

ASA system submission to House of Lords Communications Select Committee

Inquiry: The Advertising Industry

1. Background and Introduction

- 1.1. This submission is provided by the Advertising Standards Authority (ASA), the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the ‘ASA system.’
- 1.2. The ASA is the UK’s independent advertising regulator. We have been administering the non-broadcast Advertising Code (written and maintained by CAP) for 55 years and the broadcast Advertising Code (written and maintained by BCAP) for over ten, with our remit further extended in 2011 to include companies’ advertising claims on their own websites and in social media spaces under their control.
- 1.3. We are responsible for ensuring that advertising is legal, decent, honest and truthful and our work includes undertaking proactive projects and acting on complaints to take action against misleading, harmful or offensive advertisements. We are committed to evidence-based regulation and we continually review new evidence to ensure the rules remain fit-for-purpose.
- 1.4. In addition to investigating ads, we also provide a wealth of training and advice services for advertisers, agencies and media (most of which are free) to help them understand their responsibilities under the Codes and to ensure that fewer problem ads appear in the first place. CAP and BCAP provided over 281,000 pieces of such advice in 2016.
- 1.5. The ASA is providing this written submission in response to the Communications Select Committee’s Inquiry into the Advertising Industry.

2. Inquiry question: *Is there any role for the Advertising Standards Authority or other regulators in respect of digital advertising?*

- 2.1. The ASA has been regulating online advertising over many years with our remit increasing incrementally to reflect the new platforms being used.
- 2.2. In 1995 our remit was extended to cover advertisements in ‘non-broadcast electronic media’, predominantly in ‘paid-for space’ online such as banner and display ads and paid-for sponsored search.
- 2.3. By 2007, the internet had become the second most-complained about medium. However, nearly two-thirds of the complaints we received about online advertising were outside our remit as they related to claims made on companies’ own websites which we did not regulate.
- 2.4. Since 2011, our online remit was further extended to cover advertisers’ own marketing communications on their own websites and in other non-paid-for space under their control, such as social networking sites like Facebook and Twitter. Content related to causes and ideas - except content involving direct solicitations of donations for fund-raising - are excluded from the remit.

- 2.5. We also regulate Online Behavioural Advertising (OBA). OBA is the practice of collecting information from web browsers so that it can be used to deliver ads that are more relevant to web users. The rules we oversee require businesses to make clear when they are collecting and using information for OBA and require them to provide a tool so that web users can choose not to receive it.
- 2.6. Our [annual report](#), covering complaints data from 2016, told us that complaints about ads appearing online now make up nearly half our workload. In the last five years, we have:
- Resolved 41,283 complaints about 36,872 online ‘advertiser-owned’ ads;
 - Those ads accounted for 1 in 3 complained about ads to the ASA
 - 88% of complaints about online ‘advertiser-owned’ ads were about misleadingness, compared to 73% for complaints across all other media.
- 2.7. Data for the first half of 2017 tells us that while TV continues to be the most complained about advertising medium with 5,127 complaints about 2,272 ads, online is a close second with 4,062 complaints, with more individual ads complained about than any other medium – 3,852. The majority of complaints about TV ads are on the grounds of offence while the majority of complaints about online ads are about misleading claims.
- 2.8. The increasing numbers of complaints from the online sphere reflects the increase in online advertising, the cost of which is almost negligible. Ensuring online ads comply with the Advertising Code is an on-going process and includes our proactive projects which target sectors where we are concerned about widespread non-compliance, for example osteopaths, claims management companies and broadband providers. Where we do formally investigate individual cases, compliance with our rulings is very high at 87%, rising to 99% where we have undertaken additional enforcement action. This is largely due to the effectiveness of the range of self-regulatory sanctions we can deploy. Sanctions include:
- Ad Alerts: CAP can issue alerts to its members, including the media, advising them to withhold services such as access to advertising space including online space.
 - Advertisers’ claims on their own websites, or in other non-paid-for space under their control:
 - We can ask internet search websites to remove an advertiser’s paid-for search advertisements when those advertisements link to a page on the advertiser’s website that contains material which breaks the rules.
 - Advertisers may face adverse publicity if they cannot or will not amend problem marketing communications on their own websites or in other non-paid-for space online under their control.
 - The advertiser’s name and why their ad broke our rules may be featured on a dedicated section of the ASA website, designed to appear in search engine results when a consumer searches for a company’s website.
 - If necessary, we can also place an ASA ‘name and shame’ advertisement appearing in search engine results.
 - Video-on-demand: We can refer VoD media providers to Ofcom if they break certain aspects of the Code and if they refuse to work with us. The ASA’s designation by Ofcom of regulating Video-on-demand advertising means that failure to stick to the rules may result in the matter being referred with a view to Ofcom considering whether the media service provider has contravened the relevant requirements of the Communications Act.
- 2.9. The ASA is recognised by government, the courts and Trading Standards as the ‘established means’ for the enforcement of misleading advertising. Government favours self-regulation

and sees law enforcement as a last resort. This is set out in law with the Consumer Protection from Unfair Trading Regulations 2008 including the requirement for law enforcement bodies to use 'established means' before taking any action.

2.10. We also have a legal backstop arrangement with Trading Standards which has enhanced levels of compliance. National Trading Standards has contracted Camden Trading Standards to perform this role since 2013 and this has been very effective. Where an advertiser is unwilling or unable to comply with our rulings they can be referred to our backstop. Over the last four years the ASA has made just 53 referrals to Camden. The vast majority of these very quickly came into compliance following speedy, resource-light action taken by Camden TS and only in four cases was more punitive statutory enforcement necessary. These referrals emerged from a pool of 25,744 complaints about potentially misleading online ads resolved by the ASA across that period e.g. misleading pricing, product description or availability. Any one of these cases might have brought the backstop into play if complaints were upheld, the advertiser chose not to comply and self-regulatory sanctions were ultimately ineffective. The fact that so few referrals are made demonstrates the effectiveness of self-regulatory sanctions and the deterrent effect of the legal backstop, including online.

