



## REGULATORY ROLES IN TACKLING HIDDEN ADVERTISING

### What is hidden advertising?

1. Content creators can have a lot of influence over people's buying decisions if they promote a product or service in their posts. People need to know if content creators have been paid, incentivised or in any way rewarded to endorse or review something in their posts, or if they have an 'own-brand' relationship with brands. It's important that they make this clear to their followers. This needs to be clearly stated when a product, brand or service is promoted, tagged, linked or endorsed in any way.
2. Content creators, brands and platforms all have a role to play in tackling hidden advertising on social media platforms. This guide sets out the various rules which apply to these parties and which regulators are responsible for monitoring compliance.

### Who regulates hidden advertising?

3. Advertising Standards Authority ('**ASA**'), the Office of Communications ('**Ofcom**'), Trading Standards Services ('**TSS**') and the Competition & Markets Authority ('**CMA**') all have regulatory responsibilities for ensuring paid for endorsements are properly labelled on social media platforms. The rules they enforce apply across the supply chain including content creators, intermediaries (for example, marketing agencies and talent agencies), brands and social media platforms.

### Who's who: A brief introduction to the regulators

#### *The ASA*

4. The ASA is the UK's independent advertising regulator. The ASA applies the [Advertising Codes](#), which are written by the self-regulatory Committees of Advertising Practice ('**CAP**'). Its UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the '**CAP Code**') is the rule book for non-broadcast marketing communications and is relevant to influencer marketing. The ASA is considered an 'established means' for keeping advertising in line with certain pieces of consumer legislation. While it can refer brands and influencers to TSS where a breach of the CAP Code is also likely to be a breach of consumer protection law, this is rare as the self-regulatory system is typically successful in remedying serious or repeated breaches of the Code.

5. If a consumer would like to make a complaint about hidden advertising on social media, they should consider complaining to the ASA as their first point of call.

### **TSS**

6. TSS are local authority departments in England, Wales and Scotland and part of the Department for Economy in Northern Ireland. They have the duty to enforce consumer protection legislation (such as the Consumer Protection from Unfair Trading Regulations 2008 “**the CPRs**”). The CPRs apply to everyone in the advertising chain, including brands, content creators, intermediaries (for example marketing agencies) and social media platforms. TSS may investigate brands, content creators, or platforms which breach the CPRs. TSS also act as a statutory backstop to the ASA<sup>1</sup>.

### **Ofcom**

7. Ofcom is the statutory regulator for the communications industries in the United Kingdom. It is responsible for the regulatory framework applying to UK-established video-sharing platforms (‘**VSPs**’) under the Communications Act 2003 (‘**CA03**’). Under the CA03, VSPs are required to take such measures as are appropriate to protect users from harmful material, including in relation to the transparency of advertising (the CA03 sets out a list of the measures VSPs must consider taking). There is a [list](#) of VSPs subject to the regime on Ofcom’s website. In December 2021, Ofcom published [guidance](#) on the advertising measures. In the first instance, consumers should complain to the ASA, which has a co-regulatory relationship with Ofcom.

### **The CMA**

8. The CMA is the competition and consumer protection regulator in the United Kingdom. The CMA is empowered to enforce a range of consumer protection law, including the CPRs For more information, see the CMA’s [homepage](#).
9. The CMA focus is on market-wide issues affecting consumers and it does not offer advice or guidance on specific individual complaints.

### **Which rules apply to content creators?**

#### **The ASA and the CAP Code**

10. The ASA enforces the CAP Code. Section 2 contains rules about how adverts should be obviously identifiable as adverts and Section 3 sets out rules that advertisers must follow to avoid misleading people. The ASA can act when content falls within the scope of its rules, for example, when the brand exercises control over the relevant content or it contains affiliate marketing links. The ASA adopts a broad interpretation of ‘control’: as a rule of thumb, if

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<sup>1</sup> The ASA currently has an arrangement with Buckinghamshire and Surrey TSS in this respect.

influencers are not completely free to do and say whatever they want, whenever they want about a product for which they have received payment or payment in kind, the ASA is likely to consider the brand exercises control. In practice, this means there are very few cases that the ASA rejects or refers to other bodies because the control test has not been met.

11. You can find the ASA's CAP Code [here](#) and its co-guidance with the CMA [here](#), which is primarily aimed at content creators. Its other key resources on this topic can be found [here](#).
12. The ASA has published a number of rulings in respect of hidden advertising by content creators: see their recent rulings [here](#). The ASA also operates a [list](#) of non-compliant content creators, who have repeatedly engaged in hidden advertising. The ASA has an escalating sanctions regime, including naming on the non-compliant list, targeted on-platform advertising campaigns in respect of non-compliant influencers and referral to platforms for enforcement sanctions. The ASA can also refer content breaching the CAP Code to TSS, which may take enforcement action.

