

Consultation on the marketing of e-cigarettes

CAP and BCAP proposals for new rules

Issue date: 27/02/2014

Closing date: 28/04/2014



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1. Executive summary

The Committee of Advertising Practice (CAP), author of the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code) and the Broadcast Committee of Advertising Practice (BCAP), author of the UK Code of Broadcast Advertising (the BCAP Code), are consulting on proposals to introduce new rules for the advertising of electronic cigarettes (e-cigarettes).

CAP and BCAP (the Committees) consider that new rules are required to address growing public concern about the now widespread advertising of e-cigarettes. BCAP specifically considers that a new approach is required to deal with the unintended consequences of ads for e-cigarettes falling foul of the broad tobacco prohibitions written in the BCAP Code.

The Committees have prepared specific rules, drawing on principles that in their experience have been appropriate when regulating sectors that present similar societal concerns, particularly in relation to the protection of children and young persons. However they recognise that some respondents may consider that the nature of this product, sector and the accompanying public health concerns necessitate further or different restrictions. CAP and BCAP welcome responses from all those who have an interest.

The consultation will close at 5pm on Monday 28 April 2014. For more information on the next steps see section 12 and, for full details of how to respond to the consultation, please see Annex 1.

2. Introduction to the UK advertising regulatory system

2.1 The Committee of Advertising Practice (CAP)

CAP is the self-regulatory body that creates, revises and enforces the [CAP Code](#). The CAP Code covers non-broadcast marketing communications, which include advertisements placed in traditional and new media, sales promotions, direct marketing communications and marketing communications on marketers' own websites. The marketer has primary responsibility for complying with the CAP Code and ads must comply with it. Ads that are judged not to comply with the Code must be withdrawn or amended. Parties that do not comply with the CAP Code could be subject to adverse publicity, resulting from adjudication by the Advertising Standards Authority (ASA), or further sanctions including the denial of media space.

CAP's members include organisations that represent advertising, sales promotion and direct marketing and media businesses. Through their membership of CAP member organisations, or through contractual agreements with media publishers and carriers, those businesses agree to comply with the Code so that marketing communications are legal decent, honest and truthful, and consumer confidence is maintained.

By practising self-regulation, the marketing community ensures the integrity of advertising, promotions and direct marketing. The value of self-regulation as an alternative to statutory control is recognised in EC Directives, including on misleading advertising ([Directive 2005/29/EC](#)). Self-regulation is accepted by the Department for Business, Innovation and Skills and the Courts as a first line of control in protecting consumers and the industry.

Further information about CAP is available at www.cap.org.uk.

2.2 The Broadcast Committee of Advertising Practice (BCAP)

BCAP is the regulatory body responsible for maintaining the UK Code of Broadcast Advertising ([the BCAP Code](#)) under agreement with the [Office of Communications](#) (Ofcom). Ofcom has statutory responsibility, under the [Communications Act 2003](#), for maintaining standards in TV and radio advertisements. Ofcom entrusted BCAP and the broadcast arm of the ASA with the regulation of broadcast advertisements in 2004 in recognition of CAP and the ASA's successful regulation of non-broadcast advertisements for over 40 years, and in line with better regulation principles.

The BCAP Code regulates all advertisements on television channels and radio stations licensed by Ofcom and all advertisements on Sianel Pedwar Cymru (S4C) and S4C digital, including teleshopping channels and any additional television service (including television text services and interactive television services). The BCAP Code is enforced against Ofcom-licensed broadcasters, Sianel Pedwar Cymru (S4C) and S4C digital. Broadcasters are required by the terms of their Ofcom licence, and, for S4C, by statute, to observe the standards set out in the BCAP Code.

The members that make up BCAP include broadcasters and trade associations representing advertisers, broadcasters and agencies. BCAP must seek advice on proposed Code changes from an expert consumer panel, the Advertising Advisory Committee (AAC). In accordance with Section 324 of the Communications Act 2003, BCAP must consult on proposed Code changes. BCAP strives to ensure that its rule drafting is transparent, accountable, proportionate, consistent and targeted where action is needed, in

accordance with the Communications Act 2003. Ofcom must approve Code changes before BCAP implements them.

Further information about BCAP and the AAC is available at www.cap.org.uk.

