertisements for betting tips. The TV Text Code, however, permits advertisements for betting tips on TV text and interactive TV services.
- 10.32** A tip, in gambling terms, is a bet suggested by a third party who is either promoted as being, or is perceived to be, more knowledgeable than the bookmaker who sets the prices. A consumer might use a betting tips service in the hope of winning more times than the odds for each bet would suggest was likely. Betting tips are offered to the public in a variety of forms; those offered in return for payment by premium-rate call charge are subject to rules on Premium-Rate Services (see Section 22).
- 10.33** BCAP has weighed up, on the one hand, the protection the prohibition affords to the audience and, on the other, the restriction on betting tipsters' freedom to advertise on TV and radio.
- 10.34** The main justification for the prohibition on broadcast advertisements for betting tips and the now lapsed prohibition on broadcast advertisements for betting and gaming products was likely to have been the same: both prohibitions were intended, in line with Government policy, not to stimulate demand for those products through the power of broadcast media. (A relaxation of that policy was granted for TV text and interactive television broadcast services because those have typically been regulated with a lighter touch, in part to stimulate development of those nascent technologies through more avenues of potential advertising revenue.) In September 2007, however, with the introduction of the Gambling Act, the prohibition on broadcast advertisements for betting and gaming products was lifted and new rules ensured that advertisements for gambling products are responsible by protecting children and the vulnerable (see section 17). Because the Gambling Act does not cover betting tipsters, the ban on advertisements for betting tips was not reviewed when the Act was introduced and remains in place.
- 10.35** BCAP considers that the ban might continue to be justified, however, because some betting tipster services are scams²⁰, the industry is not subject to dedicated regulation and betting tips claims are difficult to substantiate. The ASA has upheld many complaints about non-broadcast advertisements for betting tipster services, mainly because they included misleading claims. As a result of the number of complaints received by the ASA about that advertising sector, CAP published guidance for the industry on non-broadcast advertisements for betting tips in the form of a Help Note and AdviceOnline entries²¹. BCAP maintains a Guidance Note that assists broadcasters of TV text and interactive TV services to ensure that advertisements for betting tips on those services comply with the general provisions in the Television Code, especially those provisions that prevent misleading claims²².
- 10.36** The ban on broadcast advertisements for betting tips does not stem from law, and the policy of not stimulating demand for gambling through broadcast advertisements is no longer relevant. BCAP considers that advertisements for betting tips are not necessarily, in and of themselves, misleading, harmful or offensive and the fact that some betting tipster services are scams and the industry is not subject to dedicated regulation does not warrant an outright broadcast advertising ban.

²⁰ www.ofcom.gov.uk/news/press/2008/126-08

²¹ www.cap.org.uk/cap/advice_online/advice_online_database/Show+Entry.htm?advice_online_id=358

²² www.cap.org.uk/cap/codes/broadcast_codes/Guidance_Notes/Advertising+Guidance+Note+No.+2.htm

- 10.37** On balance, and in line with its general policy objectives, BCAP proposes to relax the ban on broadcast advertisements for betting tips and to include dedicated new content and scheduling rules with the objective that persons under the age of 18 and the vulnerable are protected, and that misleading and irresponsible claims in betting tipster advertisements are prevented. The proposed rules have been distilled from the TV Text Guidance Note, which has been long-established and has successfully regulated TV text and interactive TV advertisements for betting tipsters; BCAP is unaware of any complaints to the ASA about those advertisements. BCAP considers the new rules provide an adequate level of protection for the audience.
- 10.38** BCAP proposes to replace the ban on television and radio advertisements for betting tips with the following rules:

SECTION 21 BETTING TIPSTERS

Principle:

Advertisements for betting tipster services should not be likely to mislead the audience.

Definitions:

Proofing means provably lodging and securely recording a betting tip with an independent and suitably qualified third party, such as a solicitor, before the start of the event to which the tip relates.

21.1

Radio advertisements for betting tipsters must be centrally cleared.

21.2

Advertisements for betting tipsters must not be likely to be of particular appeal to under 18s.

21.3

Advertisements for betting tipster services must not make money-back guarantees.

21.4

Advertisements for betting tipster update-line services are acceptable only if the broadcaster is satisfied that the recorded messages are brief and the lines are a valid and necessary complement to the main-line service.

21.5

Before broadcasting an advertisement for a betting tipster service, a broadcaster must hold the tipster's name (not merely his or her business name) and his or her full, permanent business address.

21.6

Advertisements for a betting tipster service operating on a premium-rate phone line must include the service provider or information provider's usual trading name and contact details (see Section 22.1: Premium-rate Services section).

21.7

Advertisements for betting tipsters who run, or are associated with, another betting tipster service must make that link clear.

21.8

Advertisements may include claims about a betting tipster's previous successful tips only if those claims are supported, before the relevant race, by proofing of all tips offered on his or her service on the day or during the period in question.

21.9

Advertisements for betting tipsters must not include claims about notional profits. Claims about previous profits must be proportionate and representative.

21.10

Advertisements for betting tipsters must not state or imply that success is guaranteed or that players could forge a long-term income by following the advertiser's tips.

21.11

Advertisements for betting tipsters may include claims about previous successful double, treble or other combination bets only if those claims are supported by proofing that the winners were clearly and specially tipped as a combination.

21.12

Profit, success or individual-win claims must not refer to odds.

21.13

If a change in circumstance would render it misleading, for example if a race meeting were cancelled, an advertisement for a betting tipster must be not be repeated in its original form.

21.14

Advertisements for betting tipsters must not refer to a tip as a maximum bet or similar unless it is the only tip offered for that race. Claims about the success of a maximum tip are acceptable only if they are supported by advance proofing.

Question 49

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

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

Private investigation agencies

- 10.39** Advertisements for private investigation agencies are presently prohibited on TV and TV Text services; the Radio Authority lifted the ban on radio advertisements for private investigators in 1991 when it had responsibility for the regulation of broadcast radio advertisements.
- 10.40** The present Television Code explains that some categories of advertising are unacceptable because 'In some areas ... it is not possible for the broadcaster to make a judgement about harm or misleading claims because the services are of an individual and personal nature. In these cases, the standard of the service delivered to the individual is difficult to assess and the services themselves are often not subject to independent, recognised regulation or mediation'²³. The present ban was likely to have been considered necessary because of concern that some parts of the private security industry employed those who sought to use their position to pursue criminal activities and because of poor public confidence in the competence and professionalism of some parts of that industry.
- 10.41** In 2003, which post-dated the last review of the TV Advertising Standards Code, the Home Office established the Security Industry Agency (SIA) under the Private Security Industry Act 2001. The SIA is a non-departmental, independent public body responsible for regulating the private security industry; it reports to the Home Secretary and, under the provisions of the Private Security Act 2001, licences licensable activities as defined by the Act. In 2007, after its introduction of the licensing of particular private security industry activities, the SIA issued a consultation paper²⁴ that proposed options for the extension of regulation to private investigators and precognition agents under the provisions of the Private Security Act 2001. The SIA and the Home Office's conclusion from the responses received to the consultation was that there was strong support for licensing of private investigators and

²³ Background to Section 3: UNACCEPTABLE PRODUCTS AND SERVICES, BCAP TV Advertising Standards Code.

²⁴ www.homeoffice.gov.uk/documents/cons-2007-regulations-security/Regulation_of_Security_Indu1.pdf?view=Binary

precognition agents: the Government proposes to proceed with its plans for SIA regulation and licensing of those services²⁵.

- 10.42** Given those developments, the fact that the TV advertising prohibition does not reflect a legal prohibition and because, in its opinion, the very advertising of those agencies is not in and of itself misleading, harmful or offensive, BCAP considers it is not necessary to maintain a ban on television advertisements for Private Investigation Agencies. BCAP proposes a new rule with the policy objective that only those private investigation agencies that can provide the broadcaster with evidence of suitable and relevant credentials may be permitted to advertise.
- 10.43** Until such time as private investigation agencies are subject to independent, recognised regulation under the SIA, BCAP proposes to replace the Television Code's prohibition on advertisements for private investigation agencies and, in its place, introduce this rule, which would be common to TV and radio:

SECTION 29 PRIVATE INVESTIGATION AGENCIES

29.2

Private investigation agencies may be advertised only if they have given the broadcaster evidence of suitable and relevant credentials: for example, affiliation to a body that has systems for dealing with complaints and for taking disciplinary action; registration based on minimum standards for training and qualifications, systems in place for regular review of members; skills and competencies and suitable professional indemnity insurance covering provided services.

- 10.44** BCAP undertakes to review, but not necessarily change, the drafting of the proposed rule if and when private investigation agencies are formally regulated by the SIA.

Question 50

- i) Given BCAP's policy consideration, do you agree that the ban on TV advertisements for private investigation agencies should be relaxed? If your answer is no, please explain why.
- ii) Given its specific policy objective, do you agree that BCAP's proposed rule 29.2 is necessary and easily understood? If your answer is no, please explain why.

- 10.45** To provide consistent standards for the benefit of consumers and the radio industry, the present BCAP Codes and the proposed BCAP Code require categories of radio advertisements to be centrally cleared by the RACC. Those categories of radio advertisements have a clear potential to mislead, offend or harm. On that basis BCAP proposes to include a new rule for radio:

29.1

Radio advertisements for private investigation agencies must be centrally cleared.

Question 51

Given BCAP's policy consideration, do you agree that proposed rule 29.1 should be included in the proposed BCAP Code? If your answer is no, please explain why.

Commercial services offering individual advice on personal or consumer problems

- 10.46** The present Television Code prohibits advertisements for commercial services offering individual advice on personal or consumer problems; the Radio Code does not.

²⁵ www.homeoffice.gov.uk/documents/cons-2007-regulations-security/cons-2008-private-sec-responses?view=Binary

- 10.47** BCAP considered the likely policy that underpins that TV prohibition and the types of advertisers that are banned by it.
- 10.48** BCAP understood commercial services offering individual advice on personal or consumer problems formed part of a wider category of personal services, provided by local or independent agencies to individuals. 'Personal services' were likely to have been considered difficult to evaluate in and of themselves and the degree to which they were regulated or subject to common industry standards was, therefore, difficult to ascertain.
- 10.49** BCAP understood examples of such services could include a wide variety of professions including those offering hypnosis, psychiatry, psychology, psychoanalysis, weight-loss procedures, debt management, private investigation agencies, psychic readings, life-coaching and companies offering financial and relationship advice without any qualifications. Yet all those are explicitly or implicitly covered in specific or general rules elsewhere in the Television Code.
- 10.50** BCAP understood advertisements for this category of service were considered unacceptable across TV and radio until 2000, when the Radio Authority introduced rule 20, section 3 of the Radio Code:

Section 3, Rule 20: Consumer Advice Services

Central copy clearance is required. Services offering advice on consumer problems may only be advertised if those giving the advice can provide evidence of suitable and relevant bona fides.

Advertisers must show that they have meaningful bona fides, for example that they belong to a body which has systems for dealing with complaints and for taking disciplinary action; that registration is based on minimum standards for training and qualifications, that there are systems in place for regular review of members' skills and competencies, and that they have suitable professional indemnity insurance covering services provided.

- 10.51** The present TV prohibition on commercial services offering individual advice on consumer or personal problems is not based on law and, in BCAP's opinion, is disproportionate. BCAP considers that companies offering financial advice, or indeed advice for any kind of consumer problem, should have to demonstrate to the broadcaster that they have systems in place to ensure consistency, probity and accountability of service and that that is adequately achieved using the same approach as the present radio rule (section 3, rule 20).
- 10.52** BCAP proposes to replace the present TV prohibition and instead assimilate, in a new rule, the protection afforded by the present radio rule on consumer advice services. BCAP intends that the proposed rule would achieve the policy objective of providing an adequate level of protection for the consumer and to those services whose reputations are placed at risk by rogue traders within the sector. To that end, BCAP proposes to broaden the rule to cover all services offering individual advice on consumer or personal problems and not just commercial services:

SECTION 26 SERVICES OFFERING INDIVIDUAL ADVICE ON CONSUMER OR PERSONAL PROBLEMS

26.2

Services offering individual advice on consumer or personal problems may be advertised only if those advertisers have given the broadcaster evidence of suitable and relevant credentials: for example, affiliation to a body that has systems for dealing with complaints and for taking disciplinary action; systems in place for regular review of members' skills and competencies; registration based on minimum standards for training and qualifications; and suitable professional indemnity insurance covering the services provided.

Question 52

i) Given BCAP's policy consideration, do you agree that the ban on TV advertisements for commercial services offering individual advice on consumer or personal problems should be

relaxed? If your answer is no, please explain why.

ii) Given BCAP's specific policy objectives, do you agree that BCAP's proposed rule 26.2 is necessary and easily understood? If your answer is no, please explain why.

- 10.53** To provide consistent standards for the benefit of consumers and the radio industry, the present BCAP Codes and the proposed BCAP Code require categories of radio advertisements to be centrally cleared by the RACC. Those categories of radio advertisements have a clear potential to mislead, offend or harm. On that basis BCAP proposes to include a new rule for radio:

26.1

Radio broadcasters must ensure that advertisements for services offering individual advice on consumer or personal problems are centrally cleared.

Question 53

Given BCAP's policy consideration, do you agree that proposed rule 26.1 should be included in the proposed BCAP Code? If your answer is no, please explain why.

Pornography

- 10.54** The present Television Code bans advertisements for products or services coming within the recognised character of pornography but grants an exemption for 'advertisements for some top-shelf publications designated from time to time by BCAP, which may be broadcast on encrypted elements of adult entertainment channels only.'
- 10.55** BCAP considers 'adult entertainment channels' are those that wholly or mainly broadcast adult-themed sexual content, which might include adult-sex programme material; 'encrypted elements' is interpreted with reference to the relevant rule in the Ofcom Broadcasting Code:

1.24

Premium subscription services and pay per view/night services may broadcast 'adult-sex' material between 2200 and 0530 provided that in addition to other protections mentioned above:

- there is a mandatory PIN protected encryption system, or other equivalent protection, that seeks satisfactorily to restrict access solely to those authorised to view; and
- there are measures in place that ensure that the subscriber is an adult.

- 10.56** The Radio Code permits advertisements for pornography products (but not for obscene and restricted products); radio advertisements for pornography products must not be scheduled in or around radio programmes of particular appeal to those under 18 years of age. BCAP considers TV's reach, its place in the family home and its audio-visual impact justifies, to a large extent, the Codes' different approaches to television and radio advertisements for pornography products.
- 10.57** Products coming within the recognised character of pornography may be offered in a variety of media, for example printed publications, websites, DVD, cinema and video games.
- 10.58** BCAP considered that the present TV ban was probably justified on the basis that both the very advertising of pornography products, and the likely sexual content of television broadcast advertisements for them, have the potential to cause serious or widespread offence to the TV audience and raise concerns about the protection of under 18s from unsuitable content.
- 10.59** BCAP has considered, on the one hand, the protection afforded to the audience by the prohibition on TV advertisements for pornography products and, on the other, an advertiser's desire to impart information and the desire of a suitable audience to receive that information.

- 10.60** On balance, BCAP considers that the TV ban on advertisements for pornography products is disproportionate; an outright ban is not required by law or necessary, given broadcast encryption technology. BCAP proposes to relax the ban to allow advertisements for pornography products to be broadcast on encrypted elements of adult entertainment channels only. BCAP's proposal avoids the likelihood of children and adults who might be seriously offended by advertisements for pornography from being in the viewing audience.
- 10.61** Media-literacy research shows that some children are able to access and use their parents' or guardians' PINs (Personal Identification Numbers) without those adults' knowledge²⁶. Under BCAP's proposal, those children could see advertisements for pornography products. BCAP is not persuaded however that that possibility justifies maintaining the outright ban on TV advertisements for pornography products. BCAP notes that the possibility of children accessing those channels does not justify, in terms of broadcast editorial regulation, the prohibition of adult-sex content behind encrypted elements of adult entertainment channels.
- 10.62** BCAP considers that audience members who have signed up for encrypted adult entertainment channels are unlikely to be offended by advertisements for pornography products and are unlikely to object to receiving information about such products. BCAP considers, however, it is important to ensure the content of an advertisement for a pornography product is in keeping with, and no more explicit than, surrounding programme material. On that basis, BCAP proposes these rules, which would impose on advertisements requirements similar to those in the Ofcom Broadcasting Code:

30.3 – Television only

Advertisements must not feature R18-rated material (as classified by the British Board of Film Classification) or its equivalent. That does not preclude advertisements for R18-rated material or its equivalent.

30.4 – Television only

Advertisements must not feature adult-sex material before 10pm or after 5.30am.

- 10.63** BCAP proposes to prohibit the broadcast of R18-rated material or equivalent in the content of advertisements. It does not propose to ban advertisements for R18-rated material (as classified by the BBFC) or its equivalent: those would, under BCAP's proposal, be allowed behind encryption. In the case of adult material with a BBFC R18-rated certificate (commonly known as hard-core pornography), Ofcom believes that it is appropriate to take a precautionary approach and ban editorial that is or is equivalent to BBFC R18-rated material. As highlighted, research commissioned by Ofcom indicates that some children are able to access and use their parents' or guardians' PINs without those adults' knowledge. Given its explicit sexual content – and adopting the precautionary approach – Ofcom is not satisfied that under 18s can be effectively protected from that material, even behind encryption. Because it considers access controls are insufficient to exclude under 18s from encrypted elements of adult entertainment channels, Ofcom does not permit R18-rated material to be broadcast. BCAP understands that, although the law does not expressly prohibit the broadcast of R18-rated material, it does restrict the sale of that material, which is permitted in licensed sex shops only. That means that an advertisement cannot, by law, directly offer an R18-rated product for sale; a consumer would have to go to a licensed-sex shop, where there are further controls in place to ensure that he or she is aged 18 or over, to purchase it. BCAP considers, therefore, that advertisements for R18-rated material may be advertised behind encrypted elements of adult entertainment channels only but the content of those must not include R18-rated material or equivalent and must not directly offer products for sale.
- 10.64** BCAP intends that the proposed rules would achieve the policy objective of restricting broadcast advertisements for pornography products and ensuring that they do not cause serious or widespread offence, for example, by exceeding the expectations of an audience that has accessed encrypted elements of adult entertainment channels. BCAP therefore proposes these rules:

Section 10: PROHIBITED CATEGORIES

10.1

Advertisements for products or services coming within the recognised character of or specifically concerned with these are not acceptable:

²⁶ www.ofcom.org.uk/media/mofaq/bdc/bcfag/

10.1.6

obscene material. "Obscene material" is material that may not be freely offered for sale or distribution to persons over the age of 18 years without offending against the Obscene Publications Act 1959 (as amended).

Section 30: PORNOGRAPHY PRODUCTS

Definition:

Encrypted elements of adult channels are interpreted with reference to rule 1.24 of the Ofcom Broadcasting Code.

30.1 – Radio central copy clearance

Advertisements for products coming within the recognised character of pornography must be centrally cleared.

30.2 – Television only

Advertisements for products that come within the recognised character of pornography are permitted on encrypted elements of adult entertainment channels only.

30.3 – Television only

Advertisements must not feature R18-rated material (as classified by the British Board of Film Classification) or its equivalent. That does not preclude advertisements for R18-rated material or its equivalent.

30.4 – Television only

Advertisements must not feature adult-sex material before 10pm or after 5.30am.

Question 54

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

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

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

Offensive weapons and replica guns

- 10.65** The Television Code prohibits advertisements for guns; the Radio Code prohibits advertisements for firearms and other weaponry, which includes combat knives.
- 10.66** BCAP proposes to extend the present TV prohibition on advertisements for guns to advertisements for all offensive weapons and, therefore, provide consistency between the requirements on TV and radio advertisements. Offensive weapons are items made or adapted to cause injury.
- 10.67** BCAP makes its proposal because it is mindful of public concern about violence and gun and knife crime. BCAP considers that an advertisement for offensive weapons would be unsuitable for broadcast because it would be likely to cause serious or widespread offence and to condone or encourage the use of offensive weapons.

- 10.68** The present Radio Code prohibits advertisements for replica guns; the Television Code does not expressly prohibit advertisements for replica guns.
- 10.69** The Violent Crime Reduction Act 2006 states ‘A person is guilty of an offence if he manufactures a realistic imitation firearm ... [or] ... sells a realistic imitation firearm’ (s. 36). The Act defines a ‘realistic imitation firearm’ as ‘an imitation firearm which has an appearance that is so realistic as to make it indistinguishable, for all practical purposes, from a real firearm and is neither a de-activated firearm nor itself an antique’ (s. 38).
- 10.70** Although replica guns are not, in and of themselves, harmful, BCAP considers that there are compelling reasons for including an explicit ban on advertisements for replica guns in the proposed BCAP Code. A TV advertisement for a replica gun could be viewed as glamorising the use of real guns, which BCAP considers could cause serious or widespread offence to the audience. BCAP also considers that a TV advertisement for a replica gun could be construed as an indirect promotion of an unacceptable product (and as such could already be implicitly prohibited under rule 3.2 of the Television Code). Although they are not, unlike real guns, intended to murder or maim, realistic replica guns can be used for criminal activity, such as for threatening people or using them to commit ‘armed’ robbery, and replicas can be converted into functioning weapons.
- 10.71** BCAP proposes including this revised rule into the Prohibited Categories section:

10.1

Advertisements for products or services coming within the recognised character of or specifically concerned with these are not acceptable:

10.1.4

guns (including replica guns), gun clubs and offensive weapons. “Offensive weapons” are items made or adapted to cause injury. References to clay pigeon shoots are permitted only as part of a wider range of outdoor pursuits.

Question 55

Given its policy consideration, do you agree with BCAP’s proposal to strengthen the present prohibition on TV advertisements for guns by prohibiting advertisements for offensive weapons and replica guns? If your answer is no, please explain why.

- 10.72** The present Radio Code states:

Section 3, rule 17

Firearms and Weaponry: Unacceptable Categories

No advertisement may promote the supply of firearms or other weaponry.

This includes manufacturers, distributors, gun clubs, combat knives and replica guns. Businesses that supply such items amongst a wide range of other goods may be advertised, provided that there is no promotion of, or gratuitous indication that, the prohibited items are available. References to clay pigeon shoots are permitted only as part of a wider range of outdoor pursuits.

- 10.73** BCAP proposes to retain the exception to the present radio rule that allows references to clay pigeon shoots in advertisements but only if they form part of a wider range of outdoor pursuits, for example in advertisements for a country fair. BCAP makes an on-balance proposal to extend that exception to the rule to cover TV because it considers that the policy that is likely to underpin the radio rule also underpins the TV rule, and therefore BCAP’s proposed rule. In BCAP’s opinion, an advertisement that includes incidental references to clay pigeon shooting as part of a range of outdoor activities is unlikely to cause serious or widespread offence or have the clear potential for harm, for example by condoning the use of guns. Conversely, an advertisement that had the sole focus of promoting guns, replica guns

or a gun club could, BCAP considers, cause serious or widespread offence or condone the use of guns.

Question 56

Given its policy consideration, do you agree with BCAP's proposal to extend the present radio exception to the rule for references to clay pigeon shoots in advertisements only if they are promoted as part of a wider range of outdoor pursuits? If your answer is no, please explain why.

Breath-testing devices and products that purport to mask the effects of alcohol

- 10.74** The present Television Code prohibits advertisements for breath-testing devices and products that purport to mask the effects of alcohol; the Radio Code does not.
- 10.75** BCAP proposes to extend the TV prohibition on advertisements for breath-testing devices and products that mask the effects of alcohol in the interests of preventing the promotion of products that have the potential to cause harm to the audience and preventing socially irresponsible advertising. BCAP considers that advertisements for products that are intended to mask the effects of alcohol could not be advertised in a socially-responsible way: it considered that those products' main purpose was to avoid prosecution for an offence, particularly a driving offence. BCAP considered that to allow advertisements for those products could condone or encourage drink-driving; a relaxation would also be likely to undermine anti drink-drive messages. For those reasons, BCAP proposes to extend the TV prohibition on advertisements for products that intend to mask the effects of alcohol to radio.
- 10.76** Similarly, BCAP considers that the present TV prohibition on advertisements for breath-testing devices is proportionate and relevant. The advertising of breath-testing devices could, in BCAP's judgement, condone or encourage drink-driving by implying that it is acceptable to drink up to the alcohol limit. BCAP considers that that could undermine Governmental policy and best-practice guidelines that motorists should not drink and drive. Any advertisement for a motoring product that condones or encourages dangerous or irresponsible driving practices would fall foul of the rules in the proposed Motoring section of the Code and, although they would not be subject to those rules (because breath-testing devices are not classified as a motoring product), advertisements for breath-testing devices could seem to go against the spirit of the Motoring rules. BCAP is also concerned that advertisements for breath-testing devices could engender a false sense of security among drivers who wish to drink and drive because readings from breath-testing devices may be inaccurate: for example, readings taken shortly after drinking may be misleadingly low because blood-alcohol levels continue to rise for a while afterwards. For those reasons, BCAP proposes to retain the TV prohibition on advertisements for breath-testing devices and to extend that prohibition to radio:

10.1

Advertisements for products or services coming within the recognised character of or specifically concerned with these are not acceptable:

10.1.1

breath-testing devices and products that are intended to mask the effects of alcohol

Question 57

Given its policy consideration, do you agree with BCAP's proposal to extend to radio the present TV ban on advertisements for breath-testing devices and products that purport to mask the effects of alcohol? If your answer is no, please explain why.

Deleted rules

- 10.77** None.

Other Questions

Question 58

i) Taking into account its general policy objectives, do you agree that BCAP's rules, included in the proposed Prohibited Categories 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 Prohibited Categories 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?

Part 2 - Section 11

Medicines, Medical Devices, Treatments, and Health

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

Background

The law

Communications Act 2003

- 11.1 The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objectives to this section are:

319(2)(a) that persons under the age of eighteen are protected;

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

- 11.2 See the full text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

Medicines Act 1968

- 11.3 The Medicines Act governs the manufacture and supply of medicine. The Act introduces three categories of medicine: prescription-only drugs, which are available only from a pharmacist if prescribed by a doctor or a dentist; pharmacy medicines, available only from a pharmacist but without a prescription, and general sales medicines, which may be bought from any shop without a prescription. It makes possession of prescription drugs without a prescription an offence.

- 11.4 See the full text of the Act at: www.statutelaw.gov.uk/content.aspx?activeTextDocId=1662209

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

- 11.5 The ASA (under the contracting out agreement from Ofcom) is obliged to investigate complaints about broadcast advertisements as set out in The Medicines (Monitoring of Advertising) Regulations 1994. The Regulations implement Title VIII of Directive 2001/83/EC on the advertising of medicines for human use. (See 'Meeting the need to regulate broadcast advertisements for products and services that fall within this section' below).

- 11.6 See the full text of the Medicines (Advertising) Regulations at:
www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3125011

- 11.7 See the full text of the Medicines (Monitoring of Advertising) Regulations 1994 at:
www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3124984

Audio-Visual Media Services Directive (AVMS)

- 11.8** AVMS revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989. The TVWF Directive applied to scheduled television broadcasting services only. AVMS also applies to some on-demand services. The Directive has specific provisions for teleshopping of medicinal products:

Article 3(e)

1(f) audiovisual commercial communication for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls shall be prohibited;

Article 14

2. Teleshopping for medicinal products which are subject to a marketing authorization within the meaning of Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products (1), as well as teleshopping for medical treatment, shall be prohibited.

- 11.9** See the full text of the Directive at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF>

Other

- 11.10** Other regulations are relevant to this section, for example: the Medicines for Human Use (Marketing Authorisations Etc) Regulations 1994 (as amended), Medicines (Labelling and Advertising to the Public) Regulations 1978 (as amended), the Medicines (Traditional Herbal Medicinal Products for Human Use) Regulations 2005 and the Medical Devices Regulations 2002 (as amended).

Other relevant regulatory bodies

Department of Health

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

Healthcare Commission

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

Medicines and Healthcare products Regulatory Agency (MHRA)

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

Medicines

- 11.14** The MHRA works with other statutory regulators and self-regulatory bodies to ensure advertising fully complies with EC and UK medicines law. They include:

- Advertising Standards Authority (general advertising).
- Proprietary Association of Great Britain (over the counter medicines).

- Prescription Medicines Code of Practice Authority (prescription medicines).

- 11.15** The advertising of medicines is controlled by a combination of statutory measures (with both criminal and civil sanctions), enforced by the MHRA, and self-regulation through Codes of Practice for the pharmaceutical industry, administered by trade associations. The MHRA as Licensing Authority has a statutory duty on behalf of Ministers to consider breaches of the Medicines Act 1968 and Regulations on the promotion of medicines. Please see: www.mhra.gov.uk

European Medicines Agency (EMA)

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

Prescription Medicines Code of Practice Authority (PMCPA)

- 11.17** The Prescription Medicines Code of Practice Authority (PMCPA) administers The Association of the British Pharmaceutical Industry's (ABPI) Code of Practice at arm's length from the ABPI. Please see: www.pmcpa.org.uk

Other

- 11.18** Bodies that play a part in regulating a broadcast advertisement of relevance to this section but are not conferred with legal functions to do so include: Clearcast: (www.clearcast.co.uk); RACC: (www.racc.co.uk); PAGB: (www.pagb.co.uk); Cosmetics, Toiletries and Perfumery's Association: (www.thefactsabout.co.uk); Association of the British Pharmaceutical Industry: (www.abpi.org.uk); Association of British Healthcare Industries: (www.abhi.org.uk); Independent Healthcare Advisory Services: (www.independenthealthcare.org.uk/joomla/index.php).

Meeting the need to regulate broadcast advertisements for products and services that fall within this section

- 11.19** Both the present and proposed BCAP rules on Medicines, Medical Devices, Treatments and Health principally reflect the law. The Medicines (Advertising) Regulations 1994 (as amended) set out practices that are prohibited in advertisements for medicinal products. Those practices are addressed by these rules in the proposed Code: 11.3, 11.23, 11.30, 11.31, 11.25, 11.25.1, 11.24, 11.27, 11.5, 11.22, 11.32, 11.29, 11.28 and 11.26
- 11.20** The ASA is obliged to consider complaints about alleged breaches of Regulation 9 of the Medicines (Advertising) Regulations 1994 and take action if necessary.

Proposed substantive changes

New rules

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

11.21 The present Radio Code states:

3.4.10 Services or Clinics Offering Advice and/or Treatments in Medical or Personal Welfare or other Health Matters

Advertisers will only be acceptable if they can provide suitable bona fides, such as evidence of relevant professional expertise or qualifications, or accreditation to a recognised professional body. Advertising must also comply with the rules of relevant professional bodies. Advertisers may be asked to show that clinics are registered with the Local Health Authority, and/or may be referred to the RACC's medical consultant, or other advisors as required by the ASA or the BCAP Executive as a result of monitoring.

Advertisers must show that they have meaningful bona fides, for example that they belong to a body which has systems for dealing with complaints and for taking disciplinary action; that registration is based on minimum standards for training and qualifications, that there are systems in place for regular review of members skills and competencies, and that they have suitable professional indemnity insurance covering all services provided.

11.22 That rule helps the RACC, the body that must vet prior to broadcast that category of radio advertisements, to discriminate between acceptable and unacceptable advertisements for medical, personal welfare and health services. The BCAP Television Code has no equivalent rule.

11.23 BCAP considers that the radio rule achieves the twin policy objectives of providing protection for the consumer and those services whose reputation is placed at risk by rogue traders in those sectors. BCAP considers the requirement for broadcasters to obtain suitable credentials from the advertiser does not place an undue burden on either party.

11.24 BCAP therefore proposes this TV and radio rule:

11.9 Services including Clinics, Establishments and the like Offering Advice on, or Treatment in, Medical, Personal or other Health Matters

Advertisements are acceptable only if the advertiser can provide suitable credentials, for example, evidence of: relevant professional expertise or qualifications; systems for regular review of members' skills and competencies and suitable professional indemnity insurance covering all services provided; accreditation by a professional or regulatory body that has systems for dealing with complaints and taking disciplinary action and has registration based on minimum standards for training and qualifications.

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.

Revised rules

Medicinal claims

11.25 The present BCAP Codes restrict medicinal claims to products that hold a marketing authorisation under the Medicines Act 1968 only. However, medical devices that contain medicinal substances that

act on the body in a manner ancillary to the device may also make medicinal claims. Importantly, those are not granted an 'authorisation' by the MHRA and therefore, by the letter of the present BCAP rules, they may not make medicinal claims in broadcast advertisements. BCAP considers that is an unintended and unwarranted restriction and, having taken advice from the MHRA, proposes to revise the existing rules.

- 11.26** The MHRA provides information on the differentiation between medical devices and medicinal products; it provides good background to BCAP's proposal. Please see: www.mhra.gov.uk/home/groups/es-era/documents/publication/con007498.pdf

- 11.27** BCAP's proposed television and radio rule is:

11.4 Medicinal claims

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

Question 60

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.

The use of health professionals in advertisements

- 11.28** The law restricts the use of health professionals in advertisements for medicines²⁷ and for food²⁸. The present BCAP Codes prohibit the use of health professionals in television advertisements for products that have nutritional, therapeutic or prophylactic effects and in radio advertisements for treatments, which cover a wide range of products and services.
- 11.29** BCAP weighed up, on the one hand, the protection the rules afford to the audience and, on the other hand, the restriction they place on advertisers. The Communications Act 2003 permits BCAP to prohibit ads and forms and methods of advertising whether generally or in particular circumstances if that is considered necessary to achieve the Act's standards objectives.
- 11.30** BCAP considered the policy underpinning those present BCAP rules. The use of a health professional in an advertisement might give a misleading impression that a product or a service is beneficial to health or suggest that a product or service is approved, preferred or recommended by the health profession represented, when it is not. The distinction between health claims and medicinal claims (which may be made on medicines and medical devices containing medicines only) is not always clear; arguably, endorsement by a healthcare professional, especially one that is synonymous with medical

²⁷ Medicines(Advertising) Regulations 1994 (Prohibition of certain material in advertisements) 9.—(1) Subject to regulation 11, no person shall issue an advertisement relating to any relevant medicinal product which contains any material which— (f) refers to a recommendation by scientists, health professionals or persons who are neither of the foregoing but who, because of their celebrity, could encourage the consumption of medicinal products,

²⁸ Regulation EC 1924/2006 on Nutrition and Health Claims made on Foods

Article 12 (Restrictions on the use of certain health claims) The following health claims shall not be allowed:

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

care, may suggest to the audience that the advertised product has medicinal properties even if explicit medicinal claims have not been made. The use of a health professional might be otherwise unfair, for example by taking unfair advantage of the public's trust in a profession that it perceives to be objective and independent of commercial influence. Related to that, BCAP considered the present level of restriction might be welcomed by the health professions themselves because it could help maintain public trust in health professionals.

- 11.31** BCAP considered, however, the use of a health professional in an advertisement is not, in itself, misleading or unfair. BCAP's proposed Code ensures that misleading claims are prevented; claims can be implicit as well as direct and they can be visual as well as oral (see the proposed rules in Section 3, Misleading).
- 11.32** On balance, BCAP proposes to relax the broad restriction on the use of health professionals in advertisements but maintain the restriction for medicine and foods advertisements in line with the law. (The restriction on health professionals in food advertisements is discussed in Section 13, Food, Dietary Supplements and Associated Health or Nutrition Claims.) BCAP proposes three new rules to guard against the irresponsible use of health professionals in broadcast advertisements. Those ensure that the health professional is suitably qualified in the relevant field, testimonials or endorsements are genuine and supported by documentary evidence and, if relevant, his or her direct interest in the sale of the advertised product is made clear. BCAP considers its proposed new rule 1.2, 'Advertisements must be prepared with a sense of responsibility to the audience and to society' (see Section 1, Compliance) will further prevent the irresponsible use of health professionals in broadcast advertisements.
- 11.33** BCAP's proposed rules are:

11.5 Professional Support or Advice

These are not acceptable in advertisements for medicinal products:

11.5.1

Presentations, by doctors, dentists, veterinary surgeons, pharmaceutical chemists, nurses, midwives and the like that imply professional advice or recommendation.

11.5.2

Statements that imply professional advice or recommendation by people who are presented, whether directly or by implication, as being qualified to give that advice or recommendation.

11.5.3

References to approval of, or preference for, any relevant product, its ingredients or their use by the professions covered by 11.5.1.

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 field.

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.

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.

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.

Family planning centres

11.34 The present BCAP Radio Code states:

3.6(c) Family Planning Centres

Advertisements are acceptable only from family planning centres approved by a Local Health Authority, the Central Office of Information or other appropriate NHS body.

- 11.35 The Television Code does not have a dedicated rule on advertisements for family planning centres; it indirectly bans TV advertisements for categories of family planning centres through its ban on advertisements for *commercial services* offering individual advice on personal problems. BCAP proposes to relax that ban for advertisers that can give the broadcaster evidence of suitable credentials (see section 10, Prohibited Categories). Because some family planning centres are charities the BCAP Television Code also restricts advertisements for those centres through its charity advertising rules (see section 16).
- 11.36 BCAP has weighed up, on the one hand, the protection afforded by those radio and TV restrictions and, on the other, the right of all categories of family planning centres to advertise their services. The Communications Act permits BCAP to prohibit advertisements and forms and methods of advertising whether generally or in particular circumstances if that is necessary to achieve the Act's standards objectives.
- 11.37 Family planning centres offer a wide range of pre-conception and post-conception advice. Some groups in society are potentially vulnerable to misleading or otherwise irresponsible advertisements for those centres, including women who are or might be pregnant and members of the public who are seeking advice on contraception. The nature of those centres has the potential to cause serious offence to viewers and listeners, especially those with intimate moral or religious convictions, no matter that the centres are mainly advisory; they do not carry out abortions.
- 11.38 BCAP considers that women who are or might be pregnant and are considering abortion are most likely to merit specific protection under a dedicated rule of the BCAP Code. Their vulnerability to those advertisements is arguably heightened by a perceived need to make an important decision in a limited period. The Royal College of Obstetricians and Gynaecologists advises that the earlier in pregnancy an abortion is performed the lower the risk of complications²⁹.
- 11.39 Members of the public who are seeking pre-conception advice are, arguably, adequately protected under the general provisions of the Codes (for example, on children, misleading claims and harm) and would not, in BCAP's opinion, merit dedicated protection in the proposed BCAP Code. BCAP considers that members of the audience who might be seriously offended by the nature of the advertised services are afforded adequate protection under rules that guard against offence and ensure that advertisements are suitably and sensitively scheduled. BCAP therefore proposes not to include a rule on services for pre-conception advice services; those will continue to be regulated by the general provisions of the Code and other relevant rules.
- 11.40 Because it considers that women who are or might be pregnant and are considering abortion merit specific protection under the BCAP Code, BCAP proposes to include a rule on advertisements for post-conception pregnancy advice services. BCAP considers that rule should fulfil two policy objectives: (1) to allow post-conception pregnancy advice services the freedom to advertise and (2) to ensure that advertisements for those services make clear whether the service refers women for abortion. BCAP considers information that makes clear whether a service refers women for abortion is

29 www.rcog.org.uk/resources/Public/pdf/induced_abortionfull.pdf

important because, for those women who opt for it, delay in performing an abortion could result in medical complications³⁰.

- 11.41** Pregnancy advice services either can or cannot refer women for abortion. Those that can, include GPs, organisations operating under NHS contract or pregnancy advice bureaux (PABx), which are registered by the Department of Health³¹. Pregnancy advice services that are not PABx do not (and cannot) directly refer women for abortion.
- 11.42** BCAP is aware that the Report of the House of Commons Science and Technology Committee on the Scientific Developments Relating to the Abortion Act 1967³² 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.' MPs laid an amendment to the Human Fertilisation and Embryology Act 2008; it was not reached and therefore not debated or voted on. The proposed amendment included: 'It shall be an offence to deliberately mislead through advertising in relation to the termination of pregnancy and alternatives thereto.'
- 11.43** BCAP's proposed television and radio rule:

11.11

Advertisements for post-conception pregnancy advice services must make clear in the advertisement if the service does not refer women directly for abortion. See also rule 11.9 and Section 15 Faith and Section 16 Charities.

- 11.44** The rule is supplemented by BCAP rules that ensure advertisements for services (including remote services) offering advice on medical or personal matters have, for example, relevant professional expertise or qualifications; systems for regular review of members' skills and competencies and suitable professional indemnity insurance covering all services provided; accreditation by a professional or regulatory body that has systems for dealing with complaints and taking disciplinary action and has registration based on minimum standards for training and qualifications.

Question 62

- i) Given BCAP's policy consideration, do you agree that it is necessary to maintain a rule specific to post-conception advice services and to regulate advertisements for pre-conception advice services through the general rules only?
- ii) Given BCAP's policy consideration, do you agree that rule 11.11 should be included in the proposed BCAP Code? If your answer is no, please explain why.

Hypnosis-based procedures (including techniques commonly referred to as hypnotherapy), psychiatry, psychology, psychoanalysis or psychotherapy

- 11.45** The BCAP Television Code bans advertisements for hypnosis-based procedures (including techniques commonly referred to as hypnotherapy), psychiatry, psychology, psychoanalysis and psychotherapy except 'for clinics and institutions and certain types of publications, where these have been approved by BCAP after consulting its medical advisors'. In practice, BCAP has approved those advertisements when its medical advisors have been satisfied that the advertiser is able to provide suitable credentials to ensure evidence of, for example, relevant professional expertise or qualifications; systems for regular review of members' skills and competencies and suitable professional indemnity insurance covering all services provided; accreditation by a professional or regulatory body that has systems for

30 www.rcog.org.uk/resources/Public/pdf/induced_abortionfull.pdf

31

www.dh.gov.uk/en/PublicHealth/Healthimprovement/Sexualhealth/SexualHealthGeneralInformation/DH_4063860

32 www.publications.parliament.uk/pa/cm200607/cmselect/cmsctech/1045/1045i.pdf

dealing with complaints and taking disciplinary action and has registration based on minimum standards for training and qualifications.

- 11.46** The Radio Authority replaced its equivalent rule in 2000 with a rule that requires broadcasters to obtain suitable credentials from the advertiser. That rule helps the RACC, the body that must vet that category of radio advertisements prior to broadcast, to discriminate between acceptable and unacceptable advertisements for hypnosis-based procedures (including techniques commonly referred to as hypnotherapy), psychiatry, psychology, psychoanalysis and psychotherapy.
- 11.47** BCAP considers that the radio rule achieves the twin policy objectives of providing protection for the consumer and for those services, the reputation of which is placed at risk by rogue traders within those sectors. BCAP considers the requirement for broadcasters to obtain suitable credentials from the advertiser does not place an undue burden on either party.
- 11.48** BCAP's proposed television and radio rule:

11.10

Advertisements for hypnosis-based procedures (including techniques commonly referred to as hypnotherapy), psychiatry, psychology, psychoanalysis or psychotherapy are acceptable subject to rule 11.9. Broadcasters must take particular care over advertisements for publications employing those techniques.

11.9

Services including Clinics, Establishments and the like Offering Advice on, or Treatment in, Medical, Personal or other Health Matters

Advertisements are acceptable only if the advertiser can provide suitable credentials, for example, evidence of: relevant professional expertise or qualifications; systems for regular review of members' skills and competencies and suitable professional indemnity insurance covering all services provided; accreditation by a professional or regulatory body that has systems for dealing with complaints and taking disciplinary action and has registration based on minimum standards for training and qualifications.

Question 63

Given BCAP's policy consideration, do you agree that rule 11.10, supported by rule 11.9, should be included in the proposed BCAP Code? If your answer is no, please explain why.

Remote personalised advice

- 11.49** Present Television Code states:

8.1.3 Medical or health advice given remotely

Licensees may only accept advertising for services offering remote personalised advice on medical or health matters where all staff who provide such advice are subject to regulation by a statutory or recognised medical or health professional body

- 11.50** Present Radio Code states:

4.11 Advice by Correspondence

Advertising for services offering one-to-one advice by correspondence (including telephone,

post, email and fax) on medical/health matters will only be acceptable where:

i such advice is given by suitably qualified health professionals acting in accordance with their relevant professional Codes of conduct; and

- 11.51** The present BCAP Radio Code requires that staff that give advice on health or medical matters are subject to regulation by a statutory or recognised medical or health professional body. Additionally it requires that the advice given is in accordance with the relevant professional codes of conduct of that medical or health professional body. The latter condition would be an additional requirement for TV. BCAP proposes to extend that requirement to TV, as it considers it provides an extra level of protection to the consumer and is not an overly onus requirement for TV broadcasters to comply with. That proposal is equally relevant to rule 12.3 the Weight Control and Slimming Section.

- 11.52** Proposed BCAP TV and Radio rule:

11.13

Broadcasters may accept advertisements for services offering remote personalised advice on medical or health matters only if all staff providing that advice are suitably qualified and subject to regulation by a statutory or recognised medical or health professional body and the advice given is in accordance with its relevant professional codes of conduct (see 11.9).

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.

Deleted rules

Radio: sales promotions in medicine advertisements

- 11.53** Section 3 of the present Radio Code states:

Section 4.28

Advertising for medicinal products which need a marketing authorisation must not contain references to sales promotions (including competitions, premium offers and samples).

- 11.54** When Resale Price Maintenance for medicines came to an end in 2001, the longstanding restrictions on price competition for Over-The-Counter (OTC) medicines were lifted. Multi-buy offers for medicines such as "3 for the price of 2", "buy one get second half price" and "buy one get one free" therefore became acceptable. The ITC took that into account when, during its review of the Television Code, it deleted its equivalent rule in 2001. The Radio Code was last reviewed in 2000 and therefore did not take account of those developments.
- 11.55** The MHRA discourages medicine advertisers from using volume-based promotions for analgesics (aspirin or paracetamol) believing those could encourage unnecessary use of medicines and put public health at risk. The MHRA closely monitors the use of sales promotions in medicine advertisements and the Department of Health has undertaken to review the option of legislation should self-regulation prove ineffective in protecting the public. Guidelines produced by trade associations of the

pharmaceutical industry such as the Proprietary Association of Great Britain (PAGB)³³ encourage advertisers to follow good practice and ensure a level playing field.

- 11.56** On balance, BCAP proposes to delete the ban on promotions for medicines in radio advertisements. BCAP has seen no evidence to date that suggests advertisements for medicines routinely include irresponsible promotions; that may suggest that self-regulation is working well in that regard. BCAP considers its proposed new rule 1.2, 'Advertisements must be prepared with a sense of responsibility to the audience and to society' (Section 1, Compliance) will further prevent irresponsible broadcast promotions for medicine. Additionally, rule 11.4 ensures advertisements are not permitted to encourage indiscriminate, unnecessary or excessive use of products covered by section 11 (Medicines, Medical Devices, Treatments and Health). Finally, radio advertisements that fall into this category must be centrally cleared by the RACC.

