

# OF 2019 – 1 - Consultation Proposed Truth in Advertising Rules

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Launch Date: 11 February 2019

Closing Date for comments: 13 March 2019



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## A. Introduction

1. The Utility Regulation and Competition Office (the ‘**Office**’) is the independent regulator for the electricity, information and communications technology (‘**ICT**’), water, wastewater and fuels sectors in the Cayman Islands. The Office also regulates the use of electromagnetic spectrum and manages the .ky Internet domain.
2. Different decisions by the Office will affect persons and organisations throughout the country in different ways. It is therefore important that the Office makes regulatory decisions with the appropriate input from persons with sufficient interest or who are likely to be affected by the outcome of such decisions. Consultation is an essential aspect of regulatory accountability and transparency and provides the formal mechanism for these persons to express their views in this manner. The requirement for the Office to consult is mandated in its enabling legislation.
3. Under its enabling legislation, the Office has several principal functions. One of these principal functions is to protect the short- and long-term interests of consumers in relation to utility services. The Office may do so by making administrative determinations, decisions, orders and regulations.
4. The purpose of this consultation paper is to seek the views of operators, the general public, and other interested parties regarding the draft Utility Regulation and Competition Truth in Advertising Rules (‘**the draft Rules**’) in relation to all sectors regulated by the Office (Annex 1).

## B. Legal Framework

5. The Office is guided by its statutory remit in developing the draft Rules, notably the provisions which follow.
6. Section 6(1)(c) of the Utility Regulation and Competition Office Law 2016 (‘**URC Law**’) outlines that one of the principal functions of the Office, in the markets and sectors for which it has responsibility, is “*to protect the short- and long-term interests of consumers in relation to utility services...*”.
7. Section 6(3) of the URC Law states that the Office in performing its functions and exercising its powers under this or any other Law, the Office “has the power to carry on any activity which appears to it to be requisite, advantageous or convenient for or in connection with the performance of its functions or the exercise of its under powers” under the URC Law or any other

Law. Therefore, the Office has prepared the following Rules in relation to truth in advertising that it expects licensees to consider and apply when advertising services and/or products after publication.

8. The proposed Truth in Advertising Rules (the “Rules”) outlines how the Office would normally consider the appropriateness of marketing communications made relating to the provision of Electricity, Fuels, ICT and Water Services (“Sectoral Utility Services”).
9. Section 7(1) of the URC Law requires the Office, before issuing an administrative determination which in the reasonable opinion of the Office is of public significance, “... *to allow persons with sufficient interest or who are likely to be affected a reasonable opportunity to comment on the draft administrative determination.*”

## C. Objectives of the Draft Truth in Advertising Rules

10. The Office considers that it is in the interests of the public that all marketing communications made available to consumers by Sectoral Providers be truthful, and not deceptive or unfair. Therefore, the Office prepared the proposed Truth in Advertising Rules, which includes the definition of marketing communications and the Office’s expectations of Sectoral Providers in relation to such communications, as well as the remedies available to the Office in relation to the breach of the rules and the potential consequences.
11. The draft Rules are attached to this consultation document, and are summarised in the paragraphs below. The Office strongly encourages respondents to read the draft Rules prior to submitting comments, or to answering the consultation questions in the next section, as this summary is not intended to be exhaustive.
12. The main objective of the draft Rules is to outline how the Office would normally consider the appropriateness of marketing communications made relating to the provisions of Electricity, Fuels, ICT and Water services.
13. The draft Rules consists of forty-one (41) rules, which are divided into ten different parts. In addition to addressing the Office’s expectations of Sectoral Providers in relation to marketing communications, the Rules also address the following:
  - i. Substantiation, Qualification and Exaggeration;
  - ii. Pricing statements;
  - iii. Imitation and Denigration;
  - iv. Endorsements and Testimonials; and

- v. Guarantees and After-Sales Services.

## D. Consultation Questions

- 14. Based on the above, the Office invites all interested parties to submit their comments, with supporting evidence, on the following questions:

**Question 1: Do you agree that rules should be in place to regulate marketing communications? Why or why not?**

**Question 2: What are your views on the Office's expectations of Licensees in relation to marketing communications?**

**Question 3: What are your views on the proposed remedies and consequences?**

**Question 4: Please provide your views on any other matters you consider relevant to this Consultation.**

## E. How to Respond to This Consultation

- 15. This consultation is conducted in accordance with the Consultation Procedure Guidelines determined by the Office and found on the Office's website.<sup>1</sup>
- 16. The Office considers that because the draft Rules are published as part of this consultation, this consultation will be conducted as a single-phase consultation over a period of thirty (30) days. If, upon review of the responses to the consultation, it becomes clear that a second phase of consultation is required, a further notice will be issued accordingly. As noted above, **section 7(1)** of the URC Law states that prior to issuing an administrative determination of public significance, the Office shall "*issue the proposed determination in the form of a draft administrative determination.*" The Office considers the attached draft Rules to be a "*draft administrative determination*" for the purposes of **section 7(1)**.
- 17. All submissions on this consultation should be made in writing, and must be received by the Office by **5 p.m. on 13 March 2019** at the latest.

