had worked, it would have rendered even the most misleading mail order ad claim immune from enforcement action.

In the circumstances, the catalogue section complained of, was held to breach clauses 7.1 and 7.2 of the The British Code of Advertising, Direct Marketing and Sales Promotion (the CAP Code) and the complaint was upheld.

Why this matters

The key message here is that by making various claims as to equivalence with standard bulbs, the advertising became misleading unless it also stated ways in which the advertised products were not direct alternatives.

This assessment seems harsh in some ways, but is characteristic of the increased crackdown on 'greenwash' claims and all other advertising that takes advantage of environmental concerns.

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Financial services and sponsored links

Lee Rubin

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Who: Financial Services Authority and Office of Fair Trading

When: 20 August 2009

Where: United Kingdom

Law stated as at: September 2009

What happened

Following publication of the results of the Financial Services Authority (FSA) review into online sponsored links in November 2007, the FSA and the Office of Fair Trading (OFT) have published a joint guide for advertisers of financial products and services who use them.

FSA/OFT guide

The aim of the guide is to remind advertisers of their responsibilities and to raise standards of practice in this area. The FSA and OFT want to ensure that consumers are treated fairly and not misled when they use keywords to search for information on financial products and services.

Sponsored links are text-based advertisements returned from keyword searches on a search engine or associated website. Depending on content, a sponsored link may be a financial promotion when it induces customers to take out a regulated product or use a firm's services, as may a search engine result if the firm controls the content of a search return.

One way in which a sponsored link can give rise to problems is where the sponsored link is not in line with the search term used. This can lead to the potential customer being taken to a website that does not accurately reflect the expectations created by the search term used.

One example would be where the punter keys in 'independent financial adviser' and this links him to websites of firms that are not in the least independent. Another would be where using the search terms 'free advice' leads to websites of firms who charge for their counsel. Similarly problematic would be 'guaranteed returns' taking the punter to firms whose investment products are linked to the performance of stocks and shares and are therefore by no means return-guaranteed.

The full text of the guide can be found *here*.

Sponsored links could be regulated by the FSA (under the Financial Services and Markets Act (FSMA)), the OFT (under the Consumer Credit Act (CCA)), the Advertising Standards Agency (ASA), or a combination of the three.

The regulators

The FSA regulates advertising for:

- pensions;
- savings and investments — such as cash saving and bank accounts, bonds, gilts, company shares, collective investment schemes, and individual savings accounts;
- insurance — such as household and motor, travel, payment protection or critical illness; and
- mortgages (including Islamic and equity release mortgages) and reversion plans.

The OFT regulates consumer credit advertisements issued by, or for, the following types of business:

- businesses that lend money or offer other forms of credit, whether secured or unsecured; and
- businesses that act as credit brokers by introducing consumers to sources of credit, for example retailers or motor dealers.

The ASA regulates matters involving 'non-technical' elements of advertisements otherwise regulated by the FSA or OFT, such as taste and decency and social responsibility. The ASA regulates both technical and non-technical elements of financial advertisements that are not regulated by the FSA or the OFT.

The guide sets out an overview of the regulatory requirements for sponsored links under the FSA and OFT regimes.

FSA

The FSA rule is that communication must be clear, fair and not misleading. This rule covers all communications made by an authorised firm and includes advertising (or 'financial promotions' under the FSMA).

Regulatory requirements

Financial promotions are defined as ‘invitations or inducements to engage in investment activity’. Unless there is a relevant exemption, financial promotions should conform to requirements as laid out in the advertising sections of the FSA Handbook.

Therefore, even if a sponsored link falls outside the FSA’s regime (that is, it is exempt or is not a financial promotion) it still needs to be clear, fair and not misleading if communicated by an authorized firm. For example, a sponsored link could be viewed as misleading if key information, used to clarify a prominent headline claim, is not immediately accessible to the reader.

OFT

The key requirements of the CCA (and specifically for advertising, the Consumer Credit (Advertisements) Regulations 2004 (the Regulations)) are that:

- credit advertisements must not contain false or misleading information;
- credit advertisements must be clear and use language that is not difficult to understand; and
- key information such as the typical APR, where triggered, must be easily identifiable and placed with other important information.

The Regulations define an advertiser as anyone identified by the advertisement as willing to enter into transactions to which it relates, and they apply to all forms of advertising including advertisements that appear on web pages as banner advertising and sponsored links.

Dual regulation

Some firms may produce sponsored links containing elements that are regulated by both the FSA and OFT, for example secured and unsecured credit. They may also offer a range of secured loan products — some from providers who enter into, or administer, regulated mortgage contracts, and some from providers who do not — and again may want to advertise these in the same sponsored link.

In such cases it is likely that the resulting advertisement will need to comply with both the CCA and FSMA (so-called dual regulated advertising). The advertisement will in any case need to comply with the CPRs and so must not be misleading, whether by content or omission.

Practical assistance

The guide provides some important practical assistance to advertisers by setting out:

- suggested action for firms to ensure that sponsored links returned from search term are fair, clear and not misleading; and
- examples of compliance failings in mock advertisements for sponsored links that would give rise to regulatory concerns on the part of the FSA and the OFT.

The huge growth of search engine marketing has given rise to sub-optimal practices, and although this guide focuses on financial services,

Why this matters

there is little doubt that similar activities outside this sector would potentially attract regulatory attention.

What has to be in doubt, however, is whether the ASA-enforced CAP Code as presently drawn would extend to activity such as arranging for a search engine to display links to, for instance, websites advertising Hummer motor vehicles when the words ‘environmentally friendly cars’ are keyed in. Perhaps this will change as and when the CAP Code extends more fully into online advertising.

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Prices

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Who: ASA and Tesco Stores Ltd (‘Tesco’)

Where: United Kingdom

When: 16 September 2009

Law stated as at: 30 September 2009

The Advertising Standards Authority (ASA) recently published an adjudication relating to a complaint made by Alliance Boots (‘Boots’) regarding an advert published in the national press on behalf of Tesco. The advert, with the headline ‘Fill Your Boots At Tesco’, contained photographs of various products with the prices at which they were sold at Tesco and at Boots, claiming ‘All This £5.99 Cheaper Than Boots’.

What happened

One of the items featured was a pack of Gillette MACH3 razor blades that the advert claimed cost £11.24 at Boots and £9.76 at Tesco. Boots complained that the Boots price quoted for the product was only an online price and that the razor blades were on sale for £9.60 in Boots stores. They said that the advert was misleading as it did not make it clear that the prices quoted did not apply in-store. The advert did, however, contain small print stating ‘Prices checked online at Boots.com on 25/03/09’ and ‘Also available at www.tesco.com’.

Tesco said that they had been comparing their online and in-store prices (which were the same) with Boots’ online prices since April 2008 and they believed that Boots’ online and in-store prices did generally match, unless there was an exclusive promotion online.

Tesco suggested that they could have added a disclaimer to the advert stating that Boots’ online and in-store prices should match, subject to promotions and errors, but added that they felt this would be disproportionate.

‘Disproportionate to include a disclaimer’ say Tesco