Question 65

Given BCAP's policy consideration, do you agree with BCAP's proposal to delete radio rule 3.4.28? If your answer is no, please explain why.

Anti-drugs and anti-AIDS messages

- 11.57** The present Radio Code states:

3.9 Anti-drugs and anti-AIDS messages

Central copy clearance is required;

Particular care must be taken over scheduling (see Section 2, Rule 8 Scheduling);

Advertisements are acceptable only from bodies approved by a Local Health Authority or the Central Office of Information.

- 11.58** BCAP considers those radio rules were likely reflect the need, at the time the rule was published, to ensure a consistency of information to the public about HIV/AIDS in particular. The Television Code does not include an equivalent rule.
- 11.59** On balance, BCAP considers those radio rules are not necessary given BCAP's proposal to maintain rules that prevent advertisements from misleading, causing harm, serious or widespread offence or unnecessary distress and scheduling rules that ensure that those advertisements are appropriately and sensitively scheduled. BCAP considers its proposed new rule 1.2, 'Advertisements must be prepared with a sense of responsibility to the audience and to society' (see Section 1, Compliance) will further prevent irresponsible broadcast advertisements that contain anti-drugs and anti-AIDS messages.

Question 66

Given BCAP's policy consideration, do you agree with BCAP's proposal to delete the radio rule on anti-AIDS and anti-drugs messages from BCAP's proposed Code? If your answer is no, please explain why.

³³ www.pagb.co.uk/advertising/PDFs/advertisingcode.pdf

Other questions

Question 67

- i) Taking into account BCAP's general policy objectives, do you agree that BCAP's rules, included in the proposed Medicines, Medical Devices, Treatments 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, Medical Devices, Treatments and Health rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?
- iii) Do you have other comments on this section?

Part 2 - Section 12

Weight Control and Slimming

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

Background

The law

Communications Act 2003

- 12.1** The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objectives to this section of the Code are:

319(2)(a) that persons under the age of eighteen are protected;

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

- 12.2** See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

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

- 12.3** The Regulations govern foods intended for use in energy-restricted diets for weight reduction. Regulation 4 prohibits the sale of relevant food if reference is made in the labelling, advertising or presentation to the rate or amount of weight loss which may result from its use or to a reduction in the sense of hunger or an increase in the sense of satiety.
- 12.4** See the text of the regulations at:
www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=Foods+Intended+for+Use+in+Energy+Restricted+Diets+for+Weight+Reduction+Regulations+1997+&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=2871712&PageNumber=1&SortAlpha=0
- 12.5** A response to BCAP's consultation on the Regulation of Nutrition and Health Claims made on Foods in Television and Radio Advertisements (NHCR Consultation), see below, has highlighted that the Food for Particular Nutritional Uses (Miscellaneous Amendments) (England) Regulations 2007 (regulation 3(2)) has amended the Foods Intended for Use in Energy Restricted Diets for Weight Reduction Regulations 1997 (as amended), removing the prohibition on selling certain foods where the labelling, advertising or presentation of that food refers to a reduction in the sense of hunger or an increase in the sense of satiety. BCAP presently mirrors that prohibition in rule 12.13.2 of the proposed Code, 8.4.6(2)(b) of the present Television Code and rule 13(f), section 3, of the present Radio Code. As part of its evaluation of responses to its NHCR consultation, BCAP will evaluate if maintaining those rules is consistent with Regulation (EC) 1924/2006 on nutrition and health claims made on foods. BCAP proposes to reflect the new, revised or deleted rules that are published as a result of its NHCR consultation in BCAP's present Codes and its new Code.

Food Safety Act 1990

- 12.6** The Act provides the framework for all food legislation in Great Britain – similar legislation applies in Northern Ireland. See the text of the Act, including provisions relating to advertising, at:
www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=Food+Safety+Act+1990+&sear

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

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

Potential imminent changes to this section of the existing BCAP Television and Radio Codes

- 12.8** As part of BCAP's consultation on the Regulation of Nutrition and Health Claims made on Foods in Television and Radio Advertisements, BCAP proposed the minimum number of changes necessary to ensure that the present Codes do not conflict with the NHCR. That consultation closed on 16 February 2009. BCAP has not had the time to announce the outcome of that consultation including the new rules before the publication of this consultation document. BCAP proposes to reflect the new, revised or deleted rules that are published as a result of that consultation in BCAP's present Codes and its new Code. Further details on BCAP's consultation on the Regulation of Nutrition and Health Claims made on Foods in Television and Radio Advertisements can be found here: [www.cap.org.uk/cap/Consultations/closed/BCAP Nutrition and Health Claims/](http://www.cap.org.uk/cap/Consultations/closed/BCAP_Nutrition_and_Health_Claims/)

Other relevant regulatory bodies

- 12.9** Bodies that play a part in regulating a broadcast advertisement of relevance to this section but that are not conferred with legal functions to do so include: Clearcast (www.clearcast.co.uk) and the RACC (www.racc.co.uk).

Meeting the need to regulate broadcast advertisements for products and services that fall within this section

- 12.10** Advertisements for weight control and slimming products have the potential to harm, mislead or be irresponsible. The Weight Control and Slimming rules require that those advertisements receive the necessary high level of pre-broadcast scrutiny to ensure products and services are safe and effective. The rules ensure that advertised claims do not mislead and advertisements that include weight loss or slimming claims made on foods are in line with the law. Advertisements for products and services within this category must be responsible and avoid the potential for harm, for example by not appealing particularly to under 18s and people that are underweight or regard being underweight as desirable. The ban on targeting the obese (unless the advertised product or service is provided under suitably qualified medical supervision) compliments BCAP's policy that advertisements should not discourage essential treatment for conditions for which medical supervision should be sought, for example, by offering treatment for such conditions (see rule 11.9).
- 12.11** Rule 12.8 derives from the NHCR, rule 12.13 and its sub-rules derive from the Foods Intended for Use in Energy Restricted Diets for Weight Reduction Regulations 1997 (as amended), see 'The law' above, and rule 12.14 and its sub-rules (not 12.4.4) originate from the Food Safety Act 1990.
- 12.12** Because they could be relevant for advertisements for slimming or weight control products, the rules cross-refers the reader to Section 11, Medicines, Medical Devices, Treatments, and Health and Section 13, Food, Dietary Supplements and Associated Health or Nutrition Claims.

Proposed substantive changes

New rules

Irresponsible use of a weight-control or slimming product or service

12.13 The present Television Code ensures that advertisements for slimming or weight control products or services are responsible by not encouraging indiscriminate or excessive use. The present Radio Code does not include an equivalent explicit restriction. BCAP considers the TV rule protects those whose circumstances make them vulnerable to advertisements for those products or services by ensuring they don't condone or encourage a potentially unsafe practice. BCAP proposes to extend the TV rule to radio because it does not consider the differences in media justify the maintenance of the rule for television only.

12.14 BCAP's proposed TV and radio rule is:

12.4

Advertisements must not encourage indiscriminate or excessive use of a weight-control or slimming product or service.

Question 68

Given BCAP's policy consideration, do you agree that 12.4, which presently applies to TV advertisements for weight control or slimming products or services, should equally apply to those advertisements on radio? If your answer is no, please explain why.

Revised rules

Dietary control and weight-loss surgery

12.15 Rule 13b, section 3, of the present Radio Code states:

Advertisements for establishments offering slimming treatments are acceptable only if such treatments are based on dietary control...

12.16 The Television Code does not include an equivalent rule. Without dietary control the necessary amount of energy expenditure required to lose weight is not achievable if a person's energy intake is maintained. Dietary control is therefore necessary for weight loss to be achieved and, to that end, the rule is intended to prevent misleading claims.

12.17 In BCAP's opinion, the rule has the unintended consequence of banning, for example, an advertisement for a gym that offers a weight reduction regime based on energy expenditure but does not provide a complimentary dietary control regime. BCAP considers that prohibition is unjustified and, potentially, unintended. BCAP proposes to relax radio rule 13b, section 3. To prevent the potential for misleading claims, however, BCAP proposes to require advertisements for establishments offering weight-control or slimming treatments to make clear, in the advertisement, that dietary control is necessary to achieve weight loss. In the example given, the radio advertisement for the gym offering a weight reduction regime based on energy expenditure may now advertise but the advertisement must state that dietary control is necessary to achieve weight loss. BCAP proposes rule 12.15 should apply to television and radio because the differences in media do not justify a different approach. The proposal ensures that advertisements for establishments that offer weight control or slimming treatments do not mislead and are no longer unduly prevented from advertising on radio.

12.18 BCAP's proposed TV and radio rule is:

12.15

Advertisements for establishments offering weight-control or slimming treatments are acceptable only if they make clear that dietary control is necessary to achieve weight loss...

Question 69

Given BCAP's policy consideration, do you agree that broadcast advertisements for establishments offering weight control or slimming treatments are acceptable only if they make clear that dietary control is necessary to achieve weight loss? If your answer is no, please explain why?

- 12.19** By permitting advertisements for establishments offering weight control or slimming treatments only if those treatments are based on dietary control (rule 13b, section 3), the present Radio Code prohibits advertisements for establishments that provide immediate weight loss surgery, which are clearly not based on dietary control. BCAP uses the term 'immediate' to differentiate those services from others that, for example, implant a device or the like to reduce a person's sense of hunger or increase their sense of satiety and which require dietary control to affect weight loss. The Television Code does not prohibit those advertisements. BCAP proposes to allow advertisements for services that offer immediate weight loss surgery subject to a new rule that prohibits claims about the amount of weight that can be lost. BCAP considers those claims have the clear potential to be irresponsible by, for example, inappropriately incentivising consumers to take advantage of their services. Advertisements for those services must also comply with rule 11.9 and 12.6.2:

11.9

Services including Clinics, Establishments and the like Offering Advice on, or Treatment in, Medical, Personal or other Health Matters

Advertisements are acceptable only if the advertiser can provide suitable credentials, for example, evidence of: relevant professional expertise or qualifications; systems for regular review of members' skills and competencies and suitable professional indemnity insurance covering all services provided; accreditation by a professional or regulatory body that has systems for dealing with complaints and taking disciplinary action and has registration based on minimum standards for training and qualifications.

12.6

Broadcasters must obtain suitably qualified independent medical or other health specialist advice on the safety and efficacy of weight control and slimming products or services before broadcast. In particular, the advice must satisfy broadcasters that:

12.6.2

clinics and other establishments offering medically supervised treatments are run in accordance with the National Minimum Standards Regulations issued by the Department of Health or, if they operate abroad, broadly equivalent requirements.

- 12.20** BCAP's proposed TV and radio rule is:

12.15

Advertisements for establishments offering weight-control or slimming treatments are acceptable only if they make clear that dietary control is necessary to achieve weight loss. An exception is made for clinics and other establishments that provide immediate weight loss surgery under suitably qualified medical supervision and are run in accordance with rule 11.9. Those clinics and other establishments must not refer to the amount of weight that can be lost.

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

Question 70

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

Calorie-reduced or energy-reduced foods and drinks

- 12.22** The present Codes and the proposed Code state that broadcast advertisements for slimming or weight control products or services may not target people aged under 18 (see content rule 12.5 and scheduling rule 32.2.4 of the proposed Code). Those rules protect a category of consumers that could be vulnerable to those advertisements; especially under 18s that regard being underweight as desirable. Evidence indicates that Anorexia Nervosa is most likely to strike in mid-teenage years, on average between the ages of 16 and 17³⁴. The rules do not necessarily prevent under 18s from seeing or hearing those advertisements but it ensures that those advertisements do not speak to them by directly targeted them.
- 12.23** The present Radio Code exempts, from those rules, advertisements for calorie-reduced or energy-reduced foods and drinks that are not presented as part of a slimming regime and do not use the theme of slimming or weight control. The Television Code exempts those advertisements from the scheduling rule but not the content rule. BCAP considers that that is an unnecessary and potentially unintended restriction given that those advertisements may not present the product as part of a slimming regime or use the theme of slimming or weight control. BCAP proposes to exempt TV advertisements for calorie-reduced or energy-reduced foods and drinks that are not presented as part of a slimming regime and do not use the theme of slimming or weight control from the ban on targeting the under 18s.
- 12.24** The proposed TV and radio rule is:

12.5

Advertisements for slimming or weight control products or services must not be addressed to people under 18, use creative treatments likely to be of particular appeal to them, or, feature any person whose example people under 18 are likely to follow or who has a particular appeal to them. This rule does not apply to advertisements for calorie-reduced or energy-reduced foods and drinks, provided the product is not presented as part of a slimming regime and the advertisement does not use the theme of slimming or weight control.

Question 71

Given BCAP's policy consideration, do you agree that a broadcast advertisement for a calorie-reduced or energy-reduced food or drink may be targeted at under 18s, provided the advertisement does not present the product as part of a slimming regime and does not use the theme of slimming or weight control? If your answer is no, please explain why.

Safety and efficacy of slimming or weight control products or services

- 12.25** The present Codes require broadcasters to obtain suitably qualified independent medical advice on slimming and weight control products to ensure those are safe and effective before they can be advertised. That policy takes into account the potential harm that could result from the unsuitable use of those products or services and the vulnerability of some consumers to claims for those products or services. BCAP considers that a medical professional is not always relevant to the assessment of a slimming or weight control product or service; other independent health specialist advice may be suitable. BCAP proposes, therefore, to revise the present TV and radio requirements, as shown by the underlined text.

34 www.disordered-eating.co.uk/eating-disorders-statistics/anorexia-nervosa-statistics-uk.html

12.26 BCAP's proposed TV and radio rule is:

12.6

Broadcasters must obtain suitably qualified independent medical or other health specialist advice on the safety and efficacy of weight control and slimming products or services before broadcast...

- 12.27** By proposing to allow health specialists other than medically qualified persons to assess if a product or service is safe and effective, the proposed rule is rendered more practical for broadcasters to comply with and does not, in BCAP's opinion, diminish the protection afforded to the consumer and businesses whose reputation is placed at risk by unscrupulous competitors

Question 72

Given BCAP's policy consideration, do you agree that, before it is advertised, the safety and efficacy of a slimming or weight control product must be assessed by a qualified independent medical professional or another health specialist professional? If your answer is no, please explain why.

Establishments offering medically supervised treatment

- 12.28** The present Codes permit advertisements for clinics and other establishments offering medically supervised weight loss or weight control treatments if those are run in accordance with General Medical Council guidelines. Those Guidelines have been superseded by the National Minimum Standards Regulations (NMSR) issued by the Department of Health³⁵. BCAP proposes to update the rule accordingly and to permit advertisements for non-UK clinics and other non-UK establishments offering medically supervised treatment for weight loss or weight control if those are run in accordance with broadly equivalent requirements to those established by the NMSR. BCAP's proposal affords a consistent level of protection for consumers and a level playing field for advertisers.

12.29 BCAP's proposed TV and radio rule is:

12.6

Broadcasters must obtain suitably qualified independent medical or other health specialist advice on the safety and efficacy of weight control and slimming products or services before broadcast. In particular, the advice must satisfy broadcasters that:

12.6.2

clinics and other establishments offering medically supervised treatments are run in accordance with the National Minimum Standards Regulations issued by the Department of Health or, if they operate abroad, broadly equivalent requirements.

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?

Targeting the obese

12.30 The present Television Code states:

8.4.5 Obesity

Advertisements for products and services in this category, other than those for clinics and other establishments offering treatment under medical supervision, must not be directed at the obese or use testimonials or case histories referring to subjects who were or appeared to be obese before using the product or service advertised

12.31 Section 3 of the present Radio Code Present , states:

13 h)

With the exception of clinics and other establishments/services offering treatment under medical supervision (see Section 3, Rule 4.10), advertisements for slimming aids must not be directed at the obese or use testimonials or case histories referring to subjects who were or appeared to be obese before using the product or service advertised.

12.32 People who are obese, which the present Codes and proposed Code define as people with a body mass index of 30 or above, might have other chronic conditions such as diabetes or coronary heart disease, which would render some slimming or weight control products and services unsuitable for them. In recognition of that fact, the present BCAP Codes state that only advertisements for clinics and other establishments that offer treatment under suitably qualified medical supervision may target obese people. That policy ensures that people who respond to those advertisements are appropriately assessed to gauge their suitability for the advertised treatment at each stage of the treatment and thereby avoid, as far as possible, the potential for harm. In keeping with that policy, BCAP proposes to allow advertisements for non-prescription medicines that are indicated for the treatment of obesity and that require the involvement of a pharmacist in the sale or supply of the medicine to target people who are obese.

12.33 BCAP's proposed TV and radio rule is:

12.11

Advertisements for weight control or slimming products or services must not be targeted directly at individuals with a Body Mass Index of 30 or above (obesity) ...

12.11.1

Advertisements for clinics or other establishments that offer treatment under suitably qualified medical supervision and advertisements for non-prescription medicines that are indicated for the treatment of obesity and that require the involvement of a pharmacist in the sale or supply of the medicine may nevertheless be targeted at those who are obese. Please see rule 11.9, "Services including Clinics, Establishments and the like Offering Advice on, or Treatment in, Medical, Personal or other Health Matters".

Question 74

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

Deleted rules

12.34 None.

Other

Rate of weight loss

12.35 The present Codes require that advertised claims about the rate of weight loss must be compatible with accepted good medical and dietary practice. BCAP proposes to retain that requirement and, to help broadcasters to comply with it, to make explicit a rate of weight loss that the ASA has long understood to be compatible with good medical and dietary practice.

12.36 BCAP's proposed TV and radio rule is:

12.9

Claims that refer to specific amounts of weight that have been lost by an individual must state the period over which that loss was achieved and should not be based on unrepresentative experiences of the slimming or weight-control product. The amount of weight lost and the period over which it was lost must be compatible with generally accepted good medical and dietary practice. For those who are normally overweight, a rate of weight loss greater than 2lbs (just under 1kg) a week is unlikely to be compatible with good medical and nutritional practice. For those who are obese, a rate of weight loss greater than 2lbs a week in the early stages of dieting could be compatible with good medical and nutritional practice.

12.37 The rule reproduces wording from the CAP non-broadcast Code and reflects the ASA's interpretation, for non-broadcast and broadcast advertisements, of a rate of weight loss that is compatible with accepted good medical and dietary practice. BCAP considers the proposed rule provides certainty for broadcasters, protection for the audience and a level playing field for advertisers. The proposal adds clarity to the existing requirements; it does not change advertising policy and practice.

Question 75

Given BCAP's policy consideration, do you agree that rule 12.9 should include a rate of weight loss that is compatible with generally accepted good medical and dietary practice? If your answer is no, please explain why.

Very Low-Calorie Diets (VLCDs)

12.38 The present Codes require broadcasters to obtain independent medical advice to ensure an advertisement for a VLCD is in accordance with the Government COMA Report No.31, The Use of Very Low Calorie Diets³⁶. BCAP understands that that report has been superseded by 'Obesity: the prevention, identification, assessment and management of overweight and obesity in adults and children (2006)'³⁷ published by the National Institute for Health and Clinical Excellence. BCAP proposes to update the Code accordingly to ensuring the rule is relevant. The proposal does not change advertising policy and practice.

12.39 BCAP's proposed rule TV and radio rule is:

12.14

For the purposes of this rule, very low-calorie diets (VLCDs) are those with a daily intake of less than 800 kilo-calories. They must comply with the provisions of the Food Safety Act 1990 and relevant regulations made under it, including those on advertising. These conditions apply to advertisements for such products:

12.14.4

independent medical advice must be sought on whether the proposed advertisement accords with the guidance on "Obesity: the prevention, identification, assessment and management of

36 COMA (Committee on Medical Aspects of Food Policy) (1987) The Use of Very Low Calorie Diets in Obesity: Report on Health and Social Subjects no.31. HMSO: London.

37 www.nice.org.uk/CG043

overweight and obesity in adults and children” (2006) published by the National Institute for Health and Clinical Excellence.

Question 76

Given BCAP’s policy consideration, do you agree that rule 12.14.4 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 77

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

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

iii) Do you have other comments on this section?

Part 2 - Section 13

Food, Dietary Supplements and Associated Health and Nutrition Claims

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

Background

The law

The Communications Act 2003

- 13.1** The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objectives to this section of the BCAP Code are:

319(2)(a) that persons under the age of eighteen are protected

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

- 13.2** See the full text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

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

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

- 13.4** See the full text of the NHCR at: http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_012/l_01220070118en00030018.pdf

The Audiovisual Media Services Directive (AVMS)

- 13.5** AVMS revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989. The TVWF Directive applied to scheduled television broadcasting services only. AVMSD also applies to some on-demand services but this consultation is about advertisements in scheduled broadcast services only:

2. Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communication, accompanying or included in children's programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.

- 13.6** See the full text of AVMS at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF>

The Consumer Protection from Unfair Trading Practices Regulations 2008 (CPRs)

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

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

- 13.8** See the full text of the CPRs at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3480871

Other

- 13.9** Other legislation that is relevant to this section includes: Food Standards Act 1999 (Section 6); Food Safety Act 1990 (as amended) s.15 and 16 and Schedule 1; Food Labelling Regulations (1996) as amended (regulations 40-46).

Other relevant regulatory bodies

Food Standards Agency (FSA)

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

European Food Safety Authority (EFSA)

- 13.11** EFSA's role is to assess and communicate on all risks associated with the food chain and a large part of their work is undertaken in response to specific requests for scientific advice. Requests for scientific assessments are received from the European Commission, the European Parliament and EU Member States. EFSA also undertakes scientific work on its own initiative. Please see: www.efsa.europa.eu/EFSA/efsa_locale-1178620753812_home.htm
- 13.12** Bodies that play a part in regulating a broadcast advertisement of relevance to this section but are not conferred with legal functions to do so include: Clearcast, (www.clearcast.co.uk) and the RACC, (www.racc.co.uk).

Recent changes to this section of the BCAP Code

Television

- 13.13** A growing body of research has generated concerns in the Government and society about rising childhood obesity levels and ill health due to dietary imbalance, specifically the over-consumption of high fat, salt or sugar (HFSS) foods and the under-consumption of fresh foods, fruit and vegetables. Both the Department of Health (DH) and the Food Standards Agency (FSA) identified television advertising as a sector where action should be considered to restrict the promotion of HFSS foods to children. In December 2003, the Secretary of State for Culture, Media and Sport Tessa Jowell MP asked Ofcom to consider proposals for strengthening the rules on television advertising of food directed at children.

- 13.14** In 2004, the FSA published a consultation on a scheme that would identify HFSS food and drink products by means of nutrient profiling. That model was intended to help Ofcom reach decisions on the restriction of TV advertising for less healthy foods. In December 2005, the FSA completed its work on a nutrient profiling scheme and delivered it to Ofcom.
- 13.15** Research conducted for Ofcom by Professor Sonia Livingstone concluded that TV advertising, combined with TV viewing in general, has a modest effect on children's food preferences.
- 13.16** Ofcom introduced a new scheduling rule for television advertisements for HFSS foods and new content rules for TV HFSS advertisements in particular and food advertising to children in general following public consultation. The content rules applied in full from 1 July 2007 and the scheduling rule applied from 1 January 2008. Transitional periods applied to specialist children's channels until 1 January 2009, when those channels had to comply in full with the rules.
- 13.17** The Ofcom consultation on television advertising of food and soft drink products to children can be found at: www.ofcom.org.uk/consult/condocs/foodads/

Radio

- 13.18** BCAP introduced new radio rules on food advertisements in general and food advertisements targeted directly at children in particular, following the introduction of the TV food rules. The new radio content rules came into force in full on 16 December 2007.
- 13.19** Those changes took account of clear socio-political concerns about the advertising of food to children and to pre-school and primary school children in particular. BCAP considered proportionate restrictions to the content of radio food advertisements generally were justified and introduced robust new rules on diet and lifestyle, ensuring that advertisements do not undermine progress towards national dietary improvement. In addition, BCAP added specific prohibitions on the use of celebrities, licensed characters and promotions in radio food advertisements targeted directly at pre-school and primary school children. Those restrictions do not apply to advertisements for fresh fruit and fresh vegetables, an exception that takes account of the Government's concern with the under-consumption of those food categories.
- 13.20** BCAP noted: the overwhelming and explicit political impetus to tackle TV food advertising to children; the role that dedicated TV programmes and TV channels played in justifying the scheduling restrictions on TV HFSS advertisements; the audio-visual impact of TV and its place in the family home; the significant spend on TV food advertising and the comprehensive qualitative and quantitative research that had supported Ofcom's decision to intervene in TV HFSS food advertising. Those factors are not relevant to radio and do not, in themselves, justify equivalent restrictions in other media, including radio.
- 13.21** BCAP's announcement of the new radio food rules can be found at: www.cap.org.uk/cap/news_events/news/2007/Radio+food+advertising+rules+announced.htm
- 13.22** The TV and radio food advertising rules that resulted from those consultations are reflected, in full or in part, in these rules, which form part of BCAP's proposed Code: 13.2, 13.4.2, 13.5, 13.9, 13.9.1, 13.9.2, 13.9.3, 13.9.4, 13.10, 13.11, 13.12, 13.12.1, 13.12.2, 13.12.3, 13.12.4, 13.12.5, 13.13, and 13.14. The TV HFSS advertisement scheduling rule is reproduced in rule 32.5.1 in the Scheduling Section of the Code.

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

- 13.23** As part of BCAP's consultation on the Regulation of Nutrition and Health Claims made on Foods in Television and Radio Advertisements, BCAP proposed the minimum number of changes necessary to ensure that the present Codes do not conflict with the NHCR. That consultation closed on 16 February 2009. BCAP has not had the time to announce the outcome of that consultation including the new rules before the publication of this consultation document. BCAP proposes to reflect the rules that are

published as a result of that consultation in BCAP's present Codes and its new Code. BCAP's consultation on the Regulation of Nutrition and Health Claims made on Foods in Television and Radio Advertisements can be found here:

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

Meeting the need to regulate broadcast advertisements for food and soft drink products

- 13.24** Public health policy increasingly emphasises good dietary behaviour and an active lifestyle as a means of promoting health. Commercial product advertising cannot reasonably be expected to perform the same role as education and public information in promoting a varied and balanced diet but should not, as a general principle, undermine progress towards national dietary improvement by misleading or confusing consumers or by setting a bad example, especially to children.
- 13.25** The present Codes reflect that principle through rules that cover broadcast food advertising in general and the advertising of food products directly targeted at children in particular. As determined by two recent consultations, the present TV and radio rules on the advertising of food to children are justifiably different and BCAP has maintained that approach in the proposed BCAP Code.
- 13.26** The proposed rules ensure that food advertisements do not encourage poor nutritional habits or unhealthy lifestyles, especially in children and they help broadcasters to comply with food law, including the NHCR.

Ofcom's review of the effectiveness of the HFSS food TV advertising rules

- 13.27** The Government's Cross-Government Obesity Strategy published in January 2008 contained a request that the advertising regulators should take full account of Ofcom's review of the effectiveness of the HFSS food advertising rules as part of the scheduled full Advertising Code Review process³⁸.
- 13.28** In October 2008, BCAP wrote to the Secretary of State for Health to make clear that Ofcom's initial findings would be announced too late in the day for BCAP to consider as part of its Code Review³⁹. BCAP undertook to review those findings at the earliest possible opportunity in 2009 to consider whether the present TV food advertising rules remain proportionate. The Government endorsed that approach.

Proposed substantive changes

New rules

Nutrition and Health Claims Regulation 1924/2006(NHCR)

- 13.29** The NHCR came into force in July 2007. It is the first piece of specific legislation that seeks to protect consumers from misleading or false nutrition and health claims made on foods. It harmonises the use of such claims across the EU by making clear the types of nutrition or health claims that can be made on foods.
- 13.30** Article 1 of the NHCR states that the Regulation applies to foods, including supplements, sold directly to the consumer and to foods intended for supply to restaurants, hospitals, schools, canteens and other mass caterers. The NHCR applies to food ready for consumption in accordance with manufacturers' instructions and to claims made in a commercial context only; that obviously includes broadcast advertisements.

38 'Healthy weight, healthy lives: A cross government strategy for England' – Page 19

39

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

- 13.31** In keeping with its general policy objectives, BCAP proposes to reflect some of the general and specific provisions of the NHCR to help broadcasters and advertisers to comply with the Code's general requirement that broadcast advertisements must comply with the law. BCAP has either directly reflected a single provision of the legislation or has proposed a rule based on one or more provisions of the Regulation and added commentary to support its proposed rule.
- 13.32** The NHCR can be found at: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1924R\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1924R(01):EN:NOT)
- 13.33** The Food Standards Agency's Guidance to Compliance with (EC) Regulation 1924/2006 on Nutrition and Health Claims on Foods can be found at: www.food.gov.uk/multimedia/pdfs/ec19242006complianceguide.pdf

Permitted nutrition and health claims

- 13.34** The NHCR states:

Nutrition claims

Article 8; Specific conditions

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

Health Claims

Article 10; Specific conditions

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

Transitional measures

- 13.35** The NHCR provides a number of complex transitional measures in Article 28 (1, 2, 3, 4, 5 and 6) for products, labels, nutrition claims, health claims, trade marks and brand names. The Code cannot provide detailed rules on those transitional measures and therefore BCAP advises broadcasters to take legal advice.
- 13.36** To reflect Articles 8(1), 10(1) and 28 of NHCR, BCAP's proposed TV and radio rules are:

13.4 Nutrition and Health Claims

Only Permitted Nutrition Claims listed in the Annex of EC Regulation 1924/2006 Nutrition and Health Claims made on Foods are permitted in advertisements.

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

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

Advertisements 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.

13.4.1

These Permitted Nutrition Claims or claims that would have the same meaning for the audience,

must comply with the criteria in the annex of EC Regulation 1924/2006 Nutrition and Health Claims made on Foods:

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

The Annex provisions can be found at: [\[link to BCAP help note\]](#)

Question 78

Do you agree that BCAP has correctly reflected the requirements of Articles 8(1), 10(1) and 28 of the NHCR in BCAP's proposed rules 13.4 and 13.4.1? If your answer is no, please explain why.

Giving rise to doubt about the safety or nutritional adequacy of another product

13.37 The NHCR states:

Article 3; General principles for all claims

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

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

13.38 To reflect that Article, BCAP's proposed TV and radio rule is:

13.4.4

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

Question 79

Do you agree that BCAP has correctly reflected the requirements of Article 3(b) of the NHCR in BCAP's proposed rule 13.4.4? If your answer is no, please explain why.

Comparative nutrition claims

13.39 The NHCR states:

Article 9; Comparative claims

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

2. Comparative nutrition claims shall compare the composition of the food in question with a

range of foods of the same category, which do not have a composition which allows them to bear a claim, including foods of other brands.

13.40 To reflect that Article, BCAP's proposed TV and radio rules are:

13.5.1

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

13.5.3

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

Question 80

Do you agree that BCAP has correctly reflected the requirements of Article 9 of the NHCR in BCAP's proposed rules 13.5.1 and 13.5.3? If your answer is no, please explain why.

Comparison with one product

13.41 The European Commission has published guidance⁴⁰ on certain provisions in the NHCR and its scope. It states that one product may be used as a sole reference for comparison if it is representative of the products within its category. Specifically:

"II.2.2. Reference product

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

13.42 To reflect the guidance from the European Commission, BCAP's proposed TV and radio rule is:

13.5.2

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

Question 81

Do you agree that BCAP has correctly reflected the requirements of Article 9 of the NHCR and the guidance from the European Commission in BCAP's proposed rule 13.5.2? If your answer is no, please explain why.

Prohibitions

13.43 The NHCR states:

Article 12

Restrictions on the use of certain health claims

The following health claims shall not be allowed:

(a) claims which suggest that health could be affected by not consuming the food.

⁴⁰ http://ec.europa.eu/food/food/labellingnutrition/claims/guidance_claim_14-12-07.pdf

13.44 To reflect that Article, BCAP's proposed TV and radio rule is:

13.6

These are not acceptable in advertisements for products subject to this Section:

13.6.1

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

Question 82

Do you agree that BCAP has correctly reflected the requirements of Article 12(a) of the NHCR in BCAP's proposed rules 13.6 and 13.6.1? If your answer is no, please explain why.

13.45 The NHCR states:

Article 3

General principles for all claims

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

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

13.46 To reflect that Article, BCAP's proposed TV and radio rule is:

13.6

These are not acceptable in advertisements for products subject to this Section:

13.6.4

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

Question 83

Do you agree that BCAP has correctly reflected the requirements of Article 3(e) of the NHCR in BCAP's proposed rules 13.6 and 13.6.4? If your answer is no, please explain why.

Food Labelling Regulations (1996) (FLRs)

13.47 The FLRs state:

Schedule 6

Claims

Part 1 (Prohibited Claims)

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

13.48 The NHCR states:

Article 14

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

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

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

13.49 To reflect Article 14 of the NHCR and Schedule 6 Part 1(2) of the FLRs, BCAP's proposed TV and radio rule is:

13.6

These are not acceptable in advertisements for products subject to this Section:

13.6.2

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

Question 84

i) Do you agree that BCAP has correctly reflected the requirements of Article 14 of the NHCR and Schedule 6 Part 1(2) of the FLRs in BCAP's proposed rules 13.6 and 13.6.2? If your answer is no, please explain why.

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

Infant formula and follow-on formula

13.50 The present BCAP Codes do not include a rule specific to the advertising of infant or follow-on formula. The Infant Formula and Follow-on Formula Regulations 2007 (as amended)⁴¹ prohibit the advertising of infant formula (except in scientific publications or for the purposes of trade before retail). The Regulations are intended to prevent breastfeeding from being discouraged.

13.51 In keeping with its general policy objectives and to help broadcasters and advertisers to comply with the Code's general requirement that broadcast advertisements must comply with the law, BCAP proposes to reflect the key provisions of the Regulations that are directly relevant to broadcast advertisements.

13.52 The Infant and Follow-on Formula Regulations 2007 (amended) state:

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

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

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

Presentation (infant formula and follow-on formula)

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

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

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

Restrictions on advertising infant formula

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

except—

in a scientific publication, or

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

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

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

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

13.53 Regulation 21(1)(b) explains advertisements must comply with Regulation 19 (amongst others). BCAP considers a fundamental aspect of the Infant Formula and Follow-on Formula Regulations 2007 (as amended) is the need to ensure advertisements for infant formula and follow-on formula are differentiated clearly. It proposes to make that provision explicit in its Code.

13.54 To reflect regulations 19, 20 and 21 of the Infant Formula and Follow-on Formula Regulations 2007 (as amended), BCAP’s proposed TV and radio rules are:

13.8

Advertisements for infant and formula are prohibited

13.8.1

Advertisements must not confuse between infant formula and follow-on formula.

Question 85

i) Do you agree that BCAP has correctly reflected the requirements of Regulation 21(a) of the Infant and Follow-on Formula Regulations (2007) (amended) in BCAP’s proposed rule 13.8? If your answer is no, please explain why.

ii) Do you agree that BCAP has correctly reflected the requirements of Regulation 19 of the

Infant Formula and Follow-on Formula Regulations 2007 (amended) in BCAP's proposed rule 13.8.1? If your answer is no, please explain why.

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

Revised rules

Health claims that refer to the recommendation of an individual health professional

13.55 The NHCR states:

Article 12

Restrictions on the use of certain health claims

The following health claims shall not be allowed:

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

Article 11

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

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

- 13.56** BCAP proposes to explicitly reflect Article 12(c) in the Code in keeping with its general policy objectives and to help broadcasters and advertisers to comply with the Code's general requirement that broadcast advertisements must comply with the law.
- 13.57** Food advertisements that include recommendations of or endorsements by national associations of medical, nutrition or dietetic professionals and health-related charities are exempted from the prohibition in Article 12(c), subject to national rules. In the UK, the relevant national broadcast advertising rules are set out in the BCAP Television and Radio Codes; the Television Code bans such recommendations and endorsements in food advertisements and the Radio Code allows them. The TV restriction on recommendations or endorsements by health-related charities and the like are not necessarily unlawful because they are not contrary to the provisions of the EU Treaty.
- 13.58** In Section 11 of the proposed Code, Medicines, Treatments, Devices and Health, BCAP proposes to relax the present Codes' restrictions on the use of health professionals in broadcast advertisements. The present BCAP Codes prohibit the use of health professionals in television advertisements for medicines and products that have nutritional, therapeutic or prophylactic effects (including food) and in radio advertisements for medicine and treatments, which cover a wide range of products and services (but not food).
- 13.59** In line with its recommendation on the use of health professionals in advertisements, BCAP proposes to reflect the minimum requirements of the NHCR because it considers the Code provides adequate protection. BCAP considers recommendations of or endorsements by national associations of medical, nutrition or dietetic professionals and health-related charities are not, in themselves, misleading or unfair. (See section 3: Misleading, in the proposed Code). BCAP considers its proposed new rule 1.2 'Advertisements must be prepared with a sense of responsibility to the audience and to society' (see Section1: Compliance, in the proposed Code) will further prevent the irresponsible use of recommendations of or endorsements by national associations of medical, nutrition or dietetic professionals and health-related charities.
- 13.60** To reflect article 11 and 12 of the NHCR, BCAP's proposed TV and radio rule is:

13.6

These are not acceptable in advertisements for products subject to this Section:

13.6.3

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

Question 86

i) Do you agree that BCAP has correctly reflected Article 12(c) of the NHCR in rule 13.6.3? If your answer is no, please explain why.

ii) Given BCAP's policy consideration, do you agree that the Code should allow broadcast food advertisements to include health claims that refer to a recommendation by an association if that association is a health-related charity or a national representative body of medicine, nutrition or dietetics? If your answer is no, please explain why.

Deleted rules

13.61 None

Other questions**Question 87**

i) Taking into account BCAP's general policy objectives, do you agree that BCAP'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 Food, Dietary supplements and Associated Health and Nutrition claims rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 – Section 14

Financial products, services and investments

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

Background

The law

Communications Act 2003

- 14.1** The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The standards objective most relevant to the Financial Advertising Section of the BCAP Code is:

319(2) (h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

- 14.2** See the full text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

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

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

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

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

- 14.10** The Consumer Credit Act 2006, which amended the 1974 Act, may be found at:

www.statutelaw.gov.uk/content.aspx?activeTextDocId=2459360

Banking Codes

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

- 14.12** The Banking Code may be found at:

www.bankingcode.org.uk/pdfdocs/PERSONAL_CODE_2008.PDF

- 14.13** The Business Banking Code may be found at:

www.bankingcode.org.uk/pdfdocs/BUSINESS_CODE_2008.PDF

Other relevant regulatory bodies

Financial Services Authority (FSA)

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

Office of Fair Trading (OFT)

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

Banking Code Standards Board (BCSB)

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

Meeting the need to ensure that the inclusion of financial advertising which may be misleading, harmful or offensive in television and radio services is prevented

- 14.20** The Communications Act requires BCAP and the ASA to ensure that broadcast advertising for financial products does not mislead. Aware of the degree of regulation to which financial advertisers are already subject, the ITC and Ofcom have maintained rules that largely draw attention to statutory regulation with which all advertisements must comply. The rules on financial advertising in broadcast media combine information on statutory regulations with additional provisions to ensure clarity in communication of financial promotions and suitable scheduling of advertisements for products, services or investments that are high risk or that require specialist knowledge.
- 14.21** Broadcast advertising regulators have been conscious of the fact that selecting the most relevant financial products or services normally requires consumers to consider many factors; short-form TV and radio advertisements are not well-suited to communicating large amounts of detail. Therefore, they have not been considered to be suitable formats for advertising especially high-risk or specialist investments or any financial products or services that are not regulated or permitted in the UK under the Financial Services and Markets Act 2000 (FSMA), unless on specialist channels or stations.

Developments

- 14.22** The BCAP Codes were revised when the FSA assumed responsibility for the regulation of first charge mortgage lending and selling and its rules were extended to advertisements for certain secured loans by authorised persons and general insurance intermediaries (e.g. motor, home and travel insurers). Minor changes were made to take account of The Prospectus Regulations 2005.

Proposed substantive changes

New rules

- 14.23** None.

Revised rules

Collective investment schemes

- 14.24** See Section 10, Prohibited Categories, 'New rules', for details of the changes to BCAP's rule on collective investment schemes.

Interest on savings

- 14.25** The present Television Code states:

9.7

(d) Where the interest rate is variable, this must be stated.

- 14.26** BCAP has consulted with the Banking Code Standards Board, which agrees that the present use of the word 'variable' is confusing, because it is common practice to describe savings account interest rates as 'variable' if they are not fixed. BCAP proposes to replace rule 9.7 (d) with:

14.7.5

if interest rates are calculated by reference to an external index or rate that fact must be stated clearly.

Question 88

Do you agree that rule 14.7.5 makes clearer the requirement that the nature of the relation between interest rate and variable be stated? If your answer is no, please explain why.

Other questions

Question 89

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

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

iii) Do you have other comments on this section?

Part 2 - Section 15

Faith, Religion and Equivalent Systems of Belief

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

Background

The law

Communications Act 2003

- 15.1 The Act sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for the content of advertisements. The most relevant standards objectives to the Faith section of the BCAP Code are:

319(2)(a) that persons under the age of eighteen are protected

319(2)(g) that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented

- 15.2 See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

European Convention on Human Rights (ECHR)

- 15.3 The ECHR (implemented in the UK through the Human Rights Act 1998) protects the right to 'freedom of thought, conscience and religion' (Article 9) and the right to 'freedom of expression' (Article 10).
- 15.4 See the text of the Convention at: www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf

Audio-Visual Media Services Directive (AVMSD)

- 15.5 AVMSD revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989. The TVWF Directive applied to scheduled television broadcasting services only. AVMSD also applies to some on-demand services but this consultation is about advertisements in scheduled broadcast services only:

Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.

- 15.6 See the text of the Directive at:

eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0027:01:EN:HTML

Other relevant regulatory bodies

Charity advertisers

- 15.7** Some advertisers who fall under this section of the Code are charities or, in their advertisements, refer to charities. The Office of the Scottish Charity Regulator (OSCR), the Department for Social Development Northern Ireland and the Charity Commission for England and Wales are therefore relevant regulatory bodies for advertisers that fall under this section. Please see section 16, Charities, for more information on those bodies.

Other

- 15.8** Bodies that play a part in regulating a broadcast advertisement of relevance to this section but are not conferred with legal functions to do so include: Clearcast, (www.clearcast.co.uk), the RACC, (www.racc.co.uk) and the Institute of Fundraising (IOF)

Meeting the need to ensure that broadcast advertisements for bodies concerned with faith, religion or equivalent systems of belief are socially responsible and have particular regard to the vulnerable.

- 15.9** Broadcast advertisements for bodies concerned with faith, religion or equivalent systems of belief have the potential to harm inter-faith relations and exploit the vulnerable, including the under 18s. The present Codes and the proposed Code adopt the same approach to regulating those advertisements: the rules ensure that advertisements do not exploit the vulnerable, especially the under 18s and those whose circumstances put them in need of particular protection, prohibit advertisements by bodies that might be especially harmful, prevent denigration of other religions and require the identity of the advertiser to be clear.
- 15.10** Some of the rules in the Faith, Religion and Equivalent Systems of Belief section of the present Television Code are more restrictive than in the equivalent section of the present Radio Code. That reflects the reach of television, its place in the family home and its audio-visual impact, which, in combination, can have a powerful impact on individuals, particularly those moral or religious convictions, and on society at large. For example, BCAP's proposed Code maintains the ban on TV advertisements that expound doctrine, unless those advertisements are broadcast on channels whose editorial content is wholly or mainly concerned with matters of religion, faith or equivalent systems of belief ('specialist broadcasters') but allows the expounding of doctrine or beliefs in radio advertisements if it is presented as the advertiser's opinion.
- 15.11** BCAP's rules are intended to strike a balance between the freedom of speech and competing social concerns and objectives.

Proposed substantive changes

- 15.12** For the purposes of the proposed substantive changes discussed here, BCAP uses the term 'faith advertisers' and 'faith advertisements' to refer to the bodies or advertisements that are subject to this section of the Code.

New rules

Spiritual benefit in return for donations to the advertised cause

- 15.13** The present Codes prevent advertisements for or on behalf of religious organisations from appealing for funds in broadcast advertisements except for charitable purposes. BCAP proposes to retain that restriction and to extend to TV the present radio rule 3.9 of section 3:

15.11

Advertisements must not imply that respondents will receive spiritual benefits in return for a donation to the advertised cause.

- 15.14** BCAP considers it is reasonable to extend the rule to TV to prevent advertisements by or that refer to charitable faith-based bodies from unfairly persuading members of the audience to donate to the advertised cause. The rule is intended to prevent advertisements from irresponsibly taking advantage of the commitment audience members may have, on religious grounds, to charitable giving. BCAP recognizes that, in some religions, charitable giving is considered to be spiritually beneficial; the rule is intended to prevent claims that imply giving to one particular cause is likely to result in benefits that would not be gained from donations to other similar causes.

Question 90

Given BCAP's policy consideration, do you agree that 15.11, which presently applies to radio advertisements by or that refer to charitable faith-based bodies and that appeal for funds, should also cover those TV advertisements? If your answer is no, please explain why.

Unreasonable pressure to join or participate or not opt-out

- 15.15** The present Codes prohibit advertising by bodies that practice or advocate illegal behaviour or whose rites or other forms of collective observance are not normally directly accessible to the public. The Television Code also prohibits advertisements from bodies that have "been shown to apply unreasonable pressure on people to join or participate or to obstruct or penalise people who wish to leave or cease contact".
- 15.16** BCAP considers that 15.2.3 should apply to radio as it presently does to TV because it protects the public against harm and protects the reputation of responsible faith advertisers. BCAP proposes the rule:

15.2

Broadcasters must not accept advertisements from or on behalf of bodies:

15.2.3

that apply unreasonable pressure on people to join or participate or not to opt-out.

Question 91

Given BCAP's policy consideration, do you agree that 15.2.3 should apply to radio as it presently does to TV? If your answer is no, please explain why.

Revised rules

Advertisements for charitable purposes that include recruitment or evangelism

- 15.17** The present Television Code states:

10.7 Religious charities

Advertising for religious charities may include appeals for funds if the charities reliably demonstrate:

- (b) that the conveying of that benefit will not be associated with any other objective (eg proselytising)

15.18 The present Radio Code does not include that restriction. BCAP considers that some religious charities that undertake important charitable work recruit or evangelise as part of their charitable work. Although it recognises that some members of the public are opposed to or offended by religious recruitment or evangelising, BCAP considers that that does not justify a ban on TV or radio appeals for those charitable projects. BCAP considers, however, that because information about recruitment or evangelism is significant to some people's decision to donate to a religious charity, the advertisement must make clear if the charitable purpose includes or will be accompanied by recruitment or evangelism. BCAP's proposal is intended to ensure transparency for the public and an appropriate level of freedom for the advertiser.