2.3 The Advertising Standards Authority (ASA)

The ASA is the independent body responsible for administering the CAP and BCAP Codes and ensuring that the self-regulatory system works in the public interest. The Codes require that all advertisements are legal, decent, honest and truthful.

The ASA receives and investigates complaints from the public and industry. Decisions on investigated complaints are taken by the independent ASA Council. The ASA Council's adjudications are published on the [ASA's website](http://www.asa.org.uk) and made available to the media. If the ASA Council upholds a complaint, the marketing communication must be withdrawn or amended.

An Independent Review Procedure exists for interested parties who are dissatisfied with the outcome of a case. CAP conducts compliance, monitoring and research to help enforce the ASA Council's decisions.

Information about the ASA is available at www.asa.org.uk.

2.4 Funding

The entire system is funded by a levy on the cost of advertising space, administered by the Advertising Standards Board of Finance (Asbof) and the Broadcast Advertising Standards Board of Finance (Basbof). Both finance boards operate independently of the ASA to ensure there is no question of funding affecting the ASA's decision-making.

Information about Asbof and Basbof is available at www.asbof.co.uk and www.basbof.co.uk.

3. Regulatory framework of the BCAP Code

3.1 Communications Act 2003

The [Communications Act 2003](#) ('the Act') sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objectives to this consultation are:

[319\(2\)\(a\)](#) that persons under the age of eighteen are protected;

[319\(2\)\(h\)](#) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

The Act requires Ofcom to set and, from time to time, review and revise a code containing standards for the content of broadcast advertisements carried by TV and radio services licensed under the Broadcasting Acts [1990](#) and [1996](#).

Ofcom has contracted-out its advertising standards codes function to BCAP under the [Contracting Out \(Functions Relating to Broadcast Advertising\) and Specification of Relevant Functions Order 2004](#). That function is exercised in consultation with and with the agreement of Ofcom. Provisions imposed on Ofcom by the Act are therefore relevant to BCAP.

3.2 Audio-Visual Media Services Directive (AVMS)

[AVMS](#) revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989. The TVWF Directive applied to scheduled television broadcasting services only, whereas AVMS has extended the Directive's reach to some on-demand services. The Directive prohibits the direct and indirect advertising of tobacco products; however this does not apply to e-cigarettes.

4. Policy background and the decision to consult

4.1 General policy objectives

CAP and BCAP's general policy objective is to set standards to ensure that all advertisements are legal, decent, honest and truthful and prepared with a due sense of social and professional responsibility.

CAP and BCAP intend their Codes to be based on the enduring principles that advertisements should be responsible, respect the principles of fair competition generally accepted in business and should not mislead, harm or offend. The Committees are keen to maintain an environment in which responsible advertising can flourish. They intend their rules to be transparent, accountable, proportionate, consistent, targeted only where regulation is needed and written so that the rules are easily understood, easily implemented and easily enforced. The most recent editions of both Codes were published in 2010, prior to any notable marketing of e-cigarettes in the UK.

4.2 The CAP Code and e-cigarettes

Recent years have seen a well-documented rise in the use and availability of e-cigarettes and they are now widely advertised in non-broadcast media. The rules in the CAP Code apply to all non-broadcast marketing, including that for e-cigarettes, and therefore offer general protections against misleading, offensive or otherwise harmful advertising. The ASA has investigated and published adjudications on numerous marketing communications for e-cigarettes and CAP has published [guidance](#) to assist advertisers in how to comply with both the general rules and the precedent set by the adjudications.

The current edition of the CAP Code contains no specific rules concerning e-cigarettes. It should be noted that, while it does contain a specific rule in [section 21](#) (Tobacco, rolling papers and filters) which prohibits the advertising of tobacco products specifically, this does not apply to e-cigarettes because they are not a tobacco product.

4.3 The BCAP Code and e-cigarettes

The general rules in the BCAP Code apply to all broadcast marketing, including that for e-cigarettes, and therefore offer general protections against misleading, offensive and otherwise harmful advertising.

