

**Supplemental Brief to the Standing Senate Committee on Social Affairs, Science and
Technology in Response Questions Raised on November 21, 2024**

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 26, 2024

Ad Standards, the national not-for-profit advertising self-regulatory organization in Canada, appreciated the opportunity to testify before the Standing Senate Committee on Social Affairs, Science and Technology on November 21, 2024.

During that testimony, Ad Standards committed to follow up with responses to a number of specific questions of the Senators. Below, please find additional information in response to those questions and points of clarification that we hope will be of assistance to the Senators in their consideration of Bill C-252.

(a) Preclearance and Complaint Numbers

Catherine Bate, the CEO of Ad Standards, advised the Committee that Ad Standards would consider whether it is able to share the number of preclearance submissions submitted under the Code for Responsible Food and Beverage Advertising to Children (the “Industry Code”). Given the confidential nature of all submissions for preclearance to Ad Standards, we are unable to provide precise numbers.

We can disclose that our preclearance analysts review thousands of submissions each year. Our team of ten analysts and two directors, supported by our Chief Legal Officer, have reviewed over 7,600 submissions year-to-date across all preclearance divisions (food, cosmetics, health products, alcohol, children’s broadcast, and the Industry Code). As noted in our brief and testimony, each submission undergoes a thorough review by two analysts from the larger team. In our analysts’ assessment under the Industry Code, a material number (over 20%) of submissions have not been approved on first submission. In each instance, our analysts work with the submitters by providing directional suggestions and reviewing revisions to assist the submitter in reaching compliance, where compliance is achievable. In the less than 18 months of the program so far, the preclearance process has thereby been working as an effective mechanism to pivot the advertising industry to the new prohibitions and restrictions imposed by the Industry Code.

Each year, we also receive thousands of complaints from the public about advertising. As noted in testimony, in 2023 we received approximately 1700 complaints that were assessed for adjudication under the *Canadian Code of Advertising Standards*, one of several codes we administer. In the less than 18 months that we have administered the Industry Code, we have yet to receive any complaints, which is attributable to at least 2 reasons: first, the effectiveness of preclearance as a mechanism to impact the advertising that reaches the market; and second, the newness of the Industry Code itself.

The majority of Ad Standards' own education efforts to date have focussed on the advertising industry to support compliance with the Industry Code, and only some of these efforts reach the general public. Our awareness and education activities include: three webinars to industry totalling over 1,000 registrations; 6 presentations at industry, legal and regulatory compliance events, 14 email blasts to over 17,000 total recipients, 17 social posts on LinkedIn and X (formerly Twitter), featuring the Industry Code prominently on the homepage of our website for 16 consecutive months, and highlighting the Industry Code as a category for consumer complaint on our complaints portal throughout 2024.

(b) **Distinction Between Codes and Other Initiatives**

A variety of industry codes were referenced in the testimony, and this is likely the source of some confusion. We thought it would be helpful to try to explain the various codes for clarity.

The code that addresses the same concerns addressed by Bill C-252 is the *Responsible Code for Food and Beverage Advertising to Children* (referred to as the Industry Code in this brief). As mentioned, this is a mandatory code that applies to all advertisers of food and beverages in Canada and has been in effect since June 28, 2023.

There is also the *Broadcast Code for Advertising to Children* (Broadcast Code)¹ which has been in effect for decades. It applies to all ads that appear in or immediately adjacent to children's programming in broadcast media. It also applies to ads that the broadcasters deem to be child-directed. It applies to all products and services; it is not limited to food and beverages, but does also apply to food and beverages. The Broadcast Code does not prohibit advertising of specific items, but sets our parameters for responsible advertising given the credulity of children. Compliance with the Broadcast Code is a mandatory condition of license imposed by the CRTC.

The *Canadian Code of Advertising Standards* (the Canadian Code)² sets the overarching criteria for acceptable advertising in Canada. The Canadian Code was created in 1963 and is the cornerstone of advertising self-regulation in Canada. It applies to virtually all advertising in all media. The success in Ad Standards' enforcement of the Code through a complaints based system provides the template for the use of a complaints based enforcement system for the Industry Code.