15.19 BCAP's proposed TV and radio rule is:

15.11

Advertisements must not appeal for funds, except for charitable purposes. If the charitable purpose includes or will be accompanied by recruitment or evangelism, the advertisement must make that clear.

Question 92

Given BCAP's policy consideration, do you agree that faith advertisements, which appeal for funds for charitable purposes that include or will be accompanied by recruitment or evangelism, are acceptable if that information is made clear in the advertisement? If your answer is no, please explain why.

Deleted rules

Use in advertisements of sacred or religious music and acts of worship or prayer

15.20 Section 3 of the present BCAP Radio Code states:

3.10 Sacred or Religious Music

Caution should be exercised when religious music, such as hymns and including Christmas carols, is used in advertisements.

Tasteful use may be acceptable if the subject matter is relevant, for example, in an advertisement for a concert performance. It would be inappropriate, however, for religious music to be re-worked to advertise an unrelated product.

3.11

Treatments which involve acts of worship or prayer must not denigrate and must be acceptable in context.

15.21 The present Television Code does not include those specific restrictions. BCAP considers those rules are intended to prevent the potential for widespread offence or particular offence to members of the audience with religious convictions. BCAP considers that that potential detriment is prevented by:

4.1

Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards.

Question 93

Given BCAP's policy consideration, do you agree that present radio rules 3.10 and 3.11, of

section 3, need not be included in the proposed Code? If your answer is no, please explain why.

Involving viewers in services or ceremonies

15.22 Present Television Code states:

10.9

Doctrinal advertisements⁴² must not appear to involve viewers in services or ceremonies

Note:

It is, however, acceptable to include brief extracts of ceremonies or services in ways which do not conflict with other rules.

15.23 The present Radio Code does not include that restriction.

15.24 BCAP considers that the rule was intended to support the Television Code's ban on faith advertisements expounding doctrine on general audience channels. BCAP. BCAP considers that the proposed new rule, 1.2, ('advertisements must be prepared with a sense of responsibility to the audience and to society'), would prevent the scenario set out in rule 10.9 of the present Television Code. BCAP proposes not to include present TV rule 10.9 in the BCAP Code.

Question 94

Given BCAP's policy consideration, do you agree that present TV rule 10.9 need not be included in the Code? If your answer is no, please explain why.

Individual experiences or personal benefits associated with a doctrine

15.25 The present Television Code states:

10.10 Benefit claims

Testimonials and references to individual experiences or personal benefits associated with a doctrine are not acceptable

15.26 BCAP considers that personal testimonials are not necessarily harmful. Although exaggerated and unsubstantiable claims of healing may be harmful, claims about emotional wellbeing might be acceptable expressions of opinion. BCAP considers that the rules on endorsements and testimonials in Section 3, Misleading, ensure that endorsements and testimonials are genuine and that claims that are likely to be interpreted as factual do not mislead. On balance, BCAP proposes to not include present TV rule 10.10 in the BCAP Code because it is satisfied that the mischief or harm it seeks to prevent is adequately regulated by other rules in the Code.

Question 95

⁴² 'Doctrinal advertising', in the present Television Code, refers to advertisements by bodies that are wholly or mainly concerned with religion, faith or other systems of belief that can reasonably be regarded as equivalent to those that involve recognition of a deity.

Given BCAP's policy consideration, do you agree that present TV rule 10.10 should not be included in the Code? If your answer is no, please explain why.

Other

Counselling

15.27 The present Television Code states:

10.11 Counselling

No doctrinal advertisement may offer counselling

15.28 The present Radio Code states:

3.7 Benefit Claims, Faith Healing, Miracles and Counselling

Advertising must not make claims for the efficacy of faith healing, miracle working or counselling;

References (individual or otherwise) to the benefits of religion for personal well-being should be restrained in manner, and capable of substantiation.

15.29 BCAP has weighed up, on the one hand, the restriction that TV rule 10.11 places on advertising freedoms and, on the other hand, the protection the rule affords to members of the audience for whom faith-based counselling should not be a substitute for professional medical treatment or mental-health counselling, for example. BCAP acknowledges, however, that religious organisations provide counselling on some matters, for example, marriage and relationships, on which audience members might favour faith-based advice and that some people gain important emotional and spiritual benefit from faith-based counselling.

15.30 On balance, BCAP proposes to include this rule in the proposed Code:

15.13

Advertisements must not claim that faith healing, miracle working or faith-based counselling can treat, cure or alleviate physical or mental health problems; they may, however, make restrained and proportionate claims that such services can benefit emotional or spiritual well-being.

15.31 BCAP's proposal ensures that claims about the benefits of faith healing, miracle working or faith-based counselling are appropriately restrained, ensuring that those forms of counselling are not presented as substitutes for counselling by healthcare professionals. BCAP considers its proposal strikes the right balance between protecting the consumer and ensuring an appropriate level of advertising freedom.

Question 96

i) Given BCAP's policy consideration, do you agree that present TV rule 10.11 should not be included in the Code? If your answer is no, please explain why.

ii) Given BCAP's policy consideration, do you agree that 15.13 should be included in the Code? If your answer is no, please explain why.

Advertisements for products related to psychic or occult phenomena

- 15.32** Later this year, Ofcom will consult on the use of premium-rate telephone services (PRS) in programmes with reference to Section 10 (Commercial References and Other Matters) of its Broadcasting Code, specifically to ensure that advertising is kept separate from programme content ('editorial content') in accordance with European broadcasting legislation and UK regulation. That consultation is of particular significance to a growing number of programmes that are predicated on the use of PRS, including programmes that invite the audience to call to speak to psychics or others who provide services that would be regarded, in the terms of the proposed Code, as 'occult or psychic' services. For the purposes of this consultation, these services are referred to as 'psychic PRS'.
- 15.33** Ofcom might, after consultation, include new rules in Section 10 of the Broadcasting Code and/or issue guidance to make clearer the extent to which PRS is permissible in programme content, in line with Ofcom's legal and regulatory obligations. Ofcom might conclude, on a case-by-case basis, that particular content predicated on PRS, including psychic PRS, does not comply with its Broadcasting Code, in its current form, or as amended. Broadcasters would then need to consider whether to adjust their format or broadcasting model to bring their services into compliance with the Broadcasting Code or operate as advertising (teleshopping). Teleshopping must comply with the relevant BCAP Code. At present, the BCAP Television Code bans advertisements for products that rely on belief in psychic or occult phenomena. It exempts three types of product from that prohibition: pre-recorded tarot services, publications that discuss tarot without recommending it and services that readers are likely to regard as entertainment and that offer advice that would obviously apply to large sections of the population (such as newspaper horoscopes).
- 15.34** BCAP sets out below its proposal that the ban and those exemptions to it should be retained. As part of its forthcoming consultation, Ofcom intends to conduct viewer and consumer research on PRS-based TV services. That research and consultation will inform Ofcom's decisions on possible changes to both the Ofcom Broadcasting Code and, potentially, to the BCAP Code, for which Ofcom has responsibility for final approval. BCAP's proposal that the present policy on products and services related to psychic or occult phenomena should be maintained is subject to change following BCAP's and Ofcom's consultations and decisions by Ofcom. We welcome comments from stakeholders on this matter and, unless confidentiality to BCAP alone is requested, we will share such responses with Ofcom.

Reviewing TV rule 10.3 and radio rule 3.12 of section 3:

- 15.35** Present TV rule 10.3 states:

The occult, psychic practices and exorcism

With very limited exceptions, advertisements for products or services concerned with (a) the occult or (b) psychic practices are not acceptable

Notes:

1) When appropriate, the ASA and BCAP will make exceptions for specific categories of publications which are of general interest. [Exceptions published 1 November 2002] The ITC defined two categories of advertising which are exempt and which may therefore be advertised:

a) Advertisements for tarot-based prediction services where: the service is pre-recorded and this is explained in the advertising and at the start of the recording and the service is for entertainment only and this is clear from the advertising and is explained at the start of the recording and all references to tarot in the service and the advertising are qualified to make clear that it is not a "real" tarot service (e.g. "tarot-based reading" would be acceptable) and the service does not contain any material which might feel threatening to callers, or which might harm, offend or distress them

b) Advertisements for books, newspaper or magazine articles and similar paper or electronic publications which refer to or discuss tarot without recommending or promoting it.

2) For these purposes, 'the occult' includes, for example, invocation of spirits, tarot and attempts to contact the dead or demons.

3) Products or services concerned with exorcism may not be advertised since they are

concerned with the occult in the sense of being intended to counter it.

4) Psychic practices include astrology, horoscopes, palmistry etc. An exception to part (b) of the rule has been made for the advertising of services (for example, typical newspaper horoscopes) which most viewers are likely to regard simply as entertainment and which offer only generalised comments that would clearly apply to large sections of the population. Such advertising must comply with the rules on misleading advertising in Section 5.

5) Beyond Entertainment is an ITC-commissioned report on research which explored attitudes in this area, including the distinctions the public draw between the occult and psychic issues.

15.36 Present radio rule 3.12 of section 3 states:

3.12 Divination and the Supernatural

Astrological services, along with products and services of a psychic nature, such as clairvoyance, divination, mediumship and psychic exhibitions or fairs, may be advertised but no claims of efficacy can be made or implied. Advertising must conform to the rules in this Code on harm, and scheduling restrictions may apply.

15.37 BCAP considered the policy underpinning the present rules and assessed if, in BCAP's opinion, evidence merited changes to them. BCAP presents here:

- i) The extent to which law and other regulatory bodies regulate products or services relating to psychic or occult phenomena
- ii) the effect of, and policy underpinning, the present rule
- iii) evidence relevant to the review of the present rule
- iv) BCAP's proposal to maintain the present rules and options that BCAP has considered and, on balance, not favoured.

i) The law and other regulatory bodies

15.38 The Communications Act 2003 requires BCAP, through its contracting-out agreement with Ofcom, to ensure that persons under the age of 18 are protected and that the inclusion of advertising which may be misleading, harmful or offensive in TV and radio services is prevented.

15.39 No legislation specific to occult or psychic practices is presently in force. The Fraudulent Mediums Act 1951 was repealed when the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) came into force. The CPRs contain no provisions specific to occult or psychic practices; those practices are subject to the general prohibitions on misleading, aggressive and unfair practices. For more information about the CPRs, see 'Appendix 3: Outline of the effects of the Consumer Protection from Unfair Trading Regulations 2008' to the proposed Broadcast Advertising Standards Code, which is included in Annex 1 of this consultation document.

15.40 When they came into force, many news reports claimed that the CPRs required psychics to include the text 'for entertainment purposes only' or similar in their advertisements. That is not an explicit requirement of the CPRs and, although it might help to render some advertisements compliant, cannot be relied on to bring otherwise unfair advertisements into line with the law or the BCAP Code.

15.41 PhonepayPlus (www.phonepayplus.org.uk) regulates services offered in return for payment by premium-rate call charge, including live psychic PRS.

15.42 Trading Standards organisations may enforce consumer protection legislation against providers of products or services that relate to psychic or occult practices.

ii) The effect of and policy underpinning the present rules

- 15.43** BCAP has reviewed rule 10.3 of the present Television Code and rule 3.12 (section 3) of the present Radio Code. It has, in that review, been minded to the Communication Act's requirements to ensure that under 18s are protected and advertisements that may be misleading, harmful or offensive are prevented.
- 15.44** As indicated in Part 1 (4) of this consultation document, this review is the first thorough examination of the Television and Radio Advertising Standards Codes since the establishment of Ofcom in 2003 and of BCAP in 2004. In the main, therefore, the policies underlying the rules in the present Codes date back to the previous regulators, specifically the Independent Television Commission and the Radio Authority. In many cases, the historical rationale for those policies is no longer clear. BCAP has therefore had to make some assumptions about the origins of rules and their underlying policies, as indicated in this analysis.
- 15.45** The effect of TV rule 10.3 is to prohibit TV advertisements for products and services that rely on belief in psychic or occult phenomena. TV advertisements for three types of product are explicitly exempted from that prohibition: pre-recorded tarot services, publications that discuss tarot without recommending it and services that readers are likely to regard as entertainment and that offer advice that would obviously apply to large sections of the population (such as newspaper horoscopes).
- 15.46** The Radio Code allows radio advertisements for those products provided no efficacy claims are made.
- 15.47** In both Codes, the rules cover products and services that relate to a wide range of practices including astrology, horoscopes, palmistry, tarot, mysticism, chakra healing, divination, crystals, reading auras, clairaudience and clairvoyance. Those might be offered to the public in a variety of forms from related paraphernalia to publications, from clinics and other establishments to psychic exhibitions or fairs, and by face-to-face or distance-selling means.
- 15.48** The policy underpinning the rules is principally intended to prevent vulnerable members of the audience from being harmed or exploited. Those who are particularly vulnerable to this category of advertising include, for example, children, those suffering ill health, the recently bereaved, those going through divorce or separation, victims of crime and those in financial difficulty. Vulnerable groups could potentially be caused mental, moral or financial harm by broadcast advertisements for those products. Potential harm includes indirect harm caused by discouraging individuals from seeking more suitable professional help, for example mental health counselling, financial planning or medical consultation.
- 15.49** BCAP considers offence is also a relevant factor in the policy underpinning the present TV rule because some products and services relating to psychic or occult practices are, by their nature, offensive to some people and not just those with religious or moral convictions.
- 15.50** BCAP considers the sector throws up concerns about misleading advertising too; BCAP knows of no adequate evidence for the efficacy of products and services in this category.
- 15.51** The Television Code bans *advertisers* that provide products or services that rely on belief in psychic or occult phenomena; the Radio Code merely prohibits claims for the efficacy of those practices in *advertisements*. That difference in approach probably takes account of the broad reach of television, its place in the family home and its audio-visual impact, which can, in combination, have a powerful impact on society at large and on individuals, particularly viewers who have an underlying vulnerability to the advertised product. The present TV rule might suggest, therefore, that the power of TV advertising inappropriately validates or otherwise lends weight to a product or service that could cause harm to vulnerable members of the audience, including children. Although radio has a broad reach, that by itself was clearly not considered enough to justify a ban on those advertisers. A ban on claims in radio advertisements for the efficacy of practices that rely on belief in psychic or occult phenomena, and a note to broadcasters to ensure those advertisements are suitably scheduled and comply with the general harm rules, was evidently thought sufficient to deal with the potential for harm or offence.

iii) Evidence relevant to the review of the present rule

- 15.52** The ITC conducted research in 2001 into public attitudes to occult and psychic practices featured in television programmes and advertisements (see www.ofcom.org.uk/static/archive/itc/research/beyond_entertainment.pdf).

- 15.53** That research was conducted after the present Television Code was drafted but before the emergence of television programmes predicated on the use of psychic PRS. The research found that the audience discriminated between benign psychic practices and other psychic and occult practices that have the potential to harm the vulnerable. The quantitative element of the research found:

‘...viewers were very conservative about the kind of advertisements they considered acceptable on a mainstream channel, such as ITV1. Aside from advertisements for horoscopes along the lines of “What your year holds” in a Sunday tabloid, and advertisements for a pre-recorded horoscope phone line offering daily updated predictions for each star sign, respondents were unhappy to accept other offerings. They were slightly more accepting of psychic and occult advertising on a standard Pay-Television channel, such as Sky One, but not to any great extent. It is clear from this research that the majority of viewers do not want to see such advertising on channels that reach a broad audience ...’⁴³

- 15.54** The research concluded:

‘For advertising, television’s greater authority and wider audience than print meant there was greater expectation of regulation of the former, and more latitude for the latter... Concern centred on the apparently unregulated nature of fringe professions, leading to higher expectations of regulation by the broadcasting authority or regulator.’⁴⁴

- 15.55** The ITC’s research predated the emergence of television programmes predicated on the use of psychic PRS (‘Psychic TV’). Psychic TV typically consists of broadcasts encouraging viewers to call premium-rate telephone numbers to speak to psychics; some conversations between viewers and psychics are broadcast and some are conducted off-air. This content can appear on channels dedicated to this genre of programming or in “windows” (typically three-hour slots) on other general lifestyle channels. Ofcom might conclude, on a case-by-case basis, that particular content predicated on PRS, including psychic PRS, does not comply with its Broadcasting Code in its present form or as amended. Broadcasters would then need to consider whether to adjust their format or broadcasting model to bring their services into compliance with the Broadcasting Code, or whether they could operate as advertising (teleshopping). The latter must comply with the present Television Code and, in time, the proposed BCAP Code. Please see ‘Ofcom consultation on Participation TV’ (‘PTV’), above, for more information.

- 15.56** In July 2007, as part of its consultation on PTV⁴⁵, Ofcom published ‘An independent report on Participation TV – quizzes, adult chat and psychic readings’ to help understand how viewers perceive PTV, including Psychic TV, and what their concerns are if any (see www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf). The report stated:

‘In the qualitative research respondents claimed that their calls to Psychic channels tended to be infrequent, but bursts of calling could be triggered by specific personal events or “lows”. In these circumstances, the frequency of calling could increase considerably. Respondents had been prompted to call TV ‘psychics’ by events such as family deaths, miscarriages, break-up of relationships or general depression. The qualitative research suggested that viewers’ reasons for calling tended to be the need for support, guidance or reassurance ...’⁴⁶

‘Some respondents hinted that their judgement, or that of other callers, may sometimes be impaired at the time of participation. Reasons for this perceived vulnerability included insomnia and heavy alcohol consumption before or during viewing. However, when talking to Psychic TV viewers, it became clear that they were particularly concerned about the emotional vulnerability of callers to TV ‘psychics’. The ‘psychic’ is believed to provide guidance or reassurance when callers are depressed or dealing with difficult personal events. While most regular viewers of Psychic TV could happily watch for long periods without feeling compelled to call in, the decision to call in was normally triggered by a specific incident or feeling of depression, hence callers were often in an emotionally fragile state of mind. Some respondents recognised that they have

⁴³ www.ofcom.org.uk/static/archive/itc/research/beyond_entertainment.pdf (p. 47)

⁴⁴ www.ofcom.org.uk/static/archive/itc/research/beyond_entertainment.pdf (p. 52)

⁴⁵ <http://www.ofcom.org.uk/consult/condocs/participationtv/>

⁴⁶ www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf (p. 7).

been or could be emotionally vulnerable when calling in. “A while back I lost my mum and dad and I started to feel addicted (to Psychic channels) to try to make some sense of my loss.” Female, London. “I spent a hell of a lot of money on it (Psychic Interactive). I was going through a dark patch. I get so down about... (several miscarriages and husband’s disability) ... and they were telling me what I wanted to hear, so I’m not sure if it was a waste of money. They were telling me what was going to happen.” Female, Sussex⁴⁷

‘A number of respondents claimed that they had experienced very high telephone bills after heavy use of PRS to call... Psychic channels....Since the size of telephone bills was only discussed qualitatively, this research cannot quantify the average monthly bill incurred by callers to PTV channels, nor how many callers are experiencing serious problems. However, the following quotes are typical among those who were willing to discuss their own experiences. “My bill was between £300 and £400 from calling Psychic Interactive...” Female, Sussex, Psychic depth interview⁴⁸

‘A minority of respondents referred directly to being “addicted” to calling... Psychic TV. “Psychic Interactive can be very more-ish. They say something you think is true, but you don’t know if it’s from something you’ve told them, so then you have to ring up again, so it’s quite addictive for me.” Female, Sussex, Psychic depth interview⁴⁹

- 15.57** Although they are not the only measure of offence or harm, complaints can be an indicator. BCAP noted that radio advertisements for psychic practices have generated no significant complaints. BCAP could not draw on complaints about TV advertisements for those practices because they are largely banned. BCAP noted that, since 2007, Ofcom has received very few complaints about Psychic TV; none of those complaints were found in breach of Ofcom’s Broadcasting Code. Those complaints raised concerns about, for example, misleading practices, the giving of life-changing advice and a psychic channel’s proximity to a children’s channel on the Electronic Programme Guide.

iv) BCAP’s proposal to maintain the present rules and options that BCAP has considered and, on balance, not favoured.

- 15.58** BCAP weighed up, on the one hand, the desire of some audience members to see advertisements for products or services relating to the occult or psychic practices and, on the other, the need to protect the vulnerable from potentially harmful material and material that could cause serious or widespread offence. BCAP considered that, although it possibly did not envisage long-form television advertisements for products and services that rely on belief in psychic or occult phenomena, the policy underpinning the present TV rule is as relevant to those advertisements as to TV spot advertisements for those products and services. BCAP took account of the fact that radio advertisements for those products and services have been allowed, albeit without efficacy claims, since 2000 and have generated no complaints. It considers the radio rule has been effective and proposes to maintain it. BCAP considers, however, that TV’s broad reach, its place in the family home and its audio-visual impact can, in combination, have a powerful impact on society at large and on individuals. It considers the impact of TV advertisements for those products and services on viewers who have an underlying vulnerability to the advertised product is likely to be much greater than the impact of radio advertisements on listeners with the same underlying vulnerability. BCAP therefore proposes to maintain the present TV rule.

- 15.59** BCAP’s principle consideration is to protect the audience from harm, most obviously to protect the vulnerable from exploitation. To secure that protection, the Communications Act 2003 provides that the Code (under the contracting-out agreement with Ofcom):

321(1)(b) may include provision prohibiting advertisements and forms and methods of advertising or sponsorship (whether generally or in particular circumstances).

- 15.60** In reaching its proposal for TV advertisements for products or services relating to psychic or occult practices, BCAP considered three broad approaches:

1) maintain the prohibition on advertisements for products and services relating to the psychic or occult with the present exceptions;

⁴⁷ www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf (p. 23).

⁴⁸ www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf (p. 24).

⁴⁹ www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf (p. 25).

2) maintain the prohibition on advertisements for products and services relating to the psychic or occult but add a category of exempted products: premium-rate telephone services operating with prior permission from PhonepayPlus;

3) maintain an explicit prohibition on advertisements for occult products; allow advertisements for psychic products in principle but draft rules designed to prevent the most harmful psychic products from being advertised, and limit the claims that can be made for the products that can be advertised.

15.61 Under option 2, BCAP considered adding a category of exempted products: those that operate under prior permission from PhonepayPlus. All live PRS providers in this category must obtain prior permission to operate from PhonepayPlus and must

- give call cost and service provider information at the start of the call,
- discourage users from giving out information about their surname, place of work, address, geographic telephone numbers or from arranging meetings,
- user reasonable endeavours to prevent people under 18 from taking part
- end calls if they have reasonable grounds, after questioning a user, to suspect the user is under 18 and
- take reasonable steps to identify and cut off calls made without the bill payer's permission.

15.62 BCAP acknowledged that those rules could limit the potential harm to children that might otherwise be caused by such services and, to an extent, protect adult consumers from being misled. It noted, however, that PhonepayPlus's rules neither restrict the content that might be offered on those services nor protect adult callers from exploitation, for example through predictions of negative events that encouraged users to make repeated calls or by offering advice that might cause consumers to take life-changing decisions, including decisions affecting their finances or health. The protection provided by PhonepayPlus does not alleviate BCAP's concern that such services might exploit the vulnerable. BCAP considered that advertisements for those services did not therefore warrant an exemption from the general ban on advertisements for products and services relating to the psychic or occult.

15.63 BCAP noted many operators presently offering editorial psychic interactive TV services have adopted voluntary guidelines, which their psychics are advised to adhere to, to protect the vulnerable. Those guidelines compliment Ofcom's requirement that demonstrations of exorcism, the occult, the paranormal, divination, or practices related to any of these whether such demonstrations purport to be real or are for entertainments purposes) must not give life-changing advice directed at individuals⁵⁰. BCAP was concerned, however, that those voluntary guidelines do not go far enough to prevent the exploitation of the vulnerable and that new entrants to the market might choose to disregard voluntary standards.

15.64 Under option 3, BCAP considered maintaining the explicit ban on TV advertisements for products and services relating to the occult but allowing, in principle, advertisements for products and services relating to psychic practices, the latter being subject to rules designed to prevent advertisements for psychic products that have the potential to be harmful. BCAP considered, however, that that could lead to uncertainty about which advertisers are acceptable and which are not. Although those rules would ensure the content of advertisements would be responsible, by limiting the claims that can be made for the products that can be advertised, they would not necessarily preclude types of advertisers that might exploit the vulnerable. Again, that consideration takes into account the impact of TV on viewers who have an underlying vulnerability to the advertised product. BCAP considered the present TV rule is clear because it exempts advertisements for distinct types of products or services. BCAP did not consider it had the evidence to justify exempting other psychic practices from the ban on TV advertisements for products and services that rely on belief in psychic or occult phenomena

15.65 On the balance of evidence, BCAP proposes to maintain the present TV and radio policy in proposed rules 15.4 and 15.5:

15.4

Television and television text advertisements must not promote psychic practices or practices related to the occult, except those permitted by rule 15.5. Radio advertisements may promote psychic and occult practices but must not make efficacy claims.

Psychic and occult-related practices include astrology, personalised horoscopes, palmistry, fortune-telling, tarot, attempts to contact the dead, divination, clairvoyance, clairaudience, the invocation of spirits or demons and exorcism.

15.5 – Television and television text only

Television and television text advertisements may promote services that the audience is likely to regard merely as entertainment and that offer generalised advice that would obviously be applicable to a large section of the population, for example, typical newspaper horoscopes.

15.5.1

Advertisements may promote a pre-recorded tarot-based prediction service if:

15.5.1.a

the service includes no content that respondents might feel to be threatening and

15.5.1.b

both the advertisement and the service state clearly that the service is pre-recorded and qualify references to “tarot” to make clear that the predictions are not based on live readings.

Question 97

Given BCAP's policy consideration, do you agree to maintain the existing TV and radio requirements on advertisements for products or services concerned with the occult or psychic practices? If your answer is no, please explain why.

Other questions

Question 98

i) Taking into account BCAP's policy consideration, do you agree that BCAP's rules on Faith, Religion and Equivalent Systems of Belief are necessary and easily understandable? If your answer is no, please explain why?

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

iii) Do you have other comments on this section?

Part 2 - Section 16

Charities

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

Background

The law

Communications Act 2003

- 16.1** This Act sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objective to the Charities Section of the BCAP Code is:

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

319(2)(g) that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services

- 16.2** See the full text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

Charities Act 1992 (as amended)

- 16.3** The Charities Act 1992 sets out specific obligations on certain individuals or organisations that fundraise for charities in return for payment in some form. This includes provisions as to what information is given to potential donors. This Act also sets out provisions in relation to 'commercial participators' who advertise or offer goods or services for sale with an indication that some part of the proceeds are to be donated to charity. They have an obligation to set out key information in a statement. This Act also states it is an offence for an individual or organisation which is not a charity to solicit donations by representing that it is a registered charity. The Charitable Institutions (Fund-Raising) Regulations 1994 provide further related regulations.

- 16.4** See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=1699799

- 16.5** See the text of the Charities Act 1993 (as amended) at:

www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=1700197

- 16.6** See the text of the Charitable Institutions (Fund-Raising) Regulations 1994 at:

www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3147060

Charities Act 2006

- 16.7** This Act provides for the establishment and functions of the Charity Commission for England and Wales and the Charity Tribunal; to make other amendments of the law about charities, including provision about charitable incorporated organisations; to make further provision about public charitable collections and other fund-raising carried on in connection with charities and other institutions; to make other provision about the funding of such institutions and for connected purposes.

16.8 See the full text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=2939707

16.9 Guidance on implementation of the Charities Act 2006

www.cabinetoffice.gov.uk/media/cabinetoffice/third_sector/assets/brief_guide_implementation.pdf

Charities Act Northern Ireland (2008)

16.10 This Act provides for the establishment and functions of the Charity Commission for Northern Ireland and the Charity Tribunal for Northern Ireland; to make provision about the law of charities, including provision about charitable incorporated organisations; to make further provision about public charitable collections and other fund-raising carried on in connection with charities and other institutions; and for connected purposes.

16.11 See the full text of the Charities Act Northern Ireland (2008) at:

www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3528436

Charities and Trustee Investment (Scotland) Act 2005

16.12 This Act establishes a system of charity regulation in Scotland. The Office of the Scottish Charity Regulator was established through Part 1 of the Act and is required to regulate all charities in Scotland.

16.13 See the full text of the Charities and Trustee Investment (Scotland) Act 2005 at:

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

Other relevant regulatory bodies

Charity Commission

16.14 The Charity Commission for England and Wales is established by law as the regulator and registrar of charities in England and Wales. Most charities in England and Wales have to register with them. They are responsible for maintaining the Register of Charities, which can be viewed on their website⁵¹. Charities with yearly incomes over £10,000 must by law send their accounts to the Charity Commission and report every year within 10 months of their financial year-end.

Department for Social Development Northern Ireland

16.15 The Department for Social Development is the charity authority for Northern Ireland. Its Charities Branch of its Voluntary & Community Unit handles the normal day-to-day work. Most of its functions are carried out under the Charities Act (Northern Ireland) 1964 and the Charities (Northern Ireland) Order 1987, but it has no statutory role in connection with the setting up of new charities. The introduction of the Charities Act (Northern Ireland) 2008 means that by April 2009 the Northern Ireland Charity Commission will be established⁵² and bring Northern Ireland broadly into line with the Charity Commission and the Office of the Scottish Charity Regulator.

⁵¹ www.charity-commission.gov.uk/

⁵² www.dsdni.gov.uk/charities_draft_time_table.htm

Office of the Scottish Charity Regulator (OSCR)

- 16.16** The Office of the Scottish Charity Regulator is established by law as the regulator and registrar of charities in Scotland. The Charities and Trustee Investment (Scotland) Act 2005 gives OSCR a number of key functions in relation to charities these can be found on their website⁵³.

Other

- 16.17** Bodies that play a part in regulating a broadcast advertisement of relevance to this section but are not conferred with legal functions to do so include: Clearcast, (www.clearcast.co.uk), the RACC, (www.racc.co.uk) and the Institute of Fundraising (www.institute-of-fundraising.org.uk/bestpractice).

Meeting the need to regulate broadcast advertisements for charities

- 16.18** Advertisements for charities or advertisements that include charity-based promotions have the potential to take unfair advantage of the audience's charitable impulses, to include content that might offend or distress and to mislead about, for example, the objectives of the charity or the basis on which the amount to be donated will be calculated. The present Codes and the proposed Code address that potential detriment by prohibiting unacceptable charity advertisers and including detailed rules that prevent unacceptable charity advertisements.
- 16.19** Because of the nature of some charities, the charity section in the Code cross-refers the reader to: section 7: Political and Controversial Matters, section 5: Children, section 15: Faith, Religion and Other Systems of Belief, section 9: Environmental Claims and section 32: Scheduling.

Proposed substantive changes

New rules

- 16.20** None.

Revised rules

Requirement to identify charities

- 16.21** The present Television Code states:

11.3.6 References to charities in general advertising

(d) Advertisements which offer to donate money to charity must:

identify the charities which will benefit.

- 16.22** Section 3 of the present Radio Code states

2.4 References to Charities in Advertisements by Commercial Advertisers

(b) where advertisements include an offer to donate part of the proceeds of sales to charity:

⁵³ www.oscr.org.uk/

each advertisement must specify which individual charity or group of charities will benefit and clarify how the donations will be calculated.

- 16.23** The present Codes require advertisements that refer to charities to identify, in the advertisement, all charities that will benefit from donations. BCAP recognises that is important information for the audience but it considers that that requirement adversely impacts radio and, to a lesser extent, television, where there is an incremental cost for airtime.
- 16.24** To meet the audience's need for transparency and to account for the cost constraints of broadcast advertising airtime, BCAP proposes:

16.5

Advertisements that include an offer to donate money to charity must:

16.5.2

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.

Question 99

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.

Medicine advertisements and donations to charities

- 16.25** The present Television Code states:

11.3.6(f)

Advertisements for medicinal products must not offer to donate money to charity.

- 16.26** Section 3 of the present Radio Code states:

2.4 References to Charities in Advertisements by Commercial Advertisers

(b) where advertisements include an offer to donate part of the proceeds of sales to charity:

(iv) offers of this kind in connection with advertisements for medicinal products are unacceptable;

- 16.27** The Medicines (Advertising) Regulations 1994 do not prohibit an advertisement for a medicine from offering to donate money to charity. The Government introduced legal restrictions⁵⁴ on pack sizes of analgesics on sale to consumers in 1998 in order to reduce toxicity in overdose, particularly related to impulsive gestures which may be associated with stocks of medicines in the home. The MHRA discourages any volume-based promotion on products containing analgesics. This is an area of voluntary action by relevant stakeholders which the MHRA closely monitors.

54 The Medicines (Sale or Supply) (Miscellaneous Provisions) Amendment (No.2) Regulations 1997 (SI 1997/2045)

The Medicines (Products Other Than Veterinary Drugs) (General Sale List) Amendment Order 1997 (SI 1997 2043).

Pharmacy pack sizes were introduced by amending Schedule 1 of the POM Order (SI 1997/2044).

16.28 Those TV and radio rules and the restrictions on the sale and supply of analgesics, is likely intended to prevent advertisements from encouraging unnecessary, indiscriminate, excessive or otherwise irresponsible or potentially harmful purchases of a medicine. BCAP considers charity-based promotions in medicine advertisements are not, in themselves, irresponsible or harmful. BCAP considers, however, that such advertisements should not take advantage of the public's charitable impulses by, for example, offering to donate a large percentage of the price of the medicinal product to charity; that might encourage unnecessary purchase of the product.

16.29 BCAP's proposed television and radio rule is:

16.7

Advertisements for medicinal products may offer to donate money to charity but must not be likely to encourage indiscriminate, unnecessary or excessive purchases of medicinal products. Advertisements must state the basis on which the contribution will be calculated. See also Section 11 Medicines, Medical Devices, Treatments and Health.

16.30 BCAP considers that proposed rule, rule 11.14 that prevents an advertisement from encouraging indiscriminate, unnecessary or excessive use of medicine and its proposed new rule, 1.2, 'Advertisements must be prepared with a sense of responsibility to the audience and to society' ensures that charity-based promotions in medicine advertisements are acceptable.

Question 100

i) Given BCAP's policy consideration, do you agree that the present TV and radio prohibitions on charity-based promotions in medicine advertisements should be deleted? If your answer is no, please explain why.

ii) Given BCAP's policy consideration, do you agree that 16.7 should be included in the new code? If your answer is no, please explain why.

Deleted rules

Complying with Data Protection Legislation

16.31 Section 3 of the present Radio Code states:

2.3 Advertisers must be required to give the following assurances:

(c) that they will not publish or otherwise disclose the names of contributors without their prior permission and that they otherwise comply with the requirements of current Data Protection Legislation.

16.32 In practice, that rule requires the broadcaster to obtain an assurance that the advertiser complies with the requirements of Data Protection Act. BCAP considers that is an obligation placed on all organisations who obtain, store, or process personal data and, therefore, it is not, in BCAP's opinion, necessary to require the broadcaster to obtain an assurance from the advertiser to that end. However, BCAP proposes to include a cross-reference to the Data Protection Act 1998 in this section.

Question 101

Given BCAP's policy consideration, do you agree that it is not necessary to require a broadcaster to obtain an assurance that the advertiser will not disclose data to a third party without the client's consent, and the client's name will be promptly deleted on request? If your answer is no, please explain why.

Comparisons with other charities

16.33 The present BCAP Television Code states:

11.3.5 Comparisons

Advertisements must not include comparisons with other charities, non-charitable voluntary bodies or government aid agencies.

16.34 Section 3 of the present BCAP Radio Code states:

2.5 Advertisements for charities must:

e) not contain comparisons with other charities

16.35 The law does not directly prohibit charity advertisements from including comparisons with other bodies, including other charities. Those rules likely prevent misleading comparisons, because accurate, like-for-like comparisons might be difficult for a charity or a broadcaster to establish, and those rules likely help maintain the public trust in and perception of the charity sector; 'tit-for-tat' charity comparison advertising might bring the sector into disrepute and adversely impact donations.

16.36 BCAP has weighed up, on the one hand, the protection the rule affords and, on the other hand, the freedom of charity advertisers to compare themselves favourably with other bodies, including other charities. BCAP considers its proposed Code includes extensive rules that prevent misleading claims in general and unfair comparisons in particular (see Section 3: Misleading of the proposed Code), which ensure that charity advertisements that include comparisons with other bodies do not mislead the audience. BCAP considers its proposed new rule, 1.2, 'Advertisements must be prepared with a sense of responsibility to the audience and to society' and detailed rules that ensure charity advertisements are not irresponsible ensure that the charity sector would not be brought into disrepute by charity comparison advertisements.

16.37 On balance, BCAP considers the benefits of lifting the prohibition, for consumers and charities that are comparatively more efficient or otherwise more effective than other bodies undertaking similar activities, outweighs any benefit of maintaining the present rule.

Question 102

Given BCAP's policy consideration, do you agree that the present TV and radio prohibitions on comparisons in charity advertisements should be deleted? If your answer is no, please explain why.

The right of refund for credit or debit card donations of £50 or more

16.38 Section 3 of the present Radio Code states:

Section 2.4 References to Charities in Advertisements by Commercial Advertisers

(c) if the advertisement states that payment may be made by credit or debit card, full details must be given of the donor's right to have any payment so made of £50 or more refunded.

- 16.39** That requirement reflects section 60(4) of the Charities Act 1992 (as amended)⁵⁵, which applies to TV and radio. The present BCAP Television Code does not include an equivalent rule. BCAP proposes not to include radio rule 2.4 in the Code because it cannot envisage a scenario in which a third party, for example a shampoo advertiser, invites the audience to donate over £50 to its nominated charity. Charity-linked promotions in advertisements tend to be linked to the purchase of a product, for example, ‘buy shampoo X and we will donate 10p to charity X.’ In the unlikely event that that legal provision is relevant, BCAP’s general requirement for broadcasters to comply with the law can be invoked.

Question 103

Given BCAP’s policy consideration, do you agree that the present radio rule, 3.2.4, should be deleted? If your answer is no, please explain why.

Other questions

Question 104

- i) Taking into account BCAP’s general policy objectives, do you agree that BCAP’s rules included in the proposed Charities 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 Charities rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and should be retained or otherwise be given dedicated consideration?
- iii) Do you have other comments on this section?

⁵⁵ Part 2, 60(4) (4) If any such solicitation or representation as is mentioned in any of subsections (1) to (3) is made—

(a) in the course of a radio or television programme, and

(b) in association with an announcement to the effect that payment may be made, in response to the solicitation or representation, by means of a credit or debit card,

the statement required by virtue of subsection (1), (2) or (3) (as the case may be) shall include full details of the right to have refunded under section 61(1) any payment of £50 or more which is so made.

Part 2 - Section 17

Gambling

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

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

Background

The law

Communications Act 2003

- 17.1** The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The “standards objectives” most relevant to the Gambling Section and Lotteries Section of the BCAP Code are:

3 (3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—

(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed;

319(2)(a) that persons under the age of eighteen are protected;

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

- 17.2** See the full text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

Gambling Act 2005

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

- 17.4** Section 1 of the Act states its licensing objectives:

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

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

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

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

National Lottery etc Act 1993

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

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

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

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

17.7 See the full text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=2459584

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

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

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

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

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

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

19 Rights under—

a) a contract for differences; or

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

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

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

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

17.11 See the full text of FSMA at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=2927341

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

fsahandbook.info/FSA/html/handbook/COBS

17.13 The FPO may be found at:

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

Other relevant regulatory bodies

Gambling Commission

- 17.14** The Gambling Commission was set up under the Gambling Act 2005 and was formally established in October 2005. It took over the role previously played by the Gaming Board for Great Britain in regulating casinos, bingo, gaming machines and lotteries and also has responsibility for the regulation of betting and remote gambling, as well as helping to protect children and vulnerable people from being harmed or exploited by gambling. The Commission advises local and central government on issues related to gambling. It is a Non-Departmental Public Body, sponsored by the Department for Culture, Media and Sport that operates at arm's length from government and its advice is independent. The Commission's work is funded mainly by licence fees from the gambling industry.
- 17.15** 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. Ofcom is responsible for setting, reviewing and revising standards for broadcast gambling advertisements in consultation with the Gambling Commission. BCAP exercises that role under its contracting-out agreement with Ofcom. 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.
- 17.16** The Gambling Commission can choose to include other provisions on non-broadcast advertising in its codes of practice. Ultimately, the Secretary of State has a reserve power to make regulations on non-broadcast advertising. If such regulations are ever made, under the Act their provisions have to be reflected in the BCAP broadcast advertising rules.
- 17.17** More information on the Gambling Commission can be found here:
www.gamblingcommission.gov.uk/Client/index.asp

National Lottery Commission

- 17.18** The National Lottery Commission regulates the National Lottery and enforces the National Lottery Advertising and Sales Promotion Code of Practice, which states that it should be applied in conjunction with industry regulations, particularly those issued by the ASA, the Committee of Advertising Practice and the Independent Television Commission (ITC), effectively BCAP under the contracting-out of broadcast advertising regulation by the ITC's successor, Ofcom.
- 17.19** More information on the National Lottery Commission can be found here:
www.natlotcomm.gov.uk/CLIENT/index.asp

Financial Services Authority (FSA)

- 17.20** Spread betting is regulated by the FSA and may be advertised as an investment activity under FSMA, the FPO and in accordance with the FSA Handbook.
- 17.21** More information on the Financial Services Authority can be found here: www.fsa.gov.uk/

Other

- 17.22** Other bodies that play a part in regulating a broadcast advertisement of relevance to this section but that are not conferred with legal functions to do so include Clearcast (www.clearcast.co.uk) and the RACC (www.racc.co.uk).
- 17.23** Readers should note that gambling advertisements are also subject to the Gambling Industry Code for Socially Responsible Advertising, which the industry imposed on itself voluntarily. Read more at the Gambling Commission's website here:

www.gamblingcommission.gov.uk/Client/mediadetail.asp?mediaid=190

Recent changes to this section of the BCAP Code

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

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

- 17.25** At present, broadcast advertisements for gambling products and services are regulated by general and specific BCAP rules that ensure children and vulnerable persons are not harmed or exploited. The rules put into place key general principles on social responsibility: further, they seek to prevent advertising from exploiting children by restricting the scheduling of advertisements and prohibiting certain types of content in gambling advertisements to minimise their appeal to young audiences; similarly, they seek to protect the vulnerable by prohibiting approaches that target financial or psychological vulnerabilities associated with problem gambling.
- 17.26** BCAP proposes to maintain that approach and those rules in its proposed Code but it proposes to create a separate, dedicated section for all lottery advertisements, which, with one exception, includes all the rules that presently apply to society and local authority lotteries ('SLA lotteries').
- 17.27** The National Lottery is presently subject to dedicated BCAP advertising rules that are less numerous and, on certain points, less restrictive than the BCAP gambling rules, which applies to SLA lotteries.
- 17.28** The recent BCAP Gambling Advertising Consultation⁵⁶ ensured that all gambling rules, including those that apply to SLA lotteries, secure the objectives set out in the Gambling Act 2005⁵⁷ and the relevant principles and standards objectives set out in s.3 and s.319(2) of the Communications Act 2003⁵⁸.

⁵⁶ www.cap.org.uk/cap/Consultations/closed/gambling_consultation/

⁵⁷ www.opsi.gov.uk/acts/acts2003/ukpga_20030021_en_1

⁵⁸ www.opsi.gov.uk/acts/acts2003/ukpga_20030021_en_1

Proposed substantive changes

Background

- 17.29** In their 2006 consultation on gambling advertisements, BCAP and CAP proposed that the UK National Lottery should be regulated under the proposed non-broadcast and broadcast gambling advertising rules, which included exceptions for lottery advertisements. The vast majority of respondents agreed. Those responses came from a broad range of stakeholders including media owners and related bodies and marketers (the 'advertising industry'), gambling advertisers (the 'gambling industry') and faith entities. Significant points raised in favour of the proposal to include the National Lottery in the proposed gambling rules were: a proposal to move regulation of the National Lottery from the National Lottery Commission (NLC) to the Gambling Commission (GC), which government rejected because of the National Lottery's special role; there is no reason why that reasoning should extend to advertising regulation; consumers are best served by one set of rules and one regulator to which to complain; the good causes that benefit from National Lottery sales do not negate any risks the National Lottery may carry for children, young persons and vulnerable adults; those risks are greater for scratch cards, which provide instant gratification; the objectives in the proposed CAP and BCAP rules are just as pertinent to the National Lottery as to other operators.
- 17.30** Significant points in opposition to the proposal to include the National Lottery in the proposed gambling rules were: there is regulatory demarcation between the National Lottery and other gambling operators in the form of the NLC and the GC; the National Lottery was intended by Parliament to have a special national status and major fundraising role; the National Lottery operator is also regulated by the NLC under the National Lottery Code of Practice and could be subject to double regulation if two detailed sets of sector-specific rules were applied by two different bodies; the rationale for the proposed gambling rules reflects the licensing objectives of the Gambling Act, which do not apply to the National Lottery.
- 17.31** BCAP and CAP acknowledged the backing for the proposal to include the National Lottery within the CAP and BCAP gambling rules. But they were mindful of the unique status of the National Lottery, which continues to be subject to specific regulation administered by the NLC, as highlighted in the NLC's consultation response. CAP and BCAP accepted that implementation of the Gambling Act provides no explicit public policy mandate to include the National Lottery in the proposed gambling rules. On balance, CAP and BCAP decided to exclude the National Lottery from the new CAP and BCAP gambling rules.
- 17.32** However, that decision meant the BCAP TV and Radio Codes continued to maintain rules for the National Lottery that are less numerous and, on certain points, less restrictive than the BCAP gambling rules, which applies to all other lotteries (see Table 1 below). Because the Communications Act requires that under 18s should be protected and, like the Better Regulation principles, that regulation should be consistent, BCAP determined to maintain dialogue with the NLC about how the National Lottery is regulated under the BCAP Codes, mindful of the special status of the National Lottery.
- 17.33** BCAP has since held discussions with the NLC and other relevant public bodies with a view to ensuring the relevant requirements of the Communications Act are met. BCAP's proposals take into account those bodies' views but it does not necessarily imply their endorsement.

17.34 Table 1.

Present rules applicable to National Lottery advertisements	Present rules applicable to other lottery advertisements
Advertisements must not use treatments likely to be of particular appeal to under 16s . Advertisements must not feature any personality whose example children under 16 are likely to follow or who has particular appeal to audiences under the relevant age	Advertisements must not be likely to be of particular appeal to children or young persons [under 18s] , especially by reflecting or being associated with youth culture
	Advertisements for a lottery product may include under 18s in an incidental role. No-one who is, or seems to be, under 25 years old may be featured gambling or playing a significant role
	Advertisements that exclusively feature the good causes that benefit from a lottery and include no explicit encouragement to buy a lottery product may include children or young persons and they may be featured playing a significant role.