[Section 10 of the BCAP Code](#) prohibits advertisements for certain products and services, either because those products may not legally be advertised or because of a clear potential for harm or serious or widespread offence to the audience or to society. Rules 10.1.4 and 10.3 to 10.5 inclusive address Tobacco:

Relevant current rules in Section 10	Prohibited categories 10.1 Advertisements for products or services coming within the recognised character of or specifically concerned with these are not acceptable: 10.1.3 all tobacco products. Also non-tobacco products or services that share a name, emblem or other feature with a tobacco product (as provided for by rule 10.4), rolling papers and filters. Tobacco
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10.3 Advertisements must not promote smoking or the use of tobacco products.

10.4 If it shares a name, emblem or other feature with a tobacco product, a non-tobacco product or service may be advertised only if the advertisement is obviously directly targeted at an adult audience, makes or implies no reference to smoking or to a tobacco product, does not promote tobacco or smoking and does not include a design, colour, imagery, logo style or the like that might be associated in the audience's mind with a tobacco product.

10.5 Advertisements that might be of particular interest to children or teenagers must not refer to tobacco or smoking, unless that reference obviously forms part of an anti-smoking or anti-drugs message.

These rules are worded with the intention of preventing the indirect promotion of tobacco products and particularly brandsharing. They are more restrictive than those found in the relevant legislation (in promoting any reference to smoking or to a tobacco product) or the CAP Code. This reflects BCAP's and previous regimes' desire to set a higher degree of protection in recognition of the greater reach of broadcast advertising and particularly television; its place in the family home and its audio-visual impact having the potential to have a comparatively more powerful impact.

The Tobacco rules were authored prior to the rise in popularity of e-cigarettes and before any marketer had seriously sought to advertise them in broadcast media. In January 2013, after lengthy pre-clearance discussions, e-cigarettes were advertised on television for the first time. Several such ads were very soon the subject of complaints to the ASA and subsequent investigation. Adjudications such as [ZULU Ventures Ltd trading as SkyCig](#) and [Zandera Ltd trading as E-Lites](#) demonstrate the difficulty caused by the current TV rules. They also establish the position that advertisers may advertise their product and make verbal or written references to it, but may not show them. BCAP considers that advertisements for e-cigarettes cannot avoid being caught by the Tobacco prohibitions and this situation, if left unaddressed, would only continue to cause confusion for the for the public, advertisers and broadcasters.

4.4 Policy history and the decision to consult

CAP and BCAP acknowledge that there is much uncertainty amongst the public, policymakers and public health professionals about e-cigarettes. There is widespread interest in their potential public health benefits as an alternative to tobacco. However there are concerns about the fact that they contain nicotine; their efficacy and safety; their potential to renormalise smoking, and questions over whether they may act as a gateway to nicotine or tobacco for the young or non-smokers.

While CAP and BCAP do not seek to answer the question of these products' proper use they acknowledge that the above characteristics; their potential for harm, for addiction and their relationship with tobacco, carry a reasonable expectation of regulatory protection in relation to how they may be advertised. CAP and BCAP are concerned to ensure that advertising is responsible and have been considering how they might best answer those concerns. They concluded that new rules were likely to be the best way to communicate what they regard as responsible advertising for this sector. BCAP was also keen to address the above-mentioned difficulties being presented by the Tobacco rules.

In 2013 the Medicines and Healthcare products Regulatory Agency (MHRA) announced the UK government's desire to regulate e-cigarettes (which contain above a certain level of

nicotine) as medicines. More information about the MHRA's work in this area can be found [here](#). However, the European Parliament rejected the relevant amendments to the European Tobacco Products Directive that would have been required to make this possible.

Shortly before the publication of this document the European Parliament voted to approve a compromise text that will allow e-cigarettes to remain as consumer goods, subject to various quality controls and limitations on nicotine content. CAP and BCAP understand that marketers wishing to apply for a medicines authorisation will be able to do so. Additionally there will be prohibitions on advertising for non-medicinal e-cigarettes, but the full implications of these are still to be worked out at a national level. At the time of writing, the compromise text had just been adopted by the European Parliament. There is likely to be a two year interim period before those rules are required to be given effect in UK law.

CAP and BCAP recognise their duty to provide protection to consumers and clarity to industry around how e-cigarettes may be advertised during this interim period and consider that specific rules based on proper consultation are the appropriate way to address the issue. CAP and BCAP will consider the implications of the statutory regime on their rules closer to the time of that regime's implementation.

