

Brief to the Standing Senate Committee on Social Affairs, Science and Technology

Bill C-252 An Act to amend the Food and Drugs Act (prohibition of food and beverage marketing directed at children)

Prepared by: **Ad Standards** on invitation from the Standing Senate Committee

Date submitted: November 15, 2024

Who We Are

Ad Standards is providing this brief as the national not-for-profit advertising self-regulatory organization in Canada. Ad Standards' mission is to ensure advertising on all media in Canada is responsible, truthful, fair and accurate. Ad Standards accomplishes this through both proactive (preclearance) and responsive (complaints) mechanisms. There is a detailed overview of the organization at the end of this briefing paper.

The Canadian Code

For over 60 years, virtually all advertising in Canada has been subject to the *Canadian Code of Advertising Standards* (the Canadian Code)¹. The Canadian Code provides a set of principles that all advertisers must follow, many of which surpass standards set by government, both federally and provincially.

The fourteen clauses of the Canadian Code are as follows:

- Clause 1. Accuracy and Clarity
- Clause 2. Disguised Advertising Techniques
- Clause 3. Price Claims
- Clause 4. Bait and Switch
- Clause 5. Guarantees
- Clause 6. Comparative Advertising
- Clause 7. Testimonials
- Clause 8. Professional or Scientific Claims
- Clause 9. Imitation
- Clause 10. Safety
- Clause 11. Superstitions and Fears
- Clause 12. Advertising to Children
- Clause 13. Advertising to Minors
- Clause 14. Unacceptable Depictions and Portrayals.

Compliance with the Canadian Code is mandatory for all advertisements directed to Canadian consumers. The Canadian Code is applied to all advertisers, regardless of membership or support of Ad Standards, and is enforced through a robust system (guided by

¹ <https://adstandards.ca/code/the-code-online/>

detailed procedures) to respond to complaints from consumers², competitors and advocacy groups³.

An independent Standards Council adjudicates all consumer complaints under the Canadian Code that raise a potential violation. For Advertising Disputes raised by competitors or advocacy groups, an external panel of legal and industry experts convene to determine if a Canadian Code violation has occurred.

Under both processes, advertisers who are found to be noncompliant with the Canadian Code are required to amend or withdraw their advertisements. If they fail to do so, Ad Standards will notify carrying media and request their assistance in removing the contravening ad. Most carrying media will comply with this request. Ad Standards also reserves the right to notify the Competition Bureau and post a notice of noncompliance on its website of a violation if the advertiser refuses to voluntarily comply with the requirement to amend or withdraw their ad.

In Ad Standards' experience, compliance is achieved from the vast majority of advertisers who are advised that their advertising violates the Canadian Code. In the past 5 years, for example, there were only four instances where compliance was not immediately achieved; in each instance, compliance was ultimately achieved and advertisements were withdrawn prior to any action being taken by the Competition Bureau.

Council decision summaries are posted to educate industry as to what is acceptable and not acceptable under the Canadian Code⁴ and for transparency to the public.

As illustrated through the Canadian Code procedures, Ad Standards' mandate is to the benefit of consumers, government agencies, and the advertising industry. By Ad Standards holding advertisers to account, the public can have greater trust in the advertising that they see and know that there is a remedy available for noncompliance. That remedy – the reporting of brands and advertisers that are not compliant with the Canadian Code – has proven in itself to be an effective deterrent to noncompliance over the history of advertising self-regulation in Canada. This important and effective tool saves agencies like the Competition Bureau, for example, from having to dedicate resources to this effort and helps ensure the veracity of Canadian advertisements. This model forms the basis of the procedures applicable to the Industry Code (defined and discussed below).

²<https://adstandards.ca/complaints/consumer-complaint-procedure/>

³<https://adstandards.ca/complaints/advertiser-disputes/>

⁴<https://adstandards.ca/complaints/complaints-reporting/>

Advertising Preclearance

Ad Standards has been responsible for the preclearance of broadcast advertising directed to children under 12 through The Broadcast Code for Advertising to Children (Children's Code)⁵ since 1972. For over 50 years, Ad Standards and the Children's Clearance Committee has had responsibility for the oversight of all broadcast advertising to children in Canada. Notably in this context, the Children's Code includes provisions related to social values under Clause 11, whereby: "Children's advertising must not encourage or portray a range of values that are inconsistent with the moral, ethical or legal standards of contemporary Canadian society." This has long been applied under Ad Standards' relevant Interpretation Guideline⁶ to require that child-directed messages for food meet requirements, including the depiction of food as part of healthy eating habits consistent with Health Canada recommendations, that the quantity of food shown not exceed the labelled serving size, and not to disparage healthy eating or physical activity.