### ***The CMA, TSS and the CPRs***

13. The CMA and TSS both enforce the CPRs, which contain rules prohibiting content creators and others from engaging in hidden advertising, in particular (i) Using editorial content in the media to promote a product without making it clear you have been paid (Banned Practice 11), (ii) Creating the impression of being a consumer (Banned Practice 22), (iii) Professional diligence (Regulation 3), (iv) Misleading actions (Regulation 5) and (v) Misleading omissions (Regulation 6).
14. These rules apply regardless of whether the brand exercises control over the content. Aside from that, the rules under the CAP Code and the CPRs are broadly complementary and hidden advertising is likely to infringe both.
15. In January 2019, the CMA obtained undertakings from sixteen influencers who had not made it clear when they had been paid or otherwise incentivised to endorse a product or service. You can find out more on the CMA's social media endorsements [case page](#).
16. The CMA has also published [guidance for content creators](#) (in addition to the guidance it has co-published with the ASA) on how to comply with consumer protection law.

### **Which rules apply to brands?**

#### ***The ASA and the CAP Code***

17. Brands are also subject to Section 2 and Section 3 of the ASA's **CAP Code** when the content falls within the scope of its rules. The ASA has an escalating sanctions regime, including naming on its list of non-compliant brands/influencers, targeted on-platform advertising to social media users to highlight non-compliant influencers and referral to platforms for enforcement sanctions. The ASA can also refer influencers or brands breaching the CAP Code to TSS, who may take enforcement action. The **ASA** has previously made a number of rulings in respect of hidden advertising by brands: see their recent rulings [here](#).

### ***The CMA, TSS and the CPRs***

18. The CPRs, as enforced by **TSS** and the **CMA**, apply across the supply chain and so also apply to brands. In particular, brands engaged in hidden advertising may breach Banned Practice 11 (*Using editorial content in the media to promote a product without making it clear you have been paid*), Banned Practice 22 (*Creating the impression of being a consumer*), Regulation 3 (*Professional diligence*), Regulation 5 (*Misleading actions*) and Regulation 6 (*Misleading omissions*). Unlike the CAP Code, the CPRs do not have a requirement that the brand exercises control over the content.

19. The CMA has published [guidance for brands on how to comply with the CPRs](#).

### **Which rules apply to social media platforms?**

#### ***Ofcom and the CA03***

20. Ofcom regulates UK-established video-sharing platforms ('**VSPs**'), including TikTok, Twitch, Vimeo and Snapchat, under the regime set out in Part 4B of the CA03. This legislation requires in-scope platforms that have the required connection with the UK to take such measures as are appropriate to address advertising that they do not control (i.e. that they do not market, sell or arrange) in order to ensure, amongst other things, that it is readily recognisable as such and that it does not use techniques which exploit the possibility of conveying a message subliminally or surreptitiously. The measures that platforms must consider taking include having in place terms & conditions to the effect that adverts must be recognisable as such and providing a functionality for users to label adverts.

21. Ofcom has published guidance for VSPs on the advertising measures [here](#) (see paragraphs 1.9 to 1.20 in particular).

#### ***The CMA and the CPRs***

22. The **CMA** (and also **TSS**) can take enforcement action where social media platforms breach the CPRs. In particular, Regulation 3(3) CPRs requires that platforms act with 'professional diligence'. The CMA considers this means platforms must take reasonable and proportionate steps to tackle hidden advertising on their sites.
23. The CMA has published '[Hidden advertising: Compliance Principles for social media](#) platforms' which sets out its expectations of the steps platforms should take to ensure compliance with the CPRs. These are separate to the CA03 regime, which operates in a different statutory framework. The Principles are therefore additional to the regime enforced by Ofcom under the CA03.

**Which rules apply to *intermediaries* (e.g. social media agencies, agents and marketing agencies)?**

***The CMA and the CPRs***

24. The **CMA** (and also **TSS**) can take enforcement action where intermediaries breach the CPRs. In particular, if intermediaries encourage or engage in practices connected to hidden advertising, they may breach Banned Practice 11 (*Using editorial content in the media to promote a product without making it clear you have been paid*), Banned Practice 22 (*Creating the impression of being a consumer*), Regulation 3 (*Professional diligence*), Regulation 5 (*Misleading actions*) and Regulation 6 (*Misleading omissions*).
25. The CMA has previously taken enforcement action against market agencies in the context of hidden advertising, and has published an [open letter](#) to marketing professionals, see its [case page here](#).

***The ASA***

26. The **ASA** holds brands and content creators responsible for the actions of their intermediaries. This places the onus on brands and content creators to ensure that they are working with agencies, and other intermediaries, that uphold the same high standards that they are expected to meet.