In preparing the rules set out in this document, CAP and BCAP have drawn on their experience setting rules for sectors that have presented similar public policy issues, such as alcohol and gambling. However the Committees are mindful that e-cigarettes are a unique product with their own complexities and, unlike with alcohol and gambling, strong arguments have been made for their public health benefits. In addition to their general objectives CAP and BCAP seek to offer particular protection to the young, the vulnerable and to non- and former-users of nicotine.

The speed with which the market has moved has led the Committees to publish this consultation as quickly as possible. The Committees recognise that there is widespread interest and expertise in this field on which they can draw through the consultation process itself and which may lead them to change or extend the rules set out below, as appropriate. The Committees welcome responses from all those who have an interest.

4.5 Proposed rules

The proposed rules are set out in the following sections grouped in three broad categories: General, Prohibited Approaches and Protection of Children. The rules have background information where necessary and specific questions that respondents are invited to answer.

Different terminology is used in each Code, reflecting the difference in media. The CAP Code refers to "marketing communications" throughout, while the BCAP Code refers to "advertisements". That terminology will be preserved upon implementation of these rules. For simplicity in this document each rule is stated just once with a forward-slash separating the required terminology for each code.

Respondents should note that on implementing new specific rules for e-cigarettes BCAP will amend section 10 of its Code so that e-cigarettes are exempted from the Tobacco rules. BCAP asks respondents to view the proposed rules in this document in that context.

CAP and BCAP are aware that some respondents may wish to see more, fewer or different rules altogether. Respondents are invited to provide those arguments in answer to the more broad questions in section 11 of this document.

5. General rules

Rule 1: *Marketing communications / advertisements for e-cigarettes must be socially responsible.*

It is a general rule in the CAP and BCAP Codes that advertisements must be socially responsible. The Committees see fit to repeat the rule in certain Code sections so that it can provide more detail in recognition of specific concerns or risks for the sector in question. For example the corresponding rule in the Alcohol sections of the Codes explicitly requires marketers not to encourage styles of drinking that are unwise or immoderate, or the exploitation of the young and vulnerable. CAP and BCAP have considered whether the rule might, for example, prevent “excessive” use, though they question whether excessive use can be defined in a useful way for this product. Likewise they question whether there is a need to prohibit advertising treatments which, for example, link e-cigarettes with toughness or aggression. CAP and BCAP welcome comments and evidence from respondents that can inform their view on any specific approaches that might be prohibited within the wording of this rule.

Question 1: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

Question 2: What specific advertising approaches, if any, that are not covered by the following rules do you consider might be identified as problematic within the wording of the rule?

Rule 2: *Marketing communications / advertisements must contain nothing which promotes the use of a tobacco product or shows the use of a tobacco product in a positive light. This rule is not intended to prevent cigarette-like products being shown.*

CAP and BCAP acknowledge that there is significant concern about the potential indirect promotion of tobacco products via advertising for e-cigarettes. However, they are mindful that the similarity of e-cigarettes to tobacco products is their chief appeal to those seeking a tobacco alternative and that new rules cannot unreasonably restrict marketers from showing their product.

At the time of writing, the rules in the BCAP Code and ASA adjudications are between them operating to restrict visuals of e-cigarettes being shown on television; BCAP currently considers this to be a disproportionate restriction. Both CAP and BCAP propose that this new rule would not be breached by visuals of products, including in use, provided that it was clear from the ad as a whole that the product shown was an e-cigarette and not a tobacco cigarette. This rule should therefore be read in conjunction with Rule 4. BCAP, in particular, is keen to hear from respondents who consider that the BCAP Code may need to specify additional protections in recognition of the greater reach and intrusiveness of broadcast advertising.

Question 3: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

Question 4: Do you have any comments or evidence which can help to inform CAP and BCAP’s goal of preventing the indirect promotion of tobacco products while still permitting

e-cigarettes to be advertised?

