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Making Health Claims in Advertising

Introduction

In the increasingly health-conscious society that we live in today, the benefits to advertisers of making health claims about their products and services cannot be understated. But it can be a potential regulatory minefield. There is a great deal of pressure from consumer groups and regulatory bodies to ensure that there is the smallest possibility of misleading claims being made and to force advertisers to stand by their claims. This Ad Guide aims to highlight the main regulatory provisions which advertisers must bear in mind when making health claims in their advertisements, and also gives recent examples of advertisements which have fallen foul of the rules.

The Existing Advertising Codes

The advertising industry in the United Kingdom is governed by the CAP Code for non-broadcast advertising and the BCAP Code for broadcast advertising.¹ There is an overarching principle in the Codes that all advertising must be “legal, decent, honest, and truthful” (Clause 2.1). In addition, any claim made in an advertisement must be capable of substantiation, and an advertiser must hold on file documentary evidence proving the claims they make and be able to send this evidence to the ASA on request (Clause 3.1). Medical and scientific claims about beauty and health products should be backed by evidence, and where relevant, this evidence should consist of trials conducted on people (Clause 50.1). With regard to promoting vitamins minerals or other food supplements, advertisers should hold scientific evidence for any claim promoting the health benefits of their product (Clause 50.20), but should not claim that their product can replace a well-balanced and healthy diet rather than supplement one (Clause 50.21)

The New Advertising Codes

In March 2009, in light of Government pressure and lobbying from consumer groups, a consultation was launched by CAP, the code-writing body, with a view to updating the CAP and BCAP Codes. New versions of the Codes were launched in March 2010, but there will be a grace period before implementation until 01 September 2010². Any ASA investigations carried out up until 01 September will be subject to the existing rules.

There are several important amendments in the new Codes in terms of health claims, which incorporate EC Regulation 1924/2006 on Nutrition and Health Claims on Foods (the “Regulation”)³. This Regulation seeks to protect consumers from misleading or false claims to do with the health and nutritional value of foodstuffs, by providing greater clarity on what can and cannot be claimed by advertisers about their products in their advertisements.

EC Regulation 1924/2006

The Regulation came into force on 1 July 2007 and is the first piece of legislation to deal specifically with nutrition and health claims made on foods. It harmonises the position across Europe, making inter-Community trade easier and ensuring consumer confidence and protection on a Community level. It applies to nutrition and health claims made in commercial communications, in the labelling, presentation and advertising of foods to directed at the consumer as an end-user, including foods which are placed on the market unpacked or supplied in bulk, and also applies with regard to foods intended for supply to restaurants, hospitals, schools, canteens and similar institutions.

In April 2008, the Food Standards Agency produced guidance on how advertisers can comply in the UK with the requirements of the Regulation⁴.

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1. <http://cap.org.uk/The-Codes.aspx>
 2. <http://bcap.org.uk/Media-Centre/2010/Advertising-Codes-Launch.aspx>
 3. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1924:EN:HTML>
 4. <http://www.food.gov.uk/multimedia/pdfs/ec19242006complianceguide.pdf>

Most significantly, the regulation provides guidance for food business operators about the types of claims they can make, and these are divided into claims relating to health benefits and nutritional value. The Regulation defines a nutrition claim as any claim which states, suggests or implies that a food has particular nutritional properties due to the presence, or absence of, or the increased or reduced levels of energy or of a particular nutrient or other substance in the product. The FSA cites claims such as “source of calcium”, “low fat”, “high fibre” and “reduced salt” as examples of nutritional claims. The Regulation defines a health claim as any claim that states, suggests, or implies that a relationship exists between a food category, a food or one of its constituents and health. The FSA gives the example of the latter situation as “calcium helps build strong bones”. A health claim differs from a nutritional claim since it specifically refers to a function in or an effect on the body.

Under Article 3 of the Regulation, claims must comply with a number of general requirements, such as being true, not being ambiguous or misleading, not encouraging or condoning the excessive consumption of a food, nor implying that a balanced diet cannot provide the necessary nutrients required for general good health.

Under Article 12 of the Regulation, health claims are prohibited if they suggest that health could be affected if the food product is not consumed, or give specific predictions as to the rate or amount of weight that could be lost through consumption of the product in question. Claims which state suggest or imply that a food product has the ability to prevent, treat or cure disease will continue to be prohibited under the Food Labelling Regulations 1996 (as amended)⁵.

The Annex to the Regulation, reproduced in the following table, provides a detailed list of the vocabulary which can be used to make a nutrition claim and sets out the various conditions for use of that specific terminology.

