

# Advertising & Marketing

*Contributing editor*  
**Rick Kurnit**



**2018**

GETTING THE  
DEAL THROUGH

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# Advertising & Marketing 2018

*Contributing editor*

**Rick Kurnit**

**Frankfurt Kurnit Klein & Selz, PC**

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# Preface

## Advertising & Marketing 2018

Fifth edition

**Getting the Deal Through** is delighted to publish the fifth edition of *Advertising & Marketing*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Hong Kong and Russia.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Rick Kurnit of Frankfurt Kurnit Klein & Selz, PC, for his continued assistance with this volume.

GETTING THE   
DEAL THROUGH 

London  
April 2018

# Japan

Chie Kasahara

Atsumi & Sakai

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## Legislation and regulation

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### 1 What are the principal statutes regulating advertising generally?

Advertising activities are generally regulated in Japan by the following acts:

- the Act against Unjustifiable Premiums and Misleading Representations (AUPMR);
- the Act on Specified Commercial Transactions (ASCT);
- the Medical Care Act;
- the Act on Pharmaceuticals and Medical Devices (formerly the Pharmaceutical Affairs Act);
- the Health Promotion Act; and
- the Outdoor Advertisement Act.

There is also a 'fair commission code' applicable to advertising, and a number of advertising guidelines issued by government bodies responsible for specific industries.

### 2 Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

The Secretary General of the Consumer Affairs Agency and prefecture governors are responsible for issuing advertising regulations and enforcing rules on advertising in accordance with the AUPMR. The Minister of the Economy, Trade and Industry (METI) also has responsibility in accordance with the ASCT.

In addition, the Japan Advertising Review Organization (JARO) ([www.jaro.or.jp](http://www.jaro.or.jp)), a self-regulatory body established by the advertising industry, handles complaints and enquiries from consumers, competitors and others, and makes recommendations for the modification or discontinuance of questionable representations.

### 3 What powers do the regulators have?

If a representation is found to be misleading, the Secretary General of the Consumer Affairs Agency (CAA) may order the advertiser to cease the misleading representation, to take the measures necessary to prevent a reoccurrence or to take any other necessary action, including public notice of the matters relating to the implementation of such measures (collectively, a cease-and-desist order). Such an order may be issued even if the violation has already ceased to exist.

In addition, where an advertiser has misrepresented the quality and value of a product or services, the CAA may order the advertiser to pay 3 per cent of sales value, for up to three years, of the represented products or services if the value is more than ¥50 million (Penal Charge System). The advertiser may deduct the penal charge through submitting a refund plan to the CAA. In such an event, the president of the CAA authorises the refund plan and the advertiser refunds the amount authorised by the CAA to the applying customers and reports the refund to the CAA within one week. The CAA may deduct a penal equivalent to the amount refunded. If the amount refunded exceeds the amount for the penal charge, the CAA will not order payment of the penal charge.

If a prefectural governor recognises that misleading representations have been made in violation of the AUPMR, he or she may issue a cease-and-desist instruction similar to the order described above. If

the advertiser does not comply with this instruction, or the prefectural governor finds it necessary to put an end to a violation, or prevent its reoccurrence, he or she may take appropriate measures, including the issuance of a cease-and-desist order. A prefectural governor may ask the advertiser itself, or others who have a business relationship with the advertiser (eg, its advertising agent, media company, etc) to report on the misleading representations, and may also have his or her officials enter the advertiser's offices or other places of business, or those of other persons who have a business relationship with the advertiser, to inspect its books and documents, etc, or to ask questions about the persons concerned. The power of a prefectural governor has been strengthened, allowing him or her to independently take appropriate measures, without going through the CAA.

Where a seller or a service provider designated under the ASCT has violated the obligation to indicate certain information concerning goods, rights or services (eg, price, payment due and method, and cancellation) in an advertisement, the prohibition of misleading advertising, or the prohibition from sending email advertising without consent, and if the METI finds that the conduct is likely to significantly prejudice the fairness of a transaction arising from mail order sales and the interests of the purchaser or the service recipient, or if the seller or the service provider fail to comply with the above obligations and abide by the above prohibitions, the METI may order the seller or the service provider to suspend business activities that are connected with such mail order sales, either partially or completely, for a specified period of no longer than one year.