¹ <https://adstandards.ca/preclearance/advertising-preclearance/childrens/childrens-code/>

² <https://adstandards.ca/code/the-code-online/>

The Canadian Code contains a provision related to advertising to children (Clause 12) which states:

Advertising that is directed to children must not exploit their credulity, lack of experience or their sense of loyalty, and must not present information or illustrations that might result in their physical, emotional or moral harm.

Child-directed advertising in the broadcast media is separately regulated by the Broadcast Code for Advertising to Children, also administered by Ad Standards.

Advertising to children in Quebec is prohibited by the Quebec Consumer Protection Act.

There is also an interpretation guideline³ related to this Clause that addresses depictions of food in advertising to children, and is in addition to the requirements of the Industry Code.

There was also discussion at the Hearings, and evidence of self regulation's effectiveness, focussed on the Canadian Children's Food and Beverage Advertising Initiative (CAI). This was a voluntary pledge which started in 2007 and ended with a final report issued in 2020. Any data related to the prevalence of advertising to children, or on childhood obesity, dating prior to the implementation of the new Industry Code under 18 months ago, is based on a false equivalence of these two separate and distinct programs. The CAI did not have a preclearance mechanism, was only applicable to those advertisers who chose to opt in to the program, and permitted advertisers to set their own specific pledges; in these ways and more Industry Code differs fundamentally from the CAI.

(c) **Fees for Advertisers to Complain Under the Industry Code**

A question was raised about whether advocacy groups (referred to in the hearing as self-interest groups) are required to pay a fee in order to submit a complaint under the Industry Code. Ms. Bate advised that the fee was *de minimus* and was intended to be a cost recovery for Ad Standards which is a not-for-profit organization, and apologized that she could not recall the quantum of that fee in the moment. Following up on that question, we can confirm that the fee for an advertiser (including advocacy groups that qualify as advertisers) to file a complaint is currently \$250 for Ad Standards members and \$500 for non-members. This was intentionally set substantially lower than the fee that advertisers pay to bring a complaint under the *Canadian Code of Advertising Standards* (currently \$8500 for Ad Standards members and \$10,500 for non-members) to encourage use and access. Please note that to qualify as an advertiser that is

³ <https://adstandards.ca/code/interpretation-guidelines/>

required to pay the fee to file a complaint, the advocacy group must engage in advertising itself, which includes advertising to influence people's choice, opinion or behaviour. If the advocacy group is not itself an advertiser, then it can file a complaint as a consumer. There is no charge for any consumer complaint process administered by Ad Standards.

(d) Funding Directly from Advertising Industry

Ms. Bate was also asked about sources of funding for Ad Standards. The organization's primary sources of funding are membership and fee-for-use preclearance services, available to both members and non-members. Members include not only advertisers and advertising agencies, but also associations, media, governments, law firms, and professional and research services companies. Preclearance services are used by advertisers and their agencies, and the media who host the advertising. Ad Standards also receives funds to administer additional compliance programs, including those related to automotive advertising, alcoholic beverage advertising, and governmental non-partisan advertising programs. There is no similar program funding behind the Industry Code; instead preclearance service fees are intended to cover the further costs of reporting and administrate complaints related to the Industry Code so that preclearance makes the program self-funding based on preclearance activity.

(e) Application of the Industry Code

There were several questions posed to other witnesses about the scope and application of the Industry Code that Ad Standards was not provided with the opportunity to address. We provide this information in hopes that it helps to clarify remaining misunderstandings about the application of the Industry Code.

The current Health Canada proposed policy is narrower in scope than the Industry Code, although certain misunderstandings about the Industry Code may make it seem otherwise. The regulator's proposed policy, based on currently available information, will only apply to advertising on digital and broadcast media. The Industry Code applies to all media with few exceptions. Were a form of this policy to be implemented in regulation under Bill C-252, it would therefore leave unregulated important activities that are, in fact, addressed by the Industry Code, including children in schools, cinemas, games, print, out-of-home, charitable initiatives, sponsorships, product placements and product integrations.

As members of the Senate are aware, advertising is a subset of marketing; the terms are not interchangeable. This fact, commonly understood in the advertising industry, is consistent with the treatment by Health Canada of all of its restrictions related to advertisements for food, drugs

and cosmetics under the *Food and Drugs Act*. Health Canada does not incorporate packaging, labelling or product shape into its rules of advertising as those marketing elements are regulated distinctly.