Through the Children's Code, Ad Standards' Interpretation Guideline, and provisions and guidelines related to child-directed advertising under the Canadian Code, and the systems administered by Ad Standards of both preclearance and complaints, Canada has one of the strongest frameworks in the world for regulating advertising directed to children.

Ad Standards began preclearing advertising for food and non-alcoholic beverages in 1992 when that responsibility passed to them from Consumer and Corporate Affairs Canada. The Ad Standards staff who review advertising compliance with the Industry Code (below), have expertise including decades of work evaluating advertising to children, as well as the food-related provisions of the *Food and Drugs Act* and regulations, and the Canadian Food Inspection Agency's Food Labelling for Industry.

In 1997, at the request of broadcasters and advertisers, Ad Standards Clearance Services began reviewing alcoholic beverage broadcast advertising to ensure compliance with the Canadian Radio-television and Telecommunications Commission (CRTC) Code for Broadcast Advertising of Alcoholic Beverages (Alcohol Code). Ad Standards communicates regularly with the CRTC regarding both the Children's Code and the Alcohol Code to keep the agency informed of our activities.

⁵ <https://adstandards.ca/precleanance/advertising-precleanance/childrens/childrens-code/>

⁶ <https://adstandards.ca/precleanance/advertising-precleanance/childrens/interpretation-guideline-clause-11-broadcast-code-advertising-to-kids/>

Also in 1997, Ad Standards began preclearing consumer-directed nonprescription drug advertising. Since that time, the health products preclearance complement has expanded to encompass the review of natural health product advertising, vaccine advertising, medical device advertising, and prescription drug direct-to-consumer-advertising (DTCA) and direct-to-consumer-information (DTCI). Ad Standards is recognized as an Advertising Preclearance Agency by Health Canada for a wide variety of consumer health products⁷.

In June 2023, when the *Code for the Responsible Advertising of Food and Beverage Products to Children* (the Industry Code) came into force, Ad Standards began preclearing advertisements in all media against that industry code and its accompanying Guide. This means that today, Ad Standards offers preclearance services for advertising in all media (broadcast, digital, social, out-of-home, etc.) in six different product categories: food, cosmetics, health products, children's advertising, alcohol, and now the Industry Code. Review services are offered in both English and French. Each piece of advertising submitted to Ad Standards is reviewed by two analysts (and supported by our Chief Legal Officer), against regulations, codes and industry standards. Our two-reviewer system ensures thoroughness of the analysis and consistency in the application of the rules across different campaigns. The expertise of advertising lawyers on staff is available to the analysts for support if required.

Preclearance in all sectors is available for all advertisers and agencies, whether or not the advertiser or agency is a member of Ad Standards. The service is provided on a fee-for-service model. For some regulated product categories, preclearance is required by the broadcasters to demonstrate their compliance with their conditions of licence. For others, and in other media, preclearance demonstrates the advertiser's due diligence to comply with applicable laws and codes.

About Advertising Self-Regulation in Canada

Self-regulation is a common form of governance in the advertising industry. World-wide, there are now approximately 50 advertising self-regulatory organizations;⁸ Canada was one of the first. Sitting at the intersection between the public, government agencies and regulation, and the advertising industry, Ad Standards brings a unique and specialized perspective to their skills of advertising analysis. There are multiple checks and balances in place to ensure the system is transparent and accountable.

⁷ <https://www.canada.ca/en/health-canada/services/drugs-health-products/regulatory-requirements-advertising/advertising-preclearance/list-canadian-advertising-preclearance-agencies.htm> |

⁸ <https://icas.global/advertising-self-regulation/faq/>

Ad Standards is proud to have fostered relationships with, and earned the trust of, so many regulators and government agencies, including Health Canada, the Competition Bureau, and the CRTC. It also the compliance partner for the federal government's own non-partisan advertising review process⁹, as well as for the government of British Columbia¹⁰.

