

# TAPS | therapeutic advertising pre-vetting service

<b>GUIDELINE 9</b> <b>Medicines</b>	<b>Comparative Advertising for Consumers</b>
Last Updated	August 2016
What kind of product is this guideline for?	Medicines
What is the purpose of this guideline?	<p>To provide guidance on advertisements that contain comparative claims between medicines or classes of medicines.</p> <p><b>Please Note:</b></p> <p><u><a href="#">Guideline 8 in the Medicines Section</a></u> of the TAPS Guidelines is specific for comparative advertising when directed solely or principally to Healthcare Professionals.</p> <p><u><a href="#">Guideline 1 in the Cosmetic Section</a></u> of the TAPS Guidelines is specific for comparative advertising between cosmetic products / devices / procedures and medicines / medical devices / methods of treatment.</p>

## BACKGROUND

The comparative advertising of Medicines Direct to the consumer is covered in both the ASA Code for Comparative Advertising, the ASA Therapeutic and Health Advertising Code, the Medicines New Zealand Code of Practice and the Self Medication Industry Code of Practice.

Consumers are particularly vulnerable when faced with comparative advertising for medicines. They do not have the knowledge of a health professional in order to be able to comprehend the subtleties of such advertising, and can easily feel confused about the medicine they are taking or considering taking. Such advertising direct to consumers should not exploit their vulnerability or lack of knowledge. While quoting studies and papers may be acceptable for health professionals, it does not work for consumers, as they don't have the ability to find the papers, and may not understand them even if they could access them.

Medicines are something consumers depend on for their health, and unsuitable comparative advertising can create doubts and apprehension for the consumer, it is also likely to breach the ASA Therapeutic and Health Advertising Code in that it is likely to be deemed not a high standard of social responsible or possibly playing on fear.

The relevant principles of the Codes are as follows:-

### **ASA Therapeutic and Health Advertising Code**

#### **PRINCIPLE 1**

***Therapeutic and Health advertisements shall observe a high standard of social responsibility particularly as consumers often rely on such products, devices and services for their health and wellbeing.***

#### **PRINCIPLE 2**

***Advertisements shall be truthful, balanced and not misleading. Advertisements shall not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust, exploit their lack of knowledge or without justifiable reason, play on fear. This includes by implication, omission, ambiguity, exaggerated or unrealistic claim or hyperbole.***

*2(a) Advertisements shall be accurate. Statements and claims shall be valid and shall be able to be substantiated. Substantiation should exist prior to a claim being made. For medicines and medical devices, therapeutic claims must be consistent with the approved indication(s) (for medicines) or the listed intended purpose (for medical devices).*

*2(c) Comparative advertising shall be balanced and shall not be misleading, or likely to be misleading, either about the product, device or service advertised or classes of products, devices or services, with which the comparison is made.*

- 1. Comparative advertisements shall not be disparaging and shall be factual, fair and able to be substantiated, referenced to the source and reflective of the body of available evidence.*
- 2. Comparative advertisements shall not discourage consumers from following the advice of their healthcare practitioner.*
- Comparative advertisements shall compare 'like with like'. Advertisements for Natural Health Products and Dietary Supplements shall not include comparisons with medicines or medical devices either specifically or generally.*

### **ASA Code for Comparative Advertising**

Comparative advertising, or advertising that identifies a competing product or service, is characterised by three distinct features:

- a. It should be **factual and informative**.
- b. **It should explicitly or by implication make clear what comparison is being made.**
- c. **It should not mislead the consumer** about other products or services with which comparisons might be made.

Advertisements **should not unfairly attack or discredit other products**, advertisers or advertisements **directly or by implication**.

## **Self Medication Industry Code of Practice**

### **5.1.2.3**

*An advertisement for any Therapeutic Product or Natural Health Product must not:*

*Mislead directly or by implication or through emphasis, comparisons, contrasts or omissions.*

### **5.3 Comparative Advertising**

*5.3.1 Comparative advertisements may only be used in circumstances permitted by the Codes of the New Zealand Advertising Standards Authority.*

*5.3.2 Comparative advertisements must be balanced and must not be unsubstantiated or likely to mislead the reasonable consumer, either about the Therapeutic Product or Natural Health Product advertised or that with which it is compared.*

*5.3.3 Comparisons should be factual and reflect substantiated current scientific evidence.*

*5.3.4 Comparisons should not imply that the Therapeutic Product or Natural Health Product to which it is compared is harmful or ineffective.*

*5.3.5 Comparisons must not insult, denigrate or unfairly criticise any other Therapeutic Product or Natural Health Product.*

### **EXPLANATORY NOTES TO CLAUSE 5.3 Advertising and Promotion: Comparative Advertising**

#### **General**

*(i) Clause 4.4 of this Code requires compliance with provision of Codes issued by the New Zealand Advertising Standards Authority. One such code is the Advertising Standards Authority Code for Comparative Advertising 17 July 1989.*