### 4 What are the current major concerns of regulators?

The CAA has concerns over compliance with existing laws by new means of advertising through the internet, such as the many 'advertising agents' that offer services related to providing positive feedback and comments on evaluation sites where there is an assumption of voluntary 'word-of-mouth' evaluation. The CAA has announced that such staged word-of-mouth evaluations are deemed to be an unjustifiable representation under the AUPMR.

Misleading representations and supply issues in relation to food-stuffs have been a problem, flaring up again in Japan in 2013, with instances of processed meat represented as high-quality beef and 100 per cent reconstituted juice sold as fresh juice, etc.

There are concerns over labelling that is misleading but not fraudulent. For example, 'salmon' can include rainbow trout and trout salmon, not just red salmon and silver salmon. The CAA considers and advises on how to represent foods collectively.

The CAA also requires advertisers to comply with AUPMR and related laws and regulations by instructing employees and assigning a person in charge of advertising and promotion.

### 5 Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

Each industry usually has its own code of practice. These are voluntary rules, but members generally follow these rules once formulated. Advertising agencies and media companies are also generally familiar with, and comply with, the rules specific to their clients' industries. Non-compliance is very rare and could directly lead to a cease-and-desist order by the CAA and calls for commercial boycott by consumers.

**6 Must advertisers register or obtain a licence?**

No.

**7 May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?**

Advice may generally be sought from regulators; however, clearance before publication or broadcasting is not necessarily required. Each prefecture has its own advisory desk (eg, the Bureau of Social Welfare and Public Health in Tokyo), which can provide advice in relation to the Act on Pharmaceuticals and Medical Devices, the AUPMR and the Health Promotion Act. However, confirmation before publication or broadcast is optional.

In addition, the Advertising Review Council, Japan (ARC), a public interest incorporated foundation authorised by the Cabinet Office and originally established by major Japanese newspaper companies, can also research and provide a report on the contents of advertising prior to publication or broadcast, if requested by a member media organisation. Such ARC reports are not legally binding.

**Private enforcement (litigation and administrative procedures)****8 What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging competitors' advertising?**

If an advertisement infringes the rights of a competitor, the competitor may bring a lawsuit against the advertiser. The competitor may ask the court for an injunction, damages and other remedies. However, litigation is costly and time-consuming, so advertising-related litigation of this kind is rare. A competitor may also complain to the JARO and ask them to recommend that the advertiser modify or discontinue any questionable advertising. This is relatively inexpensive, and generally produces reasonable results.

Notifying a prefectural governor or the CAA, or both, is another option. However, handling of complaints is at the discretion of the governor of the prefecture or the CAA, so notification is not always an effective remedy. In practice, directly contacting and discussing the questionable advertising with the advertiser or the advertising agency that is handling it can be fast and effective. If the assertions of the competitor are reasonable, faster settlement and an effective remedy can be obtained in many cases.

**9 How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?**

In practice, most advertising is challenged through the CAA or the JARO. Anyone may contact the CAA and the JARO, and no grounds are required to bring a complaint with either of these organisations.

If the CAA receives notice of questionable advertising, it will research the advertising, and, if it agrees that the advertising is misleading, it may issue a cease-and-desist order as described in question 3.

If the JARO receives complaints and enquiries concerning advertising, it examines them and, where necessary, recommends the advertiser to modify or discontinue making any questionable representations. Advice or information is also provided in response to enquiries.

**10 Which party bears the burden of proof?**

In the court, the party asserting that there has been an infringement of rights bears the burden of proof.

In a procedure before the CAA under the AUPMR, the advertiser bears the burden of proof.

There are no specific rules regarding burden of proof in procedures before the JARO, though, in practice, the advertiser bears the burden of proof.

**11 What remedies may the courts or other adjudicators grant?**

The courts may grant an injunction, damages and other remedies, such as publishing additional advertisements to correct an original misleading representation, or making a public apology if there is sufficient cause.

The CAA may issue a cease-and-desist order against the advertiser. Such order includes, in practice, an injunction to restrain the advertisement; necessary measures to prevent reoccurrence of the misleading advertising; a public notice of the above measure through newspapers; and requiring that all planned future advertising be submitted for approval.