Rule 3: *Marketing communications / advertisements must not contain health or medicinal claims [unless the product is licensed for those purposes by the MHRA]. E-cigarettes may however be presented as an alternative to tobacco.*

For the purposes of this rule CAP and BCAP consider that a “health claim” is any claim that states, suggests or implies that a relationship exists between an e-cigarette or one of its constituents and health. It has adapted this definition from the one provided in Regulation (EC) No 1924/2006 on nutrition and health claims made on foods. The Regulation can be found [here](#). CAP and BCAP consider this an appropriate general definition for use in this context.

Under current UK legislation, any product that makes a medicinal claim must be appropriately authorised as a medicine or medical device. Any claim that a product can be used to cut down or quit smoking or to provide a form of nicotine replacement therapy is likely to be seen as medicinal by the MHRA and the ASA. A claim that an e-cigarette is an alternative to tobacco is not a medicinal claim and may be made.

The Committees have yet to decide whether these rules should apply to e-cigarettes licensed as medicines and welcomes respondents’ views on that subject in section 11.

Question 5: Do you agree with the proposal to prohibit health claims for e-cigarettes? If not, please explain why and provide any suggestions you may have for improvement.

Question 6: Do you agree with the proposed definition of health claims for the purposes of this rule? If not, please explain why and provide any suggestions you may have for improvement.

Question 7: Do you agree with the proposal to prohibit medicinal claims? If not, please explain why and provide any suggestions you may have for improvement.

Rule 4: *Marketing communications / advertisements must make clear that the product is an e-cigarette.*

In 2013 the ASA Council considered a number of complaints about e-cigarette advertising and adjudicated that, because of the novel nature of the product, ads for them should make clear what was being advertised. CAP and BCAP endorse that view and also seek with this rule to further answer concerns about the indirect promotion of tobacco use by providing clarity about what is being advertised.

Question 8: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

Rule 5: *Marketing communications / advertisements must state clearly if the product contains nicotine [or if it does not]. They may include factual information about other product ingredients.*

In 2013 the ASA Council adjudicated that whether or not an advertised e-cigarette contained nicotine was material information which a consumer would need to avoid being misled regarding the nature of the product. CAP and BCAP endorse that view but wish to make clear that this is not intended to limit advertisers from describing other product ingredients.

CAP and BCAP have yet to decide whether some or all of these rules should apply to advertisements for e-cigarettes that do not contain nicotine. Responses on that point should be made in section 11.

Question 9: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

6. Prohibited approaches

Rule 6: *Marketing communications / advertisements must not encourage non-smokers or non-nicotine-users to use e-cigarettes.*

Although e-cigarettes are available as a consumer good, many stakeholders and the general public regard their primary purpose as being an alternative to tobacco smoking. CAP and BCAP understand that there is presently little evidence for their use in never-smokers, but accept that this may change. The Committees are concerned that advertising should not be a medium by which people are encouraged to begin or re-establish the use of nicotine. Respondents should note that the rule does not require every marketing communication to target tobacco smokers / e-cigarette users explicitly, only that they must not explicitly encourage those who do not currently use nicotine to start.

Question 10: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

Question 11: Do you consider that this rule is proportionate? If you consider that advertising of e-cigarettes expressly to non-users of nicotine is acceptable or if you would prefer a rule which required all marketing to be explicitly addressed only to existing nicotine users please provide your comments and any evidence.

Rule 7: *Marketing communications / advertisements must not link e-cigarettes with gambling, alcohol or illicit drugs.*

CAP and BCAP consider that there is an obvious benefit in prohibiting links with illicit drugs. The Committees also wish to consider preventing irresponsible creative treatments involving alcohol and gambling; the two other sectors that most provoke societal concern. However, they are mindful that the Alcohol and Gambling rules already provide protections in this regard. Additionally they consider that there may be responsible advertising executions which feature an e-cigarette being used in an environment in which alcohol is being consumed or gambling conducted. CAP and BCAP welcome respondents' views.

Question 12: Do you agree with the proposal to prohibit linking e-cigarettes with illicit drugs? If not, please explain why and provide any suggestions you may have for improvement.

Question 13: Do you consider that alcohol should be included in this rule? Please explain why and provide any evidence you consider relevant.

Question 14: Do you consider that gambling should be included in this rule? Please explain why and provide any evidence you consider relevant.