New rules

The National Lottery

Consistency; principle

- 17.35** BCAP proposes to create a dedicated lottery advertising section, which would include rules that have applied to advertisements for SLA lotteries since September 2007 and would, for the first time, apply to broadcast advertisements for the National Lottery. BCAP considers the requirement for consistency, 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. BCAP is not aware of any legal or significant regulatory obstacle to its proposal.

Question 105

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

Consistency: age of appeal of content

- 17.36** The existing BCAP TV and radio rules provide that the content of SLA lottery advertisements must not be directed at or likely to be of particular appeal to under 18s. National Lottery advertisements, however, must not use treatments likely to be of particular appeal to under 16s (see Table 1).
- 17.37** BCAP and CAP's consultation on Gambling Advertising determined that advertisements for 16-rated and 18-rated gambling products must not appeal to under 18s; that ensured that the core objective of protecting under 18s is met.

17.38 BCAP proposes broadcast advertisements for all lotteries should be subject to this rule:

18.5

Advertisements for lotteries must not be likely to be of particular appeal to under 18s, especially by reflecting or being associated with youth culture.

Question 106

Given BCAP's policy consideration, especially the requirement for consistency in regulation, do you agree it is proportionate to increase the restriction on age of appeal for broadcast National Lottery advertisements from 16+ to 18+? If your answer is no, please explain why.

Consistency; age at which a person may be featured gambling in a lottery advertisement

17.39 The existing BCAP TV and radio rules provide that SLA lottery advertisements may include under 18s in an incidental role. No-one who is, or seems to be, under 25 years old may be featured gambling or playing a significant role. The exception to this rule is that advertisements that exclusively feature the good causes that benefit from a lottery and include no explicit encouragement to buy a lottery product may include children or young persons and they may be featured playing a significant role.

17.40 The present TV and Radio Codes impose no minimum age at which a person may be featured gambling in a National Lottery advertisement. BCAP proposes that the 25 age limit be extended to National Lottery advertisements. BCAP favours a 25 age limit on people featured gambling or playing a significant role because by that age, people clearly look and sound more adult than adolescent and that gives more certainty to the advertising industry when creating advertisements and to the ASA Council when deciding if an advertisement has breached the Codes. Moreover, it will ensure that children and young people do not identify by age with those playing a significant role or featured gambling. However, BCAP considers that all advertisements for lotteries, including the National Lottery, should continue to be able to include children or young persons in a significant role if they exclusively feature the good causes that benefit from a lottery and include no explicit encouragement to buy a lottery product.

17.41 BCAP proposes broadcast advertisements for all lotteries should be subject to these rules:

18.6

Advertisements for lotteries may include under 18s. No-one who is, or seems to be, under 25 years old may be featured gambling or playing a significant role

18.7

Advertisements that exclusively feature the good causes that benefit from a lottery and include no explicit encouragement to buy a lottery product may include under 18s in a significant role

Question 107

Given BCAP's policy consideration, especially the requirement for consistency in regulation, do you agree it is proportionate to apply rules 18.6 and 18.7 to all broadcast lottery advertisements? If your answer is no, please explain why.

Consistency; other lottery rules

17.42 The policy and the drafting of the rules on SLA lottery advertisements have recently been subject to public consultation and, with the exception of the rule that prevents condoning or featuring gambling in a working environment (see 'Deleted rules') BCAP is not aware of evidence that would merit a change to those rules. BCAP considers that rules included in the Lottery Section of the Code are in line with BCAP's general policy objectives (see Section 4 of this consultation document) and should be applied

to broadcast advertisements for the National Lottery as they presently are to broadcast advertisements for other lotteries.

Question 108

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

Revised Rules

- 17.43** BCAP proposes not to change or replace an existing Gambling rule to the extent that that change amounts to new advertising policy and practice. BCAP has proposed to change existing BCAP rules on broadcast advertisements for the National Lottery and to apply new rules to those advertisements. Those proposals are covered in 'New Rules' above.

Deleted Rules

Participating in a lottery in a working environment

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

Question 109

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

Other questions

Question 110

i) Taking into account BCAP's policy consideration, do you agree that BCAP'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 and are not reflected here and that should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 - Section 18

Lotteries

- 18.1** BCAP's proposal to establish a dedicated section on lottery advertising is discussed in [section 17](#), Gambling, of this consultation document.

Part 2 - Section 19

Alcohol

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

Background

The law

Communications Act 2003

- 19.1** The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objectives to the Alcohol section of the BCAP Code are:

section 319 (2) (a) that persons under the age of eighteen are protected

section 319 (2) (h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented

- 19.2** See the full text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

Audiovisual Media Services (AVMS) Directive

- 19.3** The AVMS Directive revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989. The TVWF Directive applied to scheduled television broadcasting services only. AVMS also applies to some on-demand services but this consultation is about advertisements in scheduled broadcast services only. Article 3(e) states:

audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages.

- 19.4** See the full text of the Directive at:

eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF

Regulation on Nutrition and Health claims made on Foods 1924/2006

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

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

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

- 19.6** See the full text of the NHCR at:

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

Other relevant regulatory bodies

- 19.7** Bodies that play a part in regulating a broadcast advertisement or a product or service of relevance to this section but are not conferred with legal functions to do so include: Clearcast (www.clearcast.co.uk), RACC (www.racc.co.uk) and The Portman Group (www.portman-group.org.uk).

Recent changes to this section of the BCAP Code

- 19.8** In March 2004, the Government's Alcohol Harm Reduction Strategy recommended that Ofcom should oversee a review of the TV rules for alcohol advertisements by the end of that year. Following consultation, Ofcom announced new rules on 1 January 2005 that aim to reduce the appeal of television advertisements for alcohol to children and young teenagers and to tone down sexual content in TV advertisements for alcohol. The Ofcom consultation can be found at: www.ofcom.org.uk/consult/condocs/AlcAds/
- 19.9** In response to comments raised in Ofcom's consultation on TV advertisements for alcohol, Ofcom asked BCAP to draft a set of Guidance notes to help interpret and apply the alcohol rules and conduct a review on the acceptability of health and dietary claims in TV advertisements for alcohol. The BCAP consultation can be found at: www.cap.org.uk/cap/Consultations/closed/alcohol_consultation/
- 19.10** As part of BCAP's consultation on the Regulation of Nutrition and Health Claims made on Foods in Television and Radio Advertisements, BCAP has proposed changes to the present BCAP rules on health claims in alcohol advertisements. The proposed revised rule is reproduced in 19.18. That consultation closed on 16 February 2009. BCAP has not had the time to announce the outcome of that consultation and the new rules before the publication of this consultation document. BCAP proposes to reflect the agreed version of 19.18 in its present Television and Radio Codes and the proposed Code. The BCAP consultation can be found at: http://www.cap.org.uk/cap/Consultations/closed/BCAP_Nutrition_and_Health_Claims

Meeting the need to regulate broadcast advertisements for alcohol

- 19.11** BCAP's proposed approach mirrors the present approach: to include rules that apply to all broadcast advertisements in which alcohol is featured and rules specific to broadcast advertisements for alcohol. The latter ensure that broadcast advertisements for alcohol are responsible and prevent appeal to young persons and the vulnerable.
- 19.12** Code provision 19.18 approximates legal provisions in the (EC) Regulation on Nutrition and Health claims made on Foods 1924/2006. Code provisions 19.4, 19.5, 19.6, 19.12, 19.15 and 19.17 result from Ofcom's consideration, in 2004, of the advertising rules for alcohol.

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

- 19.13** The Department of Health's *Safe, Sensible, Social* consultation called on BCAP and Ofcom to take into account the findings of the Sheffield University study into the relationship between the price, promotion and alcohol-related harm as part of the BCAP Code Review⁵⁹.
- 19.14** In October 2008, BCAP wrote to the Secretary of State for Culture Media and Sport to make clear that the Sheffield University study would be announced too for BCAP to consider as part of the Code

⁵⁹ [Safe. Sensible. Social. Consultation on further action – Page 15](#)

Review⁶⁰. BCAP undertook to review those findings at the earliest possible opportunity in 2009 to consider if the present TV alcohol rules remain proportionate. The Government endorsed that approach.

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

Proposed substantive changes

New rules

Sales promotions in alcohol advertisements

19.15 The present Radio Code states:

Section 3, 11.5 Sales Promotions

Advertisements for alcoholic drinks must not publicise sales promotions (including competitions) that appear to encourage excessive consumption.

19.16 BCAP considers that that rule supports the general principle that advertisements must not feature, imply, condone or encourage irresponsible or immoderate drinking. It proposes to reflect that policy in a rule covering TV and radio advertisements. BCAP considers that is a clarification as opposed to a tightening of the rules and reflects how the ASA already interprets the alcohol rules in relation to sales promotions.

19.17 BCAP's proposed television and radio rule is:

19.11

Advertisements may include alcohol sales promotions but must not imply, condone or encourage immoderate drinking.

Question 111

Given BCAP's policy consideration, do you agree that rule 19.11 should be included in the proposed BCAP Code? If your answer is no, please explain why.

Irresponsible handling of alcohol

19.18 The present Television Code states:

Section 3, 11.8.1 (g)

(3) Alcoholic drinks must be handled and served responsibly.

19.19 Although it accepts that that rule refers to a type of treatment that is primarily visual, BCAP considers it is possible to convey to listeners that alcohol is being handled or served irresponsibly. BCAP proposes to reflect that policy in a rule covering television and radio advertisements.

19.20 BCAP's proposed television and radio rule is:

60

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

19.12

Advertisements must not feature alcohol being handled or served irresponsibly.

Question 112

Given BCAP's policy consideration, do you agree that rule 19.12 should be included in the proposed BCAP Code? If your answer is no, please explain why.

Revised rules**Alcoholic strength**

- 19.21** Presently, TV advertisements cannot state that a drink is to be preferred because of its alcohol content or place undue emphasis on alcoholic strength, unless it is a low-alcohol drink. Low-alcohol drinks are defined as drinks containing between 0.5% and 1.2% alcohol.
- 19.22** Presently, radio advertisements cannot state that a drink is to be preferred because of its 'higher' alcohol content. The use of the word 'higher' implies that radio advertisements can state that a drink is to be preferred because of its 'lower' alcohol content, but there is no definition of a 'lower' strength alcoholic drink.
- 19.23** BCAP considers that preferential advertising of 'lower' alcoholic drinks would result in the preferential promotion of intoxicating beverages. BCAP is concerned that advocating swapping higher-strength alcoholic drinks for lower-strength alcoholic drinks could cause confusion, especially in relation to drinking and driving, if a 'lower-strength' alcoholic drink is advertised as being responsible.
- 19.24** BCAP considers the differences between TV and radio do not merit different rules: BCAP proposes to maintain the restriction for TV and strengthen the rule for radio:
- 19.25** BCAP's proposed TV and radio rule is:

19.10

Advertisements may give factual information about the alcoholic strength of a drink or make a factual strength comparison with another product but, except for low-alcohol drinks, which may be presented as preferable because of their low alcoholic strength, must not otherwise imply that a drink may be preferred because of its alcohol content or intoxicating effect.

Question 113

Given BCAP's policy consideration, do you agree that rule 19.10 should be included in the proposed BCAP Code? If your answer is 'no', please explain why.

Alcohol in a working environment

- 19.26** The present TV rule states:

11.8.2(d)

Advertisements for alcoholic drinks must not normally show alcohol being drunk in a working environment.

- 19.27** Whereas the present Radio Code goes further by stating:

Section 3, 11.4

Nothing may link alcohol with a work or other unsuitable environment.

19.28 BCAP considers the present TV rule permits alcohol to be featured in the context of a working environment in exceptional circumstances only, for example, a brewer tasting his beer. BCAP considers such treatments are acceptable and do not contradict the principle that, 'Advertisements for alcoholic drinks should not be targeted at people under 18 years of age and should not imply, condone or encourage immoderate, irresponsible or anti-social drinking.' BCAP proposes to maintain the TV rule and apply that to radio.

19.29 BCAP's proposed TV and radio rule is:

19.14

Advertisements must not normally show alcohol being drunk by anyone in their working environment.

Question 114

Given BCAP's policy consideration, do you agree that rule 19.14 should be included in the proposed BCAP Code? If your answer is no, please explain why.

Exception for children featuring incidentally in alcohol advertisements

19.30 The present Television Code states:

11.8.2(a)

(2) Children must not be seen or heard, and no-one who is, or appears to be, under 25 years old may play a significant role in advertisements for alcoholic drinks. No-one may behave in an adolescent or juvenile way.

19.31 The TV Code has an exception to that rule for advertisements in which families are depicted socialising responsibly. The exception might reflect a policy intention to normalise a 'continental approach' to drinking, for example, in moderation and as an accompaniment to a family meal. In those circumstances, children may be included but they, and anyone who is, or seems to be, under 25 must have only an incidental role. Nevertheless, it must be explicitly clear that anyone who seems to be under the age of 18 is not drinking alcohol.

19.32 The present Radio Code has no similar exception. BCAP considers it is possible to convey to listeners the presence of a child in an incidental role in a radio advertisement for alcohol that features families socialising responsibly. BCAP proposes that the exception for television should be extended to radio.

19.33 Additionally, BCAP has amended the wording to stipulate that anyone under the age of 25 must not be drinking as opposed to under the age of 18 as it was previously; alcohol advertisements are not permitted to feature in a significant role anyone who is, or seems to be, under 25. BCAP's proposed TV and radio rule is:

19.17

Alcohol advertisements must not feature in a significant role anyone who is, or seems to be, under 25 and must not feature children.

An exception is made for advertisements that feature families socialising responsibly. Here, children may be included but they should have an incidental role only and anyone who seems to be under the age of 25 must be obviously not drinking alcohol.

Question 115

Given BCAP's policy consideration, do you agree that rule 19.17 should be included in the proposed BCAP Code? If your answer is no, please explain why.

Deleted rules

Low alcohol exceptions

- 19.34** The present BCAP alcohol rules include exceptions for low-alcohol drink advertisements. Those exceptions might reflect a policy intention to normalise the consumption of low-alcohol drinks, especially among young adult drinkers. BCAP considered whether those exceptions are relevant given that low-alcohol drinks may not be sold to persons under 18⁶¹.

Television

- 19.35** Presently, TV advertisements for low-alcohol drinks can feature anyone who is or seems to be 18 or over; not 25 or over as for alcohol of a strength above 1.2%. At 25 years of age, an average person seems demonstrably older than 18. Given that policy consideration BCAP proposes that 25 or over is the correct age point for both low-alcohol drinks and alcoholic drinks above 1.2% ABV.
- 19.36** Presently, TV advertisements for low-alcohol drinks are exempt from the rule on implying or encouraging immoderate drinking, including an exemption on buying a round of drinks. Again, BCAP considers that the exception for low-alcohol drinks is not warranted and that all advertisements for alcohol drinks should be prevented from encouraging immoderate drinking. BCAP considers the potential to undermine the alcohol rules outweighs the potential and likely benefits of granting the exemptions in the first place. BCAP proposes that those exceptions are not warranted and should be deleted:

11.8.3 – Low alcohol drinks.

Exceptions to 11.8.1 and 11.8.2 apply to advertisements for drinks containing 1.2% alcohol by volume or less so long as the low alcohol content is made clear. (The exceptions are not granted if the advertising might promote a product of higher alcoholic strength or might conflict with the spirit of the rules.)

The exceptions are:

11.8.2 (a)(2): Anyone associated with drinking must be, and appear to be, at least 18 years old.

(b) The advertisements need not comply with 1.8.1 (g)(1) or (2)⁶²

Question 116

i) Given BCAP's policy consideration, do you agree that it is wrong to exempt television advertisements for low alcohol drinks from the rule that requires anyone associated with

⁶¹ Section 146 of the Licensing Act 2003 states: "(1) A person commits an offence if he sells alcohol to an individual aged under 18." Section 146 applies to all strengths and types of alcohol.

⁶² **11.8.1 (g)** (1) Advertisements must not show, imply or encourage immoderate drinking. This applies both to the amount of drink and to the way drinking is portrayed.

(2) References to, or suggestions of, buying repeat rounds of drinks are not acceptable. (Note: This does not prevent, for example, someone buying a drink for each of a group of friends. It does, however, prevent any suggestion that other members of the group will buy any further rounds.)

drinking must be, and seem to be, at least 25 years old? If your answer is no, please explain why.

ii) Given BCAP's policy consideration, do you agree that it is wrong to exempt television advertisements for low alcohol drinks from the rule that prevents implying or encouraging immoderate drinking, including an exemption on buying a round of drinks? If your answer is no, please explain why.

Radio

- 19.37** Presently, radio advertisements for low-alcohol drinks are exempt from the rule on implying or encouraging immoderate drinking, including an exemption on buying a round of drinks and encouraging excessive consumption via sales promotions. Those advertisements may feature a voiceover of anyone who is or seems to be 18 or over; not 25 or over as for alcohol of a strength above 1.2%.
- 19.38** BCAP considers those exemptions are wrong and the potential to undermine the alcohol rules outweighs the potential and likely benefits of granting the exemptions in the first place.
- 19.39** BCAP proposes that the following exemption should be deleted:

11.7 Low Alcohol Drinks

Provided they comply generally with the Code and reflect responsible consumption and behaviour, advertisements for drinks containing less than 1.2% alcohol by volume will not normally be subject to Rules 11.3f⁶³), 11.4b⁶⁴) and 11.5⁶⁵. However, if a significant purpose of an advertisement for a low alcoholic drink could be considered to promote a brand of stronger alcoholic drink, or if the drink's low alcohol content is not stated in the advertisement, all the above Rules are applicable.

Question 117

i) Given BCAP's policy consideration, do you agree that it is wrong to exempt radio advertisements for low alcohol drinks from the rule that prevents implying or encouraging immoderate drinking, including an exemption on buying a round of drinks? If your answer is no, please explain why.

ii) Given BCAP's policy consideration, do you agree that it is wrong to exempt radio advertisements for low alcohol drinks from the rule that prevents encouraging excessive consumption via sales promotions? If your answer is no, please explain why.

iii) Given BCAP's policy consideration, do you agree that it is wrong to exempt radio advertisements for low alcohol drinks from the rule that prevents featuring a voiceover of anyone who is or appears to be 24 or under? If your answer is no, please explain why.

Other questions

Question 118

63 11.13f) Advertisements must not foster, depict or imply immoderate or irresponsible drinking or drinking at speed. References to buying rounds of drinks are unacceptable;

64 11.4b) Nothing may link alcohol with a work or other unsuitable environment.

65 11.5 Sales Promotions: Advertisements for alcoholic drinks must not publicise sales promotions (including competitions) that appear to encourage excessive consumption.

i) Taking into account BCAP's general policy objectives, do you agree that BCAP'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 section that are likely to amount to a significant change in advertising policy and practice, are not reflected here and should be retained or otherwise be given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 - Section 20

Motoring

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

Background

The Law

Communications Act 2003

- 20.1** The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The standards objectives most relevant to the Motoring Section of the BCAP Code are:

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

- 20.2** See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

Other relevant regulatory bodies

- 20.3** Bodies that play a part in regulating a broadcast advertisement of relevance to this section but that are not conferred with legal functions to do so include: Clearcast (www.clearcast.co.uk) and the RACC (www.racc.co.uk).

Meeting the need to ensure that motoring advertisements are responsible

- 20.4** The present BCAP Television Code includes a section titled 'Driving Standards'. That section comprises two rules, which are heavily supplemented by notes of guidance. The approach of both the present BCAP Television and Radio Codes is to prevent advertisements – particularly motoring advertisements – from condoning or encouraging dangerous or irresponsible driving practices. BCAP intends that the proposed Code should also prevent such creative treatments to secure the Communications Act standards objective that requires the prevention of misleading, harmful and offensive material in advertisements. BCAP proposes simplified rules common to TV and radio motoring advertisements. BCAP intends those rules to be supplemented by guidance notes that assist the broadcaster or the advertiser to comply with the rules.

Proposed substantive changes

New rules

- 20.5** None.

Revised rules

References to speeds over 70mph

- 20.6** The present BCAP TV Code states:

11.9.2 Automotive advertising

Advertisements for cars, motorbikes or other automotive products must not: ...

(b) refer to speeds over 70mph ...

- 20.7** The Radio Code does not include an equivalent rule. BCAP has weighed up, on the one hand, the protection that rule affords to the audience and, on the other, the level of restriction it places on the creative content of advertisements.
- 20.8** The rule suggests that a reference to speeds over 70mph in a TV motoring advertisement would be in and of itself irresponsible because, for example, it would condone or encourage the breaking of UK speed limits.
- 20.9** BCAP considers it does not follow that a mere reference to a speed over 70mph is necessarily irresponsible and, therefore, that the prohibition is unjustified. BCAP considers that a reference to a speed over 70mph might be acceptable depending on the context in which that reference is made; it might be acceptable, for example, to refer to a top speed as part of a list of a car's characteristics.
- 20.10** BCAP does not underestimate, however, the potential for references to speeds over 70mph to condone dangerous, irresponsible or inconsiderate driving or motorcycling. It therefore proposes to replace the rule with a rule that ensures speed or acceleration claims are not presented as the main selling message of an advertisement or as a reason for preferring the advertised product. Proposed rule 20.2 also ensures that no motoring advertisement condones or encourages motorists breaching the legal requirements of the Highway Code, which include the requirement that motorists must adhere to speed limits.
- 20.11** BCAP's proposed rule is:

20.4

Motoring advertisements must not refer to speed in a way that might condone or encourage dangerous, competitive, inconsiderate or irresponsible driving or motorcycling. Factual statements about a vehicle's speed or acceleration are permissible but must not be presented as a reason for preferring the advertised vehicle. Speed or acceleration claims must not be the main selling message of an advertisement.

Question 119

i) Given BCAP's policy consideration, do you agree that it is not justified to maintain a rule that prohibits references to speeds of over 70mph in motoring advertisements? If your answer is no, please explain why.

ii) Given BCAP's policy consideration, do you agree that rule 20.4 should be included in BCAP's new Code? If your answer is no, please explain why

The use of fog lights

- 20.12** The present Television Code states:

Note (2) to rule 11.9.2

Highway Code: All driving which appears to be on public roads or in public places should normally comply with the letter and spirit of the Highway Code. Exceptions may be made where there is no indication that the setting is in the UK and the failure to comply would not, in real life, have direct safety implications (eg using fog lights when visibility is good).

- 20.13** Part 1 (4) of this consultation document makes clear that BCAP is not required to consult on guidance notes, which are non-binding. Nevertheless, some guidance notes in the present BCAP Codes have

the force of a rule. In those cases, BCAP has either adopted the guidance as a rule in the proposed Code or, if it proposes to change or delete it (constituting a change in advertising policy and practice), reviewed the guidance as part of this consultation.

- 20.14** The note to the present TV rule 11.9.2 gives the example of a driver using fog lights when visibility is good as a driving practice that breaches the Highway Code but does not have 'direct safety implications'. BCAP is mindful, however, that the Highway Code requires motorists not to use their fog lights unless visibility is seriously reduced and that they must switch off their fog lights when visibility improves because they could dazzle other road users and, for example, obscure a motorist's brake lights⁶⁶. BCAP therefore considers that, because using fog lights in good visibility could have 'direct safety implications', the exemption is incompatible with the requirement of the note. For that reason, BCAP proposes not to include the exemption.

Question 120

Given BCAP's policy consideration, do you agree that the Code should not grant an exemption from proposed rule 20.2 for advertisements that feature a driver on a non-UK public road or in a non-UK public place using his or her fog lights when visibility is good? If your answer is no, please explain why.

Deleted rules

- 20.15** None.

Other questions

Question 121

i) Taking into account its general policy objectives, do you agree that BCAP'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 consider should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

⁶⁶ See rule 236 of the Highway Code, which stems from regulations 25 and 27 of the Road Vehicles Lighting Regulations 1989:

http://www.direct.gov.uk/en/TravelAndTransport/Highwaycode/DG_069859

Part 2 - Section 21

Betting Tipsters

- 21.1 BCAP's proposal to establish a dedicated section on betting tipster advertising is discussed in [section 10](#), Prohibited Categories, of this consultation document.

Part 2 - Section 22

Premium-Rate Services

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

Background

The law

Communications Act 2003

- 22.1** The Act sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objectives to the Premium-Rate Services section of the BCAP Code are:

319(2)(a) that persons under the age of eighteen are protected;

319(2)(f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

- 22.2** See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

Binding requirements

Ofcom television and radio broadcast licences

- 22.3** TV and radio broadcasters are required, by the terms of their Ofcom licence, to ensure advertisements they broadcast that promote premium-rate services (PRS) comply with the PhonepayPlus Code of Practice.

PhonepayPlus (PP+) Code of Practice

- 22.4** The PP+ Code of Practice sets standards for the promotion, content and overall operation of PRS, taking account of consumers, particularly children, who might be especially vulnerable. The Code is enforceable against those who provide networks that carry the services (network operators), those who provide the services themselves (service providers) and those who provide the content of the services, if the service provider does not do that itself (information providers).

Other relevant regulatory bodies

PhonepayPlus (PP+)

- 22.5** PP+ regulates PRS under a co-regulatory agreement with Ofcom, which retains its legal powers in regard to PRS that stem from the Communications Act 2003. PP+ carries out its duties so that consumers, particularly children who might be especially vulnerable, can use PRS with absolute confidence. PP+'s Code of Practice sets standards for the promotion, content and overall operation of PRS. The Code of Practice is approved by Ofcom under section 121 of the Communications Act 2003. PP+ investigates complaints and has the power to fine companies, bar access to services and order

refunds. PP+ can also bar the individual person behind a company from running a premium-rate service under any company name on any telephone network for a set period. PP+'s website, which includes its Code of Practice, is www.phonepayplus.org.uk.

Other

- 22.6** Bodies that play a part in regulating a broadcast advertisement of relevance to this section but are not conferred with legal functions to do so include: Clearcast (www.clearcast.co.uk) and the RACC (www.racc.co.uk).

Meeting the need to regulate broadcast advertisements that promote PRS

- 22.7** Regulatory principles that are directly relevant to the advertising of PRS include the need to ensure transparency, especially about the cost, type and content of services and, because of the nature of some PRS, the need to protect the vulnerable, especially children. The BCAP Television and Radio Codes presently realise those principles through dedicated rules for advertisements that promote PRS. Those rules are intended to protect audiences from potentially misleading, offensive or harmful advertisements and, in line with broadcasters' Ofcom licence requirement, to secure compliance with PP+'s Code of Practice. BCAP proposes to maintain that approach in the proposed BCAP Code.

Proposed substantive changes

New rules

PhonepayPlus Code

- 22.8** The present BCAP Television and Radio Codes require broadcast advertisements to comply with the PP+ Code of Practice in line with the 'Binding requirements' set out in this consultation document section. PP+ is the expert body that maintains and interprets the PP+ Code of Practice.
- 22.9** With the exception of advertisements for political and controversial matters, the ASA must consider complaints about all broadcast advertisements that are covered by the present BCAP Codes and the proposed BCAP Code. If a complaint raised a potential breach of the PP+ Code of Practice, the ASA would, following due process, invite PP+ to consider the complaint before the ASA adjudicated under the relevant BCAP rule:

22.1

Advertisements that include a premium-rate telephone number must comply with the PhonepayPlus Code of Practice.

- 22.10** To prevent the ASA from, in effect, contracting-out the investigation of all complaints about broadcast advertisements that raise a potential breach of the PP+ Code, BCAP proposes to introduce new rules into its Code. It proposes to reflect, in rules 22.2 to 22.4, general provisions in the present PP+ Code and, rules in 22.5 and 22.6, established PP+ policy regarding the provision of a non-premium-rate telephone number for customer care purposes in television and radio advertisements that promote a PRS. Proposed rule 22.8 reflects a provision in PP+'s Code of Practice that advertisements for live PRS should not normally be targeted at people under 18 years of age.

22.2

Advertisements for premium-rate telephone services must include clear pricing information if the service generally costs 50 pence per call or more.

22.3

Advertisements for premium-rate children's services, services accessed by automated equipment or subscription services must always include clear pricing information.

22.4

Advertisements for premium-rate services must state the identity of the service provider or the information provider.

22.5 – Radio

If it is not included in the advertisement, radio broadcasters must retain and, on request, make available a non-premium-rate telephone number for the premium-rate service for customer care purposes.

22.6 – Television

Television advertisements for premium-rate services must include a non-premium-rate telephone number for customer care purposes.

...

22.8

Advertisements for live premium-rate services must not appeal particularly to people under 18, unless those services have received prior permission from PhonepayPlus to target people under 18.

- 22.11** BCAP's proposal is therefore to clarify some of the significant requirements for broadcast advertisements for PRS, which, it is intended, would provide more certainty for broadcasters through joined-up regulation with PP+.
- 22.12** BCAP considers the inclusion of those rules would not increase the regulatory burden for television or radio.

Question 122

Given BCAP's policy consideration, do you agree that proposed rules 22.1 to 22.6 and 22.8 should be included in the proposed BCAP Code? If your answer is no, please explain why.

Radio advertisements for telecommunications-based sexual entertainment services

- 22.13** BCAP invites readers to consider the rules on TV advertisements for PRS of a sexual nature under 'Other' of this consultation section. Discussion about BCAP's proposal to include a rule on advertisements for telecommunications-based sexual entertainment services, which includes services that involve a premium-rate payment mechanism, is also included in the 'Other' part of this consultation section.
- 22.14** To provide consistent standards for the benefit of consumers and the radio industry, the present Radio Code and the proposed BCAP Code require some categories of radio advertisements to be centrally cleared by the RACC. Those categories of radio advertisements have a clear potential to mislead, offend or harm. On that basis BCAP proposes to include a new rule for radio:

23.1 – Radio

Advertisements for telecommunications-based sexual entertainment services must be centrally cleared.

- 22.15** Telecommunications-based sexual entertainment services are mainly offered in return for payment by premium-rate call charge and would, under BCAP's proposal, be defined in the Code as 'voice, text, image or video services of a sexual nature that are made available to consumers via a direct-response mechanism and are delivered over electronic communication networks'. Under the 'Other' part of this consultation section, BCAP proposes to create a new section in the Code titled Telecommunications-Based Sexual Entertainment Services, in which BCAP intends that rule to sit.

Question 123

Given BCAP's policy consideration, do you agree that proposed rule 23.1 should be included in the proposed BCAP Code? If your answer is no, please explain why.

Revised rules

22.16 None.

Deleted rules

22.17 None.

Other

Television advertisements for PRS of a sexual nature

Ofcom consultation on Participation TV

- 22.18** Later this year, Ofcom will consult on the use of PRS in programmes with reference to Section 10 (Commercial References and Other Matters) of its Broadcasting Code, specifically to ensure that advertising is kept separate from programme content ('editorial content') in accordance with European broadcasting legislation and UK regulation. That consultation is of particular significance to a growing number of unencrypted programmes that are predicated on the use of PRS of a sexual nature and other programmes that promote PRS to a broadly equivalent level. Ofcom might, after consultation, include new rules in Section 10 of the Broadcasting Code and/or issue guidance to make clearer the extent to which PRS is permissible in programme content, in line with Ofcom's legal and regulatory obligations. Ofcom might conclude, on a case-by-case basis, that particular content predicated on PRS, including PRS of a sexual nature, does not comply with its Broadcasting Code, in its current form, or as amended. Broadcasters would then need to consider whether to adjust their format or broadcasting model to bring their services into compliance with the Broadcasting Code, or operate as advertising (teleshopping). The latter must comply with the present BCAP Television Code and, in time, the proposed BCAP Code. At present, advertisements for PRS of a sexual nature may be carried on encrypted elements of adult channels only.
- 22.19** BCAP sets out below its proposal that the existing policy on TV advertisements for PRS of a sexual nature should be retained. As part of its forthcoming consultation, Ofcom intends to conduct viewer and consumer research on PRS-based TV services. That research and consultation will inform Ofcom's decisions on possible changes to both the Ofcom Broadcasting Code and, potentially, to the BCAP Code, for which Ofcom has responsibility for final approval. BCAP's proposal is that the present policy on TV advertisements for PRS of a sexual nature should be maintained. That proposal, however, is subject to change following BCAP's and Ofcom's consultations and decisions by Ofcom. We welcome comments from stakeholders on this matter and, unless confidentiality to BCAP alone is requested, we will share such responses with Ofcom.
- 22.20** The present BCAP TV rule states:

11.1.2

Premium rate services of a sexually explicit nature (ie those which operate on the 0909 dialling code) may not be advertised. An exception is made for premium rate voice services of a sexual nature, which may be advertised on encrypted elements of adult entertainment channels only

- 22.21** BCAP considered the policy underpinning the present rule and assessed if evidence merited, in BCAP's opinion, a change to the rule. BCAP presents here:

- i) the effect of the present rule
- ii) the policy underpinning the present rule
- iii) evidence relevant to the review of the present rule
- iv) BCAP's proposal to maintain present advertising policy and practice
- v) options that BCAP has considered and, on balance, not favoured.

i) The effect of the present rule

- 22.22** For the avoidance of doubt, the present rule regulates TV advertisements for PRS of a sexual nature and not advertisements for telephone chatline services, which must comply with the general requirements of the Code and, if they are offered in return for payment by premium-rate call charge, the Premium-Rate Services section of the Code. The PP+ Code of Practice prevents premium-rate chatline services from being promoted or operated as sexual entertainment services and requires that operators must use all reasonable endeavours to prevent conversation of a sexual nature. The ASA has upheld complaints about TV spot advertisements for premium-rate chatline services that have misleadingly been promoted as PRS of a sexual nature⁶⁷. PP+'s Adjudication Panel has upheld complaints about premium-rate chatline services that have, in breach of the PP+ Code of Practice, operated as sexual-entertainment services⁶⁸.
- 22.23** TV advertisements for PRS of a sexual nature are restricted to encrypted elements of adult entertainment channels. BCAP considers 'adult entertainment channels' are those that wholly or mainly broadcast adult-themed sexual content, which might include adult-sex programme material and 'encrypted elements' is interpreted with reference to the relevant rule in the Ofcom Broadcasting Code:

1.24

Premium subscription services and pay per view/night services may broadcast 'adult-sex' material between 2200 and 0530 provided that in addition to other protections mentioned above:

- there is a mandatory PIN [personal identification number] protected encryption system, or other equivalent protection, that seeks satisfactorily to restrict access solely to those authorised to view; and
- there are measures in place that ensure that the subscriber is an adult.

ii) The policy underpinning the present rule

- 22.24** As indicated in Part 1 (4) of this consultation document, this review is the first thorough examination of the Television and Radio Advertising Standards Codes since the establishment of Ofcom in 2003 and of BCAP in 2004. In the main, therefore, the policies underlying the rules in the present Codes date back to the previous regulators, specifically the Independent Television Commission and the Radio Authority. In many cases, the historical rationale for those policies is no longer clear. BCAP has therefore had to make some assumptions about the origins of rules and their underlying policies, as indicated in this analysis.
- 22.25** BCAP has reviewed TV rule 11.1.2 in the light of the Communication Act's requirements to ensure that under 18s are protected and advertisements that may be misleading, harmful or offensive are prevented.

67 The ASA's adjudication against Live Lines Ltd: www.cap.org.uk/NR/rdonlyres/3CD1EE8E-CC80-4B38-BCC9-7336339F40C4/0/Broadcastreport19April2006.pdf and against Channel U: www.cap.org.uk/NR/rdonlyres/3CD1EE8E-CC80-4B38-BCC9-7336339F40C4/0/Broadcastreport19April2006.pdf.

68 www.phonepayplus.org.uk/service_providers/adjudications/default.asp?cmd=3&id=697

- 22.26** BCAP considered the policy underpinning the present rule possibly did not envisage long-form TV advertising for PRS of a sexual nature. The focus would have been on spot advertisements, about which viewers are not given pre-broadcast information: spot advertisements arrive unannounced and are unbidden by the audience. For the avoidance of doubt, where they invite the audience to call a premium-rate telephone number, both spot advertisements and long-form advertisements amount to teleshopping, which is defined as television-broadcast direct offers for the supply of goods and services, including immovable property, rights and obligations, in return for payment.
- 22.27** PRS of a sexual nature may not be 'sold' to under 18s. Television advertisements for products that may not be sold to under 18s and that are legal to be advertised in broadcast media are generally allowed to be broadcast on TV, subject to content and scheduling restrictions. BCAP questioned why advertisements for PRS of a sexual nature are subject to a greater restriction: they are permissible on encrypted elements of adult channels only.

The potential for serious or widespread offence

- 22.28** Both the nature of a product and the content of an advertisement can have the potential to cause serious or widespread offence. To lessen the potential for offence, the BCAP Television Code requires advertisements to comply with general or specific content and scheduling restrictions. The present restriction on advertisements for PRS of a sexual nature to encrypted elements of adult entertainment channels indicates that content and scheduling restrictions are not thought sufficient to guard against potentially serious or widespread offence being caused to the audience by advertisements for PRS of a sexual nature carried on unencrypted channels.

The protection of under 18s

- 22.29** Providers of telephone sexual entertainment services typically offer those services in return for payment by premium-rate call charge. The normal means of payment is by telephone, to which under 18s have easy access. The telephone, fixed or mobile, is also the means of delivering the product directly and immediately to the consumer. The product, in this case, might include very strong sexual content that is unsuitable for under 18s.
- 22.30** BCAP considered that the present restriction of advertisements for PRS of a sexual nature to encrypted elements of adult entertainment channels indicates that content rating and access controls for those services are thought inadequate to guard against under 18s from potentially accessing unsuitable sexual content in response to seeing an unencrypted television advertisement. In the absence of conclusive evidence linking strong sexual material to harm, especially to children, the present restriction indicates that the rule is, in part, based on a precautionary policy. (If the present rule is intended to protect under 18s from potential harm, BCAP considers it is more likely to be moral harm than financial harm, given the BCAP Television Code does not likewise restrict advertisements for premium-rate chatline services, which also may not be sold to under 18s.)

The ban on advertisements for pornography products

- 22.31** BCAP noted that, in 2002 when the present rule was published, the ITC maintained the outright ban on advertisements coming within the recognised character of pornography. BCAP did not conclude that PRS of a sexual nature necessarily fell within the recognised character of pornography, but it did accept that both types of product could include strong sexual content. BCAP considered the more permissive regime for advertisements for PRS of a sexual nature (allowed on encrypted elements of adult entertainment channels) might take into account that premium-rate services are subject to a licensed regulatory regime under PhonepayPlus (previously ICSTIS), which puts in place controls that seek to prevent under 18s' access to live chatline services, for example.

Summary of the policy underpinning the present rule

- 22.32** BCAP considered that the present restriction on TV advertisements for PRS of a sexual nature was thought necessary because both the very advertising of those services, and the likely content of

advertisements for them, have the potential to cause serious or widespread offence to the TV audience and raise concerns about the protection of under 18s from unsuitable content. The restriction to encrypted elements of adult entertainment channels significantly reduces the chances of those advertisements being seen by adults who might be offended by the nature of the services being advertised or the likely sexual themes in the content of those advertisements. It also ensures, as far as possible on TV services, that under 18s do not form part of the viewing audience.

iii) Evidence relevant to the review of the present rule

- 22.33** BCAP considered if the present rule is necessary and in line with its general policy objectives as set out in Part 1 (4) of this consultation document. BCAP's consideration included a review of evidence relevant to spot advertisements for PRS of a sexual nature, on which BCAP considers the present policy was based, and to long-form advertisements for PRS of a sexual nature.

The potential for serious or widespread offence: the nature of the product

- 22.34** The nature of a product can have the potential to cause serious or widespread offence when that product is promoted through a TV advertisement. BCAP considered evidence with a view to assessing the public's perception of PRS of a sexual nature.
- 22.35** OFTEL's 2002 qualitative research on Premium-Rate Services⁶⁹ found 'Few parents were overly concerned about adult [premium-rate] services. The [telephone] numbers were not felt to be widely publicised or known. Indeed, people felt children or teenagers would need to seek numbers in magazines.' Nevertheless, it also found 'A small number of parents in the sample were concerned about adult services and chatlines. The concern focused... on availability and the publicising of these services...'. BCAP noted that, since 2000, there has been a significant increase in the prevalence of PRS of a sexual nature on TV (see 'The potential for serious or widespread offence: programmes predicated on PRS of a sexual nature and long-form advertisements for PRS of a sexual nature'). The OFTEL research further found 'Adult [premium-rate] services and chatlines were generally felt to be seedy' and one respondent commented 'Adult services shouldn't be accessible for kids. Who knows what's on the end of the telephone...'.
- 22.36** Conversely, research indicates that regular viewers of TV programmes predicated on the use of PRS of a sexual nature did not raise concerns about excessive telephone bills or addictive behaviour and appeared to feel that they were getting what they paid for⁷⁰. 'Harm and Offence in Media Content: a review of the evidence'⁷¹, which was published in 2006, found 'There is little substantive academic evidence for the potential risk of harm or offence caused through access to the professionally produced content market for mobiles'.

The potential for serious or widespread offence: spot advertisements

- 22.37** Unacceptable content and scheduling of an advertisement would have the potential to cause serious or widespread offence. BCAP considered evidence with a view to assessing the likelihood of serious or widespread offence being caused by unencrypted spot advertisements for PRS of a sexual nature. BCAP considered that, in keeping with the nature of the product, spot advertisements for PRS of a sexual nature have potential to include sexual themes, including sexual images and sexual language.
- 22.38** Research shows that the circumstances in which a spot advertisement is viewed affect its acceptability⁷². That relates partly to its place in the schedule, including its timing in relation to the

⁶⁹ www.ofcom.org.uk/static/archive/oftel/publications/research/2002/prs_qual0802.pdf

⁷⁰ www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf

⁷¹ www.lse.ac.uk/collections/media@lse/pdf/Harm%20and%20Offence,%20summary.pdf

⁷² www.asa.org.uk/NR/rdonlyres/A9D4F1F4-E34B-44D2-8B28-43348F30D435/0/Nudity_in_Television_Advertising.pdf

watershed. Viewers also take into consideration the type of programme during which the advertisement appears and on which channel it is broadcast.

- 22.39** Because the BCAP Television Code restricts them to encrypted elements of adult-entertainment channels, BCAP could not draw on directly relevant complaints figures about unencrypted spot advertisements for PRS of a sexual nature as a measure of serious or widespread offence. Although they are not the only measure of offence, complaints can be an indicator. BCAP noted that spot advertisements for premium-rate chatline services, which are permitted on unencrypted TV services and can be advertised on a flirtatious theme, had not prompted a significant number of complaints to the ASA. Nevertheless, nudity, sexual themes and bad language in TV spot advertisements are often a cause for complaint for the audience⁷³. 92% of people consider it suitable that spot advertisements should not be permitted to include 'strong language'⁷⁴. Research shows that spot advertisements that show nudity and have sexual connotations are likely to cause offence⁷⁵.

The potential for serious or widespread offence: programmes predicated on PRS of a sexual nature and long-form advertisements for PRS of a sexual nature

- 22.40** BCAP considered evidence with a view to assessing the likelihood of serious or widespread offence being caused by unencrypted long-form television advertisements for PRS of a sexual nature. In keeping with the nature of the product, and its knowledge of programmes predicated on the use of PRS of a sexual nature, BCAP considered that long-form advertisements for PRS of a sexual nature have the potential to include strong sexual themes, including sexual images and sexual language.
- 22.41** Over the last decade, there has been a significant increase in the number of TV channels that offer programmes predicated on the use of PRS of a sexual nature. Those programmes typically broadcast after the 9pm watershed and feature female presenters who invite the audience to call telephone numbers, which are almost exclusively premium-rate numbers, to engage in conversation of a sexual nature. Phone conversations with an on-screen presenter are not audible to viewers: while the presenter is on the phone, there is either recorded music or another presenter talking to viewers, usually doing little more than asking viewers to call in. Premium-rate text, image or video services of a sexual nature might also be offered to the audience. The female presenters dress and act in a sexual manner and the on-screen content typically becomes more sexually explicit as the night progresses. During later hours, the content of the programmes might include nudity, simulation of sex acts and strong sexual language. Those programmes are made available unencrypted to multi-channel-home audiences. On the Sky platform, channels that broadcast those programmes are confined to the Adult section of the Sky electronic programme guide (EPG).
- 22.42** Regular viewers of programmes that are predicated on PRS of a sexual nature express very few concerns about the content of those programmes, or the practices of the broadcasters of those programmes, and support 'soft' adult content being shown on those channels⁷⁶.
- 22.43** Between February 2006 and February 2009, Ofcom received around 200 complaints about Participation TV services, many of which were predicated on the use of PRS of a sexual nature. The complaints include concerns about very strong sexual images and sexual language; unsuitable transmission times; the possibility of children viewing those channels; the proximity on the EPG of those channels to family-viewing channels (research indicates that 'channel flicking' continues to be the primary way of locating channels and only a few respondents said they use the EPG to find specific channels⁷⁷); the unencrypted nature of the content; children calling on-screen numbers for PRS of a sexual nature and participating in those services; drunken female presenters and misleading call cost information.

73 Just under 10% of the complaints about TV advertisements received by the ASA in 2008 related to depictions of nudity, sex or bad language.

74 www.asa.org.uk/NR/rdonlyres/1EAEACA7-8322-4C86-AAC2-4261551F57FE/0/ASA_Delete_Expletives_Dec_2000.pdf (p. 3)

75 www.asa.org.uk/NR/rdonlyres/A9D4F1F4-E34B-44D2-8B28-43348F30D435/0/Nudity_in_Television_Advertising.pdf

76 www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf (p. 6).

77 www.ofcom.org.uk/consult/condocs/participationtv/research/report.pdf

- 22.44** Ofcom has issued fines to four Ofcom TV licensees, totalling £87,500, for breaches of its Broadcasting Code's requirement that programmes must not show adult-sex material unless it is broadcast behind a mandatory PIN-protected encryption system between 10pm and 5.30am (see rule 1.24 of the Ofcom Broadcasting Code). Ofcom has also published findings (breaches against the Ofcom Broadcasting Code) on various channels (see in particular bulletin of 22 October 07⁷⁸) and has had cause to remind all TV channels that broadcast those programmes about their obligations under Rule 1.24 of the Ofcom Broadcasting Code.

