

SECTION 1: COMPLIANCE

Question 1:

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

| <i>Responses received from:</i> | <i>Summaries of significant points:</i> | <i>CAP's evaluation of those points and action points:</i> |
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| ASDA Sainsbury's | <p>1.1 The introduction of new relevant sector-specific rules should be communicated by CAP / CAP Copy Advice Team to ensure compliance from Marketers.</p> <p>1.2 <i>1.6 Marketing communications must respect the principles of fair competition generally accepted in</i></p> | <p>1.1 Sector specific rules presently exist in the CAP Code e.g. Motoring, Weight Control, and Alcoholic Drinks etc. CAP considers users of the Code will understand the use of the term 'sector-specific rules'. CAP understands this is a comment on the future communication and industry understanding of the rules and their application.</p> <p>1.2 CAP considers users of the Codes will be aware of the meaning of 'fair' and generally accepted' in regard to good business practice. In this case the</p> |

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| | <p><i>business.</i></p> <p>"Fair" and "generally accepted" should be defined or a help-note issued for the purposes of clarification.</p> <p>1.3</p> <p><i>1.7 Any unreasonable delay in responding to the ASA's enquiries will normally be considered a breach of the Code.</i></p> <p><i>1.7.1 The full name and geographical business address of the marketer must be given to the ASA or CAP without delay if requested.</i></p> <p>"Unreasonable delay" should be defined by CAP to ensure organisations respond to ASA enquiries within a specified period. The proposed requirement does not go far enough to ensure organisations respond within a specified period. CAP should consult then define what is reasonable. This would create consistency in the treatment of all cases and prevent organisations flouting the law or CAP rules by continuing to advertise when clear breaches of the Code or failure to substantiate have occurred.</p> <p>1.4</p> <p>The CAP Code 'Sanctions' also states "if a marketing communication is obviously misleading or offensive, the ASA and CAP may take compliance action in the absence of complaints or during an investigation". It is not clear under what</p> | <p>rule has particular relevance to comparative claims in marketing communications.</p> <p>1.3</p> <p>CAP considers the drafting of this rule allows the ASA to apply reasonable time limits given the situation. To prescribe different periods of time in the Code depending on the circumstances or media would be impractical. This rule allows the ASA and the marketer sufficient leeway and ensures investigations are kept within reasonable time limits. In the past, the ASA has applied this rule in cases where the advertiser has not responded to the ASA's initial enquiries.</p> <p>The ASA explains the circumstances under which this rule is applied, in its document: 'Procedures for investigating complaints' http://asa.org.uk/Complaints-and-ASA-action/Dealing-with-complaints/Complaints-and-investigations-process.aspx</p> <p>1.4</p> <p>(See: Evaluation of How the system works)</p> |
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| | circumstances such action will be taken. This should be explained for the purposes of clarification. | |
| AIME | <p>1.5</p> <p>The rules are necessary and easily understandable but would like to see more emphasis placed on a Principles based Code with flexible Help Notes or Guidelines offering examples or clarification.</p> | <p>1.5</p> <p>The present and the new Code set out the overarching principles and rules that inform the sections that follow. The Compliance section ensures that the public and marketers understand that the Code requires marketing communications to reflect the spirit, and not merely the letter, of the Code. This section contains general rules which are principles based. There are more detailed rules elsewhere in the Code that cover the general rules in this section (e.g. legality, decency, honesty/ truthfulness, social responsibility etc) which are sector specific, for example the restriction on advertising prescription only medicines to the public is a legal requirement that the present and new CAP Code reflects in rule 12.12 (Medicines Section).</p> |
| An organisation; Charity law Association; E.ON; 1 Individual; Nestle; Quaker Action on Alcohol and Drugs; Institute of Sales Promotion; Changing Faces; Institute of Practitioners in Advertising; Pet Advertising Advisory | <p>1.6</p> <p>Respondents agree that CAP's rules, included in the proposed Compliance Section are necessary and easily understandable. Respondents agree with the principle of all marketing communications being Legal, Decent and Honest and that the CAP Code in its proposed format is a fair reflection of this principle and is clear and easy to understand.</p> | <p>1.6</p> <p>CAP agrees</p> |