Rule 8: *Marketing communications / advertisements must not link e-cigarettes with activities or locations in which using them would be unsafe or unwise; such as driving.*

CAP and BCAP are proposing this rule as a precautionary measure; but, other than driving, they have not yet identified any activities and locations where e-cigarette use might be so demonstrably problematic in all instances that it can be included in the rule. The

Committees welcome respondents' views and evidence on any other such activities or locations which they consider might usefully be specified within this rule.

Question 15: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

Question 16: Are there any other situations, other than driving, in which you consider that e-cigarette use is so demonstrably harmful that their depiction in advertising should be prohibited?

7. Protection of children and young persons: general

CAP and BCAP wish to prevent advertising which might, through its content or context, encourage children or young people to use e-cigarettes. Drawing on their experience setting rules for the alcohol and gambling sectors the Committees are therefore proposing the rules below to prevent ads being directed at, or appealing to, under-18s.

Rule 9: *Marketing communications / Advertisements must not be likely to appeal particularly to people under 18, especially by reflecting or being associated with youth culture. They should not feature or portray real or fictitious characters who are likely to appeal particularly to people under 18. People shown using e-cigarettes or playing a significant role should not be shown behaving in an adolescent or juvenile manner.*

Question 17: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

Rule 10: *People shown using e-cigarettes or playing a significant role must neither be, nor seem to be, under 25. People under 25 may be shown in an incidental role but must be obviously not using e-cigarettes.*

This minimum age limit on people featured in a significant role has been chosen because by the age of 25 people clearly look and sound more adult than adolescent. It mirrors the minimum age limit in other Code sections. CAP and BCAP consider that this approach provides that children and young people do not identify, by age, with those playing a significant role or featured using e-cigarettes. It also gives more certainty to the advertising industry when creating advertisements and to the ASA Council when deciding if an advertisement has breached the Codes.

Question 18: Do you agree with the inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

Rule 11: *Marketing communications / advertisements must state that products are not suitable for under-18s.*

At the time of writing the UK Government is progressing legislation to prevent sales of e-cigarettes to under-18s. Currently it is common for advertisers to restrict the sale of their products to over-18s and / or to include a statement to that effect in their advertising. CAP and BCAP's preliminary work suggests that there would be widespread support amongst industry for the inclusion of this rule.

However, the BCAP and CAP Codes do not typically require warning messages to be included in ads. A rare example is the requirement in CAP Code rule 11.7 and BCAP Code rule 9.9 that ads for specific energy-related products must include the product's energy efficiency class. Usually when compulsory messages appear in ads, it is because other regulators, such as the Financial Conduct Authority (FCA), require them.

While CAP and BCAP welcome efforts that may further the objective of discouraging children and young persons from purchasing e-cigarettes the Committees have previously had cause to question the overall value of warning messages.

During their joint gambling consultation in 2006 CAP and BCAP referred to international research on the effects of warnings in advertisements, practices in other jurisdictions and advice from problem gambling organisations, faith groups and gambling industry trade associations. Because there was little empirical literature on gambling advertising, the Committees referred to research on the effectiveness of different forms of warnings and messages in other public policy sectors. Clearly, the characteristics of the sector and the message or warning must be borne in mind.

Research tends to evaluate the effectiveness of warnings or messages in terms of a measurable reduction in the prevalence or quantity of the behaviour of concern¹ or in terms of improved awareness and understanding of risk². CAP and BCAP did not identify any clear evidence that messages or warnings were effective in preventing or reducing gambling among under-18s and vulnerable adults, or that they were effective in reminding the public of the risks.

Some research suggests they have a small positive effect. For example, research on warnings in TV alcohol advertisements in the U.S.A. showed a cumulatively decreasing confidence in perceived product benefits but no impact on viewers' perception of the risks and benefits associated with alcohol³. Research on health warnings in the tobacco sector in Canada showed a small impact on the quantity smoked but at a low level of confidence and no effect on smoking prevalence⁴.

Other research shows that messages have no effect or that such warnings were viewed with cynicism⁵. Research in the alcohol sector showed that, because they were already well-known to consumers above and below the legal drinking age, hazards described in warnings taught consumers that reading warnings was a waste of time instead of raising awareness⁶.