*(ii) Section 94 of the Trade Marks Act 2002 permits the use of a competitor's trademark for the purposes of comparative advertising but only if this is in accordance with honest practices in industrial or commercial matters and the use must not take unfair advantage of, or be detrimental to, the distinctive character or the repute of the trade mark.*

## **The Medicines New Zealand Code of Practice**

*3.4.4 Product comparisons should not be used in Direct to Consumer Advertising (DTCA) (see section 5.11).*

*5.11.8 Direct product comparisons with the aim of encouraging the consumer to consider a choice between two different medicines may cause consumer confusion and are prohibited in DTCA. Companies must respect that individual treatment decisions should be based on a prescriber's broad knowledge and understanding of all treatment alternatives and on an open and positive dialogue between prescriber and patient.*

### **Clarification of Section 5.11.8 on DTCA (Medicines NZ Website)**

*Medicines New Zealand has received a number of queries with regard to the Code of Practice 16th Edition concerning interpretation of section 5.11.8 on direct product comparisons in DTCA.*

*The clause must be read and applied in its entirety. Direct product comparisons are prohibited where it would be considered to be encouraging consumers to make a choice between medicines which may cause consumer confusion, and when it may undermine the prescriber and patient relationship. In other instances direct product comparisons may be considered.*

*Consideration must be given to other relevant sections in the Code of Practice; legislation; and the ASA Therapeutic and Health Advertising Code with respect to DTCA.*

## **GUIDELINES**

- Comparative advertising should be **factual and informative** and should offer a product or service on its **positive merits**. The intent and connotation of the advertisement should be to **inform and not to discredit**, disparage or attack competitors, competing products or services **directly or by implication**.
- Comparative claims should be **unambiguous and clearly understandable** so that there is no likelihood of the consumer being misled as a result of the comparison.
- Where an advertisement makes a comparison, whether explicitly or implicitly, it should be **clear with what the comparison is being made**, i.e. dimension to dimension, feature to feature.
- The competition should be fairly and properly identified but never in a manner or tone of voice that has degraded the competitive product or service.
- The identification should be for **honest comparison purposes and not simply to 'upgrade by association'**.
- The subject matter of a comparison should not be chosen in such a way as to confer an **artificial advantage upon the advertiser** or so as to suggest that a better product is offered than is actually the case.
- Where appropriate, comparative advertising claims must be **supported by documentary evidence which is easily understood**. Where technical data is submitted it should be accompanied by a summary of the relative comparative points, **written in layman's language**.
- If the advertisement refers to a competitive test, such tests should have been conducted by an **independent and objective body** so that there will be no doubt as to the veracity of the test. In all cases the test must be supportive of all claims made in the advertising that are based on the test.
- The advertising should **never use partial results or stress insignificant differences to cause the consumer to draw an improper conclusion**.
- The product or service being compared should be **significant in terms of value or usefulness to the consumer**.
- Advertisements should not make unjustifiable use of the name or initials of any firm, company or institution nor take unfair advantage of the goodwill attached to the trade name or symbol of another firm or its product or the goodwill acquired by its advertising campaign.
- Advertisements should not be so similar to other advertisements in general layout, copy, slogans, visual presentation, music or sound effects as to be likely to mislead or confuse.

**The important points are that:**

- \* Use of reports, studies or papers to support a comparative claim is problematical for DTCA. The consumer cannot discern the subtle points of difference which often qualify a claim. Therefore claims based on such reports really cannot be made unless the claim is understandable and presented factually and truthfully in layman's language. There should be no implications or room for interpretation where the claimed result is not exactly what it appears.
- \* Ads cannot exploit the lack of knowledge of consumers and play on fear. They must not create anxiety and exploit the vulnerability of consumers who rely on these products for their health
- \* The comparative claim must be unquestionably accurate and true, and not likely to incite competitors to place comparative ads in response, as this is confusing for consumers, and creates further anxiety for them.
- \* A high standard of social responsibility is required for advertisements for therapeutic products. This implies that pharmaceutical companies should not engage in comparative advertising debates in the DTC media, as it creates uncertainty for the consumer and will result in visits to the doctor which may be unnecessary.
- \* Wording in comparative ads must be very carefully thought through from all perspectives, in order that the message given is strictly factual and unquestionable, in consumer language and doesn't create doubts in the mind of the consumer.
- \* Comparative claims must not be used to "extend" the approved purpose for the medicine beyond what has been approved by Medsafe. Nor must they contradict the approved purpose of another medicine that has been approved by Medsafe. Great care should be taken that direct or implied benefits claimed as a result of the comparison do not extend the therapeutic purpose beyond what was approved. This is an important point, as the use of comparative advertising may imply extended benefits which don't have official approval. The proper forum for "Extending the approved indication and purpose is for the company to submit an application to Medsafe for evaluation and approval. The advertising media should not be used to establish this "extension" by default.