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<http://www.ofreg.ky/upimages/commonfiles/1507893545OF20171DeterminationandConsultationProcedureGuidelines.pdf>

18. The Office will post any comments received within the stated deadline on its website by **5 p.m. on 27 March 2019**.
  
19. Submissions may be filed as follows:  
  
By e-mail to:  
[consultations@ofreg.ky](mailto:consultations@ofreg.ky)  
  
Or by post to:  
Utility Regulation and Competition Office  
P.O. Box 2502  
Grand Cayman KY1- 1104  
CAYMAN ISLANDS  
  
Or by courier to:  
Utility Regulation and Competition Office  
3<sup>rd</sup> Floor, Alissta Towers  
85 North Sound Rd.  
Grand Cayman  
CAYMAN ISLANDS
  
20. The Office expects to issue a Determination on the matters addressed by this Consultation by the end of the second quarter of 2019.

## F. Next Steps

21. If it is determined that it appropriate to proceed, and upon publication of these new Truth in Advertising Rules, the previous Information and Communications Technology Authority Truth in Advertising Guidelines will be repealed.

OF 2019 – 1 - Consultation  
Proposed Truth in Advertising Rules  
ANNEX 1

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# Truth in Advertising Rules

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**UTILITY REGULATION AND COMPETITION OFFICE  
THE CAYMAN ISLANDS**

Publication Date: [ ]



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## A. Introduction and Objectives

1. The Utility Regulation and Competition Office (the “**Office**”) is the independent regulator for the electricity, information and communications technology (“**ICT**”), water, wastewater and fuels sectors in the Cayman Islands. The Office also regulates the use of electromagnetic spectrum and manages the .ky Internet domain.
2. One of the functions of the Office, in accordance with section 6 of the Utility Regulation and Competition Law (the “**URC Law**”), is to protect the short- and long-term interests of consumers in relation to utility services. Section 6(3) provides that “...the Office has the power to carry on any activity which appears to it to be requisite, advantageous or convenient for or in connection with the performance of its functions or the exercise of its under powers” under the URC Law or any other Law. Therefore, the Office has prepared the following Rules in relation to truth in advertising that it expects licensees to consider and apply when advertising services and/or products after publication.
3. These ‘Truth in Advertising’ Rules (the “**Rules**”) outlines how the Office would normally consider the appropriateness of marketing communications made relating to the provision of Electricity, Fuels, ICT and Water Services.
4. In the event of a complaint or dispute about such marketing communications being made to the Office, the Office would normally expect to follow the Rules when making its subsequent determination. However, as the Office cannot legally fetter its discretion in advance, the Office retains the ability to depart from the Rules where the circumstances warrant it.
5. These Rules are relevant to all members of the public, licensees and stakeholders who could be affected by the regulatory decisions made by the Office, and are applicable to all marketing communications by licensees made via any form of medium or delivery. These Rules replace the former Information and Communications Technology Authority’s Truth in Advertising Guidelines. It should be noted that these Rules do not restrict the use of other remedies that a Consumer may have, such as a contractual or statutory right.

## B. Definitions

6. In the Rules:

‘Claim’ means an assertion of the truth of something. For the purposes of these Rules, a claim can be implied or direct, written, spoken or visual;

‘Consumer’ means a person who uses, or may use, the Utility Services of a Sectoral Provider which is intended for private use;

‘Sectoral Provider’ has the same definition as in the Utility Regulation and Competition Law (as revised);

‘Marketer’ includes but is not limited to an advertiser, promoter or direct marketer;  
‘Marketing Communications’ includes but is not limited to:

- advertisement in newspapers, magazines, brochures, leaflets, circulars, mailings, e-mails, text transmissions (including SMS and MMS), fax transmissions and other electronic or printed material;
- advertorials (being an advertisement feature, announcement or promotion, the content of which is controlled by the marketer, not the publisher, that is disseminated in exchange for a payment or other reciprocal arrangement);
- cinema, television, radio, video, DVD advertisements;
- online advertisements, web search listings, preferential listings on price comparison sites, viral advertisements, in-game advertisements and other online advertisements and promotions;
- point-of-sale displays;
- posters and other promotional media (including moving images);
- promotions; and,
- sponsorships.

‘Material Information’ means information that the Consumer needs in order to make an informed decision in relation to the purchase or continued use of a Sectoral Utility Service.