Lastly, some research shows that messages or warnings can have the opposite effect to the one intended, through a "boomerang effect"⁷. That effect was found in relation to drugs, tobacco, alcohol, film content and high-fat foods. Products such as gambling can appeal to under 18s and vulnerable adults because they involve impulsiveness, rebellion, risk-taking or a challenge. One theory is that warning messages can cause a "boomerang effect" by reinforcing those perceived qualities and heightening the audience's desire to use the product, leading to "reactive behaviour". Young people and particularly young men were most likely to react⁸. In the context of alcohol, heavy drinkers also reacted strongly.

¹ Laughery and Hammond (1999), Lehto and Miller (1986), Peters (1984), cited in Jones Ringold D. (2002) "Boomerang Effect: In Response to Public Health Interventions: Some Unintended Consequences in the Alcoholic Beverage Market", *Journal of Consumer Policy*, March 2002; 25, 1 p.27.

²Hadden (1991), Wogalter and Dingus (1999), cited in Jones Ringold D. (2002).

³Dr Lowe G., "Beer Advertisements on U.S. TV", *Quarterly Review of Alcohol Research*, August 1995, Vol. 3, Issue 3.

⁴Gospodinov N. and Irvine I.J. (2004) "Global Health Warnings on Tobacco Packaging: Evidence from the Canadian Experiment", *Topics in Economic Analysis and Policy*, Vol. 4, Issue 1, Article 30, 2004.

⁵Navigator (2004) "Radio Commercials and Wealth Warnings: Summary Report of Findings", prepared for the Radio Advertising Bureau, February 2004.

⁶Horst (1988), cited in Jones Ringold D. (2002).

⁷Jones Ringold D. (2002).

⁸Hong et al. (1994), cited in Jones Ringold D. (2002).

Furthermore, those were the groups that were most aware of the warnings⁹. CAP and BCAP invite respondents to consider whether e-cigarettes present the same issues.

Proponents often argue that, for consumers, messages or warnings “probably won’t help but they can’t hurt”. But in light of the available evidence, CAP and BCAP consider it is good policy-making practice to take into account the risk that messages or warnings can have no effect on consumers and create warning fatigue or can have a result that is opposite to the one intended. Furthermore, under better regulation principles, CAP and BCAP must consider the impact of proposed regulation on industry, in particular to ensure fair competition. The inclusion of messages or warnings in advertisements can produce an extra financial cost for advertisers, especially for radio where mandatory messages necessitate extra airtime (media space)¹⁰.

CAP and BCAP share the public policy concerns behind the consideration of warnings or messages in advertising. The Committees have designed the general principles, content, and scheduling and placement of advertisements provisions in the proposed e-cigarette advertising rules to ensure that e-cigarette advertising is socially responsible. They therefore question the need for a rule that requires an 18+ message. The committees welcome respondents’ views in this area particularly.

Question 19: Do you consider that a rule is necessary which requires that ads state that products are not suitable for under-18s? Please provide any evidence which may you consider may assist CAP and BCAP’s consideration of this rule.

⁹Jones Ringold D. (2002).

¹⁰Navigator (2004) “Radio Commercials and Wealth Warnings: Summary Report of Findings”, prepared for the Radio Advertising Bureau, February 2004.

8. Protection of children and young persons: targeting (CAP Code only)

Rule 12: *Marketing communications must not be directed at people under 18 through the selection of media or the context in which they appear. No medium should be used to advertise e-cigarettes if more than 25% of its audience is under 18 years of age.*

For other sectors that present societal concerns around the protection of children and young persons, such as alcohol and gambling, CAP applies a rule which requires non-broadcast marketing communications not to appear in media which has an audience of under-18s of more than 25%. CAP proposes to replicate this principle in its e-cigarette rules.

