Broadcast restriction of ads for unregulated investments

Broadcast Committee of Advertising Practice statement on rule amendments to clarify the scope of broadcast restrictions on ads for unregulated investments

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1. Executive summary

Following public consultation, the Broadcast Committee of Advertising Practice (BCAP), author of the UK Code of Broadcast Advertising (the BCAP Code), are introducing changes to the Section 14 of the BCAP Code (Financial products, services and investments) to clarify the scope of its restriction of ads for unregulated investments to specialised financial channels and programming.

The amendments relate to the Background and Definitions of the Code section, as well the wording of rule 14.5.4.

BCAP received two responses to its consultation, both of which agreed with the proposed change.

The amendment will clarify the scope of the existing restriction on ads for investments unregulated by the FCA, to ensure that it applies in practice to unregulated 'investments' that meet the likely consumer understanding of that term. That is, an opportunity for the consumer to invest their capital in the expectation of making a profit. It will remove the risk of inadvertent application of the restriction to unregulated products that technically fall within the definition of investment activity set out within the Financial Services and Markets Act 2000 (FSMA) (as reflected in the Code section), but that are not in line with a layperson's understanding of an investment, and that are not compatible with the type of risky financial products from which restrictions were intended to protect general broadcast audiences.

BCAP are mindful of the need to avoid unintended consequences of amending the wording of rules and to ensure that changes are effective. As such, the amended rules will be subject to review after 12 months.

These changes take effect immediately**.**

2. Background

The BCAP Code has long included a rule that restricts ads for certain types of complex financial products to specialised financial channels, stations and programming, meaning that such ads cannot be broadcast on mainstream TV or radio to a general audience. The restriction was put in place by the Independent Television Commission (ITC), the predecessor of Ofcom, because of concerns about the relative unsuitability of TV and radio as media for the promotion of complex financial products, with their attendant risks for investors.

Wider review of the Code section revealed a previously-unidentified technical interpretation issue with the rule and its interaction with the wording of the background to the section, which has the unintended effect of banning TV ads for mass market financial products that would fall outside a layperson's understanding of an 'investment', on mainstream channels. The amended wording seeks to clarify that the restriction in rule 14.5.4 applies to unregulated products that would be regarded as investments, in a conventional sense. 'Investment activity' defined under the Financial Services and Markets Act 2000 (FSMA) includes services unlikely to be regarded by the public as investments, and therefore the Code as currently worded unintentionally restricts ads for products that do not conform with the type of high-risk products the rule was intended to keep away from mass audiences. As a case in point, it would disproportionately restrict ads for unregulated buy-now-pay-later (BNPL) credit services from advertising in broadcast media.

Please see the consultation document for further details.

3. Consultation responses

The consultation received two responses, both of which agreed with the proposals. CAP and BCAP have published the responses they received, and carried out an evaluation of all significant points made in these responses. The chief points raised are set out below.

One respondent said that the proposals served to clarify that the restrictions in Section 14 should only apply to advertisements for unregulated financial products that the public would widely consider to be conventional investments, that is, where the consumer might invest money with the expectation of a return.

They considered the amendments appeared to be sufficient to address any risk that the restrictions might be interpreted as applying to advertisements for products that consumers would not understand as conventional 'investments' – in particular, unregulated buy-now-pay-later (BNPL) products. They said that BNPL and similar products were widely used by UK consumers and had been for many years, and were clearly not the type of risky or highly complex investment product to which the restriction, as originally drafted, was intended to apply. They agreed that it would be disproportionate for restrictions to apply to those products simply due to a technicality of interpretation.

Another respondent stated that they had never understood rule 14.5.4 to apply to BNPL products and supported the amendments. They queried whether ads that offered investment opportunities in buying gold, in solar panels and in timeshare/buying properties abroad fell within the existing and proposed restriction of 14.5.4. Ads for investment in unregulated products, including those raised by the respondent, have been covered by 14.5.4 and will continue to be under the revised wording of the rule.

Neither respondent was aware of any unregulated financial products caught by the FSMA definition of 'investment activity' that would not be caught by BCAP's proposed revised definition of conventional investments, and that would not be suitable for advertisement to a mass-market audience.

BCAP considers that the scope of the rule remains suitably broad and retains its purpose to limit public exposure to ads for investments that expose consumers to risk due to their nature, complexity, or lack of regulation and protection. The wording of the rule may be applied to ads for any number of products or services, dependent on whether they are presented as an opportunity to make a return on an investment. It therefore encompasses future ads for products or services that may not have previously been presented as such.

Aside from BNPL, BCAP is not aware of any other products that fall within the parameters of the definition of investment activity in FSMA, and that are also unregulated. There is no reason to assume that other products meeting this definition and not known at the present time should enjoy freedom to advertise.