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| Group; | | |
| British Retail Consortium Consumer Policy Group; Sainsbury's | <p>1.7 Under the CPRs the broader test is one of professional diligence rather than 'fair competition'. The Code should reflect this.</p> <p>1.8 The Code should set out clear time limits for making a complaint (as did the previous Code); investigating a complaint; making an adjudication; for an appeal; and for answering a query from the ASA. In the old Code there was a time limit of 3 months for a complaint in Section 60 – but the mapping document seems to omit a number of provisions of the old Code after point 57.</p> | <p>1.7 CAP considers this reference to 'fair competition' is intended to remind marketers their marketing communications that refer to other marketers i.e. comparative claims, reflect the principles of competition between marketers. The reference to professional diligence in the CPRs concerns marketing practices in relation to consumers and that issue is covered by Appendix 1 of the new Code.</p> <p>1.8 (See: Evaluation of 'How the system works') The procedures and time scales for investigations are set out clearly on the ASA website: http://www.asa.org.uk/asa/how_to_complain/</p> <p>At the point the ASA starts an investigation; relevant parties are sent a copy of those procedures. CAP considers these provisions are adequate.</p> |
| Home Retail Group Plc | <p>1.9 This section needs to be simplified to the point that it sets the Code in the context of the Regulations.</p> <p>The text should clearly acknowledge the existence of the CPRs, the fact that ASA/CAP have a duty to act only under the code and therefore involvement is non mandatory, based on voluntary co operation</p> | <p>1.9 The CAP Code already references the CPRs and has had a number of rules added (e.g. proposed rule 1.10.1) following a public consultation on the effect of the CPRs on the BCAP Code (http://www.cap.org.uk/cap/Consultations/closed/BCAP+CPRs+consultation/BCAP+CPRs+Consultation.htm). There are a number of pieces of</p> |

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| | <p>and set out the process for input of the OFT (and trading standards?) where necessary at the appropriate time for non compliances of the code.</p> <p>Where compliance with the code is required through contractual relationships, we would question if these are permissible as additional measures contrary to the maximum harmonisation objective of the CPRs – it would be permissible to emphasize the voluntary nature of the code and compliance with it, however requiring a contractual agreement to comply would appear to be a restriction on trade.</p> <p>The objective of the code to extend into areas beyond the content of advertisements e.g. the administration of sales promotions, is an area covered by the broad remit of CPRs, therefore does not require prescriptive coverage in the code.</p> <p>CAP can issue help notes guidance etc but any further prescriptive measures both must surely contravene the maximum harmonisation objectives of the Directive.</p> | <p>legislation, including the CPRs that are reflected in the CAP Code.</p> <p>Whenever it considers complaints that an advertisement misleads consumers or is aggressive or unfair to consumers, the ASA will have regard to the CPRs. That means it will take factors identified in the Regulations into account when it considers whether an advertisement breaches the CAP Code.</p> <p>The principle at the start of the Compliance section states:</p> <p>The ASA/CAP self-regulatory system is recognised by the Government, Office of Fair Trading and the Courts as one of the “established means” of consumer protection in non-broadcast marketing communications. Any matter that principally concerns a legal dispute will normally need to be resolved through law enforcement agencies or the Courts.</p> |
| Independent Healthcare Advisory Services | <p>1.10</p> <p>CAP’s rules in the proposed Compliance Section are necessary but would like to see more clarity, explanation and examples in relation to stating or otherwise creating the impression that a product can legally be sold when it cannot. We have particular concerns in relation to advertising</p> | <p>1.10</p> <p>The present and the new Code set out the overarching principles and rules that inform the sections that follow. The Compliance section ensures that the public and marketers understand that the Code requires marketing communications</p> |