Protection of the under 18s

- 22.45** PRS of a sexual nature and broadcast content predicated on PRS of a sexual nature have the potential to include strong sexual content that is unsuitable for under 18s. BCAP considers that neither those services nor broadcast content that promotes them necessarily fall within the definition of pornography. BCAP considers, however, that parallels can be drawn with pornography in terms of the singularly sexual nature of those products and the likely sexual content of the broadcast content of advertisements for those products, which has the potential to include very strong sexual images and sexual language. Those advertisements' exclusion from unencrypted elements of broadcast services are likely to be borne out of the fact that products and services with strong sexual themes have the potential to cause serious or widespread offence.
- 22.46** The evidence that viewing strong sexual content harms children remains scarce given the ethical limitations on conducting such research. There is therefore little substantive academic evidence for the potential risk of harm or offence caused through access to the professionally-produced content market for mobiles⁷⁹.
- 22.47** The present BCAP Codes and the proposed BCAP Code require that broadcast advertisements must comply with the PhonepayPlus (PP+) Code of Practice, which requires:

Before a user may participate in a sexual entertainment service, the service provider must obtain the user's date of birth and confirmation that he has the permission of the bill-payer to use the service.

Sexual entertainment services, and promotions for them, must not contain references which suggest or imply the involvement of persons under 18 years of age.

Promotions for sexual entertainment services must not appear in media targeted at persons under the age of 18.

Save where the relevant network operator has provided an alternative solution acceptable to PhonepayPlus, all sexual entertainment services must provide a message at the beginning of the service stating that: a) the user must be over the age of 18, b) the user should be either the bill-payer or have the bill-payer's permission to call the service, c) service details may appear on the phone bill⁸⁰.

Service providers must ensure that promotions for sexual entertainment services, and the services themselves, are compatible with access control and rating arrangements available for and appropriate to the medium through which they are accessible.

Providers of sexual entertainment services which can be accessed by any means at premium rate must ensure that all websites which can be accessed are content-rated with the Internet Content Rating Association (ICRA) or any other rating system that is generally accepted⁸¹.

- 22.48** BCAP is aware that operators of PRS of a sexual nature undergo training to identify callers who are likely to be under 18 and to terminate those calls immediately. The UK's mobile network operating

⁷⁸ www.ofcom.org.uk/tv/obb/prog_cb/obb95/

⁷⁹ www.lse.ac.uk/collections/media@lse/pdf/Harm%20and%20Offence,%20summary.pdf

⁸⁰ Rule 7.11.5 of the PhonepayPlus Code of Practice.

⁸¹ Rule 7.11.7 of the PhonepayPlus Code of Practice.

companies and the wider UK mobile industry has established a voluntary code of practice that seeks to restrict the availability of unsuitable content to customers under the age of 18⁸².

- 22.49** In 2006, the PP+ Adjudication Panel recorded breaches of the PP+ Code against two service providers that had engaged under 18s in chat of a sexual nature⁸³. In one case, 'Although the operator did not engage in sexual talk herself, she allowed... [two underage] boys to do so. When asked 'will I be allowed to have sex?' the operator even encouraged one of the boys to call after 9pm'. In the other case, 'the caller involved clearly sounded as if he was under 18 years old and that therefore the operator should have terminated the call at an early stage...the operator did not do so, but rather continued the call and engaged the caller in chat of an adult nature...'. In both cases, the numbers were promoted in the context of TV programmes predicated on the use of premium-rate live chatline service.
- 22.50** TV is present in almost all UK children's lives from an early stage, nine out of ten 8-15 year olds live in households with digital TV, and children are increasingly likely to have a greater number of media devices in their bedrooms. On average, 12-15 year olds use six media devices in their bedroom on a day-to-day basis⁸⁴.
- 22.51** Ofcom's Media Literacy Audits highlight that children's solitary use of media has increased: one in six of all children aged 8 to 15 who watch TV in their bedroom do so alone; a higher proportion of 12 to 15s and older boys do so. Children who watch TV or use the Internet in their bedrooms are less likely to have parental rules or restrictions on that use than children who use the same devices in the living room.
- 22.52** 25% of people are confident that they can set a parental control PIN on their multi-channel TV sets. A minority of parents and guardians in households with digital TV impose restrictions on which channels and programmes their children can watch by setting PIN or password controls: just under a third of 8-15 year olds in households with digital TV have restricted access to certain channels or programmes because their parents or guardians have put PIN or password controls in place. Although there has been a significant increase in the use of PIN and password protection on TVs in households with 8-11 year olds since 2005 (possibly as a result of Sky having widely publicised its parental control features over the last two years), older children are more likely to have totally unrestricted access to TV. Ofcom's Media Literacy Audits state that 'those [children] with no rules in place regarding their viewing, who mostly watch without an adult present and who do not have any controls set on their television... account for one in ten children aged 8-15. This figure increases to one in five children aged 12-15'⁸⁵. Some children are able to access and use their parents' or guardians' PINs without those adults' knowledge⁸⁶.
- 22.53** Many more children now own mobile phones: 79% of 8-11 year olds, and 93% of 12-15 year olds, have a mobile phone⁸⁷.
- 22.54** There is ample evidence not only that children can access sexual material but also that they actively seek it out. Many children claim to be able to subvert parental viewing rules. A significant minority of

82 www.aimelink.org/docs/UK_MNO_Age_Verification_Procedures.pdf

83 www.phonepayplus.org.uk/service_providers/adjudications/default.asp?cmd=3&id=725 and

www.phonepayplus.org.uk/service_providers/adjudications/default.asp?cmd=3&id=586

84 www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrssl/ml_adult08/ml_adults08.pdf

and www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrssl/children/children.pdf

85 www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrssl/children/children.pdf

(p. 42)

86 www.ofcom.org.uk/media/mofaq/bdc/bcfag/

87 www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrssl/ml_childrens08/ml_childrens08.pdf (p. 14)

10-year olds, and a majority of 12-14 year olds, appear positively to enjoy adult-orientated programmes (which may or may not contain sexual content)⁸⁸.

iv) BCAP's proposal to maintain present advertising policy and practice

22.55 BCAP considered that, although the policy underpinning the present rule possibly did not envisage them, the policy is relevant to long-form television advertisements for PRS of a sexual nature. On the balance of evidence, BCAP proposes to maintain the present policy: to allow TV advertisements for PRS of a sexual nature on encrypted elements of adult entertainment channels only.

22.56 BCAP weighed up, on the one hand, the TV audience's possible desire to receive advertisements for PRS of a sexual nature and, on the other, the need to ensure that generally accepted standards are applied to the contents of TV services to provide adequate protection for the audience from the inclusion of offensive material and, especially for the under 18s, the inclusion of potentially harmful material. So that those obligations can be secured, the Communications Act 2003 states that BCAP's Code (under the contracting-out agreement with Ofcom):

321(1)(b) may include provision prohibiting advertisements and forms and methods of advertising or sponsorship (whether generally or in particular circumstances).

22.57 Evidence that BCAP found persuasive in reaching its proposal includes:

That long-form, live TV broadcast content predicated on the use of PRS of a sexual nature has, in breach of the Ofcom Broadcasting Code, included very strong sexual content that exceeds generally accepted standards on unencrypted TV services.

That research suggests nudity, sexual themes or bad language in TV spot advertisements are often a cause for complaint for the audience. Research shows that spot advertisements that show nudity or have sexual connotations are likely to cause offence.

That one in ten children aged 8-15, and one in five children aged 12-15, have no rules in place regarding their viewing; most watch without an adult present and do not have any access controls set on their television.

That 'channel flicking' continues to be the primary way of locating channels.

That children can access sexual material and actively seek it out.

Television broadcasters' ability to restrict access to broadcast adult content

22.58 In reaching its proposal, BCAP took into account concerns expressed by some providers of PRS of a sexual nature that TV encryption technology was not available on all digital platforms.

22.59 BCAP understands that all digital TV platforms present the opportunity to restrict access to adult content. The means they use to achieve that varies but essentially all are able to accommodate the requirement that an audience member enters a PIN before he or she is able to view particular programmes. Encryption is possible on satellite and terrestrial platforms, although audience members need compatible receivers to be able to watch encrypted services with PIN protection of adult content. In practice, that means using a Sky receiver for satellite, while for terrestrial services a box that can accept a Conditional Access Module is required (such as a TopUpTV or ITV Digital box). For free-to-air services, it is possible to obscure the content behind PIN-protected captions. On cable, content can be assigned an age rating which, depending on the time of day and level of access chosen by the subscriber, will restrict access to certain content until an audience member enters a PIN.

⁸⁸ www.asa.org.uk/NR/rdonlyres/AAC9A328-6525-4164-B2FA-FA5C86C5B52E/0/ASA_Young_people_media_personal_relationships_Nov_2003.pdf

Question 124

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

Payment mechanisms for accessing telephone sexual entertainment services

- 22.60** The present rule specifies premium-rate as the method of payment for telephone sexual entertainment services. That likely reflects the fact that, at the time the rule was included in the Code, the ITC understood those services were offered in return for payment by premium-rate call charge only. BCAP's review of the rule makes clear that the present restriction on TV advertisements for those services is intended to prevent serious or widespread offence and protect children from potential harm. The restriction takes account of the wholly adult nature of the service and the potential for advertisements, particularly live broadcast material predicated on the use of telephone sexual entertainment services, to go beyond generally accepted standards on unencrypted TV channels. The method of payment is not therefore relevant to restricting those advertisements to encrypted elements of adult entertainment channels. An advertisement for a telecommunications-based sexual entertainment service that is offered in return for payment by credit card, for example, would likely be similarly restricted to encrypted elements of adult entertainment channels through other rules in the BCAP Code.

Question 125

i) Given BCAP's policy consideration, do you agree that the BCAP rule on PRS of a sexual nature should be clarified to make clear that it applies also to TV advertisements for telecommunications-based sexual entertainment services made available to consumers via a direct-response mechanism and delivered over electronic communication networks? If your answer is no, please explain why.

ii) If your answer is no to question X(i), do you consider the rule should make clear that 'premium-rate call charge' is the only permissible form of payment? If your answer is no, please explain why.

- 22.61** In line with this proposal, BCAP proposes to create a new section, entitled Telecommunications-Based Sexual Entertainment Services, in the proposed BCAP Code. Advertisements for PRS of a sexual nature would continue to be required to comply with the rules in the Premium-Rate Services section of the proposed BCAP Television Code, as well as the rules in the Telecommunications-Based Sexual Entertainment Services section.

Dialling codes

- 22.62** The present TV rule defines PRS of a sexual nature as those that operate on the 0909 dialling Code only. That is incorrect. Today, those services may operate on 0908, 0909 or 098 number ranges and on mobile short code numbers beginning 69 or 89 only. Those number ranges are designated for the purpose of premium-rate sexual entertainment services by Ofcom⁸⁹.
- 22.63** BCAP has considered if the proposed rule might reference those number ranges (either as examples or as a means of defining 'PRS of a sexual nature') because that reference might assist a broadcaster to identify immediately the nature of the service being advertised and to ensure that the advertisement complies with the rule for PRS of a sexual nature. BCAP is mindful, however, that some PRS of a sexual nature have illegitimately operated on number ranges other than those designated for those types of services⁹⁰. That means a broadcaster cannot rely entirely on the number on which a service

⁸⁹ www.phonepayplus.org.uk/consumers/faq/default.asp#phone%20paid%20services

⁹⁰ www.phonepayplus.org.uk/service_providers/adjudications/default.asp?cmd=3&id=585

operates to confirm the nature of the service being advertised. BCAP is mindful, too, that there is no guarantee that those number ranges will not change again.

- 22.64** On balance, BCAP proposes not to reference number ranges either as examples of, or as a means of defining, PRS of a sexual nature.

Question 126

Given BCAP's policy consideration, do you agree that BCAP's rule should not define PRS of a sexual nature as those operating on number ranges designated by Ofcom for those services? If your answer is no, please explain why.

Types of PRS services of a sexual nature

- 22.65** The present rule refers to 'voice services of a sexual nature' (emphasis added). BCAP considers it reasonable to assume that, when the rule was last reviewed, voice services (live or recorded) comprised the vast majority of telecommunications-based sexual entertainment services made available to the public, typically via a fixed phone. Today, telecommunications-based sexual entertainment services include voice, text, image or video content services.
- 22.66** The ASA and its predecessors, the Independent Television Commission and Ofcom, have interpreted the present TV rule as applying to image, text and video services of a sexual nature, not only to voice services⁹¹. BCAP accepts there is a qualitative difference between voice and moving-image telecommunications-based sexual entertainment services but that that difference does not necessarily justify different advertising rules. BCAP considers that the ASA's present interpretation of the rule is proportionate and takes account of the rapid advances in communications technology.
- 22.67** BCAP proposes to reflect the custom and practice of interpreting the present rule by making clear that telecommunications-based sexual entertainment services are 'voice, text, image or video services of a sexual nature'.

Question 127

Given BCAP's policy consideration, do you agree that BCAP's rule on TV advertisements for telecommunications-based sexual entertainment services should extend to 'voice, text, image or video services of a sexual nature'? If your answer is no, please explain why.

BCAP proposal in summary

- 22.68** BCAP proposes to replace rule 11.1.2 of the present BCAP Television Code with rule 23.2, which it would include in a new Code section, Telecommunications-Based Sexual Entertainment Services.

THE PRESENT RULE

11.1.2

Premium rate services of a sexually explicit nature (ie those which operate on the 0909 dialling

⁹¹ The ASA's adjudication against Eckoh Technologies (5 April 2006) stated: "For the avoidance of doubt, we regard rule 11.1.2 as applying to all premium rate voice services of a sexual nature. (Premium rate text services of a sexual nature fall within the spirit of this rule)" (see www.asa.org.uk/NR/rdonlyres/DB285EE9-1D6E-439B-8D16-3131615FAE54/0/Broadcastreport5April06.pdf). The ASA's adjudication against Red Circle Technologies (20 December 2006) stated: "We do not interpret the requirement in Rule 11.1.2 for advertisements of premium rate services to be broadcast on encrypted elements of adult entertainment channels only to be limited solely to services deemed to be sexually explicit or using the 0909 dialling code" (see www.asa.org.uk/asa/adjudications/Public/TF_ADJ_42080.htm).

code) may not be advertised. An exception is made for premium rate voice services of a sexual nature, which may be advertised on encrypted elements of adult entertainment channels only

THE PROPOSED RULE

Definitions

Telecommunications-based sexual entertainment services are voice, text, image or video services of a sexual nature that are made available to consumers via a direct-response mechanism and are delivered over electronic communication networks.

Encrypted elements of adult channels are interpreted with reference to rule 1.24 of the Ofcom Broadcasting Code.

23.1 – Television

Advertisements for telecommunications-based sexual entertainment services are acceptable on encrypted elements of adult entertainment channels only.

- 22.69** BCAP considers that, by restricting TV advertisements for telecommunications-based sexual entertainment services to encrypted elements of adult entertainment channels, the proposed rule prevents the potential for serious or widespread offence. It also, on a precautionary principle, protects children from seeing material that goes beyond generally accepted standards on unencrypted channels and prevents children from responding to TV advertisements for services intended for a strictly adult audience and potentially accessing those services.

Question 128

Given BCAP's policy consideration, do you agree that rule 11.1.2 in the present BCAP Television Code should be replaced by proposed rule 23.2? If your answer is no, please explain why.

Telecommunications-based live chatline services

- 22.70** The present BCAP Codes do not include a rule on TV advertisements for live chatline services. The vast majority of those are offered in return for payment by premium-rate call charge and, therefore, advertisements for them must comply with rules in the Premium-Rate Services section and the general rules of the present Codes and the proposed BCAP Code.
- 22.71** If the new BCAP Code allowed TV advertisements for telecommunications-based sexual entertainment services on encrypted elements of adult entertainment channels only, BCAP will undertake, in discussion with PhonepayPlus, to monitor closely the content of unencrypted advertisements for live chatline services and the content of those services. BCAP and the ASA would not allow a rule that confined advertisements for telecommunications-based sexual entertainment services to encrypted elements of adult entertainment to be circumvented by unencrypted advertisements for live chatline services that, in breach of the BCAP Code and the PP+ Code, promoted those services as being sexual in nature or that operated as sexual entertainment services.

v) Options that BCAP has considered and, on balance, not favoured

- 22.72** As part of its review of TV rule 11.1.2, BCAP has considered different approaches that it could adopt in regulating advertisements for telecommunications-based sexual entertainment services. But BCAP considers that, on a preliminary review of those approaches, they do not afford the same necessary degree of protection as that that would be provided by its proposal.

- 22.73** BCAP considered if advertisements for telecommunications-based sexual entertainment services should be permitted on unencrypted channels subject to content rule and a scheduling restriction, such as after 9pm, 10pm, 11pm or 12am.
- 22.74** BCAP considered that that approach would not adequately protect members of the audience who could be seriously offended by advertisements for telecommunications-based sexual entertainment services. BCAP also considers that that approach would not adequately protect children from potentially harmful material.
- 22.75** BCAP considered if advertisements for telecommunications-based sexual entertainment services could be regulated by distinguishing between, and applying different rules to, short- and long-form advertisements. For example, BCAP considered if a suitable approach could be to limit the broadcast of long-form advertisements for PRS of a sexual nature to encrypted elements of adult entertainment channels but allow short-form advertisements for them to be broadcast on open-access channels, subject to a scheduling restriction, or *vice versa*.
- 22.76** BCAP considered that that approach would not adequately protect members of the audience who could be seriously offended by TV advertisements for telecommunications-based sexual entertainment services. BCAP also considers that that approach would not adequately protect children from potentially harmful material.
- 22.77** BCAP considered amending the present rule to prohibit TV advertisements for PRS of a sexual nature. BCAP considered that that approach would be unduly proscriptive and disproportionate. The protection provided by encryption means that it is unlikely that advertisements broadcast on encrypted elements of adult entertainment channels would be seen by under 18s and by those who do not wish to see material with sexual themes. Considering the typically strong sexual content of the programmes and other advertisements broadcast on encrypted elements of adult entertainment channels, BCAP considers that a rule that entirely prohibited the advertising of those services would not proportionately protect the viewing audience from harmful or offensive material.
- 22.78** Conversely, BCAP considered another approach to be to delete the present rule entirely and rely on the Code's general provisions, which prevent misleading, harmful and offensive material in advertising, to regulate advertisements for PRS of a sexual nature.
- 22.79** BCAP considered that that approach would not adequately protect members of the audience who could be seriously offended by advertisements for telecommunications-based sexual entertainment services. BCAP also considers that that approach would not adequately protect children from potentially harmful material.

Other Questions

Question 129

- i) Taking into account BCAP's general policy objectives, do you agree that BCAP's rules, included in the proposed Premium-Rate Services 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 Premium-Rate Services rules that you consider are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?
- iii) Do you have other comments on this section?

Part 2 - Section 23

Telecommunications-Based Sexual Entertainment Services

- 23.1** BCAP's proposal to establish a dedicated section on betting tipster advertising is discussed in [section 10](#), Prohibited Categories, of this consultation document.

Part 2 - Section 24

Homeworking Schemes

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

Background

The law

Communications Act 2003

- 24.1** The Communications Act sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objective to the Homeworking Schemes Section of the BCAP Code is:

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

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

Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

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

- 24.4** The CPRs implement European Directive 2005/29/EC.

- 24.5** You can read the text of the CPRs at:

www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3480871

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

- 24.6** The Regulations govern the conduct of the private recruitment industry and establish a framework of minimum standards that clients – both work-seekers and hirers – are entitled to expect.

- 24.7** See the text of the Regulations here:

www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=870918

Other relevant regulatory bodies

- 24.8** Bodies that play a part in regulating a broadcast advertisement of relevance to this section but that are not conferred with legal functions to do so include: Clearcast (www.clearcast.co.uk) and the RACC (www.racc.co.uk).

Meeting the need to regulate broadcast advertisements for homeworking schemes

- 24.9** The ITC reviewed the Television Standards Code in 2002 and decided to retain strict rules on advertisements for homeworking schemes. BCAP considers it likely that the decision to maintain those rules recognised concern that schemes involving a charge for raw materials present a significant risk to vulnerable viewers. The rules were likely considered necessary to protect the audience, and vulnerable people in particular, from misleading advertisements for homeworking schemes and to reduce the risk of the operators of bogus schemes from exhorting money from people and giving them little or nothing in return.
- 24.10** The consumer protection matters identified by the ITC still pertain today; BCAP's proposed Code similarly includes rules that protect the audience from misleading advertisements for homeworking schemes.

Proposed substantive changes

New rules

New rules for radio

- 24.11** Unlike the Television Code, the present Radio Code does not include dedicated rules covering advertisements for homeworking schemes. BCAP proposes to extend to radio two of the TV rules on homeworking schemes.
- 24.12** BCAP's proposed TV and radio rules are:

24.1

Advertisements must not give a misleading impression of how homeworking schemes work or of the likely remuneration. Advertisements must make clear conditions, obligations or limitations that could reasonably be expected to influence a decision to participate in the scheme.

24.2

No homeworking scheme may be advertised:

24.2.1

if a charge or deposit is required to obtain information about the scheme

24.2.2 – Television only

if it involves a charge for raw materials or components or

24.2.3 – Television only

if the advertiser offers to buy goods made by the homeworker.

- 24.13** BCAP considers proposed rule 24.1 compliments, and goes no further than, the Code's misleading rules, particularly 3.1: 'Advertisements must not materially mislead'. BCAP's proposed rule 24.1 would be unlikely to restrict advertisements that are currently permissible under the Radio Code.
- 24.14** Proposed rule 24.2.1 would prevent homeworking schemes from being advertised on radio if a charge or deposit is required to obtain information about the scheme. Although such a practice is not explicitly banned by the existing Radio Code, BCAP considers it reasonable to extend that TV Code requirement to radio. Both the OFT and the now defunct National Group on Homeworking, in its 'Practical Guide to Dealing with Misleading Advertisements and Bogus Homeworking Schemes', advise consumers not to send money to the advertisers of homeworking schemes to avoid being caught out by a scam⁹².
- 24.15** Although it proposes to extend rules 24.1 and 24.2.1 to cover radio advertisements, BCAP does not propose likewise to extend 24.2.2 or 24.2.3. BCAP has no evidence to suggest that the lack of those

⁹² www.of.gov.uk/shared_of/consumer_leaflets/general/of831.pdf and www.homeworking.gn.apc.org

rules in radio has proved detrimental to consumers, for example that there is a pattern of the audience being misled by those advertisements. BCAP also considers that the combination of TV's reach, its audio-visual impact and its place in the family home justify, to a large extent, tougher regulation of TV advertisements for homeworking schemes.

Question 130

i) Given BCAP's policy consideration, do you agree that rules 24.1 and 24.2.1 should be applied to radio advertisements, as they presently are to TV advertisements? If your answer is no, please explain why.

ii) Given BCAP's policy consideration, do you agree that it is not necessary to extend to radio the TV ban on advertisements that involve a charge for raw materials or advertisements that include an offer from the advertiser to buy goods made by the homeworker? If your answer is no, please explain why.

Revised rules

Obligation on licensees to obtain full details of the scheme

24.16 The present Television Code states:

11.4.1

Licensees must obtain full details of the scheme and must ensure that advertisements do not give a misleading impression of how it will work or of the likely remuneration

24.17 BCAP's proposed rule 24.1 does not include the TV Code's requirement (rule 11.4.1) that 'Licensees must obtain full details of the [advertised homeworking] scheme'. BCAP considers it reasonable to assume that, given it in its entirety, the purpose of the rule is to help broadcasters decide whether or not a homeworking advertisement is likely to mislead the audience. BCAP proposes to delete the requirement because it considers it superfluous: broadcasters are expected to exercise reasonable judgment and ensure that all the advertisements they accept for broadcast comply with the Code.

Deleted rules

24.18 None.

Other Questions

Question 131

i) Taking into account its general policy objectives, do you agree that BCAP's rules, included in the proposed Homeworking Schemes 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 Homeworking Schemes rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

iii) Do you have other comments on this section?

Part 2 - Section 25

Instructional Courses

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

Background

The law

Communications Act 2003

- 25.1** The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objectives to the Instructional Courses Section of the BCAP Code is:

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

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

Other relevant regulatory bodies

- 25.3** Bodies that play a part in regulating a broadcast advertisement of relevance to this section but that are not conferred with legal functions to do so include: Clearcast (www.clearcast.co.uk) and the RACC (www.racc.co.uk).

Meeting the need to regulate broadcast advertisements for Instructional Courses

- 25.4** BCAP's proposed rules broadly retain the requirements of the present TV rules to ensure that audiences are protected from misleading material and that the susceptibilities or credulity of those seeking work are not exploited. The present Radio Code does not include dedicated rules on advertisements for instructional courses, relying instead on its general misleading rules. BCAP proposes rules common to advertisements in both media because it considers that the differences between television and radio do not justify different rules for advertisements for instructional courses.

Proposed substantive changes

New rules

New rules for radio

- 25.5** The present Radio Code does not include dedicated rules covering advertisements for instructional courses. BCAP's proposed TV and radio rules are:

25.1

Advertisements offering a qualification, a course of instruction in a skill or a course that leads to a professional or technical examination must not exaggerate the resulting opportunities for work or remuneration.

25.2

Advertisements for a correspondence school or college may be broadcast only if the advertiser has given the broadcaster evidence of suitable and relevant credentials: for example, affiliation to a body that has systems for dealing with complaints and for taking disciplinary action; systems in place for regular review of members' skills and competencies and registration based

on minimum standards for training and qualifications.

- 25.6** Radio advertisements for instructional courses presently have to comply with the Code's general misleading rules. BCAP considers that rule 25.1 prevents a misleading practice that was common to advertisements for Instructional Courses before that rule was included in the TV Code. BCAP considers it would not amount to a change in advertising policy and practice for radio.
- 25.7** Rule 25.2 would amount to a new regulatory requirement on radio broadcasters. That proposed rule takes into account public concern about bogus qualifications; it prevents the audience from being misled about the nature of the advertised product or service and protects advertisers of instructional courses whose reputation is placed at risk by disreputable competitors.
- 25.8** BCAP proposes that the rules should be common to TV and radio.

Question 132

i) Given BCAP's policy consideration, do you agree that rules 25.1 and 25.2 should be applied to radio advertisements, as they presently are to television advertisements? If your answer is no, please explain why.

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

Revised rules

- 25.9** None.

Deleted rules

Unrecognised qualifications

- 25.10** The present BCAP TV Code states:

11.5b

Advertisements must not offer unrecognised qualifications.

- 25.11** The rule does not define an 'unrecognised qualification' and it is not clear how advertisers, broadcasters and the regulator should interpret the requirement. It was likely to have been intended to prevent advertisements for 'bogus' qualifications, for example paid-for 'qualifications' involving no study or training or advertisements for a qualification that is not recognised by employers or established academic institutions.
- 25.12** Offering a bogus qualification in an advertisement could mislead the audience, who might have a reasonable expectation that a qualification necessarily involves study or training; those advertisements would be subject to the Code's general misleading rules.
- 25.13** An advertisement for a qualification that is not recognised by employers or established academic institutions is not, in BCAP's opinion, in and of itself irresponsible or misleading. Qualifications are not necessarily undertaken for the sole purpose of, for example, improving employment prospects. BCAP considers that proposed rules 25.1 and 25.2 would prevent misleading practices (see Section 5); they would adequately regulate broadcast advertisements that misleadingly offer bogus qualifications. For those reasons, BCAP proposes to delete present TV rule 11.5b.

Question 133

Given BCAP's policy consideration, do you agree with BCAP's proposal not to include present TV rule 11.5b in the proposed BCAP Code? If your answer is no, please explain why.

Other questions

Question 134

i) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Instructional Courses 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?

Part 2 - Section 26

Services Offering Individual Advice on Consumer or Personal Problems

- 26.1** BCAP's proposal to establish a dedicated section on advertising for services offering individual advice on consumer or personal problems is discussed in [section 10](#), Prohibited Categories, of this consultation document.

Part 2 - Section 27

Introduction and Dating Services

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

Background

The law

Communications Act 2003

- 27.1** The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objectives to the Introduction and Dating Services Section of the BCAP Code are:

319(2)(a) that persons under the age of 18 are protected

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in TV and radio services is prevented

- 27.2** See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

Data Protection Act 1998 (DPA)

- 27.3** The purpose of the Act is to protect the rights of the individual about whom data is obtained, stored, processed or supplied rather than those of the people or organisations who control and use personal data. The Act applies to both computerised and structured paper records. The Act requires fair and lawful processing of personal data, appropriate security measures against unauthorised access to, or alteration, disclosure or destruction of personal data and against accidental loss or destruction of personal data.

- 27.4** See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=3190610

Other Relevant regulatory bodies

The Association of British Introduction Agencies (ABIA)

- 27.5** In October 1981 the ABIA was created, at the instigation of the Office of Fair Trading, in response to genuine concern about the conduct of dating and introduction agencies. ABIA has a complaints procedure and has a voluntary code of practice that includes guidance on fees, refunds, method of operation and advertising.

Online services

- 27.6** Online introduction services providers must conform to all legal requirements applying to their business. In particular, they are required by law to register with the Data Protection Registrar, and must publish their registration number. They must also state how personal information supplied by clients is stored and how it may be used. On their website, they must give clients the right to refuse the passing on of information about them to other organisations of any kind.
- 27.7** Services operating through a premium rate number are subject to the PhonepayPlus (PP+) Code and Section 22 Premium-Rate Telephone Services of the BCAP Code.

Other

- 27.8** Bodies that play a part in regulating a broadcast advertisement of relevance to this section but are not conferred with legal functions to do so include: Clearcast, (www.clearcast.co.uk) and the RACC, (www.racc.co.uk).

Meeting the need to regulate broadcast advertisements for introduction and dating services

- 27.9** Advertisements for introduction and dating services have the potential to exploit individuals' vulnerabilities, for example, an individual's sense of inadequacy and to mislead about the likelihood of meeting a partner. The present and proposed rules address those concerns and ensure that broadcast advertisements for introduction agencies and dating services do not appeal to under 18-year-olds.

Proposed substantive changes

New rules

- 27.10** None.

Revised rules

Precautions when meeting people

- 27.11** The present TV Code states:

11.7.2

For advertising subject to 11.7 (Introduction and Dating Services), licensees must obtain an assurance that the advertiser gives clear advice on precautions to take when meeting people through introduction or dating services.

- 27.12** The Radio Code does not contain an equivalent rule. BCAP considers it is good practice to ensure that individuals, particularly the vulnerable, are given clear advice on precautions to take when meeting people through those services. However, BCAP considers the requirement on the broadcaster to obtain an assurance is too prescriptive, given that the broadcaster may determine that an advertiser complies with this condition through, for example, information included on the advertiser's website.

- 27.13** BCAP's proposed TV and radio rule is:

27.4

Broadcasters must satisfy themselves that advertisers give customers clear advice on precautions to take when meeting people through an advertisement for an introduction or dating agency.

Question 135

Given BCAP's policy consideration, do you agree that rule 27.4 should be included in the proposed BCAP Code? If your answer is no, please explain why.

Deleted rules

Data Protection

27.14 The present Radio Code states:

Section 3.14(c)

licensees must obtain an assurance that the advertiser will not disclose data to a third party without the client's consent, and that the client's name will be promptly deleted on request.

27.15 In practice, that rule requires the broadcaster to obtain an assurance that the advertiser complies with the requirements of Data Protection Act. BCAP considers that is an obligation placed on all organisations who obtain, store, or process personal data and, therefore, it is not, in BCAP's opinion, necessary to require the broadcaster to obtain an assurance from the advertiser to that end. However, BCAP proposes to include a cross-reference the Data Protection Act 1998 in this Section.

Question 136

Given BCAP's policy consideration, do you agree that it is not necessary to require a broadcaster to obtain an assurance that the advertiser will not disclose data to a third party without the client's consent, and the client's name will be promptly deleted on request? If your answer is no, please explain why.

Promiscuity

27.16 The present TV Code states:

11.7.1(b)

advertisements for introduction or dating services must not contain material that appear to encourage or condone promiscuity.

27.17 The present Radio Code states:

3.14(e)

advertisements must not:

contain material which could be taken to encourage or endorse promiscuity.

27.18 BCAP considered whether a blanket ban on encouraging or condoning promiscuity is necessary. Those rules likely reflect a concern that such messages might cause serious or widespread offence, or cause harm by, for example, endorsing a lifestyle that significantly increases an individual's chances of catching a sexually transmitted disease.

27.19 However, BCAP considers that such messages may not be in themselves offensive or harmful. BCAP considers those messages could be acceptable if they appeared in advertisements that are sensitively scheduled and suitably restrained. BCAP considers that the general offence rule (4.1 'Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards.'), the proposed social responsibility rule (2.1 'Advertisements must be prepared with a sense of responsibility to the audience and to society.') and the general scheduling rule (32.1) that prevents inappropriate juxtapositions between advertisements and surrounding programme material, adequately regulates advertisements that include those messages. BCAP has, in addition, cross-referenced this section of the Code with the existing rules on prohibited categories to ensure

advertisements for dating or introduction services do not indirectly promote an unacceptable product or service, for example sexual massage.

Question 137

Given BCAP's policy consideration, do you agree the proposed BCAP Code provides adequate protection from the potential for harm or offence from advertisements that encourage or condone promiscuity? If your answer is no, please explain why.

Misleading

27.20 The present Radio Code states:

Section 3.14(a)

before accepting advertisements, licensees must establish that those wishing to advertise conduct their business responsibly and can provide a level of service commensurate with the claims in their advertising.

Section 3.14(d)

any quoted price must be the price at which the full service described in the advertisement is actually available and any qualification or supplementary charge must be made clear.

27.21 BCAP considers those are adequately regulated by rules in the Misleading section; see Section 3 of the proposed BCAP Code, which includes specific rules on price claims. BCAP therefore proposes to delete those rules but, because it considers it to be a common claim in advertisements for introduction and dating services, to retain the requirement that, 'Advertisements must not imply a greater degree of matching of individual clients according to suitability than is achieved.'

Question 138

Given BCAP's policy consideration, do you agree it is not necessary to carry over radio rules 3.14 (a) and (d) into the proposed BCAP Code? If your answer is no, please explain why.

Location or telephone number

27.22 The present Radio Code states:

3.14(b)

where business is conducted from premises where clients, actual or potential, can visit, the full postal address, or telephone number as published elsewhere, for that location should be included.

27.23 BCAP considers the business models on which introduction and dating services are based means that most, if not all advertisements in this sector, include a telephone number or website address that include relevant contact details and locations for clients to visit.

Question 139

Given BCAP's policy consideration, do you agree it is not necessary to carry over radio rule 3.14 (b) into the proposed BCAP Code? If your answer is no, please explain why.

Other questions

Question 140

- i) Taking into account BCAP's general policy objectives, do you agree that BCAP's rules, included in the proposed Introduction and Dating Services 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 Introduction and Dating Services rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?
- iii) Do you have other comments on this section?

Part 2 - Section 28

Competitions

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

Background

The law

Gambling Act 2005

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

Other relevant regulatory bodies

The Gambling Commission

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

PhonepayPlus (PP+)

- 28.8 PP+ regulates PRS under a co-regulatory agreement with Ofcom, which retains its legal powers in regard to PRS that stem from the Communications Act 2003. PP+ carries out its duties so that consumers, particularly children who might be especially vulnerable, can use PRS with absolute confidence. PP+'s Code of Practice sets standards for the promotion, content and overall operation of PRS. The Code of Practice is approved by Ofcom under section 121 of the Communications Act 2003. PP+ investigates complaints and has the power to fine companies, bar access to services and order refunds. PP+ can also bar the individual person behind a company from running any premium-rate service under any company name on any telephone network for a set period. PP+'s website, which includes its Code of Practice, is www.phonepayplus.org.uk.

Meeting the need to regulate competitions in broadcast advertisements

- 28.9 Competitions in broadcast advertisements have the potential to mislead members of the audience and cause them financial harm.

- 28.10** At present, broadcast advertisements for competitions are subject to the Codes' general rules that ensure advertisements do not mislead, harm or offend and the privacy of the individual (a competition entrant, for example) is protected. Competitions that invite entry via a premium-rate payment mechanism must comply with rules in the Premium-Rate Services sections of the existing Codes. The present Radio Code includes an additional requirement; a radio broadcaster must be satisfied that prospective entrants to a competition can obtain printed details of a competition, including announcement of results and distribution of prizes.

Ofcom consultation on Participation TV

- 28.11** Ofcom will later this year consult on the use of premium-rate services (PRS) in programmes with reference to Section 10 (Commercial References and Other Matters) of its Broadcasting Code, specifically to ensure that advertising is kept separate from programme content ('editorial content') in accordance with European broadcasting legislation and UK regulation. That consultation is of particular significance to a growing number of programmes that are predicated on the use of PRS, including Quiz TV. Quiz TV services form a genre of TV programme, which normally features a presenter inviting the viewing audience to solve on-screen competitions (including quizzes, puzzles, etc). Viewers generally pay the cost of a premium-rate text message or premium-rate telephone call for a chance to solve the quiz and win prize-money; sometimes a caller's identity and spoken answer is broadcast. A free-entry route is offered to the audience if it is necessary for the purposes of complying with the Gambling Act 2005.
- 28.12** Ofcom might, after consultation, include new rules in Section 10 of the Broadcasting Code and/or issue guidance to make clearer the extent to which PRS is permissible in programme content, in line with Ofcom's legal and regulatory obligations. It is possible that Ofcom may conclude, on a case-by-case basis, that particular content predicated on PRS, including Quiz TV, does not comply with its Broadcasting Code, in its current form, or as amended. Broadcasters might then need to consider whether to adjust their format or broadcasting model to bring their services into compliance with the Broadcasting Code, or to consider whether they could operate as advertising (teleshopping). The latter must comply with the present BCAP Television Code and, in time, the proposed BCAP Code. At present, The BCAP Television Code regulates competitions in advertisements through its general rules, especially rules that prevent misleading advertisements.
- 28.13** As part of its forthcoming consultation, Ofcom intends to conduct viewer and consumer research on PRS-based TV services. That research and consultation will inform Ofcom's decisions on possible changes to both the Ofcom Broadcasting Code and, potentially, to the BCAP Code, for which Ofcom has responsibility for final approval. BCAP's proposal is to introduce a new rule ensuring competitions are conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known, which BCAP intends to support with a guidance note that assists broadcasters to comply with that rule. That proposal, however, is subject to change following BCAP's and Ofcom's consultations and decisions by Ofcom. We welcome comments from stakeholders on this matter and, unless confidentiality to BCAP alone is requested, we will share such responses with Ofcom.

Proposed substantive changes

New rule

Competitions

- 28.14** The present Radio Code states:

Section 2, rule 26 Competitions ...

Advertisements inviting listeners to take part in competitions are acceptable, subject to Section 14 and Schedule 2 of the Gambling Act 2005.

Licensees must be satisfied that prospective entrants can obtain printed details of a competition, including announcement of results and distribution of prizes. There are no limitations on prize values.

- 28.15** That rule merely informs radio broadcasters that advertisements inviting listeners to take part in competitions should take into account rules on the protection of privacy and exploitation of the individual, rules that safeguard children (including restrictions on the content and type of advertisements for competitions directed at children) and rules on promotions in medicine and alcohol advertisements. The Note to the rule requires a radio broadcaster to be satisfied that prospective entrants can obtain printed details of a competition, including announcement of results and distribution of prizes. That information might go some way to satisfying a prospective entrant that the administration of the competition is fair.
- 28.16** Beyond those rules, the BCAP Codes do not include dedicated rules on the administration of competitions or any other type of promotions that feature in advertisements. Because spot advertisements are typically short in duration, promotions included in them tend to be simple, for example two-for-one offers, 25% off, 10% more and the like. BCAP considers its Misleading rules adequately regulate those promotions, especially the existing rules that prevents advertisements from misleading by omission of significant conditions. BCAP has no evidence that the audience or broadcasters have been disadvantaged by the lack of specific rules on promotions and it does not propose to include new rules for advertised promotions in general.
- 28.17** Broadcast advertisements that invite viewers or listeners to take part in competitions are, at present, few and far between. BCAP is mindful, however, of the potential for competitions, quizzes and the like to feature in long-form broadcast advertising, particularly television advertising in the light of Ofcom's consultation on PTV.
- 28.18** BCAP has considered if the existing rules are adequate to regulate competitions in broadcast advertisements given the widely reported and serious compliance failures in programmes that encourage viewer participation through premium-rate payment mechanisms, much of which concerned competitions in TV and radio programmes, including Call TV quiz services. That led to Ofcom commissioning an inquiry in March 2007⁹³, which concluded that systemic problems were evident in TV broadcasters' use of PRS.
- 28.19** In the light of that inquiry, Ofcom published Guidance⁹⁴ to assist compliance with rule 2.11 of its Broadcasting Code, which states: 'Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known.' The Guidance applied to all broadcast competitions in television and radio programmes and not just Quiz TV services. It made clear that 'Ofcom expects all competitions to be run fairly and honestly. Broadcasters who run them are inviting viewers and listeners to take part in schemes on terms that would be assumed to be equitable and free of deception: everyone who takes part should have the same chances of winning and all aspects of a competition should be clear and fair.' The Guidance reminds broadcasters of their compliance obligations in general and sets out detailed guidance on the operation of a competition and the procedure for choosing a winner. It includes guidance on pricing, free entry routes, despatch, availability and substitution of prizes, competition rules, solutions and methodology.
- 28.20** BCAP proposes to include a dedicated rule on competitions because it would bring to broadcasters' attention the importance of ensuring that conditions of competitions are made clear and the administration of those are fair. It therefore proposes to reproduce in the new BCAP Code Ofcom's rule on competitions with the intention of providing continuity in regulation and protection for broadcasters and the public alike. BCAP intends to supplement that rule with Guidance, which is likely to cover the same ground as Ofcom's Guidance. BCAP intends that the Guidance will be published at the same time as the new BCAP Code. The proposed rule and guidance would complement rules in the Misleading section of the BCAP Code and replace the existing radio rule, rule 26 in section 2, which deals with Competitions.

⁹³ www.ofcom.org.uk/tv/ifi/prsinquiry/ayrereport/report.pdf

⁹⁴ www.ofcom.org.uk/tv/ifi/guidance/bguidance/guidance2.pdf

28.21 BCAP's proposed TV and radio rule is:

28.1

Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known.

Question 141

i) Given BCAP's policy consideration, do you agree that rule 28.1 should be included in BCAP's new Code? If your answer is no, please explain why?

ii) Do you have other comments on this section?

Part 2 - Section 29

Private Investigations Agencies

- 29.1** BCAP's proposal to establish a dedicated section on advertising for private investigations agencies is discussed in [section 10](#), Prohibited Categories, of this consultation document.

Part 2 - Section 30

Pornography

- 30.1** BCAP's proposal to establish a dedicated section on advertising for products and services coming within the recognised character of pornography is discussed in [section 10](#), Prohibited Categories, of this consultation document.

Part 2 - Section 31

Other Categories of Radio Advertisements that Require Central Copy Clearance

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

Background

The law

Communications Act 2003

- 31.1** The Act sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objectives to this section of the BCAP Code are:

319(2)(a) that persons under the age of eighteen are protected;

319(2)(f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

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

Other relevant regulatory bodies

RadioCentre and Radio Advertising Clearance Centre (RACC)

- 31.3** The RadioCentre's members consist of the majority of UK Commercial Radio stations who fund the organisation. The RadioCentre aims to maintain and build a strong and successful commercial radio industry. The RadioCentre administers the RACC.
- 31.4** Please see www.radiocentre.org
- 31.5** The RACC was set up by the commercial radio industry to ensure, before they are broadcast, that radio advertisements comply with the Radio Advertising Standards Code.
- 31.6** Please see www.racc.co.uk

Meeting the need to ensure that radio advertisements do not mislead, harm or offend and consistency of advertising standards is achieved for the benefit of consumers and the radio industry

- 31.7** The present BCAP Codes and the proposed BCAP Code require categories of radio advertisements to be centrally cleared by the RACC. Those categories of radio advertisements have in common a clear potential to mislead, offend or harm.
- 31.8** Section 31 of the proposed Code includes categories of radio advertisements that do not have a Code section dedicated to them, mainly because the general rules are considered adequate to regulate those categories of radio advertisements. The requirement for other categories of radio advertisements to be centrally cleared is included in some Code sections dedicated to a specific

advertising sector, for example alcohol. Through the RadioCentre, the commercial radio industry agrees that categories of radio advertisements must be centrally cleared for the benefit of consumers and the radio industry.

Proposed substantive changes

New

18+ rated computer or console games

31.9 In section 32, Scheduling, BCAP proposes to include an explicit scheduling rule for broadcast advertisements for 15+, 16+ and 18+ rated computer or console games, in line with current restrictions on broadcast advertisements for 15- and 18-certificate films. In keeping with that proposal, BCAP proposes to require radio advertisements for 18+ rated computer or console games to be cleared by the RACC before they are broadcast, in line with the same requirement for 18-certificate films. BCAP's proposal ensures that those advertisements receive a necessary high level of pre-broadcast scrutiny to ensure they are sensitively and appropriately scheduled and do not cause serious or widespread offence.

31.10 BCAP's proposed radio rule is:

31.1

In addition to categories of radio advertisements specified in Sections of this Code, these products and services require central copy clearance:

...

31.1.4

films, DVDs, videos, computer and console games that have an 18+ certificate or rating.

Question 142

Given BCAP's policy consideration, do you agree that 31.1.4 should be included in the Code? If your answer is no, please explain why.

Part 2 - Section 32

Scheduling

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

Background

The law

Communications Act 2003

- 32.1** The Communications Act 2003 sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. Section 322 states:

The regulatory regime for each of the following—

- a) every television programme service licensed by a Broadcasting Act licence,
- b) the public teletext service, and
- c) every other teletext service so licensed that consists in an additional television service or a digital additional television service,

includes a condition requiring the person providing the service to comply with every direction given to him by OFCOM with respect to any of the matters mentioned in subsection (2).

2) Those matters are—

[...]

d) the exclusion of advertisements from a specified part of a licensed service.

3) Directions under this section—

- a) may be either general or specific;
- b) may be qualified or unqualified; and
- c) may make different provision for different parts of the day, different days of the week, different types of programmes or for other differing circumstances.

- 32.2** See the text of the Act at: www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=817413

Audiovisual Media Services (AVMS) Directive

- 32.3** AVMS revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989. The TVWF Directive applied to scheduled television broadcasting services only. AVMSD also applies to some on-demand services but this consultation is about advertisements in scheduled broadcast services only. Article 3e 2 of the Directive states that:
- 32.4** Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communication, accompanying or included in children's programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.

32.5 See the text of the Directive at:

eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF

Other relevant regulatory bodies

- 32.6** Ofcom retains responsibility for the amount and distribution of advertising, which are regulated by the Ofcom Code on the Scheduling of Television Advertisements. BCAP's rules on scheduling include the principle that television licensees must also comply with Ofcom's Code, which is available at www.ofcom.org.uk/tv/ifi/codes/code_adv/tacode.pdf
- 32.7** Bodies that play a part in regulating a broadcast advertisement of relevance to this section but that are not conferred with legal functions to do so include Clearcast (www.clearcast.co.uk) and the RACC (www.racc.co.uk).