**12 How long do proceedings normally take from start to conclusion?**

The injunction process usually takes a few months in court (both parties are involved); a court proceeding related to damages and other remedies would generally take one to two years from start to conclusion.

Procedures through the CAA or the JARO would generally take two to six months, depending on the case.

**13 How much do such proceedings typically cost? Are costs and legal fees recoverable?**

Judicial proceedings cost about ¥500,000 to ¥1 million (legal fees, depending on counsel) plus ¥2,000 (court costs) for an injunction; and approximately ¥1 million to ¥2 million (legal fees) plus ¥10,000 (if the amount claimed is up to ¥1 million) or more in relation to an action for damages and remedies, depending on the amount of damages claimed. The successful party can recover its court costs, but, in practice legal fees are not fully recoverable. CAA and JARO proceedings entail low costs, but they are not recoverable.

**14 What appeals are available from the decision of a court or other adjudicating body?**

Appeal to a higher court is available from the decision of a court. Administrative litigation is available from the decision of the CAA.

**Misleading advertising****15 How is editorial content differentiated from advertising?**

There are no such requirements to disclose where advertisers have influenced editorial content.

**16 How does your law distinguish between 'puffery' and advertising claims that require support?**

Advertising claims generally require support in Japan. If claims cannot be supported, they are generally treated as misleading or untruthful advertising. What might be considered puffery in another jurisdiction can be potentially subject to challenge. See question 17.

**17 What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?**

Misleading advertising is considered to occur in the case of any representation:

- by which the quality, standard or any other matter relating to the substance of goods or services are shown to general consumers to be much better than is actually the case or much better than that of other competitors, contrary to the facts, and that thereby tends to unjustly influence customers and impede fair competition;
- by which price or any other trade terms of goods or services will be misunderstood by general consumers as being much more favourable to them than is actually the case or more favourable than those of competitors, and that thereby tends to unjustly influence and impede fair competition; or
- that is likely to cause any matter relating to transactions for goods or services to be misunderstood by general consumers and that is designated by the CAA as being likely to unjustly influence customers and to impede fair competition.

Misleading advertising is prohibited in Japan.

It is not necessary to disclose all material information, and footnotes are permissible. There are no specific rules on disclaimers, but it is rare to use disclaimers in advertising, with the exception of tobacco advertising. In tobacco advertising, disclaimers such as 'light neither means low tar nor low risk' or 'mild does not mean mild effect' are generally used.

### Update and trends

Many gender-related advertisements are currently being publicly criticised as 'sexual harassment' or 'sexual discrimination'. We note that public criticism of advertising can lead to withdrawal of advertising or damage to a company's reputation in Japan, irrespective of the legal circumstances. Advertisers should be aware of the potential for reputational damage from negative advertising, even if there is no regulation to prohibit the particular advertising concept.

Many advertisers, especially within TV advertising, currently seem to be cautious about gender bias (eg, we see many men cooking and washing in advertisements).

### 18 Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?

It is not necessary to have proof of the claims before publishing, and there are no recognised standards for the type of proof in Japan, but it is advisable to have proof of any claims before publishing if you are going to make any claims that might appear to be misleading.

### 19 Are there specific requirements for advertising claims based on the results of surveys?

No.

### 20 What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?

Advertising may use comparisons if the comparison is proven objectively, is supported by evidence and presented correctly and appropriately and is fair in methodology. It is permissible to identify a competitor by name, although it is rare in practice.

### 21 Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?

There are no specific degrees or types of proof. However, tests and studies must be objective, must be supported by results and facts, and must be fair.

### 22 Are there special rules for advertising depicting or demonstrating product performance?

No.

### 23 Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief, or experience?

No. Industry codes of practice generally stipulate that a statement of opinions, beliefs and experience must not mislead consumers, and advertisers use notes on statements such as 'this is an individual experience and not for everyone'. Endorsement by third parties may not be used without their prior consent and must not mislead consumers. Professional comments, for example, by a doctor or a specialist, must be general and not for a specific good or service.

### 24 Are there special rules for advertising guarantees?

No.

### 25 Are there special rules for claims about a product's impact on the environment?

No.

### 26 Are there special rules for describing something as free and for pricing or savings claims?

No. However, there is a special guideline on representation of pricing in relation to the AUPMR issued by the Fair Trade Committee (now taken over by the CAA), and, again, any misleading advertising is prohibited.