‘Sectoral Utility Services’ means service, products and ancillary items in relation to the markets and sectors for which the Office has responsibility as outlined in the URC Law.

For Marketing Communications that quote prices for advertised Sectoral Utility Services, the definition of Material Information includes:

- the main characteristics of the Sectoral Utility Services;
- the identity (for example, a trading name) and geographical address of the Marketer and any other trader on whose behalf the marketer is acting;
- the price of the advertised Sectoral Utility Services, or if the nature of the Sectoral Utility Services is such that the price cannot be calculated in advance, the manner in which the price is calculated;
- delivery or installation charges, if any;
- the arrangements for payment, delivery, performance or complaint handling, if those differ from the arrangements that consumers are likely reasonably to expect; and,
- that the Consumer as a customer of that Sectoral Provider has the right to cancel his or her contract, if they have that right.

## C. The Office’s Expectations

7. All Marketing Communications should be truthful, and not deceptive or unfair. Any specific claims mentioned in Marketing Communications should be able to be substantiated with credible evidence.

8. Marketing Communications are considered deceptive if they contain a statement, or omits information, that is likely to mislead reasonable consumers and is important to a consumer's decision to buy or use the service and/or product.
9. Marketing Communications are considered unfair if they cause or are likely to cause substantial loss to the consumer which a consumer could not reasonably avoid, and this loss is not outweighed by the benefit to the consumer.
10. Obvious exaggerations/Claims ('puffery') about the Sectoral Utility Services being marketed that the reasonable Consumer who sees such Marketing Communications is unlikely to take literally are allowed, provided such exaggerations/Claims do not materially mislead the reasonable Consumer, or be likely to do so.
11. Marketing Communications should not materially mislead the reasonable Consumer or be likely to do so by, among other things:
  - i. omitting Material Information;
  - ii. hiding Material Information; or,
  - iii. presenting Material Information in an unclear, unintelligible, ambiguous or untimely manner.

Whether the omission or presentation of Material Information is likely to mislead materially a Consumer, or be likely to do so, will depend on:

- i. the context;
- ii. the medium and if the medium of the Marketing Communication is constrained by time or space;
- iii. use of subliminal messaging;
- iv. inconsistent information such as an image which conveys information different from text or voice track; and/or,
- v. the measures that the Marketer may take to make that Material Information available to the Consumer by other means.

Marketing Communications should not materially mislead the Consumer, or be likely to do so, by omitting the identity of the Marketer. Subjective Claims about the Sectoral Utility Services should not materially mislead the Consumer, or be likely to do so: in particular, Marketing Communications should not imply that expressions of opinion by the Marketer are objective Claims.

## D. Substantiation, Qualification and Exaggeration

12. Before distributing or submitting a Marketing Communication for publication, Marketers should hold credible evidence to prove Claims that Consumers are likely to regard as objective, and that are capable of objective substantiation. The Office may regard Claims as misleading in the absence of adequate substantiation by documentation or otherwise.
13. Marketing Communications should state significant limitations and qualifications of the advertised Sectoral Utility Services, such limitations and qualifications may clarify but should not contradict the Claims that they intend to qualify.

14. All limitations and qualifications must be presented clearly, including being located and presented in such a manner as to be clearly legible and/or audible, where applicable. This precludes techniques where information or disclaimers are presented rapidly through images or sound or voice tracks.
15. Marketing Communications should not mislead Consumers, or be likely to do so, by exaggerating the capability or the performance of a Sectoral Utility Service.
16. Marketing Communications should not present rights given to Consumers in law as a distinctive feature of the Marketer's offer.
17. Marketing Communications should not suggest that the Marketer's Claims about the Sectoral Utility Services being marketed are universally accepted if a significant division of informed or scientific opinion about such a Claim exists.
18. Marketing Communications should not suggest that the holding of Sectoral Licence is a sign of satisfactory or great Sectoral Utility Services.

## E. Pricing

19. Price statements about the Sectoral Utility Services being marketed should:
  - (a) include statements about the manner in which the price will be calculated as well as the definite prices; and
  - (b) include governmental surcharges, fees and miscellaneous charges that are collected from consumers on behalf of government or appropriate authority, and any costs the law allows the Sectoral Provider to pass onto its consumer as a surcharge; and,
  - (c) not mislead by omission, undue emphasis or distortion and must relate to the Sectoral Utility Services featured in the Marketing Communication.
20. Marketing Communications that state prices of the Sectoral Utility Services should also state the applicable delivery, freight or postal charges or, if those cannot be reasonably calculated in advance, state that such charges are payable.
21. If the price of one Sectoral Utility Service depends on another, Marketing Communications should make clear the extent of the commitment the Consumer must make to obtain the advertised price.
22. Claims about the quality of a Sectoral Utility Service provided or to be provided, such as "up to" and "from", should not exaggerate the availability or amount of benefits likely to be obtained by the Consumer when using the Sectoral Utility Services.
23. Marketing Communications should not describe a Sectoral Utility Service as being "free" or "without charge", or imply such a case or similar, if the Consumer has to pay anything other than the unavoidable cost of responding and collecting or paying for

the delivery of the Sectoral Utility Services. In addition, such communications should not misrepresent the Consumer's opportunity to purchase the Sectoral Utility Services at the terms presented. If the supply of the sale item is limited, or the seller can fulfil only limited demand, this must be clearly stated in the advertisement.