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| | <p>services which involve prescription only medicines e.g. Botox. Advertising prescription only medicines contravenes the Medicines Act yet there are an increasing number of advertisements appearing in the published media particularly in relation to 'Botox'.</p> <p>We would like to see reference to professional regulation here particularly where it introduces further restrictions for clinical practitioners on Advertising e.g. Doctors, Dentists and Registered Nurses.</p> | <p>to reflect the spirit, and not merely the letter, of the Code. The Code also contains sector specific rules; section 12 Medicines, Treatments, Devices and Health reflects the requirements of the Medicines Advertising Regulations (as amended) and specifically the restriction on advertising prescription only medicines ('POM') to the public – Botox is a POM.</p> <p>The Principle of Section 12 of the proposed Code states: The rules in this Section are designed to ensure that marketing communications for medicines, medical devices, treatments, health-related products and beauty products receive the necessary high level of scrutiny. The rules apply to marketing communications and not the products, which are regulated by health regulators such as the Medicines and Healthcare products Regulatory Agency (MHRA), www.mhra.gov.uk, the European Medicines Agency (EMA), www.ema.europa.eu/ and the Department of Health, www.dh.gov.uk. <u>Marketing communications for those products must comply with the rules and professional codes of conduct of relevant professional bodies.</u></p> <p>Additionally proposed rule 12.2 explains:</p> <p>12.2</p> <p>Marketers must not discourage essential</p> |
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| | | <p>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. Accurate and responsible general information about such conditions may, however, be offered. (See also 12.11)</p> <p>Health professionals will be deemed suitably qualified only if they 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.</p> |
| <p>KAO Brands Company</p> | <p>1.11 Rule 1.2 - "Advertisements must be prepared with a sense of responsibility to the audience and to society"</p> <p>We are concerned that the rule is too broad and the subjective nature of interpretation may be exploited in the implementation of the codes. Some of this concern may be alleviated with adoption of revised post-broadcast review and</p> | <p>1.11 CAP considers this rule is intentionally broad to allow the ASA the scope to apply it as necessary. There are additional sector specific rules and further general rules that can be applied by the ASA should it see fit to do so.</p> <p>CAP considers this is a comment on the application of rule 1.2 and not the rule itself.</p> |

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| | appeal processes as parties within the community are proposing. | |
| Mobile Entertainment Forum | <p>1.12</p> <p>Agree with the proposed rule but clear guidance needs to be provided by CAP that supplements the Code provisions which indicate how the rules will be applied in practice. The provision of examples that do not form part of the Code would be of considerable use to MEF members and can be adapted quickly without the need for considerable consultation with the industry.</p> | <p>1.12</p> <p>The CAP Copy Advice site:</p> <p>http://www.copyadvice.org.uk/</p> <p>AdviceOnline is a comprehensive searchable database of guidance to help marketers, agencies and media owners ensure their ads, sales promotions and direct marketing campaigns meet the CAP Code and reflect ASA adjudications. It is regularly updated and covers a wealth of information and topics.</p> <p>Help notes are industry-approved and provide detailed guidance on the application of the broadcast and non-broadcast Codes in specific sectors or on particular subjects.</p> <p>Both are presently available and will continue to be so after the new Code is published. CAP will consider the need for further guidance in due course.</p> |
| Office of Fair Trading | <p>1.13</p> <p>Would like the CPRs to be given greater emphasis in the compliance section of the code, with a link to the summary of the CPRs requirements that appears in Appendix 1 and to a summary of the BPRs which we would suggest should also be included in Appendix 1 or as a separate Appendix.</p> | <p>1.13</p> <p>The ASA/CAP self-regulatory system is recognised by the Government, Office of Fair Trading and the Courts as one of the “established means” of consumer protection in non-broadcast marketing communications. Any matter that principally concerns a legal dispute will normally</p> |