### 27 Are there special rules for claiming a product is new or improved?

No. However, some industry-based fair commission codes only allow the use of 'new product' or 'newly on sale' for the first six months after a new product is introduced to the market.

### Prohibited and controlled advertising

#### 28 What products and services may not be advertised?

Under the Medical Care Act, advertising regarding a medical practice, dental practice, hospital or clinic is strictly limited and comparative advertising, misleading or exaggerated advertising, non-objective advertising (without good evidence) and immoral advertising are prohibited. Advertising of the following details is permitted:

- details on whether medical professionals are physicians or dentists;
- the clinical department's name;
- the name, telephone number or any information that indicates the location of the hospital or clinic, and the name of the administrator of the hospital or clinic;
- the days and hours of practice, or whether an appointment can be booked;
- the names, ages, genders, positions and brief personal records of physicians, dentists, pharmacists, nurses and other medical professionals practising at the hospital or clinic; and
- other matters related to these people that are prescribed by the Minister of Health, Labour and Welfare as matters that contribute to recipients of medical care making appropriate choices with regard to their medical care.

Advertisements by lawyers, law firms and foreign lawyers were prohibited until 2000. They are now permitted, but still strictly limited in Japan. Regulations on advertising by lawyers and foreign lawyers (Regulation No. 44 of 24 March 2000) and related guidelines prohibit advertising that is false, misleading, exaggerated, comparative, illegal or that infringes regulations of the national bar association and local bar association, or damaging or in danger of damaging the dignity of lawyers, etc. There is no prohibition on media types, but the wording, placement and methods are strictly limited. The advertiser must maintain a record of the advertising for three years. Any local bar association may investigate records of questionable advertising, facts relating to the advertising, order an injunction or take other measures.

#### 29 Are certain advertising methods prohibited?

Spam emails are prohibited under the ASCT. There are no legal prohibitions on subliminal messages. However, the Japan Commercial Broadcasters Association prohibits the use of subliminal effects on broadcasting by its regulation for broadcasting, so in practice it is not possible to broadcast advertising with subliminal messages.

#### 30 What are the rules for advertising as regards minors and their protection?

Some voluntary rules (eg, rules on alcoholic beverages and tobacco) prohibit certain advertising to protect minors. In addition, local ordinances on advertising issued by local governments prohibit certain kinds of advertising (eg, advertising of gambling and any immoral advertising).

#### 31 Are there special rules for advertising credit or financial products?

The Financial Instruments and Exchange Act requires a financial instruments business operator to indicate the following information in such advertising:

- the name or trade name of the financial instruments business operator;
- the fact that the financial instruments business operator is authorised as a financial instruments business operator, and its registration number; and
- the matters concerning the contents of the financial instruments business conducted by the financial instruments business operator.

These matters are specified by Cabinet order as important matters that may have an impact on customers' judgement.

There are also rules against making an indication that is significantly contradictory to facts, or seriously misleading with regard to the outlook of profits from conducting financial transactions and other matters specified by Cabinet Office ordinance.

### 32 Are there special rules for claims made about therapeutic goods and services?

The Act on Pharmaceuticals and Medical Devices prohibits the following:

- false or exaggerated advertising in relation to the name, effect or efficiency of medicines, quasi-drugs (whose effect on the human body is milder than drugs), cosmetics, medical equipment and regenerative medical products;
- advertising that misleads consumers into thinking that a doctor guarantees the effect or efficiency of a medicine, quasi-drug, cosmetic or medical equipment; and
- advertising that suggests abortion or uses obscene documents or images in relation to medicines, quasi-drugs, cosmetics or medical equipment.

### 33 Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

The Health Promotion Act prohibits false or exaggerating advertising of foodstuffs in relation to maintaining or improving health. The Minister of Health, Labour and Welfare or a chief of a local bureau of health, labour and welfare may recommend advertisers to take measures necessary to correct misleading advertising, and order advertisers to take necessary measures if they do not follow the recommendation. Penalties including imprisonment with labour of up to six months or a fine of up to ¥1 million may apply.