There is often a misconception by those outside of the advertising industry ecosystem that statutory restrictions are mandatory, while self-regulatory frameworks are voluntary. While it may be true that Ad Standards does not have the authority to impose fines or other monetary penalties, Ad Standards is well recognized and respected in Canada. For virtually all brands, the negative consequences as being identified as noncompliant with one of Ad Standards' codes is penalty enough to encourage full participation in the process, and compliance with the assessments of our analysts or decisions of the Standards Council. Industry-wide standards or codes that are enforced by advertising self-regulatory bodies like Ad Standards are comprehensive and quasi-regulatory systems with enforcement carried out independently from industry. Unlike pledges¹¹, these standards and codes are, de facto, mandatory. All industry members are responsible for compliance or face reporting, or other enforcement measures.

Some also misunderstand the role of Ad Standards' members in the work of Ad Standards. While it is often the case in other industries and professions that self-regulatory bodies only govern the activities of their members, this is not the case for Ad Standards. As Canada's national self-regulatory body, Ad Standards' assessments, decisions, and codes apply to the entire industry, without regard to the membership status of the advertiser or agency whose work it is analyzing. Membership is a tangible demonstration of an organization's commitment to having an effective advertising self-regulatory organization in Canada, but it in no way impacts the outcome of a Standards Council decision or the analysis performed by preclearance staff.

⁹ <https://www.canada.ca/en/treasury-board-secretariat/services/government-communications/government-advertising/standards-review-non-partisan.html>

¹⁰ <https://www2.gov.bc.ca/gov/content/bc-procurement-resources/buy-for-government/goods-and-services-catalogue/advertising-and-marketing-services/non-partisan-advertising-standards>

¹¹ From 2007 until 2020, Ad Standards administered the Canadian Children's Food and Beverage Advertising Initiative (CAI), a program establishing principles for food and beverage advertising directed to children developed by leading food and beverage companies. These companies (participants)—representing an overwhelming majority of the food and beverage advertising in children's broadcast programming—publicly committed to using their creative and marketing activities to promote and support healthy dietary choices and healthy lifestyles to children under twelve years of age. Through the CAI, participants shifted their advertising emphasis to food and beverages that are consistent with principles of sound nutrition guidance, including those that are lower in total calories, fats, salts and added sugars, and higher in nutrients that are recognized as important to support health and well-being. Other participants committed not to direct any advertising to children. Ultimately, CAI resulted in a shift in the advertising choices made by participants, as well as the reformulation of many products sold in the Canadian marketplace. Even though the vast majority of Canadian food and beverage advertisers were participants in the program, it was voluntary and applied only to those who chose to participate. It is important to distinguish this past approach to that of the current Industry Code, which is mandatory across the industry.

Further, it should be noted that Ad Standards has a Board of Directors, as required of all not-for-profit organizations, and that this advisory and governance board has no say in the decisions of the Standards Council, the work of preclearance analysts, or the day-to-day operations of Ad Standards' staff. In fact, who serves on Ad Standards' board must first resign from any volunteer position on Standards Council or the Children's Clearance Committee in order to ensure the independence of the work of these bodies.

What is Ad Standards' Role in Implementing the Code for the Responsible Advertising of Food and Beverage Products to Children (Industry Code)?

Industry, and specifically the four industry associations leading its development, appointed Ad Standards to administer the Industry Code. Its role in administration mirrors its work described above in other sectors and, specifically, is achieved through industry education, preclearance and complaints-based enforcement.

Training of Ad Standards Analysts: In preparation for the Industry Code coming into effect, the Chief Legal Officer at Ad Standards spent many hours training the analysts at Ad Standards who were going to be reviewing advertising to determine compliance with the Industry Code. This was a collaborative process designed to ensure that the Industry Code and its accompanied guide be interpreted in a manner that is consistent with the objective of the Industry Code. As new analysts join the team, they are also trained extensively.

Industry Training: Prior to launch of the Industry Code on June 28, 2023, Ad Standards conducted webinars for the industry (advertisers, agencies, and media) and presented numerous times to conferences of lawyers practising in the fields of advertising and/or food regulatory law. This outreach was designed to educate industry, lawyers, and food regulatory specialists about the Industry Code, alert participants to the mandatory nature of the Industry Code, explain how Ad Standards would apply the Industry Code and its accompanying Guide, and the benefits of preclearance.

Since the Industry Code launched, Ad Standards CEO, its Chief Legal Officer and its Director of Clearance and senior analysts, continue to offer presentations and webinars related to the Industry Code. These presentations and webinars have included Ad Standards' own webinars, member presentations, conference presentations at third party conferences, and webinars to industry associations.