## F. Comparisons

24. The Office will likely consider unqualified superlative Claims as comparative Claims against all competing Sectoral Utility Services, and any superiority Claims (i.e. any Claims that the Sectoral Provider's Sectoral Utility Services is better than a competitor's) must be supported by credible evidence unless such Claims are obvious puffery.
25. Objective superiority Claims about a Sectoral Utility Service must make clear the aspect of the Sectoral Utility Service or the Marketer's performance providing that service that is claimed to be superior and must be supported by credible evidence.
26. Marketing Communications that include a comparison with an identifiable competitor must not materially mislead the Consumer, or be likely to do so, about either the advertised Sectoral Utility Service or a competing Sectoral Utility Service, and should:
  - compare Sectoral Utility Services that meet the same need or are intended for the same purpose;
  - compare one or more material, relevant, verifiable and representative feature of those Sectoral Utility Services, which may include price; or,
  - not create confusion between the Marketer and its competitors or between the Marketer's product, service and trademarks, trade name, or other distinguishing mark and that of a competitor.
27. Marketing Communications that include a comparison with an unidentifiable competitor should not materially mislead the Consumer, or be likely to do so, and the elements of such comparison should not be selected to give the Marketer an advantage.

## G. Imitation and Denigration

28. Marketing Communications should not materially mislead the Consumer, or be likely to do so, about who provides the advertised Sectoral Utility Service, nor should they unfairly discredit or denigrate another Sectoral Utility Service, Marketer, trade mark, service mark, trade name, or other distinguishing mark.
29. Marketing Communications should not take unfair advantage of the reputation of a competitor's trade mark, service mark, trade name, or other distinguishing mark or of the designation of origin of a competing product.
30. Marketing Communications should not present a Sectoral Utility Service, including any products used to provide that service, as an imitation or replica of a product or service with a protected mark or trade name.

## H. Endorsements and Testimonials

31. Endorsements and testimonials should relate to the advertised Sectoral Utility Services and such endorsements and testimonials must be reasonably current.
32. Claims that are likely to be interpreted as factual and appear in an endorsement or testimonial must not materially mislead the Consumer, or be likely to do so.
33. Marketing Communications should not feature an endorsement or testimonial without the express permission of the person quoted, sourced or referenced.
34. Marketers should not refer in a Marketing Communication to advice received from the Office, or imply endorsement by the Office.

## I. Guarantees and After-Sales Service

35. Marketing Communications should not use the word “guarantee” in a way that could cause confusion about a Consumer’s rights.
36. Any guarantees advertised about a Sectoral Utility Service should include all related warranties, after-sales service agreements, and any care packages and similar products.
37. Marketing Communications should make clear each significant limitation to an advertised guarantee and supply the full terms of that guarantee before the Consumer is committed to taking up the guarantee.
38. Marketers should promptly refund Consumers who make valid claims under an advertised money- back guarantee.

## J. Remedies and Consequences

39. If a Marketing Communications is not truthful, or is deceptive or unfair, the Sectoral Providers may be sanctioned as follows:
  - a) Imposition of an administrative fine under section 91 of the URC Law;
  - b) letter to terminate use of the Marketing Communication;
  - c) letter of public reprimand;
  - d) letter of reprimand will be considered in an application for licence renewal;
  - e) letter recommending the payment of compensation to the Consumer who made the complaint;
  - f) the provision to the complainant consumer the name and address of the Marketers for the purpose of service civil or criminal court proceedings; and/or
  - g) criminal complaint of fraud.
40. If any specific claims mentioned in Marketing Communications cannot be immediately be substantiated with credible evidence (i.e. not in their file, but eventually produced and is credible evidence) the Sanctions include:

- a) Imposition of an administrative fine under section 91 of the URC Law;
  - b) letter to terminate use of the Marketing Communication; and/or
  - c) letter of reprimand which will be considered in an application for licence renewal.
41. If a Marketing Communications is not truthful, or is deceptive or unfair, the Consumer may make a complaint to the Office as outlined in the Consumer Complaints Appeals Procedure Guidelines.

[END]