In late 2024, Government ran a long-anticipated consultation on proposals to bring BNPL under the regulation of the FCA. The proposals will afford greater protections to borrowers in line with currently regulated credit products, including affordability checks and stronger rights of redress if issues arise. New rules are likely to take effect in 2026. The rule change adopted by BCAP as a result of its consultation does not remove any protections for consumers in the interim period, but rather maintains an appropriate business-as-usual approach in which such products, while currently unregulated, may be responsibly advertised in broadcast media, in line with the detailed guidance on delayed payment services issued jointly by CAP and BCAP.

4. Outcome

In light of the reasons set out in the consultation proposal, and the evaluation of consultation responses, CAP and BCAP will amend Section 14 of the BCAP Code (Financial products, services and investments) as follows:

Original wording:

[Background]

The rules in this section largely draw attention to statutory regulation with which all advertisements must comply. Selecting the most relevant financial products or services normally requires consumers to consider many factors; short-form television and radio advertisements are not well-suited to communicating large amounts of detail. They are not, therefore, suitable formats for advertising especially high-risk or specialist investments or any financial products or services that are not regulated or permitted in the UK under the Financial Services and Markets Act 2000 (FSMA).

[…]

[Definitions]

Under FSMA, a financial promotion is "an invitation or inducement to engage in investment activity" that is made "in the course of business" and is "capable of having an effect in the UK." That broad definition captures all promotional activity, including traditional advertising, telephone sales and face-to-face conversations, in relation to all products and services regulated by the FCA. Under FSMA, "investment activity" does not cover only conventional investments; it includes deposits, home finance transactions (regulated mortgages, home purchase plans and home reversion plans), unsecured consumer credit or consumer hire agreements, other forms of secured consumer credit or hire and credit-related activities, such as credit broking, debt counselling, debt adjusting and most insurance, including some advertisements by insurance intermediaries (see the Insurance Conduct of Business sourcebook - ICOBS).

[…]

14.5

These categories of advertisement may be broadcast on specialised financial channels, stations or programming only:

14.5.1

advertisements for the acquisition or disposal of derivatives, warrants or other transferable securities (such as shares) that are not on the Official List of the FCA or admitted to trading on a Regulated Market in the UK or other EEA State (as defined by the Markets in Financial Instruments Directive)

14.5.2

advertisements for spread betting, as an investment only. Spread betting advertisements may be advertised on interactive or additional TV services (including text services). They must comply with the gambling rules (see Section 17: Gambling). The advertised products or services should be available only to clients who have demonstrated through a pre-vetting procedure compliant with the FCA's appropriateness test that they have relevant financial trading experience

14.5.3

advertisements for contracts for differences (except spread betting), provided the products are available only to clients who have demonstrated through an appropriate pre-vetting procedure that they have relevant financial trading experience.

14.5.4

advertisements for investments not regulated or permitted under FSMA. An advertisement that implies, for example, that a collectors' item or other unregulated product or service could have investment potential (in the colloquial sense) would normally be unacceptable.

Amended wording:

[Background]

Selecting the most relevant financial products or services normally requires consumers to consider many factors; short-form television and radio advertisements are not well-suited to communicating large amounts of detail. They are not, therefore, suitable formats for advertising especially high-risk or specialist investments or financial products or services that are not regulated or permitted in the UK under the Financial Services and Markets Act 2000 (FSMA) <u>and are (or are presented as) conventional investments (in the sense that the consumer may invest money with the expectation of a return)</u>.

[…]

[Definitions]

Under FSMA, a financial promotion is "an invitation or inducement to engage in investment activity" that is made "in the course of business" and is "capable of having an effect in the UK." That broad definition captures all promotional activity, including traditional advertising, telephone sales and face-to-face conversations, in relation to all products and services regulated by the FCA. Under FSMA, "investment activity" does not cover only conventional investments <u>(in the sense that the consumer may invest money with the expectation of a return)</u> […]

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These categories of advertisement may be broadcast on specialised financial channels, stations or programming only:

[…]

14.5.4
advertisements for <u>investment products</u> not regulated or permitted under FSMA <u>that are (or are presented as) conventional investments (in the sense that the consumer may invest money with the expectation of a return)</u>. An advertisement that implies, for example, that a

collectors' item or other unregulated product or service could have investment potential (in the colloquial sense) would normally be unacceptable.

5. Implementation

The revised wording of Section 14 of the BCAP Code will come into effect immediately.

BCAP is mindful of the need to avoid unintended consequences of amending the wording of rules and to ensure that changes are effective. As such, the amended rules will be subject to review after 12 months from publication.

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