Recent changes to this section of the BCAP Code

- 32.8** In September 2006, BCAP closed its consultation on the regulation of broadcast gambling advertising, which included consideration of the scheduling of TV and radio advertisements for gambling products. Details of the consultation can be found here: www.cap.org.uk/cap/Consultations/closed/gambling_consultation/
- 32.9** In December 2006, Ofcom published its final statement on Television Advertising of Food and Drink Products to Children, which resulted in amendments to the TV scheduling rules. The final statement may be read here: www.ofcom.org.uk/consult/condocs/foodads_new/statement/statement.pdf

Meeting the need to exclude categories of advertisement from those parts of a licensed service where they may cause harm or offence

- 32.10** Scheduling rules take into account that some products are unsuitable to be advertised around programming directed at or of particular appeal to children and young persons. They are also used to protect and maintain the integrity of advertising and programming by ensuring that both may readily be recognised by viewers and listeners.
- 32.11** BCAP's proposed approach seeks to maintain those protections recently put into force on such product categories as alcohol, gambling and HFSS foods; to include general principles that make clear to broadcasters the criteria according to which advertisements should be assessed to avoid harm or offence to the likely audience of a specified part of a licensed service; and to relax those restrictions that may no longer respond to a real and present need for regulatory intervention or that may even have an adverse effect on the public interest.
- 32.12** 32.2.2 and 32.4.1 - 32.4.5 result from BCAP's consideration, in 2006, of the ad rules for gambling.
- 32.13** 32.5.1 results from BCAP's consideration, in 2007, of the ad rules for food products.

Proposed substantive changes

New rules

Computer and console games

- 32.14** Advertisements for computer and console games are not presently addressed by TV or radio scheduling rules. However, trailers for films or videos carrying an 18- or 15- certificate are currently restricted from appearing in or adjacent to programmes made for under 16s (see 'Revised rules' for further details of changes to that restriction).
- 32.15** Safer Children in a Digital World: the Byron Review was published in March 2008 and called for BCAP to specify scheduling restrictions on advertisements for 15+, 16+ and 18+ rated computer or console games in line with current restrictions on 15- and 18-certificate films. The Department for Culture, Media and Sport and the Department for Children, Schools and Families issued a joint press release stating that they accept Byron's recommendations in full and will pursue them actively.
- 32.16** In the UK, age ratings are determined by a two-tier system that works within voluntary European guidelines – the Pan-European Game Information (PEGI) ratings system, and mandatory British Board of Film Classification (BBFC) regulations that are determined by the Video Recordings Act 1984. Video games that are expected to be suitable for an 18+ audience under the Act, for example because they feature sex or violence, are submitted to the BBFC, who might give games either an 18+ or 15+ rating. Around 90% of games released in the UK are exempt from legal classification but can instead be classified under the PEGI system. That means that video games can be given the following age ratings: 3+ (PEGI), 7+ (PEGI), 12+ (PEGI), 15+ (BBFC), 16+ (PEGI) and 18+ (BBFC). Both ratings systems are monitored in the UK by the Video Standards Council (VSC).
- 32.17** BCAP proposes to harmonise the rules on the scheduling of 15+, 16+ and 18+ rated computer or console games and 15- and 18-certificate films, ensuring those may not be advertised in or adjacent to TV programmes, text and interactive content commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 16. Because of the audio-visual impact of television, BCAP proposes to apply the new rules for computer or console games to television, TV text and interactive television advertisements only.

Other Television Scheduling or Timing Restrictions: Children

Under 16s

32.5

These products may not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 16:

32.5.4

computer or console games carrying an 18+, 16+ or 15+ rating.

Placement of Television Text and Interactive Advertisements

32.20

Broadcast television text and interactive television advertisements for these product categories must not:

- be directly accessible from linear programmes commissioned for, principally directed at or likely to appeal particularly to children
- be directly accessible from linear advertisements that are adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to children

- appear on editorial pages (text or interactive) that are likely to be of particular appeal to a significant audience of children

32.20.5

Computer or console games carrying an 18+, 16+ or 15+ rating.

Question 143

Given BCAP's policy consideration, do you agree that proposed rules 32.5.4 and 32.20.5 should be included in the proposed BCAP Code? If your answer is no, please explain why.

Betting tipsters

- 32.18** BCAP proposes to relax the present TV and radio ban on advertisements for betting tips (see Section 10, Prohibited Categories), partly in light of the liberalised regime for betting services introduced by the Gambling Act 2005. The Act does not address betting tips directly. However, because betting tip services are ancillary to betting services, BCAP considers it proportionate to extend to them the same level of restriction as applies to advertisements for betting services and therefore proposes to prohibit those advertisements from being advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 18.

32.2

These may not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 18:

32.2.3

betting tipsters

Placement of Television Text and Interactive Advertisements

32.20

Broadcast television text and interactive television advertisements for these product categories must not:

- be directly accessible from linear programmes commissioned for, principally directed at or likely to appeal particularly to children
- be directly accessible from linear advertisements that are adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to children
- appear on editorial pages (text or interactive) that are likely to be of particular appeal to a significant audience of children

32.20.4

Betting tips

Question 144

Given BCAP's policy consideration, do you agree that proposed rules 32.2.3 and 32.20.4 should be included in the proposed BCAP Code? If your answer is no, please explain why.

Live premium-rate services

- 32.19** BCAP's Codes do not explicitly address the subject of live premium-rate services; Section 22 Premium-rate Services requires broadcasters to comply with the PhonepayPlus Code, which includes rules for live premium-rate services. BCAP recognises that such services have proliferated on TV and radio.
- 32.20** Under the Code for Premium Rate Services enforced by Phonepay Plus, no promotion for a live premium-rate service may be directed primarily at persons under 18 years of age without Phonepay Plus's prior permission. BCAP therefore proposes to introduce a scheduling requirement that television and radio advertisements for such services may not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 18, unless those services have received prior permission from PhonePay Plus to target people under 18.

Scheduling of Television and Radio Advertisements

Under 18s

32.2

These may not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 18:

32.2.6

live premium-rate services, unless those services have received prior permission from PhonePay Plus to target people under 18.

Placement of Television Text and Interactive Advertisements

32.20

Broadcast television text and interactive television advertisements for these product categories must not:

- be directly accessible from linear programmes commissioned for, principally directed at or likely to appeal particularly to children
- be directly accessible from linear advertisements that are adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to children
- appear on editorial pages (text or interactive) that are likely to be of particular appeal to a significant audience of children

32.20.8

Premium-rate telephone services that cost more than the normal national premium rates (higher-rate premium services)

Question 145

Given BCAP's policy consideration, do you agree that proposed rules 32.2.6 and 32.20.8 should be included in the proposed BCAP Code? If your answer is no, please explain why.

Revised rules

Restrictions around children's programmes

- 32.21** Presently, the BCAP Rules on the scheduling of television advertisements restrict advertisements for drinks containing less than 1.2% alcohol by volume, liqueur chocolates, matches, medicines, vitamins and other dietary supplements and trailers for films or videos carrying an 18- or 15-certificate from being advertised in or adjacent to children's programmes. Children's programmes are defined as programmes made for children below the age of 16 for the purposes of the rules. There is no equivalent restriction in the BCAP Radio Advertising Standards Code.
- 32.22** The restriction on medicines derives from the Medicines (Advertising) Regulations 1994, which prohibits advertisements for medicinal products or treatments directed at children. The AVMS Directive, which is relevant to television only, requires that 'audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors' (Article 3e 1. (e)). The other restrictions address products that are considered either unsafe or improper for consumption by children. See '**Deleted rules**' for further consideration of the restriction on liqueur chocolates.
- 32.23** Because the Rules on the scheduling of television advertisements defines children's programmes as programmes made for under 16s, BCAP considers the rule restricting the products listed will already have applied in spirit if not in the letter to programmes of particular appeal to audiences below the age of 16. BCAP therefore proposes to make that explicit in the BCAP Code.
- 32.24** While the restrictions on medicines and low alcohol drinks derive from statute, the other restrictions reflect longstanding advertising policy and practice relating to products for which audio-visual presentation might cause distress to younger viewers or encourage unsafe practices. While BCAP proposes that advertisements for low alcohol drinks, medicines, vitamins and other dietary supplements should be restricted on TV and radio, it considers that advertisements for matches, trailers for films or videos carrying an 18- or 15-certificate and computer or console games carrying an 18+, 16+ or 15+ rating need only be restricted on TV where audio-visual impact carries a greater risk.

Scheduling of Television and Radio Advertisements

Under 16s

32.4

These products may not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to persons below the age of 16:

32.4.6

medicines, vitamins or other dietary supplements

32.4.7

drinks containing less than 1.2% alcohol by volume when presented as low-alcohol or no-alcohol versions of an alcoholic drink.

Question 146

Given BCAP's policy consideration, do you agree with BCAP's proposal to extend the restriction on advertisements for low alcohol drinks, medicines, vitamins and other dietary supplements from around programmes made for children to programmes of particular appeal to audiences below the age of 16? If your answer is no, please explain why.

Condoms

- 32.25** The Rules on the scheduling of television advertisements presently state that condoms may not be advertised before 9pm, except on Channel 4 where the restriction is 7pm, subject to copy content. The present rule is intended to protect younger viewers from inappropriate advertising.

- 32.26** In 2007, Baroness Gould of Potternewton, Chair of the Government's Independent Advisory Group (IAG) on Sexual Health and HIV, wrote to BCAP to request a review of the scheduling restrictions on condom advertising, noting that the UK had the highest teenage pregnancy rate in Europe and spiralling rates of sexually transmitted infections. The IAG's Annual Report 2006 – 2007 included a survey that showed young people believed television was one of the most effective ways of encouraging young people to use condoms. BCAP understands that, more recently, figures placed in the Commons Library show that, from 2002 to 2006, more than 11,000 under 16s were diagnosed with gonorrhoea, chlamydia, syphilis, herpes or genital warts.
- 32.27** The presence of condom advertisements on television continues to be a subject of complaint to the ASA, but numbers are very low. Nevertheless, BCAP has to balance public sensitivities against a public health problem that is clearly urgent. In her letter to BCAP, Baroness Gould noted that the lesser degree of restriction placed on sanitary protection products had helped normalise those products and that advertising now associated them with healthy and active lifestyles. BCAP therefore proposes that the scheduling restriction on condoms be relaxed to a requirement that they should not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to children below the age of 10, in line with advertisements for sanitary protection products.

Other Television Scheduling or Timing Restrictions: Children

Under 10s

32.6

These products may not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to children below the age of 10:

32.6.2

condoms.

Question 147

Do you agree that television advertisements for condoms should be relaxed from its present restriction and not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to children below the age of 10? If your answer is no, please explain why.

Sensational newspapers/magazines/websites

- 32.28** Presently, Section 2 rule 8 of the Radio Advertising Standards Code states that advertisements for sensational newspapers, magazines, websites (or their content) must not be broadcast in or around programming/features aimed particularly at those aged below 18 years or around religious programming.
- 32.29** The rule seeks to prevent radio advertisements for sensational newspapers, magazines, websites (or their content) from causing offence to the audience of religious programming or inappropriately targeting a younger audience.
- 32.30** It is a general principle of BCAP's proposed rules on scheduling that special care should be taken when scheduling advertisements that might be unsuitable for children or young persons or the audience of religious programmes. Moreover, both the present Radio Code and the proposed Code advise that special care be taken with the scheduling of advertisements for sexual material. BCAP considers it proportionate to maintain the same level of restriction for sexual material and sensational newspapers, magazines and websites and to allow the RACC the discretion to advise informed by general principles. BCAP therefore proposes that the restriction be relaxed and brought into line with other sensitive products where special care is advised.

Scheduling of Radio Advertisements

32.17

Special care is required for these categories:

32.17.1

sensational newspapers, magazines or websites or their content

Question 148

Given BCAP's policy consideration, do you agree that it is proportionate to require that special care be taken when scheduling advertisements for sensational newspapers, magazines, websites (or their content)? If your answer is no, please explain why.

TV Text and interactive advertisements

32.31 Proposed rule 32.20 extends the present rules on the placement of TV Text advertisements to broadcast advertisements on interactive television services:

32.32 The present Code for Text Services seeks to secure three objectives in respect of TV Text:

i) To ensure adequate separation of advertisements for particular products and services from programmes of particular appeal to children and from advertisements adjacent to those programmes.

ii) To ensure adequate separation of advertisements for particular products and services from editorial pages that might reasonably be expected to be of particular appeal to or attract a significant audience of children.

iii) To ensure that relevant particular separations required of all TV advertisements apply to TV text services.

32.33 BCAP considers that those objectives remain key to the maintenance of standards in TV Text advertising and that they should be explicitly extended to broadcast advertisements behind the red button, which may exist in a similar relation to programmes. BCAP understands its proposal merely formalises the present custom and practice of broadcasters that carry broadcast interactive services.

Question 149

Given BCAP's policy consideration, do you agree that the same rules on placement of advertisements should apply to broadcast advertisements behind the red button as to TV Text advertisements?

Deleted rules

Liqueur chocolates

32.34 Presently, liqueur chocolates may not be advertised in or adjacent to children's programmes.

32.35 Since this rule was put in place, the rules on food or drink products that are assessed as high in fat, salt or sugar (HFSS) have been implemented. Since those rules effectively mean that liqueur chocolates, products that are very likely to be high in fat, salt or sugar, may not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 16, BCAP considers that a specific restriction on the advertising of liqueur chocolates is no longer needed.

Question 150

Given BCAP's policy consideration, do you agree that the restriction on advertisements for liqueur chocolates is no longer required, given the restriction on HFSS foods around programmes of particular appeal to under 16s? If your answer is no, please explain why.

Charities

- 32.36** Presently, advertisements that are the subject of the Charities section of the Television Code may not be shown adjacent to any appeal or community service announcement transmitted in programme time.
- 32.37** The restriction is, in part, intended to secure separation between advertising and editorial but BCAP considers that that policy objective is adequately secured through Section 2, Recognition of Advertising, which states that advertisements must be clearly distinguishable from editorial content to prevent the audience being confused between the two.
- 32.38** The restriction is further intended to prevent the abuse of charitable impulses, on the grounds that a programme that features an appeal may leave its audience unduly susceptible to charity advertising in the breaks adjacent to that programme. BCAP considers that the rules on the content of charity advertising (see Section 16) ensure that those advertisements are socially responsible and do not exploit the vulnerable. BCAP therefore proposes that the scheduling restriction should be lifted.

Question 151

Given BCAP's policy consideration, do you agree that it is no longer necessary to restrict advertisements for charities from appearing adjacent to any appeal or community service announcement transmitted in programme time? If your answer is no, please explain why.

Programmes featuring advertisements

- 32.39** Because of concern about the exploitation of programmes that featured compilations of advertisements, the ITC introduced a restriction prohibiting advertisements for products and services that featured in such programmes from being shown in or adjacent to the programme in question.
- 32.40** The restriction is, in part, intended to secure separation between advertising and editorial but BCAP considers that that policy objective is adequately secured through Section 2, Recognition of Advertising, which states that advertisements must be clearly distinguishable from editorial content to prevent the audience being confused between the two.
- 32.41** This rule has not been invoked since BCAP assumed responsibility for the regulation of television advertisements. BCAP considers that, in the absence of any apparent detriment and given the public's familiarity with this genre of programme, the rule is disproportionately restrictive. BCAP proposes that it be removed.

Question 152

Given BCAP's policy consideration, do you agree that it is proportionate to delete the requirement that advertisements for products and services that feature in advertisement compilation programmes should not appear in or adjacent to those programmes? If your answer is no, please explain why.

Detailed advertisements for gambling; Code for Text Services

- 32.42** Presently, the Code for Text Services (section 2, rule (d)) states that detailed advertisements for gambling must appear only on full advertising pages devoted solely to such advertisements. For example, an advertisement for a betting service offering detailed information on a horse race and how to make a bet would be precluded from appearing on a text page that contains editorial content.
- 32.43** BCAP understands that rule predates, by some way, September 2007 when the new regime for the regulation of broadcast gambling advertising was introduced to ensure that those advertisements are responsible with particular care for the protection of the vulnerable and children and young persons. The rule was not reviewed at the time the new BCAP gambling rules were introduced and BCAP considers this an oversight. Because it considers the new rules on gambling advertisements offer adequate protection to young and vulnerable viewers, BCAP proposes to delete the rule.

Question 153

Given BCAP's policy consideration, do you agree that it is no longer necessary to restrict detailed TV text advertisements for gambling to full advertising pages devoted solely to such advertisements? If your answer is no, please explain why.

Artist separation

- 32.44** Presently, television advertisements that feature a well known personality or performer, or a person who takes a leading role in or whose appearance is central to a programme, are restricted from appearing in breaks in or adjacent to that programme, with exceptions for feature films, news programmes, sports programmes and magazine style programmes. This rule is commonly referred to by broadcast advertising industry stakeholders as 'the artist separation rule'.
- 32.45** This rule derives from the principle that editorial and advertising material should remain distinct.
- 32.46** BCAP notes that the rule on artist separation has gradually been relaxed in recognition of the greater level of media literacy of the UK TV audience. The process of relaxation creates the possibility for considerable inconsistency in regulation, whereby an advertisement featuring a well known performer may appear around films, but not TV dramas, in which that performer appears.
- 32.47** BCAP's proposed rules on Recognition of Advertising (see Section 2) make clear that advertisements must be clearly distinguishable from editorial content to prevent the audience being confused between the two. If, under the proposed rules, the ASA found that an advertisement featured a person in a role so reminiscent of his/her programme role that confusion between advertising and editorial was likely to result, the rules on Recognition of Advertising offer adequate grounds on which to adjudicate that that advertisement was in breach of the Code.
- 32.48** In recognition of the greater sophistication of the contemporary TV audience and on the understanding that adequate protection is offered elsewhere, BCAP proposes to remove the restriction on advertisements that feature a well known personality or performer, or a person who takes a leading role in or whose appearance is central to a programme.
- 32.49** However, BCAP is mindful of its statutory responsibility to ensure that under 18s are protected and recognises that younger children may still be vulnerable to confusion between editorial and advertising and may be unduly influenced if the appeal of some programme content is exploited by an advertisement. BCAP therefore proposes to retain the restriction with reference to children's programmes only.

Question 154

Given BCAP's policy consideration, do you agree that it is no longer necessary to maintain 'the artist separation rule'? If your answer is no, please explain why.

Other

Exclusion of certain types of advertisement in or adjacent to broadcasts of Parliamentary proceedings

- 32.50** Following its review of Section 10 of the Rules on the Amount and Distribution of Advertising (RADA), Ofcom discussed with BCAP whether it would be more appropriate for the BCAP Code to adopt the rules in section 10.4 and 10.5 of RADA, which deal with the content of advertisements during live Parliamentary proceedings and not their amount or distribution. Ofcom had considered deleting the rules entirely, on the basis that such programmes rarely appeared on commercial television services and most of the rules were duplicated by Parliament's own conditions. However, BCAP understands that the Parliamentary authorities would prefer the rules to be maintained.
- 32.51** BCAP agrees that it is appropriate for rules that restrict advertisements in programming according to their content and not their amount or distribution to be included in the BCAP Code. BCAP is content to adopt rules from section 10.4 of RADA in the Scheduling section. Rule 10.5 of RADA is reflected in the present Television Code and can be found in the new Code under Section 3 on Recognition of Advertising, rule 2.4.3.
- 32.52** BCAP proposes to maintain these rules that have hitherto been maintained in Ofcom's RADA.

Exclusion of certain types of advertisement in or adjacent to broadcasts of Parliamentary proceedings

32.14

The following categories of advertisement may not be shown during live broadcasts of Parliamentary proceedings, or other programmes that include footage of Parliamentary proceedings other than brief news extracts:

32.14.1

advertisements that feature or refer to Members of Parliament, or Parliamentary parties, or with a Parliamentary setting;

32.14.2

advertisements with direct and specific relevance to main items of Parliamentary coverage where these are known in advance.

Question 155

Given BCAP's policy consideration and the view of the Parliamentary authorities, do you agree that it is suitable to maintain rule 32.14 in the proposed BCAP Code? If your answer is no, please explain why.

Other Questions

Question 156

i) Taking into account BCAP's general policy objectives, do you agree that BCAP's rules, included in the proposed Scheduling 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 Scheduling 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?

Other comments

Question 157

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?

Annex 1

The Proposed BCAP Broadcast Advertising Standards Code

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Scheduling rules

32. Scheduling

Introduction

(a) This Code applies to all advertisements (including teleshopping, content on self-promotional television channels, television text and interactive television advertisements) and programme sponsorship credits on radio and television services licensed by Ofcom. It is designed to inform advertisers and broadcasters of the standards expected in the content and scheduling of broadcast advertisements and to protect consumers. The basic principles of the Code are set out in Section 2: Compliance.

All Ofcom-licensed broadcasters should be familiar with the contents of this Code, which can be accessed on the ASA website, www.asa.org.uk, or the CAP website, www.cap.org.uk. They should also be familiar with relevant consumer protection legislation, most of which is listed on the CAP website at www.cap.org.uk.

(b) These definitions apply to the Code:

(i) “broadcasters” means Ofcom-licensed television and radio services provided by broadcasters within UK jurisdiction regardless of whether their main audience is in the UK;

(ii) “advertisement” means publicity by advertisers, including spot advertisements and broadcaster promotions with advertisers (outside programme time), that is broadcast in return for payment or other valuable consideration to a broadcaster or that seeks to sell products to viewers or listeners. The promotion of broadcasters’ own-branded activities, goods and events (such as websites, T-shirts and concerts), which enhance audience involvement and are not designed to make a profit or promote commercial partnerships, are excluded

(iii) “teleshopping” means television-broadcast direct offers for the supply of goods and services, including immovable property, rights and obligations, in return for payment

(iv) The “audience” comprises all those who are likely to see or hear a given advertisement; and

(v) a “claim” can be implied or direct, written, spoken or visual. The name of a product can constitute a claim.

(c) The Code does not apply to commercial references within a programme, for which, please see the Ofcom Broadcasting Code, which is available at www.ofcom.org.uk. Ofcom requires adherence to the BCAP Code for the content of sponsorship credits but the ASA refers complaints about those and about product placement, undue prominence and programme sponsorship to Ofcom. “Special Category” advertisements and sponsorship credits on radio must be cleared for broadcast by the Radio Advertising Clearance Centre (RACC). Before being broadcast on radio, all advertisements that feature claims that need substantiation must be cleared locally or, if those claims are included in advertisements for a special category, by the RACC. See Section 2: Compliance.

(d) Television licensees should seek BCAP’s permission if they want to have any rules in the Code disapplied because the advertisement in question is on a programme service addressed exclusively to audiences outside the UK.

A television advertisement that is targeted specifically and with some frequency at an audience in the territory of a single party to the 1989 Council of Europe Convention on Transfrontier Television must, with some exceptions, comply with the television advertising rules of that party. That does not apply:

(i) if the party is a Member State of the European Community or

(ii) if its television advertising rules discriminate between advertisements broadcast on television services within its jurisdiction and those on services outside its jurisdiction or

(iii) if the UK Government has concluded a relevant bilateral or multilateral agreement with the party concerned.

(e) Advertisers, advertising agencies or independent producers should seek pre-transmission guidance on scripted advertisements from Clearcast (for TV advertisements), the RACC (for radio advertisements) or from the broadcaster whose service they intend to use to advertise. See Section 2: Compliance for information about the “special categories” of radio advertisement that require central clearance.

- (f) Broadcasters seeking guidance about the interpretation of Code Rules should speak to BCAP staff. BCAP is willing to give advice on the interpretation of the Code but it does not offer pre-transmission clearance of advertisements. BCAP cannot accept liability for loss or damage alleged to result from reliance placed on such advice. Any advice it gives is without prejudice to the right of both it and the ASA to investigate and act in the event of an alleged breach. BCAP can raise and investigate a potential breach of this Code with the broadcaster.
- (g) When the ASA feels a complaint is justified, it can take action with the broadcaster concerned. The ASA can require the broadcaster to withdraw the advertisement immediately, amend it or suspend it while investigations are carried out. The ASA Council's interpretation of the Code is final and its adjudications are published weekly on the ASA website, www.asa.org.uk. Complainants, advertisers and broadcasters may request a review of Council decisions by the Independent Reviewer of ASA Adjudications. Information about the review process is given in the Broadcast Complaint Handling Procedures document, available on the ASA website.
- (h) For serious or repeated breaches of the Code, Ofcom may impose sanctions, ranging from a formal warning to a request for broadcast correction or a statement of findings, a fine or the shortening, suspending or taking away of a licence to broadcast.
- (i) The ASA (Broadcast) Council will have regard to decisions made by the ASA (Non-broadcast) Council under the CAP Code. Similarly, the ASA (Non-broadcast) Council will have regard to decisions made by the ASA (Broadcast) Council under the BCAP Code. Factors that help to determine whether an ASA decision is likely to apply across media include, but are not limited to, the characteristics of the medium, how the advertisement is targeted, the context in which a claim is made and the extent to which the relevant BCAP Code provisions correspond to those in the CAP Code.
- (j) The protection of young viewers and listeners is always a priority. Section 9 (Children) should be considered for all advertisements that:
- (i) are targeted at children or likely to be of interest to them
 - (ii) features children whether as professionals or amateurs
 - (iii) could harmfully influence children even if not of direct interest to them.
- (k) Where necessary, Sections of this Code begin by stating the overarching principles that inform the rules subsequently given and definitions of the key terms employed.
- (l) Some rules that are to be found in Code Sections dedicated to categories of products or services (such as alcoholic drinks or gambling) apply also to any advertisement that includes or refers to them. Those Code Sections are subdivided into "rules for all advertisements" and "rules for [category of] advertisements".

General Rules

Annex 1 - Section 1

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Compliance

Principle

The overarching principles of this Code are that advertisements should not mislead, cause serious or widespread offence or harm, especially to children or the vulnerable. Broadcasters are responsible for ensuring that the advertisements they transmit comply with both the spirit and the letter of the Code. All compliance matters (copy clearance, content, scheduling and the like) are the ultimate responsibility of each broadcaster. Any matter that concerns a legal dispute should be resolved through law enforcement agencies or the Courts.

Background

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

Broadcasters must ensure that all advertisements are cleared before broadcast, are scheduled suitably and in accordance with BCAP's rules on scheduling of advertisements (section 32: Scheduling). BCAP strongly advises broadcasters to follow relevant Clearcast or RACC scheduling warnings, although compliance with them is not necessarily a guarantee of compliance with the BCAP Code.

Broadcasters must ensure that previously approved copy is not re-run for subsequent campaigns without periodic checks to ensure that all claims are still accurate. For radio, copy originally cleared by the RACC that is over six months old, will need to be re-submitted for consideration by the RACC and assigned a new clearance number. Broadcasters or their respective clearance body must independently assess evidence submitted in support of an advertisement and any advice they have commissioned. Substantiation of factual claims made by advertisers and other supporting evidence must be held by the broadcaster or the relevant clearance body.

Radio

"Special category" radio advertisements, whether broadcast locally, regionally or nationally, must be centrally cleared by the RACC. Broadcasters or their sales houses must hold a record of centrally cleared advertisements. For more information, go to www.racc.co.uk or telephone 020 7306 2620. The Special Categories are:

- Consumer credit, investment and complex financial products and services
- Gambling products and services
- Alcoholic products
- Medical and health and beauty products and treatments
- Food, nutrition and dietary products, supplements and services
- Slimming products, treatments and establishments
- Adult shops, stripograms, escort agencies and premium-rate sexual entertainment services
- Dating and introduction services
- Commercial services offering individual personal and consumer advice
- Environmental claims
- Matters of public controversy including matters of a political or industrial nature
- Religious organisations
- Charitable causes
- Films, DVDs, video, computer and console games that have an 18+ certificate or rating.

Advertisements that do not fall into the special category list and are broadcast only by one station or in one locality must be cleared for broadcast by the relevant staff at the station concerned. Advertisers should contact the relevant station for information or guidance. To provide consistent standards for the benefit of consumers and the radio industry, national radio advertisements should be centrally cleared by the RACC. National radio advertisements are those sold and broadcast nationally across the network.

Rules

1.1

Advertisements must reflect the spirit, not merely the letter, of the Code.

1.2

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

1.3

Advertisements must comply with the law and broadcasters must make that a condition of acceptance.

1.3.1

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

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Recognition of Advertising

Principle

The rules on recognition of advertising must be read in conjunction with all other parts of the Code, including the annex relating to the scheduling of advertisements.

The Ofcom Code on the Scheduling of Television Advertising and the Ofcom Broadcasting Code, for both television and radio, contain rules for sponsorship and commercial references that are relevant to this section.

Unless otherwise stated, all the rules in this section apply to programme promotions.

Definitions

“Programme” is a programme on any UK television or radio service.

For television only:

“Programme promotion” is a trailer for a programme. It is not an advertisement if it is shown on the channel on which the programme will be broadcast or on a channel related to the channel on which the programme will be broadcast.

“Editorial content” in this Section applies to programmes on any UK television or radio service and, in 2.1, to editorial content on television text services and interactive television services.

Rules

2.1

Advertisements must be obviously distinguishable from editorial content, especially if they use a situation, performance or style reminiscent of editorial content, to prevent the audience being confused between the two. The audience should quickly recognise the message as an advertisement.

2.2

If used in an advertisement, an expression or sound effect associated with news bulletins or public service announcements (for example “news flash”) needs special care. The audience should quickly recognise the message as an advertisement.

2.3

The use of a title, logo, set or music associated with a programme that is broadcast on that medium needs special care. The audience should quickly recognise the message as an advertisement.

2.4 – Television only

Television advertisements, except for programme promotions, must not:

2.4.1

refer to themselves in a way that might lead viewers to believe they are watching a programme

2.4.2

feature, visually or orally, anyone who currently and regularly presents news or current affairs on television

2.4.3

include extracts from broadcasts of parliamentary proceedings.

2.5 – Radio only

A person who currently and regularly reads the news on radio or television may voice radio advertisements but must not advertise products or services that could be seen to compromise the impartiality of their news-reading role.

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Misleading

Principle

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

The ASA will take into account the impression created by advertisements as well as specific claims. It will adjudicate on the basis of the likely effect on consumers, not the advertiser’s intentions.

The rules in this Section apply to implicit as well as direct claims and to visual as well as oral claims. The name of a product can constitute a claim.

Cross-reference: Appendix X explains how the ASA will assess whether marketing communications are misleading.

Rules

General

3.1

Advertisements must not materially mislead.

3.2

Advertisements must not mislead consumers by omitting material information. They must not mislead by hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner.

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

3.3

For advertisements that quote prices for an advertised product or service, material information [for the purposes of 3.2] includes:

3.3.1

the main characteristics of the product or service

3.3.2

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

3.3.3

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

3.3.4

delivery charges

3.3.5

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

3.3.6

that consumers have the right to withdraw or cancel, if they have that right.

Cross reference: If the advertisement encourages consumers to buy a product or service through a distance-selling mechanism, please refer to Section 8: Distance-selling.

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.

3.5

Subjective claims must not mislead the audience; advertisements must not imply that expressions of opinion are objective claims.

3.6

Advertisements must make clear the identity of the advertiser if the advertisement would otherwise mislead.

Cross-reference: 8.2 requires broadcasters to give enquirers the identity and geographical address of distance selling advertisers if that information is not included in the advertisement.

3.7

Advertisements must not falsely imply that the advertiser is acting as a consumer or for purposes outside its trade, business, craft or profession. Advertisements must make clear their commercial intent, if that is not obvious from the context.

3.8

No advertisement may use images of very brief duration, or any other technique that is likely to influence them, without consumers being fully aware of what has been done.

Substantiation

3.9

Broadcasters must hold documentary evidence to prove claims that the audience is likely to regard as objective. The ASA may regard claims as misleading in the absence of adequate substantiation.

Qualification

3.10

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

3.11

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

Cross-reference: BCAP has published Guidance on Superimposed Text to help television broadcasters ensure compliance with rule 3.11.

Exaggeration

3.12

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

3.12x

Advertisements must not present rights given to consumers in law as a distinctive feature of the advertiser's offer.

Note: this rule number appears twice in error; rule 3.12x is a distinct rule and the numbering will be corrected in the final Code

3.13

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

3.14

Advertisements must not mislead about the nature or extent of the risk to consumers' personal security, or that of their families, if they do not buy the advertised product or service.

Prohibited claims

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

3.15

Advertisements must not claim that a product or service is able to facilitate winning in games of chance.

3.16

Advertisements must not explicitly claim that the advertiser's job or livelihood is in jeopardy if consumers do not buy the advertised product or service.

Prices

Principle

Price statements in advertisements should take into account the Department for Business, Enterprise and Regulatory Reform (BERR) Pricing Practices Guide.

Definition

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

3.17

Price statements must not mislead by omission, undue emphasis or distortion. They must relate to the product or service depicted in the advertisement.

3.18

Quoted prices must include non-optional taxes, duties, fees and charges that apply to all or most buyers. VAT-exclusive prices may be given only if all or most consumers pay no VAT or can recover VAT; advertisements that quote VAT-exclusive prices must prominently state the amount or rate of VAT payable if some consumers are likely to pay VAT.

3.19

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

3.20

Advertisements that quote instalment costs must state the total price of the advertised product or service and the instalment frequency equally prominently.

3.21

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

3.22

If the price of one product or service depends on another, advertisements must make clear the extent of the commitment consumers must make to obtain the advertised price.

3.23

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

Free claims

Principle

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

3.24

Advertisements must make clear the extent of the commitment consumers must make to take advantage of a “free” offer.

Advertisements must not describe items as “free” if:

3.24.1

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

3.24.2

the quality of the product or service that consumers must buy has been reduced.

3.24.3

consumers have to pay for packing, packaging, handling or administration

3.25

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

3.26

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

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

Availability

3.27

Broadcasters must be satisfied that advertisers have made a reasonable estimate of demand.

3.28

Advertisements that quote prices for featured products must state any reasonable grounds the advertisers have for believing that they might not be able to supply the advertised (or an equivalent) product at the advertised price, within a reasonable period and in reasonable quantities. In particular:

3.28.1

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

3.28.2

if the advertiser does not intend to fulfil orders, because the purpose of the advertisement is to assess potential demand, the advertisement must make that clear

3.28.3

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

3.29

Broadcasters must be satisfied that advertisers who advertise products at specific prices will not use the technique of switch selling, in which their sales staff refuse to show the advertised product, refuse to take orders for it or to deliver it within a reasonable time or demonstrate a defective sample of it to promote a different product.

3.30

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

3.31

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

Comparisons

Principle

The ASA will consider unqualified superlative claims as comparative claims against all competing products or services.

Superiority claims must be supported by evidence unless they are obvious puffery (that is, claims that consumers are unlikely to take literally). Objective superiority claims must make clear the aspect of the

product or service or the advertiser's performance that is claimed to be superior. Subjective superlative claims such as "the best" are unlikely to be justified.

Comparisons with Identifiable Competitors

3.32

Advertisements that include a comparison with an identifiable competitor must not mislead, or be likely to mislead, consumers about either the advertised product or service or the competing product or service.

3.33

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

3.34

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

3.35

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

3.36

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

Other comparisons

3.37

Advertisements that include comparisons with unidentifiable competitors must not mislead, or be likely to mislead, consumers. The elements of the comparison must not be selected to give the advertiser an unrepresentative advantage.

Price comparisons

3.38

Advertisements that include a price comparison must state the basis of the comparison. Comparisons with competitors' prices must be with the prices for identical or substantially equivalent products or services and must explain significant differences between the products or services. If the competitor offers more than one similar product or service, the advertisement must compare the advertiser's price with the price for the competitor's product or service that is most similar to the advertised product or service.

3.39

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

Imitation and Denigration

3.40

Advertisements must not mislead consumers about who manufactures the product.

3.41

Advertisements must not discredit or denigrate another product, advertiser or advertisement or a trade mark, trade name or other distinguishing mark.

3.42

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

3.43

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

Endorsements and Testimonials

Cross reference: Advertisements that include endorsements or testimonials might also be subject to Section 6: Privacy

3.44

Testimonials or endorsements used in advertising must be genuine, unless they are obviously fictitious, and be supported by documentary evidence. Testimonials and endorsements must relate to the advertised product or service. Claims that are likely to be interpreted as factual and appear in advertisements must not mislead.

3.45

Advertisements must not feature testimonials without permission.

3.46

Advertisements must not display a trust mark, quality mark or equivalent without the necessary authorisation. Advertisements must not claim that the advertiser (or any other entity referred to in the advertisement), the

advertisement or the advertised product or service has been approved, endorsed or authorised by any person or body if it has not or without complying with the terms of the approval, endorsement or authorisation.

3.47

Advertisements must not falsely claim that the advertiser, or other entity referred to in the advertisement, is a signatory to a code of conduct. Advertisements must not falsely claim that a code of conduct has an endorsement from a public or other body.

Guarantees and After-sales Service

3.48

Advertisements must not use the word “guarantee” in a way that could cause confusion about a consumer’s rights.

3.49

Advertisements must make clear each significant limitation to an advertised guarantee (of the type that has implications for a consumer’s rights). Broadcasters must be satisfied that the advertiser will supply the full terms of the guarantee before the consumer is subject to it.

3.50

Broadcasters must be satisfied that advertiser will promptly refund consumers who make valid claims under an advertised money-back guarantee.

3.51

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

3.52

If an advertisement in a language other than English offers after-sales service but the after-sales service is not available in the language of the advertisement, broadcasters must be satisfied that the advertiser will explain that to consumers before a contract is concluded.

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Harm and Offence

Principle

Advertisements must not be harmful or offensive. Advertisements must take account of generally accepted standards to minimise the risk of causing harm or serious or widespread offence. The context in which an advertisement is likely to be broadcast must be taken into account to avoid unsuitable scheduling (see Part 2: Scheduling).

Rules

4.1

Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards.

4.2

Advertisements must not include material that is likely to condone or encourage behaviour that prejudices health or safety.

4.3 – Radio only

Advertisements must not include sounds that are likely to create a safety hazard, for example, to those listening to the radio while driving.

4.4 – Television only

Advertisements must not include visual effects or techniques that are likely to affect adversely members of the audience with photosensitive epilepsy (see Ofcom's Guidance Note for Licensees on Flashing Images and Regular Patterns in Television).

4.5 – Television only

Advertisements must not be excessively noisy or strident. The maximum subjective loudness of advertisements must be consistent and in line with the maximum loudness of programmes and junction material.

Broadcasters must endeavour to minimise the annoyance that perceived imbalances could cause, with the aim that the audience need not adjust the volume of their television sets during programme breaks. For editorial reasons, however, commercial breaks sometimes occur during especially quiet parts of a programme, with the result that advertisements at normally acceptable levels seem loud in comparison.

Measurement and balancing of subjective loudness levels should preferably be carried out using a loudness-level meter, ideally conforming to ITU recommendations¹. If a peak-reading meter² is used instead, the maximum level of the advertisements must be at least 6dB less than the maximum level of the programmes³ to take account of the limited dynamic range exhibited by most advertisements.

Notes:

(1) The relevant ITU recommendations are ITU-R BS1770 *Algorithms to measure audio programme loudness and true-peak audio level* and ITU-R BS1771 *Requirements for loudness and true-peak indicating meters*.

(2) Peak-reading meters should be a PPM Type IIa as specified in BS6840: Part 10, *Programme Level Meters*.

(3) Normal convention for analogue audio is that the peak sound level of programmes is set to be no higher than +8dBm, which corresponds to 6 on a peak-reading meter. The peak sound level of advertisements should therefore be limited to +2dBm or 4.5 on a peak-reading meter. Note: +8dBm corresponds to a digital audio level of -10dB relative to digital clipping level. ITU-R BS.645 and EBU recommendation R68-2000 describe how analogue audio levels should be translated into digital levels.

4.6

Advertisements must not condone or encourage harmful discriminatory behaviour or treatment.
Advertisements must not prejudice respect for human dignity.

4.7

Advertisements must not condone or encourage violence, crime, disorder or anti-social behaviour.

4.8

Advertisements must not distress the audience without justifiable reason. Advertisements must not exploit the audience's fears or superstitions.

4.9 – Television only

Animals must not be harmed or distressed as a result of the production of an advertisement.

4.10

Advertisements must not condone or encourage behaviour grossly prejudicial to the protection of the environment.

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Children

Principle

To ensure that children are protected. The protection of children from advertisements that could cause physical, mental or moral harm should be balanced with the fundamental right to freedom of expression.

The context in which an advertisement is likely to be broadcast and the likely age of the audience must be taken into account to avoid unsuitable scheduling. This Section should therefore be read in conjunction with Part 2: Scheduling. Care must be taken when scheduling advertisements that could frighten or distress children or could otherwise be unsuitable for them: those advertisements should not be scheduled or placed in or around children's programmes or in or around programmes likely to be seen by significant numbers of children. Care must also be taken when featuring children in advertisements.

Definitions

A child is someone under 16.

"Children's products" are products or services of more or less exclusive interest to children.

"Products of interest to children" are products or services that are likely to appeal to children but are not of exclusive interest to them.

Rules

5.1

Advertisements must contain nothing that could cause physical, mental, moral or social harm to children.

5.2

Advertisements that are suitable for older children but could distress younger children must be sensitively scheduled (see Part 2: Scheduling).

5.3

Advertisements must not condone, encourage or unreasonably feature behaviour that could be dangerous for children to emulate. Advertisements must not implicitly or explicitly discredit established safety guidelines. Advertisements must not condone, encourage or feature children going off alone or with strangers.

This rule is not intended to prevent advertisements that inform children about dangers or risks associated with potentially harmful behaviour.

5.4

Advertisements must not condone or encourage practices that are detrimental to children's health.

5.5

Advertisements must not condone or encourage bullying.

5.6

Advertisements must not portray or represent children in a sexual way.

5.7

Advertisements must not exploit the special trust children place in parents, guardians, teachers or other persons.

5.8

Advertisements must not imply that children are likely to be ridiculed, inferior to others, less popular, disloyal or have let someone down if they or their family do not use a product or service.

5.9

Advertisements must not take advantage of children's inexperience, credulity or sense of loyalty. Advertisements for products or services of interest to children must not be likely to mislead, for example by exaggerating the features of a product or service in a way that could lead to children having unrealistic expectations of that product or service.

5.10

Child actors may feature in advertisements but care must be taken to ensure that those advertisements neither mislead nor exploit children's inexperience, credulity or sense of loyalty.

5.11

Advertisements must neither directly exhort children to buy a product or service nor encourage them to ask their parents, guardians or other persons to buy or enquire about a product or service for them.

5.12

Advertisements that promote a product or service and invite consumers to buy that product or service via a direct response mechanism must not be targeted directly at children. For a definition of "direct response mechanism", see Section 15: Distance Selling Section.

5.13

If it includes a price, an advertisement for a children's product or service must not use qualifiers such as "only" or "just" to make the price seem less expensive.

5.14 – Television only

Advertisements for an expensive product or service of interest to children must include a statement of the product or service's price or, if it is not possible to include a precise price, an approximate price. BCAP considers a product or service of interest to children costing £30 or more to be expensive.

5.15

Advertisements for promotions directly targeted at children:

5.15.1

must include all significant qualifying conditions

5.15.2

must not include a direct exhortation to buy a product

5.15.3

must make clear if adult permission is required for children to enter.

Advertisements for competitions directly targeted at children are acceptable if any skill required is relevant to the age of likely participants and if the values of the prizes and the chances of winning are not exaggerated.

Cross reference: Advertisements for promotions directly targeted at children should comply with Section 28: Competitions.

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Privacy

Principle

Living individuals should be protected from unwarranted infringements of privacy. Broadcasters should respect an individual's right for his or her private and family life, home and correspondence. Advertisements featuring an individual should not imply that that individual endorses a product if he or she does not (see Section 6: Misleading).

Rules

6.1 – Television only

With limited exceptions, living persons must not be featured, caricatured or referred to in advertisements without their permission.

Exceptions are made only for brief and incidental appearances, such as crowd scenes, and advertisements that refer to a person featured in publications, programmes, films and the like, providing that the reference to or portrayal of that person is neither offensive nor defamatory.

6.2 – Radio only

Broadcasters must ensure that, if an advertiser has not sought his or her prior permission, a person featured in an advertisement must not be featured in an offensive, adverse or defamatory way.

Advertisements that feature, allude or refer to a living person must not interfere with that person's private or family life: legal advice is strongly advisable and is required in cases of doubt. Advertisements that feature, caricature or refer to a living person will be cleared on the basis that it is recommended that that person's permission is sought. Even if an advertisement contains nothing that is inconsistent with the position or views of the person featured, broadcasters and advertisers should be aware that those who do not want to be associated with the advertised product might have a legal claim.

Impersonations, soundalikes, parodies or similar take-offs of celebrities are permissible only if those devices are instantly recognisable and if it could be reasonably expected that the person concerned has no reason to object. Nevertheless, advertisers are urged to obtain advance permission or seek legal advice before clearance. Copyright permission should be sought for references to, or portrayals of, well-known characters or their names or personae.

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Political and Controversial Matters

Principle

Unless stated otherwise, the rules in this Section apply to political groups and causes in the United Kingdom and elsewhere. The term “political” is used in the Code in a wider sense than “party political”. The prohibition includes, for example, campaigning for the purposes of influencing legislation or executive action by local, or national (including foreign) governments.

The setting of standards and the investigation of complaints in relation to political advertisements have not been contracted out to BCAP and the ASA and remain matters for Ofcom. The ASA refers complaints about political advertisements to Ofcom. Ofcom will determine whether an advertisement or a proposed advertisement is “political”.

These rules do not apply to the party political and election campaign broadcasts that the Communications Act 2003 obliges broadcasters to carry.

Rules

7.1 - Radio Central Copy Clearance

Radio broadcasters must seek central clearance for advertisements that might fall under this Section on the grounds of either the advertiser’s objectives or the content of the advertisement.

7.2

No advertisement may:

7.2.1

be inserted by or on behalf of a body whose objectives are wholly or mainly of a political nature

7.2.2

be directed towards a political end

7.2.3

relate to an industrial dispute, unless it is a public service advertisement by a Government department, or

7.2.4

show partiality in matters of political or industrial controversy or public policy.

Note:

Objectives of a political nature and political ends include:

- influencing the outcome of elections or referendums;
- bringing about changes of the law or otherwise influencing the legislative process;
- influencing the policies or decisions of local, regional or national governments;
- influencing the policies or decisions of persons on whom public functions are conferred by or under law;
- influencing the policies or decisions of persons on whom functions are conferred by or under international agreements;
- influencing public opinion on a matter that, in the United Kingdom, is a matter of public controversy and
- promoting the interests of a party or other group of persons organised for political ends.