A company may make certain health claims if it is approved by the CAA to state that the particular food product in question has certain health effects as a 'food for specified health use' (FOSHU), which refers to foods containing ingredients that are shown to have certain physiological effects on the human body. Once approved, this allows the use of a FOSHU seal of approval. The CAA also recommends that FOSHU-approved food advertising include a health advice statement such as: 'Our eating habits should be based on a staple diet, a main dish and side dishes, and balanced eating.' Approval to make the above-mentioned health claims does not, of course, allow the company to make exaggerated or false claims, which can attract punishments including imprisonment with labour of up to six months and fines of up to ¥1 million, although this would most likely come after governmental warnings and orders.

### 34 What are the rules for advertising alcoholic beverages?

There is no specific legislation on alcohol advertising, and alcohol advertising in Japan is regulated only via voluntary rules adopted by the industry (the Commission on Alcohol Beverages, which consists of nine major beverage groups).

These voluntary rules basically stipulate:

- the prohibition of alcohol-related TV advertisements from 5am to 6pm, with some exemptions such as adverts warning about the effects of drinking (eg, for minors or pregnant women), and adverts aiming to improve the company's corporate image through, for example, emphasising its commitment to social responsibility;
- alcohol adverts shall follow only after TV or radio programmes that have been confirmed as having an audience of which 70 per cent or more are of drinking age (20 years or older in Japan);
- characters and celebrities appealing to the younger generation may not be used;
- warnings must be provided for pregnant women and nursing mothers (that alcohol may have a harmful influence on their embryos or babies);
- a warning to minors such as 'you can drink after you are 20 years old' or 'minors' drinking is prohibited by law' must be included; and
- the above warnings must be given in a specified manner in terms of, for example, wording, point size of type and timing of the warning.

In addition to the above voluntary rules, pregnant celebrities may not appear in alcohol adverts. There are no substantial sanctions under the voluntary rules, though in practice, negative public relations may arise if there is a failure to respect these.

### 35 What are the rules for advertising tobacco products?

There are no legal rules on tobacco advertising and packaging. However, the Tobacco Institute of Japan has issued voluntary rules on advertising and the industry obeys these rules. The voluntary rules essentially:

- prohibit TV, radio, cinema and internet advertisements, with some exemptions, such as where it is technically possible to target adults only;
- prohibit the use of signboards in public places, with exemptions around tobacco stores, vending machines and smoking places;
- prohibit the targeting of minors;
- prohibit the use of characters and celebrities appealing to the younger generation;
- require health warnings, including on the quantity of tar and nicotine; and
- provide for the format of the above warning, for example, wording, point size of type and package design.

### 36 Are there special rules for advertising gambling?

There are no special rules for advertising gambling. Legally, gambling is only permitted if supervised by a national government body, and illegal gambling is, of course, not advertised. Advertising gambling is under general advertising voluntary regulations.



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**37 What are the rules for advertising lotteries?**

There are no specific rules for advertising lotteries.

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**38 What are the requirements for advertising and offering promotional contests?**

There are no specific rules for advertising and offering promotional contests.

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**39 Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?**

No.

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**40 Briefly give details of any other notable special advertising regimes.**

Generally, the right to advertise is protected by the Constitution as an example of freedom of speech in Japan. Political advertising is freely done in practice, unless the advertising infringes the rights of others.

Election candidate advertising through social media (which was previously prohibited) is now permitted, and some candidates and political parties use social media actively for election campaigns.

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**Social media**

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**41 Are there any rules particular to your jurisdiction pertaining to the use of social media for advertising?**

There are some self-regulatory rules in Japan. The 'WOMJ Guideline', prepared by the Word of Mouth Japan Marketing Association in 2017 and the 'Moral Manifesto for Internet Advertising and Guideline for Publication', prepared by the Japan Interactive Advertising Association in 2015 are the main self-regulatory rules on advertising and marketing related to social media in Japan.

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**42 Have there been notable instances of advertisers being criticised for their use of social media?**

Advertising agencies that put false 'word of mouth' comments on evaluation websites (eg, restaurant recommendation sites) have come under intense pressure in recent years for the untruthful use of social media, and many such agencies have changed their methods of advertising.

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**43 Are there regulations governing privacy concerns when using social media?**

There are no specific regulations governing privacy concerns. However, the Act on the Protection of Personal Information and the respective guidelines also apply to the use of social media.

## *Getting the Deal Through*

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