Claim	Conditions for use
Low Energy	A claim that a food is low in energy, and any claim likely to have the same meaning for the consumer, may only be made where the product does not contain more than 40kcal (170kJ)/100g for solids or more than 20kcal (80kJ)/100ml for liquids. For table-top sweeteners the limit of 4kcal (17kJ)/portion, with equivalent sweetening properties to 6g of sucrose (approximately one teaspoon of sucrose), applies.
Energy Reduced	A claim that a food is energy-reduced, and any claim likely to have the same meaning for the consumer, may only be made where the energy value is reduced by at least 30%, with an indication of the characteristic(s) which make(s) the food reduced in its total energy value.
Energy Free	A claim that a food is energy-free, and any claim likely to have the same meaning for the consumer, may only be made where the product does not contain more than 4kcal (17kJ)/100ml. For table-top sweeteners the limit of 0.4kcal (1.7kJ)/portion, with equivalent sweetening properties to 6g of sucrose (approximately one teaspoon of sucrose), applies.
Low Fat	A claim that a food is low in fat, and any claim likely to have the same meaning for the consumer, may only be made where the product contains no more than 3g of fat per 100g for solids or 1.5g of fat per 100ml for liquids (1.8g of fat per 100ml for semi-skimmed milk).
Fat Free	A claim that a food is fat-free, and any claim likely to have the same meaning for the consumer, may only be made where the product contains no more than 0.5g of fat per 100g or 100ml. However, claims expressed as "X % fat-free" shall be prohibited.
Low Saturated Fat	A claim that a food is low in saturated fat, and any claim likely to have the same meaning for the consumer, may only be made if the sum of saturated fatty acids and trans-fatty acids in the product does not exceed 1.5g per 100g for solids or 0.75g/100ml for liquids and in either case the sum of saturated fatty acids and trans-fatty acids must not provide more than 10% of energy.
Saturated Fat Free	A claim that a food does not contain saturated fat, and any claim likely to have the same meaning for the consumer, may only be made where the sum of saturated fat and trans-fatty acids does not exceed 0.1g of saturated fat per 100g or 100ml.

5. http://www.opsi.gov.uk/si/si1996/uksi_19961499_en_1.htm

Claim	Conditions for use
Low Sugar	A claim that a food is low in sugar, and any claim likely to have the same meaning for the consumer, may only be made where the product contains no more than 5g of sugar per 100g for solids or 2.5g of sugar per 100ml for liquids.
Sugar Free	A claim that a food is sugar-free, and any claim likely to have the same meaning for the consumer, may only be made where the product contains no more than 0.5g of sugar per 100g or 100ml.
With No Added Sugar	A claim stating that sugars have not been added to a food, and any claim likely to have the same meaning for the consumer, may only be made where the product does not contain any added mono- or disaccharides or any other food used for its sweetening properties. If sugars are naturally present in the food, the following indication should also appear on the label: "CONTAINS NATURALLY OCCURRING SUGARS".
Low Sodium/Salt	A claim that a food is low in sodium/salt, and any claim likely to have the same meaning for the consumer, may only be made where the product contains no more than 0.12g of sodium, or the equivalent value for salt, per 100g or per 100ml. For waters, other than natural mineral waters falling within the scope of Directive 80/777/EEC, this value should not exceed 2mg of sodium per 100ml.
Very Low Sodium/Salt	A claim that a food is very low in sodium/salt, and any claim likely to have the same meaning for the consumer, may only be made where the product contains no more than 0.04g of sodium, or the equivalent value for salt, per 100g or per 100ml. This claim shall not be used for natural mineral waters and other waters.
Sodium Free Or Salt Free	A claim that a food is sodium-free or salt-free, and any claim likely to have the same meaning for the consumer, may only be made where the product contains no more than 0.005 g of sodium, or the equivalent value for salt, per 100g.
Source Of Fibre	A claim that a food is a source of fibre, and any claim likely to have the same meaning for the consumer, may only be made where the product contains at least 3g of fibre per 100g or at least 1.5g of fibre per 100kcal.
High Fibre	A claim that a food is high in fibre, and any claim likely to have the same meaning for the consumer, may only be made where the product contains at least 6g of fibre per 100g or at least 3g of fibre per 100kcal.
Source Of Protein	A claim that a food is a source of protein, and any claim likely to have the same meaning for the consumer, may only be made where at least 12% of the energy value of the food is provided by protein.
High Protein	A claim that a food is high in protein, and any claim likely to have the same meaning for the consumer, may only be made where at least 20% of the energy value of the food is provided by protein.
Source Of (Name Of Vitamin/s) And/Or (Name Of Mineral/s)	A claim that a food is a source of vitamins and/or minerals, and any claim likely to have the same meaning for the consumer, may only be made where the product contains at least a significant amount as defined in the Annex to Directive 90/496/EEC or an amount provided for by derogations granted according to Article 7 of Regulation (EC) No 1925/2006 of the European Parliament and of the Council of 20 December 2006 on the addition of vitamins and minerals and of certain other substances to foods.
High (Name Of Vitamin/s) And/Or (Name Of Mineral/s)	A claim that a food is high in vitamins and/or minerals, and any claim likely to have the same meaning for the consumer, may only be made where the product contains at least twice the value of "source of (NAME OF VITAMIN/S) and/or (NAME OF MINERAL/S)".
Contains (Name Of The Nutrient Or Other Substance)	A claim that a food contains a nutrient or another substance, for which specific conditions are not laid down in this Regulation, or any claim likely to have the same meaning for the consumer, may only be made where the product complies with all the applicable provisions of this Regulation, and in particular Article 5. For vitamins and minerals the conditions of the claim "source of" shall apply.
Increased (Name Of The Nutrient)	A claim stating that the content in one or more nutrients, other than vitamins and minerals, has been increased, and any claim likely to have the same meaning for the consumer, may only be made where the product meets the conditions for the claim "source of" and the increase in content is at least 30% compared to a similar product.