2.11. Our primary purpose is to make sure ads are responsible and consumers are protected which applies online just as much as it does in traditional media. However, we recognise that in some areas, advertisers need more guidance on how our rules apply online. As a result, we have developed specific guidance on areas such as ad placement for age-restricted products; interest-based targeting; social influencers; and, affiliate marketing.

3. Ad placement for age-restricted products

3.1. Earlier this year, CAP published [new guidance on non-broadcast ad placement](#) to protect children and young people – this includes online. The guidance states that ads for age-restricted products like alcohol and gambling must not appear in media:

- for children (under-16s) or children and young people (under-18s); and
- where children or children and young people make up a significant proportion – more than 25% – of the audience.

3.2. Alcohol and gambling have long been subject to such rules which now also applies to electronic cigarette advertising and, from July this year, ads for food and soft drink products high in fat, salt and sugar.

3.3. Advertisers must be able to demonstrate to the ASA that they have taken steps to target their ads appropriately. This includes holding sufficiently robust audience measurement data to show that they have a good understanding of the audience composition who will see their ad and that they can legitimately be targeted with ads for age-restricted products. Where audiences are created on the basis of data on a marketing list or account data, advertisers should ensure they take all steps to avoid directing communications at age categories (children and young people) protected by the rules; the most important step in this is to ensure the exclusion of those known to be under the relevant age category.

4. Interest-based targeting

4.1. Linked to ad placement for age-restricted products, CAP also published [new guidance](#) dedicated to children and age-restricted ads online.

- 4.2. The guidance advises advertisers to use a range of interest targeting factors to complement and address some of the imperfections of self-reported age data. By doing so, advertisers of age-restricted products are better able to reach their target audience, while excluding children and young people who benefit from explicit protections under our rules.

5. Social influencers

- 5.1. Influencer marketing is a technique that has evolved alongside the rise of social media, including video platforms. It involves brands engaging with figures popular on social networks such as YouTube, Facebook, Twitter and Instagram, to discuss, photograph, recommend and sometimes just insert themselves into conversations about a product.
- 5.2. When the brand has control over the content of the post and rewards the influencer with a payment, free gift, or other perk, the post becomes an ad. If the commercial intent is not clear from the overall context of the communication, it should be labelled as an ad so as not to break the ASA's rules and mislead the influencer's audience. Consumers should always know when they're being sold to and by whom, so that they can fairly and critically assess the content in the context of a commercial message.
- 5.3. We hold both the brand owner and the influencer to public account, including in ASA rulings. The negative publicity that arises from our interventions can erode consumers' trust in the brand and followers' trust in the influencer; so, neither party wins from a failure to disclose advertising as such.
- 5.4. Examples of complaints we've upheld include:
 - [Mondelez UK Ltd](#) where five YouTube videos created by vloggers featuring Oreo biscuits failed to identify they were ads;
 - [Nomad Choice Pty Ltd t/a Flat Tummy Tea](#) where Instagrammer, Sheikhbeauty, failed to identify her post about Flat Tummy Tea as an ad;
 - [Britvic Soft Drinks Ltd](#) where Millie Macintosh failed to identify her video posted on Instagram about J2O Spritz was an ad; and
 - [Alpro \(UK\) Ltd](#) where a Tweet from the television presenter AJ Odudu's Twitter account promoting an Alpro product was not identifiable as an ad.

6. Affiliate marketing

- 6.1. [New guidance](#) was published this year on affiliate marketing to help social influencers and brands stick to the rules by making clear and upfront when the content they are viewing is an ad.
- 6.2. Affiliate marketing is where an affiliate, which can include bloggers, Instagrammers or other third-party content providers, is rewarded by a business for each new customer they attract through their marketing efforts. Affiliates usually place links online that direct anyone looking at that page to the website of the business and they receive a pre-agreed percentage of each sale.
- 6.3. While some forms of affiliate marketing will be obviously identifiable as advertising because of the nature or context of the content, such material is not always obvious in social media, vlogs, and blogs. Much of the material on those platforms is non-commercial content or created with seemingly editorial independence, which is why people viewing these sites should be made aware from the start when something is an ad.

- 6.4. Furthermore, brands that allow their affiliates to have control over the content of ads does not absolve them of responsibility for ensuring they meet advertising rules; we have ruled that both the business and affiliate marketer are responsible for meeting advertising rules.
- 6.5. Recently we have banned four gambling ads where an affiliate was used – [Casumo](#), [Ladbrokes](#), [888](#) and [SkyBet](#) - on the grounds of not being identifiable as an ad and for social irresponsibility relating to the content of the ads.

7. Conclusion

- 7.1. As a regulator, we take our responsibilities to regulate online just as seriously as we do for traditional media. Our remit and our Codes have evolved to take into account changing technologies and emerging platforms that have provided advertisers with new avenues to promote their products and services. We do not seek to stifle business and, indeed, we recognise that many online platforms would not be free without advertising. However, ads online must stick to our rules and we will not hesitate to intervene if there are problem ads in order to protect the consumer. We will continue to work with the advertising industry to ensure compliance and provide advice, guidance and training to help them advertise responsibly.

Contact

Shabnum Mustapha
Advertising Standards Authority
shabnumm@asa.org.uk or publicaffairs@asa.org.uk
07985 033076 or 020 7492 2222