

ASA system submission to the Department of Health and Social Care consultation on enforcing HFSS promotion restrictions

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 58 years and the broadcast Advertising Code (written and maintained by BCAP) for 16, 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 tackle 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 (most of which are free) for advertisers, agencies and media 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 722,523 pieces of advice and training in 2020.
- 1.5. The ASA system is providing this written submission in response to the Department of Health and Social Care consultation on enforcing HFSS promotion restrictions

2. Consultation response

- 2.1. The consultation proposals involve a variety of scenarios that are within the remit of the CAP Code. We want to ensure Government are aware of this and to outline how the ASA will address any issues arising in our work that fall under the new restrictions on the use of promotions.
- 2.2. The Code covers both traditional advertising appearing in paid-for space and marketing communications that appear in marketers’ own space online (both websites and social media). Additionally, the Code covers promotional marketing, and applies to communications not in paid ad space (e.g. at point of sale in-store and on-pack) that includes promotional marketing.
- 2.3. There are two general areas where the ASA might be made aware of a relevant promotion through its complaint handling or otherwise identify one in the course of its proactive monitoring activities. These are:
 - Promotional marketing (e.g. leaflets or promotional displays) present at the point of sale (i.e. in-store, proximate to the checkout facilities); and
 - Marketing communications on marketers own websites (including e-tail platforms, online grocery sites etc.).
- 2.4. Government’s proposals are detailed and, from our perspective, complex; focusing on particular kinds of commercial activity to be restricted. The statutory nature of the restrictions and the proposal to enforce them through local authorities leads CAP to consider that it would not be effective to attempt to reflect the restrictions in the CAP Code, particularly as the Code

already provides protection for consumers in this area. We will however work to ensure that the protections we maintain in this area are highly unlikely, in practice, to lead marketers to undertake promotions prohibited by the new legal restrictions (see 2.10).

- 2.5. The ASA will still play a part in supporting the compliance work of Trading Standards Officers. It is a principle of the CAP Code that advertising must be lawful (rule 1.10). If we identify instances of promotions likely to be covered by the new regulations, we will of course refer them to the relevant authorities for action. This will include any cases found as a result of our proactive monitoring work.
- 2.6. This is in line with the CAP Code's approach to enforcement where there are underlying statutory frameworks governing advertising. The Scope of the Code IV(I) states:

"In relevant cases the ASA will have regard to existing statutory enforcement bodies. The ASA reserves the right to refer complainants to the relevant statutory regulator in cases where a complaint about a marketing communication relates to a Code rule that reflects a legal provision for a regulated product."
- 2.7. In practice, the number of referrals is likely to be limited. Our experience tells us that the number of complaints from members of the public are likely to be low. Those such as NGOs with more knowledge of the regulatory regime are likely to be aware that local authorities are the relevant enforcement bodies.
- 2.8. In 2020, we received in total 36,296 complaints related to 22,419 cases. Of these only 61 complaints were related to HFSS advertising. In 2020, we referred only 20 businesses to Trading Standards and other statutory backstops, none of which were related to HFSS advertising.
- 2.9. Recognising the statutory prohibition of the promotions covered by the envisaged regulations, the ASA will assess the complaints it receives – irrespective of the issue raised by the complainant – to identify matters that should be addressed under the new regulations.
- 2.10. The ASA will also consider the need to provide advice or guidance to marketers so they're aware of the new restrictions and how the ASA will deal with cases that arise.

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