

# Is your online marketing CAP Compliant?

From 1 March 2011, online marketing will be covered by the CAP Advertising code

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The Committee of Advertising Practice has announced that the digital remit of the CAP advertising Code will be extended from 1 March 2011 to cover nearly all forms of online marketing communications which have previously been exempt, including websites belonging to businesses and organisations. The changes will affect all businesses and organisations regardless of size.

## What is the CAP Code?

The UK Code of Advertising, Sales Promotion and Direct Marketing, created by the Committee of Advertising Practice, is a voluntary but industry-recognised code which covers many forms of non-broadcast media. Although paid-for online advertising and promotions are currently covered by the CAP Code, other forms of online marketing, such as business websites and pages on social networking sites, have so far been exempt.

The CAP Code is enforced by the Advertising Standards Authority ("ASA"), which provides an alternative forum to the Courts for complaints concerning misleading, offensive or unlawful advertisements.

## Expanded remit of the CAP Code

Between 2008 and 2009, the ASA rejected 3,500 complaints about the content of business websites because they were outside the remit of the CAP Code. Many of these complaints concerned potentially misleading claims.

From 1 March 2011, these complaints will be covered by the same rules as other non-broadcast media following an extension of the CAP Code to cover:

*"Advertisements and other marketing communications by or from companies, organisations or sole traders on their own websites, or in other non-paid-for space online under their control, that are directly connected with the supply or transfer of goods, services, opportunities and gifts, or which consist of direct solicitation of donations as part of their own fund-raising activities."*

As a result, business websites and advertiser-controlled pages on social networking sites such as Facebook and Twitter will be covered by the CAP Code, potentially including some or all of the user-generated content published on those pages. Business related blogs, which are now commonly used alongside traditional business websites, where the content of those sites contains relevant marketing communications.

The extension of the CAP Code will apply only to marketing communications aimed at selling something, or directly seeking donations for fund-raising activities. Marketing to promote causes or ideas more generally will fall outside the remit of the Code. However, initial guidance confirms that marketing which doesn't contain a price, or appear to seek an immediate or short-term transaction may still be covered. Each case will involve a consideration of the content and context of the marketing communication concerned. In practice, the extension is likely to have broad implications relating to almost every page of a business' website or online marketing efforts.

With the extension, two new exclusions from the CAP Code shall be introduced:

- Company investor relations material (whether or not it includes information about products and services) falls outside the Code's remit; and
- Heritage advertising will be excluded, provided that it is contained in an appropriately identified part of the website.

Press releases continue to be excluded from the Code.

If a complaint about online marketing is upheld, the ASA will have additional sanctions at its disposal. As long as non-compliant webpages remain live the ASA may:

- publish details of the advertiser and its non-compliant marketing online on an ASA micro-site;
- publicise the continued non-compliance of an advertiser using paid-for advertisements which link to the ASA's micro-site; and
- with an internet search provider's co-operation, have any paid for advertising which links directly to the non-compliant advertising removed. Google has already confirmed that it supports the expanded remit of the Code.

## Conclusion

The new provisions will fill a significant loophole in the regulation of marketing material, which reflects the growth of online trading and use of both business websites and social networking tools to spread marketing messages. The availability of a straightforward and affordable means of redress against unscrupulous online advertisers will be welcomed by businesses and consumers alike.

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However, with the extension of the CAP Code's remit, businesses and organisations must take more care in creating and maintaining their websites, blogs and social networking pages.

While it remains to be seen precisely what material will be considered by the ASA to constitute an online "marketing communication", it is likely that this will be interpreted broadly and so we recommend that every webpage available to the public is checked for compliance with the Code before the changes come into effect on 1 March 2011.

If you have any queries about the requirements of the CAP Code or how to make a complaint to the Advertising Standards Agency, please do contact a member of the Intellectual Property and Technology Team.



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