It must be noted that the proposed policy from Health Canada⁴ which is intended to be the basis of the regulations under Bill C-252, will apply to advertising only, not marketing. In fact, the proposed policy will only apply to broadcast and digital advertising. A screenshot from the Health Canada website taken on November 22, 2024 is set out below:

Summary of proposed policy

Target population: Children under 13 years old.

Scope of restrictions: Television and digital media.

Advertisements subject to restriction: Advertisements primarily directed at children for certain foods. Brand advertisements (where no identifiable food is shown or referenced by name) would not be captured by the restrictions.

Foods subject to restriction: Foods with added sodium, free sugars or added fat that exceed the 'low in' nutrient content claim thresholds for sodium, sugars and/or saturated fat. These claims are incorporated by reference in the *Food and Drug Regulations*. Free sugars are added sugars, as well as the sugars naturally present in honey, syrups, fruit juice and fruit juice concentrates.

This approach by Health Canada is consistent with the fact that the language of the actual amendment to the *Food and Drugs Act* under Bill C-252 references 'advertises' only. It does not refer to marketing, despite reference to marketing in the preamble and title.

Under the Industry Code, the assessment of whether an advertisement is 'primarily directed to children' is a three-prong test – the what, the how and the where/when – mirroring the analysis under Quebec's *Consumer Protect Act*. As mentioned multiple times in the Industry Code and accompanying Guide, no one factor is determinative. There seem to be misunderstandings in testimony heard by the Committee, largely relating to rebuttable presumptions that we wish to address.

In testimony on November 20, 2024, it was stated that "When defining time and place, the new industry self-regulatory code states that when child audiences fall below 15%, you can target children with unhealthy food products. This is very different from what is seen in Quebec where child targeting is never allowed, regardless of audience composition." This statement is inaccurate and mischaracterizes how the Industry Code is applied.

⁴ <https://www.canada.ca/en/health-canada/services/food-nutrition/healthy-eating-strategy/policy-update-restricting-food-advertising-primarily-directed-children/proposed-policy.html>

While the Guide contains presumptions as to when an ad could be considered to not be primarily directed to children based on the where/when, these presumptions are entirely rebuttable. It is important to note that there have been multiple advertisements reviewed by Ad Standards preclearance analysts for compliance under the Industry Code that are determined to be primarily directed to children *regardless* of the media. In these cases, the advertiser cannot run the ad in question in any media – even media that has a presumption of not being child-directed. Ad Standards analysts do take the position that placement within or immediately adjacent to children's television broadcast or media is virtually a non-rebuttable presumption, and the ad would be deemed to be primarily directed to children.

There was a further misunderstanding concerning the application of the Industry Code to digital media. The Industry Code does apply to digital media, and it does apply to influencers of all ages. As mentioned above, the threshold test under the Industry Code is whether the advertising is 'primarily directed to children'. And while there are presumptions related to digital media where there are age gates (with specific examples of alcohol websites), all presumptions in the Industry Code and accompanying Guide are rebuttable.

(f) Clarification of Enforcement Procedure

Several Senators noted that the Industry Code included permissive or weak steps that Ad Standards would take if an advertiser was found to be in violation of the Industry Code and failed to amend or withdraw its ad. It is important to note that the Industry Code was released before Ad Standards refined its procedures to administer it; the Industry Code provides a framework only.

Ad Standards developed a comprehensive complaints procedure⁵ that is posted on the Ad Standards website. The procedure has been in effect since October 1, 2024. This complaints procedure strengthens the language in the Industry Code and provides that if an advertiser fails to comply with a decision of Ad Standards or an appeal decision, Ad Standards:

- (a) **will** advise exhibiting media of the advertiser's failure to co-operate and request media's support in no longer exhibiting the advertising in question; and
- (b) may publicly declare, in such manner as Ad Standards deems appropriate, that the advertising in question, and the advertiser who will be identified, have been found to violate the Code for Children's Food and Beverage Advertising. [*emphasis added.*]

⁵ <https://adstandards.ca/complaints/complaint-procedure-childrens-food-beverage-advertising/>

As noted in our brief and in testimony, the overwhelming majority of cases of noncompliance under the *Canadian Code of Advertising Standards* result in voluntary and immediate compliance without the need for any further enforcement; we anticipate the same result under the Industry Code but have these further means of enforcement, should it be necessary.