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| | <p>Individual sections, as currently drafted, often refer to specific legislation affecting or governing the issues dealt with in the section concerned, but do not generally refer to the CPRs/BPRs. This could appear to imply that the issues are governed only by the specific legislation referred to. We believe that each section should contain a reference to the additional requirements of compliance with the CPRs/BPRs.</p> <p>Rule 1.10.1 restates the equivalent provision contained in the CPRs (that marketers mustn't state or imply that a product can legally be sold if it cannot). We comment only, in relation to this rule, that there may be some room for differing views as to the breadth of the scope of this provision in the CPRs, which is unlikely to be resolved until there is clarification from the courts.</p> | <p>need to be resolved through law enforcement agencies or the Courts.</p> <p>The Code does not have the force of law and its interpretation will reflect its flexibility. The Code operates alongside the law; the courts may also make rulings on matters covered by the Code. In the case of the CPRs specific references had to be added to reflect the provisions of the CPRs. CAP considers the requirements of the BPRs are adequately covered by the existing rules in the CAP Code.</p> <p>The Principle in Section 3 (Misleading) of the proposed Code clearly explains the basis on which the CPRs will be considered:</p> <p>Principle</p> <p>The ASA will take the Consumer Protection from Unfair Trading Regulations 2008 into account when it adjudicates on complaints about advertisements that are alleged to be misleading. See Appendix 1 for more information about those Regulations.</p> <p>The ASA will take into account the impression created by marketing communications as well as specific claims. It will adjudicate on the basis of the likely effect on consumers, not the marketer's intentions.</p> <p>Other Sections of the Code contain product-</p> |
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| | | <p>specific or audience-specific rules that are intended to protect consumers from misleading marketing communications. For example, the Children and Medicines Sections of the Code contain rules that apply, as well as the general rules, to marketing communications that fall under those Sections.</p> <p>CAP considers reference to the CPRs in this section, a section that closely reflects the Regulation following a public consultation on the effect of the CPRs on the Codes, is adequate. (http://www.cap.org.uk/CAP-and-BCAP-Consultations/Closed-consultations/BCAP-the-regulation-of-unfair-practices-in-TV-and-radio-advertisements.aspx)</p> |
| Redcats Brands | <p>1.14 Rule 1.1 states that “Marketing communications <u>should</u> be legal, decent, honest and truthful.” However, a number of other rules in this section have been changed from <u>should</u> to <u>must</u> but this one hasn’t.</p> | <p>1.14 CAP disagrees. While “must” accurately reflects the intention of many rules, there are still circumstances in which “should” is more appropriate.</p> <p>Amendment: 1.1 Marketing communications should must be legal, decent, honest and truthful.</p> |
| Royal Society for the Prevention of Cruelty to Animals | <p>1.15 We consider guidance is necessary on the legal sale of animals or pets. That might underpin the</p> | <p>1.15 CAP considers this is not a comment on the rule itself, but on the application of rules 1.9 and</p> |

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| | <p>requirements set out in rules</p> <p>1.9 “marketers should deal fairly with consumers” and rule 1.10.1 “marketers must not state or imply that a product can legally be sold if it cannot” with reference to businesses trading in animals.</p> | <p>1.10.1. The ASA has taken action against those marketing communications that have misled the public. The CAP Code does not apply to classified private advertisements, including those appearing online. CAP and BCAP have explored the option of requiring marketing communications to include logos/symbols (e.g. gambling – licence number), however the problem lies with those marketers that use the number/symbol without permission. The non-broadcast advertising system does not require marketers to pre-clear their advertisements. Therefore, requiring the inclusion of a symbol to denote a business/trader or private trader would not have the desired effect. CAP considers its rules are sufficient.</p> |
| RWE NPower | <p>1.16</p> <p>There is a read across from the CPRs 2008 in relation to marketing communications. It is therefore right that the CAP Code is amended to take account of the CPRs and that the former should be the primary vehicle for ensuring, monitoring compliance with the latter in a marketing context. This will avoid any duplication of activity and effort, say by local authorities, and also limit the risk of potential double jeopardy for marketers from issues being pursued by different bodies or regulatory/legal frameworks.</p> <p>There is clearly a shift of emphasis and tone within the Code and its rules, principally from “shall” to “must”, to reflect and be compatible with consumer</p> | <p>1.16</p> <p>CAP agrees.</p> |

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| | <p>law. Our internal review processes are geared up to cope with this, but again we would repeat that the risk of double jeopardy is mitigated by ensuring that the self-regulatory framework overseen by the ASA and CAP is the means of oversight and enforcement. This ensures the consistent application of the rules, with advice but not interjection by other bodies, and a proportionate response based around the merits of each case, as now.</p> | |
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