7.3

This rule does not prohibit Trade Union advertisements that are not politically or industrially contentious. Advertisements by Trade Unions may recruit members and promote the services they provide, including legal advice, insurance and meetings, but must not advertise for support in a ballot or refer to an employer.

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Distance Selling

Principle

Most distance selling contracts are subject to the Consumer Protection (Distance Selling) Regulations 2000 (as amended). These rules complement those Regulations and do not replace them. Broadcasters that operate as teleshopping channels should seek legal advice to ensure they comply with the Regulations.

Definitions

The rules in this Section apply to advertisements that promote specific products and invite consumers to buy those products, without meeting the supplier face-to-face, by means of direct response mechanisms.

Teleshopping broadcasters are the advertisers of all products and services that are promoted in their services.

These rules should be read in conjunction with other rules in this Code, especially Section 6, Misleading (Availability).

Rules

8.1

Radio advertisements subject to this Section must be centrally cleared.

8.2

Broadcasters must be able to give consumers the advertiser's name and geographical address for complaints if that information is not included in the advertisement.

8.3

Broadcasters must be satisfied that the advertisers:

8.3.1

have made adequate arrangements to protect consumers' money

8.3.2

can take enquiries during normal business hours

8.3.3

make samples of the advertised products available for public inspection and for pre-clearance of and investigation of complaints about claims made in advertisements for the product

8.3.4

tell consumers if they intend to supply substitute products if the advertised product becomes unavailable;

8.3.5

fulfil orders within 30 days unless the nature of the product makes it reasonable to specify a longer period in the advertisement; for example, advertisements for made-to-measure products, plants that are out of season, or products that are supplied on an instalment basis may reasonably specify a longer period

8.3.6

give a refund within 30 days if the consumer:

8.3.6.a

cancels, for any reason, within seven days of receiving goods or seven clear days from the conclusion of a contract for services or

8.3.6.b

can show reasonable cause for dissatisfaction with the product or delay in delivery.

Except for substitute goods supplied in place of the goods that the consumer ordered, advertisers may require consumers to pay the direct cost of returning goods ordered through a distance selling mechanism.

8.3.7

will not seek payment for products that are sent without the recipient's authority.

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Environmental Claims

Principle

Advertisements should take account of the Government guidance including the Green Claims Code published by DEFRA and BERR.

Rules

9.1 Radio Central Copy Clearance

Radio broadcasters must ensure advertisements subject to this Section are centrally cleared.

9.2

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

9.3

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

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.

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.

9.6

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

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.

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.

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Rules for Specific Categories

Annex 1 - Section 10

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Prohibited Categories

Principle

Broadcast advertisements for some products or services are not permitted either because those products may not legally be advertised or because of a clear potential for harm or serious or widespread offence to the audience or to society.

Rules

10.1

Advertisements for products or services coming within the recognised character of or specifically concerned with these are not acceptable:

10.1.1

breath-testing devices and products that are intended to mask the effects of alcohol

10.1.2

betting systems and products that are intended to facilitate winning games of chance

10.1.3

all tobacco products. Also non-tobacco products or services that share a name, emblem or other feature with a tobacco product (as provided for by rule 10.3), rolling papers and filters

10.1.4

guns (including replica guns), gun clubs and offensive weapons. "Offensive weapons" are items made or adapted to cause injury. References to clay pigeon shoots are permitted only as part of a wider range of outdoor pursuits

10.1.5

prostitution and sexual massage services

10.1.6

obscene material. "Obscene material" is material that may not be freely offered for sale or distribution to persons over the age of 18 years without offending against the Obscene Publications Act 1959 (as amended)

10.1.7

products for the treatment of alcohol and illegal-substance dependence

10.1.8

pyramid promotional schemes. "Pyramid promotional schemes" are those in which consumers pay or give other consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme, not the sale or consumption of products

10.1.9

the acquisition or disposal of units in collective investment schemes not authorised or recognised by the FSA, without the prior approval of BCAP.

10.1.10 - Television only

escort agencies

Cross reference: Information about other unacceptable and restricted categories of advertising can be found in these Sections: Political and Controversial Matters (Section 7); Children (section 5); Medicines, Medical Devices, Treatments and Health (Section 11); Financial Products, Services and Investments (Section 14); Faith, Religion and Equivalent Systems of Belief, (Section 15); Homeworking Schemes (Section 24); Instructional Courses (Section 25) and Pornography (Section 30).

10.2

No advertisement may indirectly promote an unacceptable product or service. For example, advertisements must not refer the audience to a website or a publication if a significant part of that website or publication promotes a prohibited product or service.

Tobacco

10.3

Advertisements must not promote smoking or the use of tobacco products.

10.4

If it shares a name, emblem or other feature with a tobacco product, a non-tobacco product or service may be advertised only if the advertisement is obviously directly targeted at an adult audience, makes or implies

no reference to smoking or to a tobacco product, does not promote tobacco or smoking and does not include a design, colour, imagery, logo style or the like that might be associated in the audience's mind with a tobacco product.

10.5

Advertisements that might be of particular interest to children or teenagers must not refer to tobacco or smoking, unless that reference obviously forms part of an anti-smoking or anti-drugs message.

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Medicines, Medical Devices, Treatments and Health

Principle

The rules in this Section are designed to ensure that advertisements that include health claims (please see Section 13 for health claims made on foods) and advertisements for medicines, medical devices and treatments receive the necessary high level of scrutiny. Health claims may, for example, relate to the therapeutic or prophylactic effects of products, including toiletries and cosmetics.

The rules apply to advertisements and not the products or services, which are regulated by health regulators such as the Medicines and Healthcare products Regulatory Agency (MHRA), the European Medicines Agency (EMA) and the Department of Health. Advertisements for those products or services must comply with the rules and professional codes of conduct of relevant professional bodies.

Medical advisory panels

For television advertisements, Clearcast retains a panel of consultants to advise it on health and medical aspects of products or services before they are advertised. For information, see “Contact us” at www.clearcast.co.uk.

For radio advertisements, the RACC retains a panel of consultants to advise it on health and medical aspects of advertising. For information, see “Services” at www.racc.co.uk.

The ASA or BCAP may seek a medical opinion if there is a significant challenge to an advertisement that has been accepted by a broadcaster on the advice of a member of the panels.

Background

Advertisements for products subject to licensing under the Medicines Act 1968 must comply with the requirements of the Act. That includes regulations made under the Act and any conditions contained in the marketing authorisation, certificate, licence or traditional herbal registration for the advertised product.

Title VIII of European Directive 2001/83/EC as amended by Directive 2004/27/EC concerns “The Advertising of Medicinal Products for Human Use” and has been implemented in the UK by The Medicines (Advertising) Regulations 1994 and The Medicines (Monitoring of Advertising) Regulations 1994 (both as amended). The ASA and BCAP are obliged to consider complaints about breaches of Regulation 9 of the Advertising Regulations, which has been incorporated in these rules.

With the introduction of new or changed products, the diverse licensing requirements of the Medicines Act 1968 and changes in medical opinion, this Code cannot provide a complete guide to all requirements for health claims or the advertising of products or classes of medicines and treatments.

The general principles governing the advertising of medicines, treatments, medical devices and health claims are set out below; they apply also to advertisements for veterinary products and services. Directive 2001/82/EC on the Community code relating to veterinary medicinal products (as amended by Directive 2004/28/EC), which has been implemented in the UK via The Veterinary Medicines Regulations, contains provisions relating to the advertising of such products. The Veterinary Medicines Regulations are revoked and remade annually.

For more information on medicinal products and treatments, go to: www.mhra.gov.uk.

The European legislation governing medical devices is made up of Directive 90/385/EEC relating to active implantable medical devices, Directive 93/42/EEC on medical devices (as amended by Directive 2000/70/EC) and Directive 98/79/EC on in-vitro diagnostic medical devices. The MHRA is the body responsible for ensuring medical devices work and are safe. Generally, all devices covered by the scope of the relevant Directive should carry a CE mark, which is a public representation of the manufacturer's claim that its device satisfies the relevant Essential Requirements of the Directives, is fit for its intended purpose and, if required, has been independently assessed by a Notified Body. For more information, go to: www.mhra.gov.uk.

Definition

For the purposes of this Section, "licence" includes certificate, authorisation or registration.

Rules

11.1 - Radio Central Copy Clearance

Radio broadcasters must ensure advertisements subject to this Section are centrally cleared.

11.2

If they are necessary for the assessment of claims, broadcasters must, before the advertisement is broadcast, obtain generally accepted scientific evidence and independent expert advice.

11.3

Advertisements must not discourage essential treatment for conditions for which medical supervision should be sought. For example, they must not offer specific advice on, diagnosis of or treatment for such conditions unless that advice, diagnosis or treatment is conducted under the supervision of a suitably qualified health professional. (See 11.9) That does not prevent advertising for spectacles, contact lenses or hearing aids.

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 humans beings by restoring, correcting or modifying physiological functions by exertion of a pharmacological, immunological or metabolic action.

11.5

These are not acceptable in advertisements for medicinal products:

11.5.1

Presentations, by doctors, dentists, veterinary surgeons, pharmaceutical chemists, nurses, midwives and the like that imply professional advice or recommendation;

11.5.2

statements that imply professional advice or recommendation by people who are presented, whether directly or by implication, as being qualified to give that advice or recommendation;

11.5.3

references to approval of, or preference for, any relevant product, its ingredients or their use by the professions covered by 11.5.1.

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.

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 or service.

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.

11.9

Services including Clinics, Establishments and the like Offering Advice on, or Treatment in, Medical, Personal or other Health Matters

Advertisements are acceptable only if the advertiser can provide suitable credentials, for example, evidence of: relevant professional expertise or qualifications; systems for regular review of members' skills and competencies and suitable professional indemnity insurance covering all services provided; accreditation by a professional or regulatory body that has systems for dealing with complaints and taking disciplinary action and has registration based on minimum standards for training and qualifications.

11.10

Advertisements for hypnosis-based procedures (including techniques commonly referred to as hypnotherapy), psychiatry, psychology, psychoanalysis or psychotherapy are acceptable subject to rule (11.9). Broadcasters must take particular care over advertisements for publications employing those techniques.

11.11

Advertisements for post-conception pregnancy advice services must make clear in the advertisement if the service does not refer women directly for abortion.

Cross reference: See also rule 11.9, section 15 Faith, Religion and Equivalent Systems of Belief and section 16 Charities.

11.12 – Television only

Teleshopping for these products or services are not acceptable:

11.12.1

medicinal products that are for human use and that are subject to a marketing authorisation within the meaning of Directive 2001/83/EC (as amended by Directive 2004/27/EC) and are on the General Sale List (GSL) as a pharmacy medicine (P) or as a prescription-only medicine (POM)

11.12.2

veterinary medicinal products that are subject to a marketing authorisation within the meaning of Directive 2001/82/EC (as amended by Directive 2004/28/EC) and are available as an authorised veterinary medicine on the General Sales List (AVMGSL) as a non-food animal medicine from a veterinarian, pharmacist or suitably qualified person or as a prescription-only medicine from a veterinarian (POM-V) or from a veterinarian, pharmacist or suitably qualified person (POM-VPS)

11.12.3

medical treatments for humans or animals.

11.13

Broadcasters may accept advertisements for services offering remote personalised advice on medical or health matters only if all staff providing that advice are suitably qualified and subject to regulation by a statutory or recognised medical or health professional body and the advice given is in accordance with its relevant professional codes of conduct (see 11.9).

11.13.1

Advertisements must not contain offers to prescribe or treat remotely (including by phone, post, e-mail or fax). That does not preclude advertisements containing offers to distribute general information on health-related matters, such as leaflets or information packs.

11.14

No advertisement may encourage indiscriminate, unnecessary or excessive use of products or services covered by this section.

11.15

Unless allowed by a product licence, words, phrases or illustrations that claim or imply the cure of an ailment, illness, disease or addiction, as distinct from the relief of its symptoms, are unacceptable.

11.16

Unless authorised by the relevant product licence, the word “tonic” is not acceptable in advertisements that make health claims. Claims must not suggest that a product has tonic properties. That does not prevent the use of the word “tonic” in the description “Indian tonic water” or “quinine tonic water”.

11.17

Jingles may be used but must not incorporate a medical or health claim.

11.18

Advertisements for smoking deterrents:

11.18.1

must make clear that the indispensable factor in giving up smoking is willpower

11.18.2

must not claim that smoking is safer while the habit is being reduced.

Medicines

11.19

Medicines must have a licence from the MHRA before they are advertised. Advertisements for medicinal products must conform with the licence. Advertisements must not suggest that a product is “special” or “different” because it has been granted a licence from the MHRA.

11.20

Advertisements for medicinal products must include this information:

11.20.1

the name of the product

11.20.2

the name of the active ingredient, if it contains only one

11.20.3

relevant wording such as “always read the label” or “always read the leaflet”

11.20.4

the indication (what the product is for).

Advertisements for traditional herbal medicinal products and homeopathic medicinal products must include mandatory information, which can be found in the MHRA Blue Guide at www.mhra.gov.uk.

11.21

Advertisements for these are not acceptable:

11.21.1

medicinal products or medical treatments available only on prescription

11.21.2

Products for the treatment of alcohol or substance misuse or dependence. An exception is made for smoking deterrents (see 11.18).

11.22

No advertisement may suggest that a medicinal product is a foodstuff, cosmetic or other consumer product.

11.23

No advertisement for a medicinal product may claim its effects are guaranteed. That does not prevent the offering of refunds, if the advertisement does not suggest that efficacy is guaranteed.

11.24

No advertisement for a medicinal product or treatment may be directed at people under the age of 16. See also section 9: Children and section 32: Scheduling.

11.25

Advertisements must not, without good reason, make viewers anxious that they are or might be suffering from disease or ill-health or might do so if they do not respond to the advertisement.

11.25.1

Advertisements must not falsely suggest that a product is necessary for the maintenance of physical or mental health or that health could be enhanced by taking the product or affected by not taking it.

11.26

Advertisements must not, in improper, alarming or misleading ways, use images of changes in the human body caused by disease, injury or a medicinal product.

11.27

No advertisement for a medicinal product or treatment may include a testimonial by a person well-known in public life, sport, entertainment or similar or be presented by such a person. That includes persons corporate as well as singular and would prohibit, for example, recommendations by medical charities, patient groups and health or sport organisations.

11.28

No advertisement for a medicinal product may refer in improper, alarming or misleading terms to claims of recovery.

11.29

Advertisements for medicinal products must not contain material that could, for example by description or detailed representation of a case history, lead to a wrong self-diagnosis.

11.30

Although it may refer to the likely absence of a specific side effect, for example “unlikely to cause drowsiness”, no advertisement for a medicinal product may suggest that a product has no side effects.

11.31

No advertisement for a medicinal product or treatment may suggest that the effects are better than, or equivalent to, those of another identifiable medicinal product or treatment.

11.32

No advertisement for a medicinal product may suggest that the safety or efficacy of the product is due to it being “natural”.

11.33

Only homeopathic medicinal products that are registered in the UK may be advertised. Mandatory information for homeopathic advertisements can be found in the MHRA Blue Guide at www.mhra.gov.uk.

11.34

A tension headache is a recognised medical condition; analgesics may be advertised for the relief of pain associated with that condition but no advertisement for a simple or compound analgesic may claim the direct relief of tension or refer to depression.

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Weight Control and Slimming

Principle

The rules in this Section are designed to ensure that advertisements for weight control and slimming products and services receive the necessary high level of scrutiny.

Definitions

This Section applies to advertisements for weight-control and slimming foodstuffs, aids (including exercise products that make weight-loss or slimming claims), clinics and other establishments, diets, medicines, treatments and the like. If applicable, they must comply with Section 10 Medicines, Medical Devices, Treatments and Health or Section 11 Food Dietary Supplements and Associated Health or Nutrition Claims. Broadcasters should be aware that the Proprietary Association of Great Britain (PAGB) lays down criteria for advertisements that fall within this Section.

Rules

12.1 - Radio Central Copy Clearance

Radio broadcasters must ensure advertisements subject to this Section are centrally cleared.

12.2

If they are necessary for the assessment of claims, broadcasters must, before the advertisement is broadcast, obtain generally accepted scientific evidence and independent expert advice.

12.3

Advertisements for services offering remote personalised advice on health matters related to weight control or slimming are acceptable only if all staff providing that advice are suitably qualified and subject to regulation by a statutory or recognised medical or health professional body and the advice given is in accordance with its relevant professional code of conduct (see 11.9). That does not prevent advertisements that offer general information on health matters related to slimming or weight control.

12.4

Advertisements must not encourage indiscriminate or excessive use of a weight-control or slimming product or service.

12.5

Advertisements for slimming or weight control products or services must not be addressed to people under 18, use creative treatments likely to be of particular appeal to them, or, feature any person whose example people under 18 are likely to follow or who has a particular appeal to them. This rule does not apply to advertisements for calorie-reduced or energy-reduced foods and drinks, provided the product is not presented as part of a slimming regime and the advertisement does not use the theme of slimming or weight control.

12.6

Broadcasters must obtain suitably qualified independent medical or other health specialist advice on the safety and efficacy of weight control and slimming products or services before broadcast. In particular, the advice must satisfy broadcasters that:

12.6.1

the slimming product or service is likely to be effective and will not lead to harm;

12.6.2

clinics and other establishments offering medically supervised treatments are run in accordance with the National Minimum Standards Regulations issued by the Department of Health or, if they operate abroad, broadly equivalent requirements.

12.7

Promises or predictions of specific weight loss are not acceptable for any slimming product.

12.8

Health claims in food product advertisements that refer to a rate or amount of weight loss are not permitted.

12.9

Claims that refer to specific amounts of weight that have been lost by an individual must state the period over which that loss was achieved and should not be based on unrepresentative experiences of the slimming or weight-control product. The amount of weight lost and the period over which it was lost must be compatible with generally accepted good medical and dietary practice. For those who are normally overweight, a rate of weight loss greater than 2lbs (just under 1kg) a week is unlikely to be compatible with good medical and nutritional practice. For those who are obese, a rate of weight loss greater than 2lbs a week in the early stages of dieting could be compatible with good medical and nutritional practice.

12.10

Low-calorie foods and drinks, if advertised as, or as part of, a slimming regime or if advertised using a slimming or weight-control theme, must make clear in the advertisement that the product merely helps weight loss as part of a calorie-controlled or energy-controlled diet.

12.11

Advertisements for weight control or slimming products or services must not be targeted directly at individuals with a Body Mass Index of 30 or above (obesity) or use testimonials or case histories referring to subjects who were or seemed to be obese before using the advertised product.

12.11.1

Advertisements for clinics or other establishments that offer treatment under suitably qualified medical supervision and advertisements for non-prescription medicines that are indicated for the treatment of obesity and that require the involvement of a pharmacist in the sale or supply of the medicine may nevertheless be targeted at those who are obese. Please see rule 11.9, "Services including Clinics, Establishments and the like Offering Advice on, or Treatment in, Medical, Personal or other Health Matters".

12.12

Advertisements for weight-control or slimming products must not suggest or imply that to be underweight is acceptable or desirable. If they are used, testimonials or case histories must not refer to subjects who are or seem to be underweight. Underweight means a Body Mass Index below 20.

12.13

Advertisements for specially formulated products intended for use in energy-restricted diets that, when used as instructed by the manufacturer, replace the whole of the total daily diet or one or more meals of the daily diet must comply with the Foods Intended for Use in Energy Restricted Diets For Weight Reduction Regulations 1997 (as amended), specifically:

12.13.1

advertisements for such foods may not be offered under any name except "total diet replacement for weight control" or "meal replacement for weight control"

12.13.2

advertisements for such foods may not refer to the rate or amount of weight loss that could result from use of the product or to a reduction in the sense of hunger or an increase in the sense of satiety.

12.14

For the purposes of this rule, very low-calorie diets (VLCDs) are those with a daily intake of less than 800 kilo-calories. They must comply with the provisions of the Food Safety Act 1990 and relevant regulations made under it, including those on advertising. These conditions apply to advertisements for such products:

12.14.1

the advertisement must include a clear injunction to consult your doctor before embarking on the diet

12.14.2

the diet must be positioned as a short-term measure only

12.14.3

testimonials or specific case histories must not be used

12.14.4

independent medical advice must be sought on whether the proposed advertisement accords with the guidance on “Obesity: the prevention, identification, assessment and management of overweight and obesity in adults and children” (2006) published by the National Institute for Health and Clinical Excellence.

12.15

Advertisements for establishments offering weight-control or slimming treatments are acceptable only if they make clear that dietary control is necessary to achieve weight loss. An exception is made for clinics and other establishments that provide immediate weight loss surgery under suitably qualified medical supervision and are run in accordance with rule 11.9. Those clinics and other establishments must not refer to the amount of weight that can be lost.

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Food, Dietary Supplements and Associated Health or Nutrition Claims

Principle

Public health policy increasingly emphasises good dietary behaviour and an active lifestyle as a means of promoting health. Commercial product advertising cannot reasonably be expected to perform the same role as education and public information in promoting a varied and balanced diet but should not undermine progress towards national dietary improvement by misleading or confusing consumers or by setting a bad example, especially to children. The spirit, as well as the letter, of the rules in this Section applies to all advertisements that promote, directly or indirectly, a food or soft drink product.

Background

These rules must be read in conjunction with the relevant legislation including the Food Safety Act 1990, the Food Labelling Regulations 1996 (as amended), especially Schedule 6 and Regulation (EC) No 1924/2006 on Nutrition and Health Claims made on Foods. They apply to all broadcast advertisements for food products.

Regulation (EC) No 1924/2006 on Nutrition and Health Claims made on Foods is complex and mandatory and seeks to protect consumers from misleading or false claims. Transitional periods apply and broadcasters are advised to take advice on the effect of the Regulation. Advertising industry stakeholders might find the Guidance to Compliance with European Regulation (EC) No 1924 on Nutrition and Health Claims Made on Foods published by the Food Standards Agency useful: www.food.gov.uk.

References to food apply also to soft drinks.

Rules

General

13.1 - Radio Central Copy Clearance

Radio broadcasters must ensure advertisements subject to this Section are centrally cleared.

13.2

Advertisements must avoid anything likely to condone or encourage poor nutritional habits or an unhealthy lifestyle, especially in children.

13.2.1

Advertisements must not condone or encourage damaging oral healthcare practices, especially in children.

13.3

Advertisements must not condone or encourage excessive consumption of any food.

13.4

Only Permitted Nutrition Claims listed in the Annex of EC Regulation 1924/2006 Nutrition and Health Claims made on Foods are permitted in advertisements.

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

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

Advertisements 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.

13.4.1

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

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

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

13.4.2

Nutrition or health claims must be supported by documentary evidence. Advertisements must not give a misleading impression of the nutrition or health benefits of the product as a whole and factual nutrition statements should not imply a nutrition or health claim that cannot be supported. Claims must be presented clearly and without exaggeration. References to energy should not confuse its scientific meaning, calorific value, with its colloquial meaning, physical vigour.

13.4.3

The fact that a food product is a good source of certain nutrients does not justify generalised claims of a wider nutritional benefit and should be considered in the context of a balanced diet or lifestyle or both. 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 as accepted by generally accepted scientific evidence.

13.4.4

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

13.5

Comparisons between foods must not discourage the selection of options such as fresh fruit and fresh vegetables, which generally accepted dietary opinion recommends should form a greater part of the average diet. Advertisements must not disparage good dietary practice. No advertisement should suggest that a balanced and varied diet cannot provide adequate nutrients in general.

13.5.1

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

13.5.2

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

13.5.3

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

The European Commission has produced guidance on food categories that advertising industry stakeholders might find useful:

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

13.6

These are not acceptable in advertisements for products subject to this Section:

13.6.1

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

13.6.2

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

13.6.3

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

13.6.4

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

13.6.5

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

Dietary Supplements

BCAP advises advertising industry stakeholders to ensure that claims made for food supplements and other vitamins and minerals are in line with the requirements of Regulation (EC) No 1924/2006 on Nutrition and Health Claims made on Foods.

13.7

Advertisements must not suggest that it is necessary for the average person to augment the diet or, unless the claim is authorised by the European Commission, that a dietary supplement can enhance normal good physical or mental condition. Claims about a higher vitamin or mineral intake for a specific function are permitted if authorised by the European Commission. Individuals must not be encouraged to swap a healthy diet for supplementation.

13.7.1

Advertisements may offer vitamin and mineral supplements to certain groups as a safeguard to help maintain good health. If a claim is made for a vitamin or mineral relevant only to a group who is at risk of inadequate intake the advertisement must state clearly the group's likely to benefit from the supplement.

Only certain groups are likely to benefit from a vitamin or mineral supplement. They might include:

- people on a restricted dietary regimen
- those eating unsupplemented, low-energy diets
- women of child-bearing age (especially if they are planning to have a baby, are pregnant or lactating)
- growing children
- people who eat nutritionally inadequate meals
- convalescents,
- athletes in training or others who are physically very active,

- people who smoke,
- people with Asian ancestry from the Indian subcontinent
- some individuals over 50
- people who are housebound

Infant and Follow-on Formula

These rules must be read in conjunction with the relevant legislation including the Infant Formula and Follow-on Formula Regulations 2007 and the European Regulation (EC) No 1924/2006 on Nutrition and Health claims made on foods.

13.8

Advertisements for infant formula are prohibited.

13.8.1

Advertisements must not confuse between infant formula and follow-on formula.

Food and Soft Drink Product Advertising to Children

These rules should be read in conjunction with the general rules in this Section and other rules in this code, especially Section 5 (Children) and, for television only, Section 32: (Scheduling).

Definitions

1. Children: persons below the age of 16.

- Advertisements targeted directly at pre-school or primary school children: advertisements that directly target pre-school or primary school children through their content as opposed to their scheduling. For rules on the scheduling of HFSS product advertisements, please see section 32: Scheduling.
- Equity brand characters: those characters that have been created by the advertiser and have no separate identity outside their associated product or brand.
- Licensed characters: those characters that are borrowed equities and have no historical association with the product.
- HFSS products: those food or drink products that are assessed as High in Fat, Salt or Sugar in accordance with the nutrient profiling scheme published by the Food Standards Agency (FSA) on 6 December 2005. Information on the FSA's nutrient profiling scheme is available on the FSA website at:

<http://www.food.gov.uk/healthiereating/advertisingtochildren/nutlab/nutprofmod>

For the avoidance of doubt, HFSS product advertisements may make nutritional or health claims in accordance with 13.4.

2. The spirit, as well as the letter, of the rules in this Section applies to all advertisements that promote, directly or indirectly, a food. References to food apply also to soft drinks.

13.9 – 13.12.5 apply to television only

13.9 - Television

Promotional offers must be used with a due sense of responsibility. They may not be used in HFSS product advertisements targeted directly at pre-school or primary school children.

13.9.1

Advertisements featuring a promotional offer linked to a food product of interest to children must avoid creating a sense of urgency or encouraging the purchase of an excessive quantity for irresponsible consumption.

13.9.2

Advertisements must not seem to encourage children to eat or drink a product only to take advantage of a promotional offer: the product should be offered on its merits, with the offer as an added incentive. Advertisements featuring a promotional offer should ensure a significant presence for the product.

13.9.3

Advertisements for collection-based promotions must not seem to urge children or their parents to buy excessive quantities of food. They must not directly encourage children only to collect promotional items, emphasise the number of items to be collected or create a sense of urgency. If a promotional offer can also be bought, that must be made clear. Closing dates for collection-based promotions must enable the whole set to be collected without having to buy excessive or irresponsible quantities of the product in a short time.

13.9.4

Advertisements must not encourage children to eat more than they otherwise would.

The notion of excessive or irresponsible consumption relates to the frequency of consumption as well as the amount consumed.

13.10 – Television only

Licensed characters and celebrities popular with children must be used with a due sense of responsibility. They may not be used in HFSS product advertisements targeted directly at pre-school or primary school children.

That prohibition does not apply to advertiser-created equity brand characters (puppets, persons or characters), which may be used by advertisers to sell the products they were designed to sell.

Licensed characters and celebrities popular with children, may present factual and relevant generic statements about nutrition, safety, education or similar.

13.11 – Television only

No nutrition or health claim may be used in HFSS product advertisements targeted directly at pre-school or primary school children. For the avoidance of doubt, claims referring to children's development or health are acceptable in non-HFSS product advertisements, if those claims are authorised by the European Commission.

13.12 – Television only

(Please see also Section 9, Children: Direct Exhortation)

Although children might be expected to exercise some preference over the food they eat or drink, advertisements must be prepared with a due sense of responsibility and must not directly advise or ask children to buy or to ask their parents or other adults to make enquiries or purchases for them.

13.12.1 – Television only

Nothing in an advertisement may seem to encourage children to pester or make a nuisance of themselves.

13.12.2 – Television only

Advertisements must not imply that children will be inferior to others, disloyal or will have let someone down, if they or their family do not buy, consume or use a product or service.

13.12.3 – Television only

Advertisements must neither try to sell to children by appealing to emotions such as pity, fear, loyalty or self-confidence nor suggest that having the advertised product somehow confers superiority, for example making a child more confident, clever, popular or successful.

13.12.4 – Television only

Advertisements addressed to children must not urge children to buy or persuade others to buy and must avoid high-pressure or hard-sell techniques. Neither the words used nor the tone of the advertisement should suggest that young viewers could be bullied, cajoled or otherwise put under pressure to acquire the advertised item.

13.12.5 – Television only

If an advertisement for a children's product contains a price, the price must not be minimised by the use of words such as "only" or "just".

13.13 – 13.15 apply to radio only

13.13 – Radio only

Promotional offers to children must be used with a due sense of responsibility. They may not be used in food or soft drink product advertisements targeted directly at pre-school or primary school children; that prohibition does not apply to advertisements for fresh fruit or fresh vegetables. Advertisements that contain a promotional offer linked to a food or drink product of interest to children must neither seem to encourage children to eat or drink a product only to take advantage of a promotional offer nor create a sense of urgency. If a promotional item can also be bought, that must be made clear. Closing dates for collection-based promotions must enable the whole set to be collected without having to buy excessive or irresponsible quantities of the product in a short time.

13.14 – Radio only

Licensed characters and celebrities popular with children must be used with a due sense of responsibility. They may not be used in food or soft drink product advertisements targeted directly at pre-school or primary school children. That prohibition does not apply to advertisements for fresh fruit or fresh vegetables or to advertiser-created equity brand characters (puppets, persons or characters), which may be used by advertisers to sell the products they were designed to sell.

Licensed characters, equity brand characters or celebrities well-known to children may present factual and relevant generic statements about nutrition, safety, education and the like.

13.15 – Radio only

Claims referring to children's development or health are acceptable in radio food or soft drink product advertisements if those claims are authorised by the European Commission.

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Financial Products, Services and Investments

Principle

The rules in this Section largely draw attention to statutory regulation with which all advertisements must comply. Selecting the most relevant financial products or services normally requires consumers to consider many factors; short-form television and radio advertisements are not well-suited to communicating large amounts of detail. They are not, therefore, suitable formats for advertising especially high-risk or specialist investments or any financial products or services that are not regulated or permitted in the UK under the Financial Services and Markets Act 2000 (FSMA).

The ASA and BCAP Executive may seek advice from other regulators when investigating possible breaches of the BCAP Code. They will apply their usual standards to prevent misleading advertising (see Section 3) and require significant exceptions and qualifications to be made clear (see rule **3.10**). The Financial Services Authority (FSA) Handbook requires financial promotions to be “fair, clear and not misleading”.

Definitions

In this Section, unless otherwise stated, the terms “financial promotion”, “authorised person”, “qualifying credit” and “regulated activity” have the same meanings as in FSMA and the Financial Services and Markets Act (Financial Promotion) Order 2005 (FPO) (as amended). The FSMA definition of a financial promotion is broad and includes, for example, advertisements for deposits and insurance products.

Under FSMA, a financial promotion is “an invitation or inducement to engage in investment activity that is made in the course of business and is capable of having an effect in the UK.” That broad definition captures all promotional activity, including traditional advertising, telephone sales and face-to-face conversations, in relation to all products and services regulated by the FSA. Under FSMA, “investment activity” does not cover only conventional investments; it includes deposits, home finance transactions (regulated mortgages, home purchase plans and home reversion plans), other forms of secured credit and most insurance, including some advertisements by insurance intermediaries (see the New Insurance Conduct of Business sourcebook - ICOBS).

The FSA is the regulator for the financial services industry and regulates conduct of business, including advertising, for investment products, including structured deposits where capital is subject to market risk. It also regulates the advertising of insurance, including the activities of insurance intermediaries (for example motor, home and travel insurers). It is responsible for the regulation of most first-charge mortgage lending and selling. Mortgages that are not regulated are those secured on non-UK land, business premises with less than 40% residential occupation and second-charge mortgages. The FSA’s financial promotion rules set out in Mortgages and Home Finance: Conduct of Business sourcebook (MCOB) Chapter 3 in the FSA Handbook apply to Home Reversion Plans and qualifying credit promotions as defined under the FPO and the FSA Handbook glossary. The rules in MCOB 3 do not apply to Home Purchase Plans, with the exception of the fair, clear and not misleading standard and some relevant guidance detailed in MCOB Chapter 2.

Unsecured lending, other forms of secured lending and some other credit activities continue to be regulated by the Consumer Credit Act 1974 (as amended) and the Consumer Credit (Advertisements) Regulations 2004 (as amended).

The Banking Code is published by the British Bankers' Association (BBA), the Building Societies Association (BSA) and the Association for Payment Clearing Services (APACS). The Business Banking Code is published by the BBA and APACS. Those two codes govern current accounts, savings accounts and deposit accounts (where capital is not subject to market risk), including cash and ISAs and cash deposit Child Trust Funds, and payment services, including foreign-exchange services, plastic cards, loans and

overdrafts. The codes require that all advertising and promotional material issued by institutions that subscribe to the codes is “clear, fair, reasonable and not misleading”. The Banking Code Standards Board monitors and enforces the codes.

A "specialised financial channel or station" is an Ofcom-licensed channel or station whose programmes, with few exceptions, are likely to be of particular interest only to business people or finance professionals.

In this Code, "spread betting" and "contract for differences" have the same meanings as in the glossary to the FSA Handbook.

Rules

14.1 – Radio central copy clearance

Radio broadcasters must ensure advertisements for consumer credit, investment and complex financial products and services are centrally cleared.

14.2

Broadcasters are responsible for ensuring that advertisements carried by them comply with all the relevant legal and regulatory requirements. Broadcasters might need to seek legal advice if an advertiser claims an advertisement should be considered:

14.2.1

not to be a financial promotion or

14.2.2

to be a financial promotion that is not required to be communicated or approved by an authorised person (because it is subject to an exemption under the FPO).

Advice, or general advice from the FSA, might be required on compliance with the FSA Handbook. The FSA does not pre-vet or advise on the compliance of proposed financial promotions with FSMA. For more information, visit the financial promotions pages of the FSA website (www.fsa.gov.uk) and see the FSA Handbook, especially the Conduct of Business sourcebook (COBS) Chapter 4, MCOB Chapter 3, ICOBS Chapter 2.2 and the Perimeter Guidance Manual (PERG) chapter 8.

14.3

Advertisements for financial services that are broadcast exclusively to audiences in EU Member States other than the UK or are not subject to the FSA's financial promotion rules need not comply with this Section. Instead, they must comply with the laws and regulations of the relevant Member States.

14.4

Financial promotions or other advertisements for regulated activity may be broadcast if:

14.4.1

communicated by an authorised person

14.4.2

approved or issued by an authorised person or an appointed representative of an authorised person who, to the broadcaster's satisfaction, has confirmed that the final recorded version of the advertisement complies with the FSA's financial promotion rules or

14.4.3

exempt under the FPO. An advertisement by a general insurance intermediary need not be approved by an authorised person if it is a generic promotion and exempted by the FPO. (That is usually if the advertisement does not identify an insurer, insurance intermediary or product; so it will usually apply if the financial promotion refers generally to product types.)

14.5

These categories of advertisement may be broadcast on specialised financial channels or stations or programming only:

14.5.1

advertisements for the acquisition or disposal of derivatives, warrants or other transferable securities (such as shares) that are not on the Official List of the FSA or admitted to trading on a Regulated Market in the UK or other EEA State (as defined by the Markets in Financial Instruments Directive);

14.5.2

advertisements for spread betting, as an investment only. Spread betting advertisements may be advertised on interactive or additional TV services (including text services). They must comply with the gambling rules (see Section 17). 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 experience;

14.5.3

advertisements for Contracts for Differences (except Spread Betting), provided the products are available only to clients who have demonstrated through appropriate pre-vetting procedure that they have relevant financial trading experience.

14.5.4

advertisements for investments not regulated or permitted under FSMA. An advertisement that implies, for example, that a collectors' item or other unregulated product or service could have investment potential (in the colloquial sense) would normally be unacceptable.

14.6

Unless they are obviously addressed to a specialist audience and shown either on specialised financial channels or stations or in breaks in relevant financial programmes, advertisements subject to this Section must be considered to be addressed to non-specialist audiences. No specialist knowledge should normally be required for a clear understanding of claims or references. For example, exceptions, conditions or expressions that would be understood by finance specialists must be avoided or explained if they would be unfamiliar to the audience.

14.7

References to interest payable on savings are acceptable, subject to these conditions:

14.7.1

they must be factually accurate at the time of broadcast and the advertisement must be modified immediately if the rate changes

14.7.2

advertisements quoting a rate must use the Annual Equivalent Rate (AER) and the contractual rate as set out in the British Bankers' Association and Building Societies Association Code of Conduct for the Advertising of Interest Bearing Accounts and advertisements should comply with all the provisions of that code

14.7.3

if conditions apply to calculations of interest and might affect the sum received, the advertisement must refer to the conditions and how they can be accessed

14.7.4

advertisements quoting a rate must make clear whether it is gross or net of tax, or tax-free, but do not need to explain those expressions

14.7.5

if interest rates are calculated by reference to an external index or rate that fact must be stated clearly

14.7.6

if the investment returns of different types of savings products are compared (for example, a unit trust and a bank deposit), significant differences between the products must be explained.

14.8

Subject to legal requirements, reference to specific sums assured in life insurance advertisements must be accompanied by all relevant qualifying conditions, for example age and gender of the assured at the outset of the policy, period of policy and amount and number of premiums payable.

Lending and Credit

14.9

The advertising of consumer credit or hire services is acceptable only if the advertiser complies with the Consumer Credit (Advertisements) Regulations 2004 (as amended) and the Consumer Credit Act 1974 (as amended). Credit advertisements that are not qualifying credit promotions must comply with Section 46 of the Consumer Credit Act and Regulations made under it. If the applicability or interpretation of those Regulations is in doubt, advertisers must be encouraged to seek guidance from their Local Trading Standards department. Such advertisements that involve distance marketing must also comply with the Financial Services (Distance Marketing) Regulations 2004. Other distance-marketing financial advertisements are covered by the FSA Handbook. Similarly, qualifying credit promotions must comply with the requirements imposed by FSMA and MCOB. The advertising of home finance transactions (regulated mortgages, home purchase plans and home reversion plans) regulated by the FSA is acceptable only if the advertiser complies with the FSMA and the FSA Handbook.

14.10

Advertisements for mortgages and re-mortgages are normally financial promotions under FSMA and must comply with the requirements imposed by FSMA and MCOB.

14.10.1

Advertisements for most loans secured by a second charge are credit advertisements and the requirements of the Consumer Credit (Advertisements) Regulations 2004 (as amended) therefore apply. Special note should be taken of the requirements in those Regulations for secured loans

14.10.2

Advertisements for some mortgages might also have to comply with the provisions of COBS (for example if an investment product is being sold alongside a mortgage).

14.11

Advertising for debt management services is acceptable only from bodies that:

14.11.1

are licensed under the Consumer Credit Act 1974 (as amended) and

14.11.2

undertake to comply with the Debt Management Guidance published by the Office of Fair Trading.

14.12

References to income tax and other tax benefits must be properly qualified, clarifying their meaning and making clear, if relevant, that the tax treatment depends on the individual circumstances of each person and could be subject to change in future.

Direct Remittance

14.13

Advertisements on television or radio are unacceptable if they directly or indirectly invite the remittance of money direct to the advertiser or any other person without offering an opportunity to receive more information; an intermediate stage at which more information is supplied is mandatory.

14.14

Advertisements on Ofcom-regulated text services that invite the direct remittance of money are acceptable for the categories listed in rule 14.4, but not those in 14.5.

14.15

Broadcasters must retain, for 90 days after final transmission, printed paper copies of each advertisement that invites direct remittance of money.

14.16

Advertisements for paper or electronic publications (for example periodicals, books and text services) must not recommend a specific investment offer.

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Faith, Religion and Equivalent Systems of Belief

Principle

These rules seek to strike a balance between freedom of speech and the prevention of advertising that could be harmful. BCAP intends them to:

- a. reduce the social harm that can result from damage to inter-faith relations
- b. protect the young and allow parents to exercise choice in their children's moral and philosophical education
- c. protect those who are vulnerable because, for example, of sickness or bereavement
- d. prevent potentially harmful advertisements from exploiting their audience.

Definitions

The rules in this Section apply to:

- a. advertisements, about any matter, by or on behalf of bodies that are wholly or mainly concerned with religion, faith or other systems of belief that can reasonably be regarded as equivalent to those that involve recognition of a deity, including belief in the non-existence of deities
- b. advertisements, by any body, that wholly or mainly concern matters of religion, faith or equivalent systems of belief
- c. advertisements, by any body, for products or services related to such matters.

Cross reference: Some advertisements subject to this Section are also subject to Section 7 (Political and Controversial Matters) or Section 16 (Charities).

Rules

15.1 – Radio Central Copy Clearance

Radio advertisements subject to this Section must be centrally cleared.

15.2

Broadcasters must not accept advertisements from or on behalf of bodies:

15.2.1

that practise or advocate illegal behaviour or

15.2.2

whose rites or other forms of collective observance are not normally directly accessible to the general public or

15.2.3

that apply unreasonable pressure on people to join or participate or not to opt-out.

15.3

Broadcasters must be satisfied that no representatives will contact respondents without their consent.

15.4

Television and television text advertisements must not promote psychic practices or practices related to the occult, except those permitted by rule 15.5. Radio advertisements may promote psychic and occult practices but must not make efficacy claims.

Psychic and occult-related practices include astrology, personalised horoscopes, palmistry, fortune-telling, tarot, attempts to contact the dead, divination, clairvoyance, clairsaudience, the invocation of spirits or demons and exorcism.

15.5 – Television and television text only

Television and television text advertisements may promote services that the audience is likely to regard merely as entertainment and that offer generalised advice that would obviously be applicable to a large section of the population, for example, typical newspaper horoscopes.

15.5.1

Advertisements may promote a pre-recorded tarot-based prediction service if:

15.5.1.a

the service includes no content that respondents might feel to be threatening and

15.5.1.b

both the advertisement and the service state clearly that the service is pre-recorded and qualify references to “tarot” to make clear that the predictions are not based on live readings.

15.6

Advertisements must identify the advertiser and its faith, if that is not obvious from the context.

15.7

Television and television text advertisements must not expound doctrines or beliefs, unless they are broadcast on channels whose editorial content is wholly or mainly concerned with matters of religion, faith or equivalent systems of belief ("specialist broadcasters"). Advertisements carried by specialist broadcasters may express the advertiser's opinion on matters of doctrine or belief but must not present it as unqualified fact and must make clear to the audience that it is the advertiser's opinion.

Radio advertisements may expound doctrines or beliefs if they are presented as the advertiser's opinion.

15.8

Advertisements must not exhort audience members to change their beliefs or behaviour.

15.9

Advertisements must not refer to the alleged consequences of faith or lack of faith. They must not present the advertiser's beliefs as the "one" or "true" faith.

15.10

Advertisements must not denigrate the beliefs of others.

15.11

Advertisements must not appeal for funds, except for charitable purposes. If the charitable purpose includes or will be accompanied by recruitment or evangelism, the advertisement must make that clear.

Before broadcasting an advertisement that includes a charitable appeal, broadcasters must seek to be satisfied that the funds raised will be used solely for the benefit of specified groups of disadvantaged third parties.

Advertisements must not imply that respondents will receive spiritual benefits in return for a donation to the advertised cause.

15.12

Advertisements must not exploit the hopes or fears of the vulnerable. The elderly, the sick and the bereaved should be regarded as especially vulnerable.

15.13

Advertisements must not claim that faith healing, miracle working or faith-based counselling can treat, cure or alleviate physical or mental health problems; they may, however, make restrained and proportionate claims that such services can benefit emotional or spiritual well-being.

15.14

Advertisements must not appeal particularly to people under 18 and must not be broadcast during or adjacent to programmes that appeal or are likely to appeal particularly to those under 18.

This rule does not apply to advertisements for public events, including services and festivals, that children are likely to participate in or to advertisements for publications or similar merchandise that are designed for children, provided that neither the advertisement nor the advertised product or service is linked to recruitment or fund-raising. It does not apply to advertisements on channels or stations whose editorial content is dedicated to matters of religion, faith or equivalent systems of belief.

15.15

Advertisements must not feature children as presenters, unless the advertisement is for an event, such as Christmas carol services or Diwali celebrations, that children are especially likely to take part in.

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Charities

Principle

These rules are intended to prevent the abuse of people's charitable impulses. Charity advertisements or advertisements that feature charities should treat with care and discretion any subjects likely to arouse strong emotions. Although audiences are generally more tolerant of potentially distressing treatments when the objectives of an advertisement are charitable, sensitivity is nevertheless required especially in relation to younger audiences.

If it is relevant, broadcasters should take care to comply with Section 7: Political and Controversial Matters, section 5: Children, section 15: Faith, Religion and Equivalent Systems of Belief, section 9: Environment Claims and section 32: Scheduling.

Advertisements must comply with the requirements of the Charities Act 1993 (as amended) and all relevant data protection legislation. For information on the Data Protection Act 1998 go to: www.ico.gov.uk

Definitions

Rules in this Section regulate charity advertisements and not the charities themselves, which are regulated by the Charity Commission (England and Wales) www.charitycommission.gov.uk, The Department for Social Development (Northern Ireland) www.dsdni.gov.uk, and the Office of the Scottish Charity Regulator (Scotland) www.oscr.org.uk.

The rules apply to advertisements for charities (which include charitable bodies) and advertisements for other products and services that promote the needs or objectives of charities.

Rules

16.1 – Radio Central Copy Clearance

Radio broadcasters must ensure advertisements subject to this Section are centrally cleared.

16.2

Advertising is acceptable only from:

16.2.1

bodies registered with the relevant UK authorities as having charitable status or bodies that have had their charitable status otherwise officially recognised, for example by the Institute of Fundraising (www.institute-of-fundraising.org.uk).