Claim	Conditions for use
Reduced (Name Of The Nutrient)	A claim stating that the content in one or more nutrients has been reduced, and any claim likely to have the same meaning for the consumer, may only be made where the reduction in content is at least 30% compared to a similar product, except for micronutrients where a 10% difference in the reference values as set in Council Directive 90/496/EEC shall be acceptable and for sodium, or the equivalent value for salt, where a 25% difference shall be acceptable.
Light/Lite	A claim stating that a product is "light" or "lite", and any claim likely to have the same meaning for the consumer, shall follow the same conditions as those set for the term "reduced"; the claim shall also be accompanied by an indication of the characteristic(s) which make(s) the food "light" or "lite".
Naturally/Natural	Where a food naturally meets the condition(s) laid down in this Annex for the use of a nutritional claim, the term "naturally/natural" may be used as a prefix to the claim.

Recent ASA Adjudications

In 2009, there were several high-profile adjudications against advertisers who fell foul of the rules controlling health claims made in advertisements. On the whole, complaints were made because it was deemed that the implied health benefits were exaggerated and therefore the advertisements were misleading to consumers.

Coca-Cola ran a campaign for their VitaminWater range of soft drinks⁶. The ASA received complaints that the ads suggested that there was nutritional value in the products equivalent to that of vegetables, that the drinks increased energy levels, and that their vitamin content could produce resistance to illness. These claims were deemed, upon investigation by the ASA, to not be substantiated by the evidence produced by Coca-Cola. The ASA was also concerned about the high levels of added sugar in the drinks, and therefore a claim of significant health benefits was deemed misleading. The ASA ruled that the ads breached CAP Code clauses 3.1 (Substantiation), 7.1 (Truthfulness), and 50.1 (Health and beauty products). The advertiser was prohibited from running the ads again in their current form.

A press ad from Kellogg's for their Nutri-Grain Soft Oaties ran with the strap line "Wholesome cookie goodness"⁷. The ASA received complaints, from consumer group Which? and two members of the public, that the ads misleadingly implied that the product was a snack that was beneficial to health, whereas in fact it was believed to be an HFSS food, and that the ads misleadingly implied the cookies were healthier than they were. Kellogg's highlighted the fact that the products were a source of fibre, vitamins and iron, but omitted to mention the high sugar and fat content. The ASA, upon investigation, found that the ads breached CAP Code clauses 7.1 and 7.2 (Truthfulness). It also investigated the ads under CAP Code clause 3.1 (Substantiation) but did not find them in breach. The ASA ruled that the ads must not appear again in their current form.

Finally, the ASA upheld complaints against Nutricia for its claims about the health and nutritional benefits of follow-on baby milk with regard to providing insufficient substantiation for claims in a press ad that its Cow & Gate follow-on formula could boost babies' immune systems⁸, and for suggesting in TV ads that its Aptamil product could prevent children from catching colds⁹.

Final Thoughts

The coming into force of the EC Regulation and the specific incorporation of various of its provisions into the new UK advertising Codes, will no doubt provide advertisers with greater clarity and guidance when making health and nutritional claims about their products, particularly in light of the conditions laid down in the annex to the Regulation with regard to using specific terminology. The recent spate of ASA adjudications on the subject demonstrates a clear need for this. It is evident from the fact that although the investigations were sparked by a small number of complaints, this is a serious issue which now more than ever before needs to be paramount in the minds of advertisers.

6. http://www.asa.org.uk/Complaints-and-ASA-action/Adjudications/2009/10/Coca_Cola-Great-Britain/TF_ADJ_47037.aspx
7. [http://www.asa.org.uk/Complaints-and-ASA-action/Adjudications/2009/2/Kellogg-Marketing-and-Sales-Company-\(UK\)-Ltd/TF_ADJ_45721.aspx](http://www.asa.org.uk/Complaints-and-ASA-action/Adjudications/2009/2/Kellogg-Marketing-and-Sales-Company-(UK)-Ltd/TF_ADJ_45721.aspx)
8. http://www.asa.org.uk/Complaints-and-ASA-action/Adjudications/2009/7/Nutricia-Ltd/TF_ADJ_46576.aspx
9. http://www.asa.org.uk/Complaints-and-ASA-action/Adjudications/2009/8/Nutricia-Ltd/TF_ADJ_46648.aspx

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