Preclearance: Under the Industry Code, only food and beverages that meet specified nutrient criteria may be advertised in a manner that is primarily directed to children under the age of 13.

Ad Standards' analysts review advertisements in all media to determine whether or not an ad is primarily directed to children according to the criteria established in the Industry Code and its accompanying guide. **While preclearance is voluntary, compliance with the Industry Code is mandatory for all advertisers** (see enforcement below).

As with all areas of preclearance, two analysts who have undergone trainings specific to this Industry Code review each piece of creative for thoroughness and consistency. The analysts consider a variety of factors in determining whether the advertising complies with the Industry Code: the nature and intended purpose of the product being advertising (the 'what'), the manner of presenting such advertisement (the 'how'), and the time and place it is shown (the 'where/when'). These criteria mirror the three criteria established in guidance from the Office de la protection du consommateur under Quebec's *Consumer Protection Act*. Under the Industry Code, no one factor is determinative. As Ad Standards' analysts have assessed in numerous reviews, an ad with a media buy that has fewer than 15% child-audience may still be considered child-directed if the advertisement otherwise is designed to primarily attract the attention of children.

Preclearance by Ad Standards, as an independent third party, provides advertisers with assurance that an ad is not primarily child-directed under the Industry Code. Those ads that are precleared and deemed to be compliant with the Industry Code are therefore not subject to the complaint procedure.

Note that where an advertisement for a food or beverage is submitted for either food preclearance, or broadcast to children preclearance, the submitter is reminded of its obligation to comply with the Industry Code and also advised of Ad Standards' preclearance service availability in that regard.

Enforcement: Ad Standards enforces the Industry Code through a complaints-based mechanism¹². Like the Canadian Code of Advertising Standards, for the Industry Code, reporting, compliance and enforcement apply to all advertisers in all media, regardless of whether they sign on to any code and regardless of membership in Ad Standards. Ad Standards has built an online portal to receive complaints from consumers, and clearly prompts form complaints specific to the advertising of food and beverages to children on the general complaints landing page¹³.

¹² <https://adstandards.ca/complaints/complaint-procedure-childrens-food-beverage-advertising/>

¹³ <https://complaints.adstandards.ca/pub/complaints>

For complaints related to an advertisement that has been precleared by Ad Standards Clearance Services and determined not to be primarily directed to children under the age of 13, the complainant will be advised that the ad is compliant and no further action will be taken.

For complaints related to advertisements that were not previously approved by Ad Standards Clearance Services under the Industry Code, these complaints are reviewed and adjudicated by the Director, Clearance Services, an analyst with experience in the preclearance of food advertising, children's advertising, and/or advertising under the Industry Code, and the Chief Legal Officer.

If an advertiser fails to comply with a decision requiring the advertiser to withdraw or amend their advertisement, Ad Standards will notify carrying media that the advertisement violates the Industry Code and seek their assistance to remove the ad from circulation/display/publication. Ad Standards will also name the advertiser its compliance report and may post a notice of noncompliance on its website of the violation.

Starting at the end of Q1 2025, Ad Standards will be reporting annually on the complaints received related to the Industry Code. Ad Standards hopes to raise awareness of the Industry Code so that more consumers are aware of its existence so that they can raise complaints if they have concerns about the advertising that they, or their children, see.

General Description of Ad Standards

Ad Standards (also referred to as Advertising Standards Canada) is the only national not-for-profit advertising self-regulatory organization in Canada. Its mission is to ensure advertising in Canada is truthful, fair and accurate. Supported by members, Ad Standards enhances legal compliance and ethical advertising practices, and build the public's confidence in Canadian advertising across all media.

Ad Standards reviews all consumer complaints against the *Canadian Code of Advertising Standards*, which sets the criteria for acceptable advertising in Canada. It also provides training and resources to marketing, legal and business leaders, focusing on issues relating to self-regulation and advertising clearance. Ad Standards actively participates in initiatives and exchange learnings with a global network of advertising self-regulatory organizations.

In addition, Ad Standards administers several programs intended to exceed current legislative requirements for specific types of advertising. These are referred to as Compliance Plus programs and includes the *Code for the Responsible Advertising of Food and Beverage Products to Children*, and others. And, analysts in the organization provide advertising preclearance for six regulated sectors. Preclearance services ensure compliance with specific sectoral legislation, regulations, codes, guidelines and/or industry guidelines.