16.2.2

bodies based outside the UK that supply to broadcasters confirmation that they comply with all relevant legislation in their home countries and evidence of their good faith, which might include audited accounts and a list of members of their governing body.

16.3

Advertisements seeking donations for, or promoting the needs or objectives of a charitable body must not:

16.3.1

misrepresent the body, its activities or the benefits of donated funds or exaggerate the scale or nature of the cause it claims to support

16.3.2

suggest that anyone will lack proper feeling or fail in a responsibility by not supporting a charity

16.3.3

disrespect the dignity of those on whose behalf an appeal is being made.

16.3.4

address fund-raising messages to children or likely to be of particular interest to them.

Rules that apply to references to charities in other advertisements

16.4

Advertisements by non-charity advertisers which promote the needs or objects of charitable bodies, or offer to assist them, are only acceptable if the bodies would be acceptable advertisers in their own right under 16.2

16.5

Advertisements that include an offer to donate money to charity must:

16.5.1

not depend on sales reaching a given level or be subject to a similar condition. If a target total or an amount for each purchase is stated, any extra money given to the charity must be donated on the same basis as contributions below that level

16.5.2

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

16.6

Broadcasters must hold evidence that each charity has agreed to the proposed advertisement.

16.7

Advertisements for medicinal products may offer to donate money to charity but must not be likely to encourage indiscriminate, unnecessary or excessive purchases of medicinal products. Advertisements must state the basis on which the contribution will be calculated.

Cross reference: See also Section 11 Medicines, Medical Devices, Treatments and Health

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Gambling

Principle

The rules in this Section are designed to ensure that gambling advertisements are socially responsible, with particular regard to the need to protect under 18s and other vulnerable persons from being harmed or exploited by advertising that features or promotes gambling.

The Gambling Act 2005 does not apply outside Great Britain. Licensees should ensure that specialist legal advice is sought when considering advertising any gambling product or service in Northern Ireland or the Channel Islands.

Spread betting may be advertised as an investment activity under the Financial Services and Markets Act (FSMA) 2000, the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (as amended) and in accordance with the FSA Handbook. Spread betting may be advertised on specialised financial stations or channels, in specialised financial programming or on interactive or additional television services (including text services) only (see 14.5.4). A “spread bet” is a contract for differences that is a gaming contract, as defined in the glossary to the FSA Handbook.

These Rules are not intended to inhibit advertisements to counter problem gambling that are responsible and unlikely to promote a brand or type of gambling.

Please refer to section 32, Scheduling for rules on the scheduling of gambling advertisements.

Definitions

The term “gambling” means gaming and betting, as defined in the Gambling Act 2005, and spread betting. For rules on lottery advertisements, see Section 18.

The rules in this Section apply to advertisements for “play for money” gambling products and advertisements for “play for free” gambling products that offer the chance to win a prize or that explicitly or implicitly direct the consumer to a “play for money” gambling product, whether on-shore or off-shore.

Unless they portray or refer to gambling, this Section does not apply to advertisements for non-gambling leisure events or facilities, for example hotels, cinemas, bowling alleys or ice rinks, that are in the same complex as, but separate from, gambling events or facilities.

Rules

17.1 – Radio Central Copy Clearance

Radio broadcasters must ensure that advertisements for gambling are centrally cleared.

17.2

Advertisements for events or facilities that can be accessed only by entering gambling premises must make that condition clear.

Rules for all advertisements

17.3

Advertisements must not:

17.3.1

portray, condone or encourage gambling behaviour that is socially irresponsible or could lead to financial, social or emotional harm

17.3.2

suggest that gambling can provide an escape from personal, professional or educational problems such as loneliness or depression

17.3.3

suggest that gambling can be a solution to financial concerns, an alternative to employment or a way to achieve financial security

17.3.4

portray gambling as indispensable or as taking priority in life, for example over family, friends or professional or educational commitments

17.3.5

suggest peer pressure to gamble or disparage abstention

17.3.6

suggest that gambling can enhance personal qualities, for example that it can improve self-image or self-esteem, or is a way to gain control, superiority, recognition or admiration

17.3.7

link gambling to seduction, sexual success or enhanced attractiveness

17.3.8

portray gambling in a context of toughness or link it to resilience or recklessness

17.3.9

suggest gambling is a rite of passage

17.3.10

suggest that solitary gambling is preferable to social gambling.

Rules for gambling advertisements

17.4

Advertisements for gambling must not:

17.4.1

exploit cultural beliefs or traditions about gambling or luck

17.4.2

condone or encourage criminal or anti-social behaviour

17.4.3

condone or feature gambling in a working environment (an exception exists for licensed gambling premises)

17.4.4

exploit the susceptibilities, aspirations, credulity, inexperience or lack of knowledge of under 18s or other vulnerable persons

17.4.5

be likely to be of particular appeal to under 18s, especially by reflecting or being associated with youth culture

17.4.6

feature anyone who is, or seems to be, under 25 years old gambling or playing a significant role. No-one may behave in an adolescent, juvenile or loutish way.

17.5

Advertisements for family entertainment centres, travelling fairs, horse racecourses and dog racetracks, and for non-gambling leisure facilities that incidentally refer to separate gambling facilities as part of a list of facilities on, for example a cruise ship, may include under 18s provided they are accompanied by an adult and are socialising responsibly in areas that the Gambling Act 2005 does not restrict by age.

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Lotteries

Principle

The rules in this Section are designed to ensure that lottery advertisements are socially responsible, with particular regard to the need to protect under 18s and other vulnerable persons from being harmed or exploited by advertisements that feature or promote lotteries.

This Section applies to advertisements for lottery products that are licensed and regulated by the Gambling Commission, the National Lottery Commission, or in the case of small society lotteries, registered with local authorities in England and Wales or licensing boards in Scotland.

The UK National Lottery may be advertised under The National Lottery etc Act 1993 and The National Lottery Regulations 1994 (as amended). Advertisements for the UK National Lottery are subject to the National Lottery Advertising and Sales Promotion Code of Practice, approved by the National Lottery Commission.

Rules

18.1 – Radio Central Copy Clearance

Radio broadcasters must ensure that advertisements subject to this Section are centrally cleared.

Rules for all advertisements

18.2

Advertisements must not:

18.2.1

portray, condone or encourage gambling behaviour that is socially irresponsible or could lead to financial, social or emotional harm

18.2.2

suggest that participating in a lottery can provide an escape from personal, professional or educational problems such as loneliness or depression

18.2.3

suggest that participating in a lottery can be a solution to financial concerns, an alternative to employment or a way to achieve financial security. Advertisers may, however, refer to other benefits of winning a prize

18.2.4

portray participating in a lottery as indispensable or as taking priority in life, for example over family, friends or professional or educational commitments

18.2.5

suggest peer pressure to participate in a lottery or disparage abstention

18.2.6

suggest that participating in a lottery can enhance personal qualities, for example that it can improve self-image or self-esteem, or is a way to gain control, superiority, recognition or admiration

18.2.7

link participating in a lottery to seduction, sexual success or enhanced attractiveness

18.2.8

not portray participation in a lottery in a context of toughness or link it to resilience or recklessness

18.2.9

suggest participation in a lottery is a rite of passage

18.2.10

suggest that solitary gambling is preferable to social gambling.

Rules for lottery advertisements

18.3

Advertisements for lotteries that can be participated in only by entering gambling premises must make that condition clear

18.4

Advertisements for lotteries must not exploit the susceptibilities, aspirations, credulity, inexperience or lack of knowledge of under 18s or other vulnerable persons

18.5

Advertisements for lotteries must not be likely to be of particular appeal to under 18s, especially by reflecting or being associated with youth culture. Please refer to Section 32 for scheduling restrictions

18.6

Advertisements for lotteries may include under 18s. No-one who is, or seems to be, under 25 years old may be featured gambling or playing a significant role

18.7

Advertisements that exclusively feature the good causes that benefit from a lottery and include no explicit encouragement to buy a lottery product may include under 18s in a significant role

18.8

Advertisements for lotteries must not exploit cultural beliefs or traditions about gambling or luck

18.9

Advertisements for lotteries must not condone or encourage criminal or anti-social behaviour.

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Alcohol

Principle

Advertisements for alcoholic drinks should not be targeted at people under 18 years of age and should not imply, condone or encourage immoderate, irresponsible or anti-social drinking.

The spirit as well as the letter of the rules in this section applies.

Definitions

The rules in this section apply to advertisements for alcoholic drinks and advertisements that feature or refer to alcoholic drinks. Alcoholic drinks are defined as those containing at least 1.2% alcohol; low-alcohol drinks are defined as drinks containing between 0.5% and 1.2% alcohol.

Where stated, exceptions are made for low-alcohol drinks. But, if an advertisement for a low-alcohol drink could be considered to promote a stronger alcoholic drink or if the low-alcohol content of a drink is not stated clearly in the advertisement, all the rules in this section apply.

If a soft drink is promoted as a mixer, the rules in this section apply in full.

The rules are not intended to inhibit responsible advertisements that are intended to counter problem drinking or tell consumers about alcohol-related health or safety themes. Those advertisements should not be likely to promote an alcohol product or brand.

Rules

19.1 – Radio Central Copy Clearance

Radio broadcasters must ensure advertisements for alcoholic drinks are centrally cleared.

Rules that apply to all advertisements:

19.2

Advertisements must not feature, imply, condone or encourage irresponsible or immoderate drinking. That applies to both the amount of drink and the way drinking is portrayed.

References to, or suggestions of, buying repeat rounds of alcoholic drinks are not acceptable. That does not prevent, for example, someone buying a drink for each member of a group. It does, however, prevent any suggestion that other members of the group will buy a round.

19.3

Advertisements must neither imply that alcohol can contribute to an individual's popularity or confidence nor imply that alcohol can enhance personal qualities.

19.4

Advertisements must not imply that drinking alcohol is a key component of social success or acceptance or that refusal is a sign of weakness. Advertisements must not imply that the success of a social occasion depends on the presence or consumption of alcohol.

19.5

Advertisements must not link alcohol with daring, toughness, aggression or unruly, irresponsible or anti-social behaviour.

19.6

Advertisements must not link alcohol with sexual activity, sexual success or seduction or imply that alcohol can enhance attractiveness. That does not preclude linking alcohol with romance or flirtation.

19.7

Advertisements must not portray alcohol as indispensable or as taking priority in life. Advertisements must not imply that drinking can overcome problems or that regular solitary drinking is acceptable.

19.8

Advertisements must not imply that alcohol has therapeutic qualities. Alcohol must not be portrayed as capable of changing mood, physical condition or behaviour or as a source of nourishment. Although they may refer to refreshment, advertisements must not imply that alcohol can improve any type of performance.

19.9

Advertisements must not link alcohol to illicit drugs.

19.10

Advertisements may give factual information about the alcoholic strength of a drink or make a factual strength comparison with another product but, except for low-alcohol drinks, which may be presented as preferable because of their low alcoholic strength, must not otherwise imply that a drink may be preferred because of its alcohol content or intoxicating effect.

19.11

Advertisements may include alcohol sales promotions but must not imply, condone or encourage immoderate drinking.

19.12

Advertisements must not feature alcohol being handled or served irresponsibly.

19.13

Advertisements must not link alcohol with the use of potentially dangerous machinery or driving. Advertisements may feature sporting and other physical activities (subject to other rules in this Section) but must not imply that those activities have been undertaken after the consumption of alcohol.

19.14

Advertisements must not normally show alcohol being drunk by anyone in their working environment.

Rules that apply to alcohol advertisements

19.15 – Television only

Alcohol advertisements must not:

19.15.1

be likely to appeal strongly to people under 18, especially by reflecting or being associated with youth culture or showing adolescent or juvenile behaviour.

19.15.2

Advertisements for alcoholic drinks must not include a person or character whose example is likely to be followed by those aged under 18 years or who has a strong appeal to those aged under 18.

19.16 – Radio only

Alcohol advertisements must not:

19.16.1

be targeted at those under 18 years or use a treatment likely to be of particular appeal to them.

19.16.2

Alcohol advertisements must not include a person or character whose example is likely to be followed by those aged under 18 years or who has a particular appeal to those aged under 18.

19.17

Alcohol advertisements must not feature in a significant role anyone who is, or seems to be, under 25 and must not feature children.

An exception is made for advertisements that feature families socialising responsibly. Here, children may be included but they should have an incidental role only and anyone who seems to be under the age of 25 must be obviously not drinking alcohol.

19.18

Advertisements for alcoholic drinks may give factual statements about product contents, including comparisons, but must not make any health claims, which include fitness or weight-control claims.

The only permitted nutrition claims are “low alcohol”, “reduced alcohol” and “reduced energy”.

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Motoring

Principle

Advertisements should not contribute to a culture of dangerous, irresponsible or inconsiderate driving or motorcycling, especially among young drivers.

Definition

“Motoring advertisements” are broadcast advertisements for vehicles or other automotive products, for example tyres, fuel or car accessories. These rules do not apply to public service advertisements about road safety.

Rules

Rules for all broadcast advertisements:

20.1

Advertisements must not condone or encourage dangerous, competitive, inconsiderate or irresponsible driving or motorcycling. Advertisements must not suggest that driving or motorcycling safely is staid or boring.

20.2

Advertisements must not condone or encourage a breach of the legal requirements of the Highway Code.

Rules for motoring advertisements:

20.3

Motoring advertisements must not demonstrate power, acceleration or handling characteristics except in a clear context of safety. Reference to those characteristics must not suggest excitement, aggression or competitiveness.

20.4

Motoring advertisements must not refer to speed in a way that might condone or encourage dangerous, competitive, inconsiderate or irresponsible driving or motorcycling. Factual statements about a vehicle's speed or acceleration are permissible but must not be presented as a reason for preferring the advertised vehicle. Speed or acceleration claims must not be the main selling message of an advertisement.

20.5

Motoring advertisements must not exaggerate the benefit of safety features to consumers or suggest that a vehicle's features enable it to be driven or ridden faster or in complete safety.

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Betting Tipsters

Principle

Advertisements for betting tipster services should not be likely to mislead the audience.

Definition

Proofing means provably lodging and securely recording a betting tip with an independent and suitably qualified third party, such as a solicitor, before the start of the event to which the tip relates.

Rules

21.1 – Radio Central Copy Clearance

Radio advertisements for betting tipsters must be centrally cleared.

21.2

Advertisements for betting tipsters must not be likely to be of particular appeal to under 18s.

21.3

Advertisements for betting tipster services must not make money-back guarantees.

21.4

Advertisements for betting tipster update-line services are acceptable only if the broadcaster is satisfied that the recorded messages are brief and the lines are a valid and necessary complement to the main-line service

21.5

Before broadcasting an advertisement for a betting tipster service, a broadcaster must hold the tipster's name (not merely his or her business name) and his or her full, permanent business address.

21.6

Advertisements for a betting tipster service operating on a premium-rate phone line must include the service provider or information provider's usual trading name and contact details (see Section 22.1: Premium-rate Services section).

21.7

Advertisements for betting tipsters who run, or are associated with, another betting tipster service must make that link clear.

21.8

Advertisements may include claims about a betting tipster's previous successful tips only if those claims are supported, before the relevant race, by proofing of all tips offered on his or her service on the day or during the period in question.

21.9

Advertisements for betting tipsters must not include claims about notional profits. Claims about previous profits must be proportionate and representative.

21.10

Advertisements for betting tipsters must not state or imply that success is guaranteed or that players could forge a long-term income by following the advertiser's tips.

21.11

Advertisements for betting tipsters may include claims about previous successful double, treble or other combination bets only if those claims are supported by proofing that the winners were clearly and specially tipped as a combination.

21.12

Profit, success or individual-win claims must not refer to odds.

21.13

If a change in circumstance would render it misleading, for example if a race meeting were cancelled, an advertisement for a betting tipster must not be repeated in its original form.

21.14

Advertisements for betting tipsters must not refer to a tip as a maximum bet or similar unless it is the only tip offered for that race. Claims about the success of a maximum tip are acceptable only if they are supported by advance proofing.

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Premium-Rate Telephone Services

Principle

The price and nature of premium-rate telephone services must be made clear. Advertisements that include premium-rate telephone numbers or short codes should comply with the PhonepayPlus Code of Practice.

Definition

Text short codes are premium-rate SMS services, which often consist of four or five digits and begin 5, 6 or 8.

Rules

22.1

Advertisements that include a premium-rate telephone number must comply with the PhonepayPlus Code of Practice.

22.2

Advertisements for premium-rate telephone services must include clear pricing information if the service generally costs 50 pence per call or more.

22.3

Advertisements for premium-rate children's services, services accessed by automated equipment or subscription services must always include clear pricing information.

22.4

Advertisements for premium-rate services must state the identity of the service provider or the information provider.

22.5 – Radio only

If it is not included in the advertisement, radio broadcasters must retain and, on request, make available a non-premium-rate telephone number for the premium-rate service for customer care purposes.

22.6 – Television only

Television advertisements for premium-rate services must include a non-premium-rate telephone number for customer care purposes.

22.7

Advertisements for services, excluding live or virtual-chat services, that normally involve a telephone call of at least five minutes must alert the audience that use of the service might involve a long call.

22.8

Advertisements for live premium-rate services must not appeal particularly to people under 18, unless those services have received prior permission from PhonepayPlus to target people under 18.

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Telecommunications-Based Sexual Entertainment Services

Definition

Telecommunications-based sexual entertainment services are voice, text, image or video services of a sexual nature that are made available to consumers via a direct-response mechanism and are delivered over electronic communication networks.

Encrypted elements of adult channels are interpreted with reference to rule 1.24 of the Ofcom Broadcasting Code.

23.1 - Radio central copy clearance

Advertisements for telecommunications-based sexual entertainment services must be centrally cleared.

23.2 – Television only

Advertisements for telecommunications-based sexual entertainment services are acceptable on encrypted elements of adult entertainment channels only.

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Homeworking Schemes

Principle

Homeworking scheme advertisements must neither mislead the audience nor exploit the susceptibilities or credulity of those seeking work.

Definition

Homeworking schemes are employment opportunities requiring participants to make articles, perform services or offer facilities at or from home. Participants can be self-employed or employed by a business.

Rules

24.1

Advertisements must not give a misleading impression of how homeworking schemes work or of the likely remuneration. Advertisements must make clear conditions, obligations or limitations that could reasonably be expected to influence a decision to participate in the scheme.

24.2

No homeworking scheme may be advertised:

24.2.1

if a charge or deposit is required to obtain information about the scheme

24.2.2 – Television only

if it involves a charge for raw materials or components or

24.2.3 – Television only

if the advertiser offers to buy goods made by the homeworker.

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Instructional Courses

Principle

Instructional course advertisements must neither mislead the audience nor exploit the susceptibilities or credulity of those seeking work.

Definition

Instructional courses are training or educational opportunities that typically offer instruction in a trade.

Rules

25.1

Advertisements offering a qualification, a course of instruction in a skill or a course that leads to a professional or technical examination must not exaggerate the resulting opportunities for work or remuneration.

25.2

Advertisements for a correspondence school or college may be broadcast only if the advertiser has given the broadcaster evidence of suitable and relevant credentials: for example, affiliation to a body that has systems for dealing with complaints and for taking disciplinary action; systems in place for regular review of members' skills and competencies and registration based on minimum standards for training and qualifications.

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Services Offering Individual Advice on Consumer or Personal Problems

Rules

26.1 – Radio Central Copy Clearance

Radio broadcasters must ensure that advertisements for services offering individual advice on consumer or personal problems are centrally cleared.

26.2

Services offering individual advice on consumer or personal problems may be advertised only if those advertisers have given the broadcaster evidence of suitable and relevant credentials: for example, affiliation to a body that has systems for dealing with complaints and for taking disciplinary action; systems in place for regular review of members' skills and competencies; registration based on minimum standards for training and qualifications; and suitable professional indemnity insurance covering the services provided.

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Introduction and Dating Services

Principle

Advertisements are acceptable, subject to Rule 10.1.5 (Prostitution and Sexual Massage), Section 10 (Prohibited categories) Rule 10.2 (Indirect Promotion). Services operating through premium-rate telephone and text services are subject to Section 22 (Premium-rate Section) and the PhonepayPlus code.

Rules

27.1

Radio broadcasters must ensure advertisements for an introduction or dating agency are centrally cleared.

27.2

Advertisements must not imply a greater degree of matching of individual clients according to suitability than is achieved.

27.3

Advertisements must not dwell excessively on loneliness or suggest that people without a partner are inadequate

27.4

Broadcasters must satisfy themselves that advertisers give customers clear advice on precautions to take when meeting people through an advertisement for an introduction or dating agency.

27.5

Advertisements for an introduction or dating agency must not have particular appeal to people under 18. See section 32: Scheduling.

Cross reference:

For more information on the PhonepayPlus code go to: www.phonepayplus.org.uk

For information on the Data Protection Act 1998 go to: www.ico.gov.uk

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Competitions

Rules

28.1

Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and made known.

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Private Investigation Agencies

Rules

29.1 - Radio central copy clearance

Radio advertisements for private investigation agencies must be centrally cleared.

29.2

Private investigation agencies may be advertised only if they have given the broadcaster evidence of suitable and relevant credentials: for example, affiliation to a body that has systems for dealing with complaints and for taking disciplinary action; registration based on minimum standards for training and qualifications, systems in place for regular review of members; skills and competencies and suitable professional indemnity insurance covering provided services.

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Pornography

Definition

Encrypted elements of adult channels are interpreted with reference to rule 1.24 of the Ofcom Broadcasting Code.

Rules

30.1 - Radio central copy clearance

Advertisements for products coming within the recognised character of pornography must be centrally cleared.

30.2 – Television only

Advertisements for products coming within the recognised character of pornography are permitted on encrypted elements of adult entertainment channels only.

30.3 – Television only

Advertisements must not feature R18-rated material (as classified by the British Board of Film Classification) or its equivalent. That does not preclude advertisements for R18-rated material or its equivalent.

30.4 – Television only

Advertisements must not feature adult-sex material before 10pm or after 5.30am.

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Other Categories of Radio Advertisements That Require Central Copy Clearance

31.1

In addition to categories of radio advertisements specified in Sections of this Code, these products and services require central copy clearance:

31.1.1

adult shops

31.1.2

Stripograms

31.1.3

escort agencies

31.1.4

films, DVDs, videos, computer and console games that have an 18+ certificate or rating.

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Scheduling

Principle

Broadcasters must take special care when scheduling advertisements that might be unsuitable for children or young persons or the audience of religious programmes or for broadcast around sensitive programming or news items.

Particular sensitivity is required for advertisements inserted in or around news or current affairs programmes in which a news item, especially one of a tragic nature, could completely transform the context in which an advertisement having an apparent connection with it could be perceived by viewers or listeners. A separation from news references might be inadequate and suspending the advertisement altogether to avoid distress or offence could be preferable.

Ofcom's television licensees must comply with the Ofcom Code on the Scheduling of Television Advertisements, which can be consulted on the Ofcom website, www.ofcom.org.uk.

Definitions

"Adjacent" refers to an advertising break immediately before or after the programme in question.

"Current" refers to a programme still running or scheduled to be resumed in the near future.

For the purposes of 32.12, a "politician" is defined as a Member of, or candidate for, the European or UK Parliament, other elected Assemblies in the UK or a local authority, a Member of the UK's House of Lords or a person prominent in a political party organisation.

"Children's programme" means a programme made for persons below the age of 16.

The restrictions given in 32.1 – 32.6 apply to sponsorship of the programme.

For broadcast television text and interactive television services, rule 32.20 sets out a list of products that must not be advertised around editorial content of particular appeal to children. For the avoidance of doubt, these rules apply to television text and interactive television services: 32.12, 32.13, 32.15 and 32.16.

Judging particular appeal of broadcast editorial content to children or young persons

Television

BCAP's Guidance Note "Audience indexing: identification of programmes likely to appeal to children and young people" sets out, in detail, how BCAP or the ASA would identify whether a programme has, or is likely to have, particular appeal to children or young persons.

Television Text and Interactive television services

When deciding whether an editorial page carried on broadcast television text or interactive television services has, or is likely to have particular appeal to children or young persons, BCAP or the ASA would consider, for example, the nature or subject of the editorial or the nature or subject of interactive prompts that have led or are likely to lead the child or young person directly to that page.

Radio

When deciding whether a station's programming has or is likely to have particular appeal to children or young persons, BCAP or the ASA would consider relevant factors, for example Radio Joint Audience Research (RAJAR) audience figures in the relevant time-slot, the nature of the station and programming and whether the advertisement was scheduled in the school run or in a time-slot when children are likely to be listening in large numbers.

Children

Advertisements that might frighten or distress children or are otherwise unsuitable for them (for example because they refer explicitly to sexual matters) must be subject to restrictions on times of transmission to minimise the risk that children in the relevant age group will see or hear them. That does not preclude well-considered daytime scheduling for such material but broadcasters should take account of factors, such as school holidays, that could affect child audience levels. Material that would be incomprehensible to pre-school children and could, therefore, reasonably be broadcast when they are viewing or listening with parents, might be more problematic in relation to older children.

For the avoidance of doubt, any given timing, programme category or age band restriction subsumes any other less severe restriction. Thus, on television, a 9.00pm restriction subsumes both a 7.30 pm restriction as well as the restriction on scheduling in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to children below the age of 16 or to programmes likely to have a significant child audience.

Special care needs to be exercised if a programme for, or likely to be of interest to, children is transmitted late in the evening or in the early hours of the morning, for example at Christmas. If such a programme is transmitted after 9.00pm, no advertisement carrying a timing restriction may be transmitted in or around that programme.

Children's Television Channels

Television channels devoted to children's programmes, or whose programmes are or are likely to be of particular appeal to children, will be unlikely to be able to carry at any time advertisements of the type restricted under **32.1 – 32.6**. Thus, for instance, dedicated children's channels may not carry an advertisement for a product restricted under **32.2.2** or **32.5.1**, namely: gambling and food or drink assessed as high in fat, salt or sugar (HFSS).

Scheduling of Television and Radio Advertisements

32.1

Broadcasters must exercise responsible judgement on the scheduling of advertisements and operate internal systems capable of identifying and avoiding unsuitable juxtapositions between advertising material and programmes, especially those that could distress or offend viewers or listeners.

Under 18s

32.2

These may not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 18:

32.2.1

alcoholic drinks containing 1.2% alcohol or more by volume; (See also 32.4.7)

32.2.2

gambling except lotteries, football pools, equal-chance gaming (under a prize gaming permit or at a licensed family entertainment centre), prize gaming (at a non-licensed family entertainment centre or at a travelling fair) or Category D gaming machines (see 32.4)

32.2.3

betting tipsters

32.2.4

slimming products, treatments or establishments (an exception is made for advertisements for calorie-reduced or energy-reduced foods and drinks, if they are not presented as part of a slimming regime and provided the advertisements do not use the theme of slimming or weight control)

32.2.5

religious matter subject to the rules on Religious Advertising in Section 15, Faith, Religion and Equivalent Systems of Belief

32.2.6

live premium-rate services, unless those services have received prior permission from PhonePay Plus to target people under 18.

Under 16s

32.3

Relevant timing restrictions must be applied to advertisements that, through their content, might harm or distress children of particular ages or that are otherwise unsuitable for them.

32.4

These products may not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to persons below the age of 16:

32.4.1

lotteries

32.4.2

football pools

32.4.3

equal-chance gaming (under a prize gaming permit or at a licensed family entertainment centre)

32.4.4

prize gaming (at a non-licensed family entertainment centre or at a travelling fair)

32.4.5

Category D gaming machines

32.4.6

medicines, vitamins or other dietary supplements

32.4.7

drinks containing less than 1.2% alcohol by volume when presented as low-alcohol or no-alcohol versions of an alcoholic drink.

Other Television Scheduling or Timing Restrictions: Children

Under 16s

32.5

These products may not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 16:

32.5.1

food or drink products that are assessed as high in fat, salt or sugar (HFSS) in accordance with the nutrient profiling scheme published by the Food Standards Agency (FSA) on 6 December 2005. Information on the FSA's nutrient profiling scheme is available on the FSA website at:

<http://www.food.gov.uk/healthiereating/advertisingtochildren/nutlab/nutprofmod>

32.5.2

matches

32.5.3

trailers for films or videos carrying an 18-certificate or 15-certificate (that does not preclude the scheduling in or adjacent to children's programmes of an advertisement containing brief extracts from such a film if those are used in connection with a promotional offer, derived from the film, for other types of product, subject to content);

32.5.4

computer or console games carrying an 18+, 16+ or 15+ rating.

Under 10s

32.6

These products may not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to children below the age of 10:

32.6.1

sanitary protection products

32.6.2

condoms.

Administering medicines, vitamins or dietary supplements to children

32.7

Advertisements in which children are shown having a medicine, vitamin or other dietary supplement administered to them must not be broadcast before 9.00pm.

32.8

Advertisements for merchandise based on a children's programme must not be broadcast in the two hours before or after episodes or editions of that programme. The ASA and BCAP reserve the right to require a wider separation around some programmes, including a prohibition of any advertisement while a programme series is running.

32.9

Advertisements in which persons (including puppets) who appear regularly in any children's programme on any UK television channel present or endorse products of special interest to children must not be broadcast before 9.00pm.

32.10

To maintain a distinction between programmes and advertisements that is clear to a child audience, and to minimise any risk of confusion between the two, advertisements featuring a well-known personality or performer, or a person who takes a leading role in or whose appearance is central to a children's programme, must not be scheduled in breaks in or adjacent to that programme. For the purposes of this rule, cartoon and puppet characters are classed as "persons". For appearances by persons in chart programmes or programmes such as pop concerts, the restriction applies only to the breaks adjacent to the programme segment in which they appear. The rule does not apply to public service advertisements or to characters specially created for advertisements.

32.11

Advertisements containing appearances by persons in extracts from a children's programme must not be broadcast in the two hours before or after an episode or edition of the relevant programme.

Scheduling of Television Advertisements that Feature Politicians

32.12

Once a General or European Election, a by-election for the UK or European Parliament or a local election (but not a local by-election) has been called, no advertisement featuring a UK politician may be shown in an area in which the election is to take place.

32.13

Advertisements featuring a candidate for a parliamentary by-election or a local authority election must not be shown in breaks in or adjacent to national news or election results programmes in the area where the election is to take place.

Exclusion Of Certain Types Of Television Advertisement In Or Adjacent To Broadcasts Of Parliamentary Proceedings

32.14

The following categories of advertisement may not be shown during live broadcasts of Parliamentary proceedings, or other programmes that include footage of Parliamentary proceedings other than brief news extracts:

32.14.1

advertisements that feature or refer to Members of Parliament, or Parliamentary parties, or with a Parliamentary setting

32.14.2

advertisements with direct and specific relevance to main items of Parliamentary coverage where these are known in advance.

Cross reference: For requirements applicable to advertisements in or adjacent to broadcasts of live Parliamentary proceedings, see Section 2, Recognition of Advertising

Other Television Separations and Timing Restrictions

32.15

The ASA and BCAP reserve the right to issue directions requiring separation between certain advertisements or types of advertisement and certain programmes or types of programme for reasons or in ways that go beyond those already listed.

Those separations will usually be one of these:

32.15.1

not first or last in any advertisement break or both

32.15.2

not in the two hours before or after a certain programme

32.15.3

not for the duration of a programme series

32.15.4

neither for the duration of a programme series nor for a given period before and/or after the series;

32.15.5

not before 7.30pm;

32.15.6

not in or adjacent to programmes with a specific audience index.

32.16

On encrypted subscription services for which normal programme content-related scheduling constraints have been relaxed, advertisements appearing similarly encrypted on such a service may reflect the programme scheduling. For example, if the programme watershed has been moved on such a service, say, to 8.00pm, encrypted advertisements that attract a watershed timing restriction are permitted after 8.00pm, not only after 9.00pm. (See Section 1 of the Ofcom Broadcasting Code (Protection of the Under-Eighteens) <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>.)

Scheduling of Radio Advertisements

32.17

Special care is required for these categories:

32.17.1

sensational newspapers, magazines or websites or their content

32.17.2

divination or the supernatural

32.17.3

sexual material, sex shops, stripograms or similar

32.17.4

sanitary protection products

32.17.5

family planning products (including contraceptives and pregnancy-testing products)

32.17.6

anti-AIDS or anti-drugs messages

32.17.7

solvent abuse advice.

32.18

Violent or sexually explicit material must not be advertised in or adjacent to programmes targeted particularly at audiences below the age of 18.

Placement of Television Text and Interactive Advertisements

32.19

BCAP expects broadcasters to exercise responsible judgement in the placing of broadcast television text and interactive television advertisements and especially to consider the sensitivities of viewers likely to be exposed or attracted to particular editorial content.

Advertisements that are unsuitable for children (for example because they might cause distress or because they refer explicitly to sexual matters) must be subject to restrictions on the time of transmission designed to minimise the risk that children in the relevant age group will see them.

32.20

Broadcast television text and interactive television advertisements for these product categories must not:

- be directly accessible from programmes commissioned for, principally directed at or likely to appeal particularly to children
- be directly accessible from advertisements that are adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to children
- appear on editorial pages (text or interactive) that are likely to be of particular appeal to a significant audience of children

32.20.1

Alcoholic drinks (including low-alcohol drinks)

32.20.2

Films or DVDs carrying an 18-certificate or 15-certificate

32.20.3

Medicines, vitamins or other dietary supplements

32.20.4

Betting tips

32.20.5

Computer or console games carrying an 18+, 16+ or 15+ rating

32.20.6

Introduction and dating agencies

32.20.7

Religious bodies. The only exception is advertising for publications, merchandise or other items if there is no recruitment or fund-raising link

32.20.8

Premium-rate telephone services that cost more than the normal national premium rates (higher-rate premium services)

32.20.9

Matches

32.20.10

Food or drink products that are assessed as high in fat, salt or sugar in accordance with the nutrient profiling scheme published by the Food Standards Agency (FSA). Information on the FSA's nutrient profiling scheme is available on the FSA website at:

<http://www.food.gov.uk/healthiereating/advertisingtochildren/nutlab/nutprofmod>

32.20.11

Gambling, including lotteries.

[Click here to return to this section of the Consultation Document](#)

APPENDICES

Appendix 1: Statutory framework for the regulation of broadcast advertisements

Advertising Standards

1 The Communications Act 2003 requires Ofcom to set, and from time to time review and revise, codes containing such standards for the content of television and radio services licensed under the Broadcasting Acts 1990 and 1996 as seem to Ofcom to be best calculated to secure the standards objectives. Sections 319(1), 319(3).

2 Ofcom has contracted-out its advertising standards codes function to the Broadcast Committee of Advertising Practice Limited (BCAP) under the Contracting Out (Functions Relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004. That function is to be exercised in consultation with and with the agreement of Ofcom.

3 These provisions imposed on Ofcom by the Communications Act are relevant to BCAP:

The standards objectives, insofar as they relate to advertising, include:

- "(a) that persons under the age of 18 are protected;
 - (b) that material likely to encourage or incite the commission of crime or lead to disorder is not included in television and radio services;
 - (e) that the proper degree of responsibility is exercised with respect to the content of programmes which are religious programmes;
 - (f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from inclusion in such services of offensive and harmful material;
 - (h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;
 - (i) that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with [especially, for television, those obligations set out in Articles 3b, 3e, 10, 14, 15, 19, 20 and 22 of Directive 89/552/EEC (the Audiovisual Media Services Directive)]; ...
 - (l) that there is no use of techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred."
- Section 319(2)

"In setting or revising any such standards, Ofcom must have regard, in particular and to such extent as appears to them to be relevant to the securing of the standards objectives, to each of the following matters:

- "(a) the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally, or in programmes of a particular description;
- (b) the likely size and composition of a potential audience for programmes included in television and radio services generally, or in television and radio services of a particular description;
- (c) the likely expectation of the audience as to the nature of a programme's content and the extent to which the nature of the programme's content can be brought to the attention of potential members of the audience;
- (d) the likelihood of persons who are unaware of the nature of the programme's content being unintentionally exposed, by their own actions, to that content;
- (e) the desirability of securing that the content of services identifies when there is a change affecting the nature of a service that is being watched or listened to and, in particular, a change that is relevant to the application of the standards set under this section ...".

Section 319(4).

"Ofcom must ensure that the standards from time to time in force under this section include:

- (a) minimum standards applicable to all programmes included in television and radio services; and
- (b) such other standards applicable to particular descriptions of programmes, or of television and radio services, as appeared to them appropriate for securing the standards objectives."

Section 319(5)

"Standards set to secure the standards objectives [specified in para 3(e)] shall in particular contain provision designed to secure that religious programmes do not involve:

- "(a) any improper exploitation of any susceptibilities of the audience for such a programme; or
- (b) any abusive treatment of the religious views and beliefs of those belonging to a particular religion or religious denomination."

Section 319(6)

“Standards set by Ofcom to secure the objectives [mentioned in para 3(a), (h) and (i)]:

- (a) must include general provision governing standards and practice in advertising and in the sponsoring of programmes; and
- (b) may include provision prohibiting advertisements and forms of methods of advertising or sponsorship (whether generally or in particular circumstances)."

Section 321(1)

[NB: "Programme" includes an advertisement

Section 405(1)]

- 4 The Broadcasting Act 1996 section 24(2) contains provisions permitting advertising on analogue ancillary services on channels 3, 4 and 5 only if directly related to advertising on the main service; digital ancillary services may carry no advertising of any type.
- 5 BCAP has adopted the former ITC Code and the Radio Authority Code as follows:
 - (a) BCAP Television Code (from the ITC Codes, including teleshopping and other non-advertising content);
 - (b) BCAP Radio Code (extracted from Radio Authority Advertising and Sponsorship Code);
 - (c) BCAP Rules on the Scheduling of Advertising (section 4 of the former ITC Rules, relating to the scheduling of individual spot advertisements);
 - (d) BCAP Code for Text Services (Part C of former ITC Code);
 - (e) BCAP Guidance to Broadcasters on the Regulation of Interactive Television Services (from the ITC);
 - (f) BCAP Advertising Guidance Notes 1, 2, 3 and 5 (from the ITC).(together "the BCAP Codes").
- 6 BCAP will work closely with the Committee of Advertising Practice to provide, insofar as practicable, a co-ordinated and consistent approach to standards-setting across broadcast and non-broadcast media.

- 7 The procedures for revision and consultation of the BCAP Codes consultation are, to the extent applicable to BCAP's exercise of statutory functions, set out at section 324 of the Communications Act 2003.
- 8 Ofcom retains standards-setting functions for:
- (a) political advertising, the inclusion of which in television or radio services is prohibited by section 321(2) Communications Act, including decisions on whether an advertisement is "political advertising". But the rules on that remain in the BCAP Codes;
 - (b) unsuitable programme sponsorship;
 - (c) discrimination between advertisers who seek to have advertisements included in television and radio services. NB: Subject to that, broadcasters, like publishers and other media, are generally entitled to refuse an advertisements they do not want to carry;
 - (d) the amount and scheduling of advertising, save for the scheduling of individual spot advertising.

Investigation and complaints

- 9 The Communications Act requires Ofcom to establish procedures for the handling and resolution of complaints about the observance of standards (as set out in the BCAP Codes) and to include conditions in licences for programme services requiring licence holders to comply with Ofcom's directions in relation to advertising standards.

Sections 325(2), (4) and (5).

- 10 The Medicines (Monitoring of Advertising) Regulations 1994 require Ofcom to consider complaints that any advertisement included or proposed to be included in a licensed service or S4C is an impermissible advertisement for a medicinal product, unless the complaint seems to Ofcom to be frivolous or vexatious.
- 11 Ofcom has contracted-out its powers of handling and resolving complaints about breaches of the BCAP Codes and the relevant provisions of Medicines (Monitoring of Advertising) Regulations to the Advertising Standards Authority (Broadcast) Limited (ASA(B)) under The Contracting Out (Functions Relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004.
- 12 ASAB will work closely with and under the umbrella of the Advertising Standards Authority to provide, insofar as is practicable, a coordinated and consistent approach to advertising standards regulation across broadcast and non-broadcast media.

13 Ofcom retains complaint investigation functions for:

- (a) political advertising;
- (b) unsuitable sponsorship;
- (c) discrimination between advertisers and
- (d) scheduling of advertisements.

Statutory sanctions for breaches of advertising standards

15 Ofcom has similarly contracted-out its enforcement powers under the Communications Act, such that ASA(B) has these powers (including in relation to the Welsh Authority) for the purpose of securing compliance with the BCAP Codes, and with any extra requirements in licences for programme services in relation to advertising:

- (a) to require a licence holder to exclude from its programme service an advertisement or to exclude it in certain circumstances (Section 325(5)(a));
- (b) to require a licence holder to exclude from its service certain descriptions of advertisements and methods of advertising (whether generally or in certain circumstances) (Section 325(5)(b)). ASA(B) may exercise such powers for extra licence requirements only for impermissible medical advertisements;

NB: Detailed reasons must be given for any of those actions on a medicinal product advertisement and reference must be made to any remedy available in court and any time limit that must be met. (MMAR 1994 Regulation 9);

- (c) to require, from any person who to ASA(B) seems to be responsible for an advertisement, provision of evidence for the factual accuracy of any claim and to deem a factual claim inaccurate if such evidence is not so provided. (Broadcasting Act 1990 s.4(1)(c) and 87(1)(d) and Broadcasting Act 1996 s.4(1)(c) and 43(1)(d)).

16 Ofcom retains these powers conferred by the Broadcasting Acts 1990 and 1996 and the Communications Act 2003:

- (a) to direct the broadcast of a correction or statement of findings;
- (b) to impose a financial penalty or shorten a licence period and
- (c) to revoke a licence.

Appendix 2: Extracts from Directive 89/552/EEC as amended (Audiovisual Media Services Directive)

CHAPTER II

General Provisions

Article 3b

Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.

Article 3e

1. Member States shall ensure that audiovisual commercial communications provided by media service providers under their jurisdiction comply with the following requirements:
 - (a) audiovisual commercial communications shall be readily recognisable as such. Surreptitious audiovisual commercial communication shall be prohibited;
 - (b) audiovisual commercial communications shall not use subliminal techniques;
 - (c) audiovisual commercial communications shall not:
 - (i) prejudice respect for human dignity;
 - (ii) include or promote any discrimination based on sex, racial or-ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
 - (iii) encourage behaviour prejudicial to health or safety;
 - (iv) encourage behaviour grossly prejudicial to the protection of the environment;
 - (d) all forms of audiovisual commercial communications for cigarettes and other tobacco products shall be prohibited.
 - (e) audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages;
 - (f) audiovisual commercial communication for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls shall be prohibited;
 - (g) audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.

CHAPTER IV

Television advertising, sponsorship and teleshopping

Article 10

1. Television advertising and teleshopping shall be readily recognizable and distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means.
 2. Isolated advertising and teleshopping spots, other than in transmissions of sports events, shall remain the exception.
-

Article 14

Teleshopping for medicinal products which are subject to a marketing authorization within the meaning of Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products¹, as well as teleshopping for medical treatment, shall be prohibited.

Article 15

Television advertising and teleshopping for alcoholic beverages shall comply with the following criteria:

- (a) it may not be aimed specifically at minors or, in particular, depict minors consuming these beverages;
 - (b) it shall not link the consumption of alcohol to enhanced physical performance or to driving;
 - (c) it shall not create the impression that the consumption of alcohol contributes towards social or sexual success;
 - (d) it shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;
 - (e) it shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light;
 - (f) it shall not place emphasis on high alcoholic content as being a positive quality of the beverages.
-

Article 19

¹ OJ No 22, 9. 2. 1965, p. 369, Directive as amended by Directive 93/39/EEC (OJ No L 214, 24. 8. 1993m p. 22).

The provisions of this Directive shall apply mutatis mutandis to channels exclusively devoted to advertising and teleshopping

as well as to television channels exclusively devoted to self-promotion.

Article 20

Without prejudice to Article 3, Member States may, with due regard for community law, lay down conditions other than those laid down in Article 11(2) and Article 18 ... in respect of television broadcasts intended solely for the national territory which cannot be received, directly or indirectly by the public, in one or more other Member States.

CHAPTER V

Protection of minors in television broadcasting

Article 22

1. Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral developments of minors, in particular programmes that involve pornography or gratuitous violence.
2. The measures provided for in paragraph 1 shall also extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.
3. Furthermore, when such programmes are broadcast in unencoded form Member States shall ensure that they are preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration.

Appendix 3: Outline of the effects of the consumer protection from Unfair Trading Regulations 2008

Broadcast advertisements are subject to legislation. You can find a non-exhaustive list of legislation affecting broadcast advertisements at www.cap.org.uk

One important piece of legislation that affects broadcast advertisements is the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). The CPRs prohibit unfair advertising to consumers, including misleading and aggressive advertising. Whenever it considers complaints that an advertisement misleads consumers or is unfair or aggressive to consumers, the ASA will have regard to the CPRs. That means it will take factors identified in the CPRs into account when it considers whether an advertisement breaches the BCAP Code. Relevant principles established in the CPRs are summarised below. The summary is not an exhaustive statement of the effect of the Regulations and licensees who would like detailed guidance on the Regulations, as opposed to the Code, should seek legal advice.

Many rules in this Code prohibit misleading advertising. All rules that refer to misleading advertising should be read, in relation to business-to-consumer advertising, in conjunction with this summary.

Consumers

The likely effect of an advertisement is generally considered from the point of view of the average consumer whom it reaches or to whom it is addressed. The average consumer is assumed to be reasonably well-informed, observant and circumspect.

In some circumstances, an advertisement may be considered from the point of view of the average member of a specific group:

- If it is directed to a particular audience group, the advertisement will be considered from the point of view of the average member of that group.
- If it is likely to affect the economic behaviour only of a clearly identifiable group of people who are especially vulnerable to the practice or the product, in a way that the advertiser could reasonably foresee, because of mental or physical infirmity, age or credulity, the advertisement will be considered from the point of view of the average member of the affected group.

Unfair advertisements

Advertisements are unfair if they

- are contrary to the requirements of professional diligence and
- are likely to materially distort the economic behaviour of consumers in relation to the advertised goods or services.

“Professional diligence” is the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity.

Misleading advertisements

Advertisements are misleading if they

- are likely to deceive consumers and
- are likely to cause consumers to take transactional decisions that they would not otherwise have taken.

A “transactional decision” is any decision taken by a consumer, whether it is to act or to refrain from acting, concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or whether, how and on what terms to exercise a contractual right in relation to a product.

Advertisements can deceive consumers by ambiguity, through presentation or by omitting important information that consumers need to make an informed transactional decision, as well as by including false information.

Aggressive advertisements

Advertisements are aggressive if, taking all circumstances into account, they

- are likely to significantly impair the average consumer’s freedom of choice through harassment, coercion or undue influence and
- are therefore likely to cause consumers to take transactional decisions they would not otherwise have taken.