Question 20: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

9. Protection of children and young persons: scheduling (BCAP Code only)

Rule 13: [Amendment to existing BCAP rule]

In addition to the above rules BCAP proposes adding a scheduling restriction to its Code to reduce the chance of e-cigarette advertisements being seen by children. In practice it proposes to do this by adding e-cigarettes to the list of products and services set out in rule 32.2. The full Scheduling section of the Code can be found [here](#) and the BCAP Advertising Guidance Note on Audience Indexing can be found [here](#). The specific rule and proposed amendment are set out below:

Proposed amendment	<p>32.2 These may not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 18:</p> <p style="padding-left: 40px;">32.2.1 alcoholic drinks containing 1.2% alcohol or more by volume (see rule 32.4.7)</p> <p style="padding-left: 40px;">32.2.2 gambling except lotteries, football pools, equal-chance gaming (under a prize gaming permit or at a licensed family entertainment centre), prize gaming (at a non-licensed family entertainment centre or at a travelling fair) or Category D gaming machines (see rule 32.4)</p> <p style="padding-left: 40px;">32.2.3 betting tipsters</p> <p style="padding-left: 40px;">32.2.4 slimming products, treatments or establishments (an exception is made for advertisements for calorie-reduced or energy-reduced foods and drinks, if they are not presented as part of a slimming regime and provided the advertisements do not use the theme of slimming or weight control)</p> <p style="padding-left: 40px;">32.2.5 religious matter subject to the rules on Religious Advertising in Section 15: Faith, Religion and Equivalent Systems of Belief</p> <p style="padding-left: 40px;">32.2.6 live premium-rate services, unless those services have received prior permission from PhonePay Plus to target people under 18.</p> <p style="padding-left: 40px;">32.2.7 <i>electronic cigarettes</i></p>
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Question 21: Do you agree with e-cigarettes being included in this list of scheduling restrictions?

10. Radio central copy clearance (BCAP Code only)

Rule 14: *Radio Central Copy Clearance – Radio broadcasters must ensure advertisements for e-cigarettes are centrally cleared.*

10.1 The Radio Advertising Clearance Centre (RACC)

The [RACC](#) was set up by the commercial radio industry to ensure, before they are broadcast, that radio advertisements comply with the BCAP Code. The RACC is administered by the [RadioCentre](#), whose members consist of the majority of UK Commercial Radio stations who fund the organisation. The RadioCentre aims to maintain and build a strong and successful commercial radio industry.

10.2 Mandatory pre-clearance

The BCAP Code requires certain categories of radio advertisements to be centrally cleared by the RACC. Those categories of radio advertisements have in common a clear potential to mislead, offend or harm, for example alcohol. BCAP proposes that all radio advertisements for e-cigarettes must be centrally cleared by the RACC. This proposal ensures that such advertisements receive the necessarily high level of pre-broadcast scrutiny to ensure they are appropriately scheduled and do not cause harm.

Question 22: Given BCAP's policy consideration, do you agree that all advertisements for e-cigarettes must be centrally cleared? If you disagree, please explain why.

11. Additional questions

In addition to the above rules, CAP and BCAP invite responses to aid in their consideration of various related issues, including how extensively these rules should be applied and whether other rules may be necessary:

11.1 E-cigarettes which do not contain nicotine

Although some e-cigarettes do not contain nicotine, CAP and BCAP consider that their advertising may still present the same or similar issues as nicotine-containing e-cigarettes.

Question 23: To what extent, if any, do you consider that new rules should apply to e-cigarettes that do not contain nicotine? Please provide any relevant evidence in support of your response.

Question 24: Do you consider that any additional rules should be considered specifically in relation to the advertising of e-cigarettes that do not contain nicotine? Please provide any relevant evidence in support of your response.

11.2 E-cigarettes which are licensed as medicines

Advertisers may obtain a licence for their product from the MHRA. This would permit them to make smoking cessation claims and marketing for such products would be subject to the rules in section 12 (Medicines, medical devices, health-related products and beauty products) of the Code which can be found [here](#).

Question 25: To what extent, if any, do you consider that the above rules for e-cigarettes should apply to those which are licensed as medicines?

11.3 Definition of electronic cigarette

Notwithstanding the need to decide to what extent these rules will apply to e-cigarettes that do not contain nicotine, for the purposes of these rules CAP and BCAP propose to use the definition of e-cigarette provided in the *Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products*.

That definition is as follows:

“Electronic cigarette’ means a product, or any component thereof, including cartridges and the device without cartridge, that can be used for consumption of [nicotine-containing] vapour via a mouth piece. Electronic cigarettes can be disposable, refillable by means of a refill container or rechargeable with single use cartridges.”

Question 26: Do you agree with the proposed definition of e-cigarette? If not please explain why.

11.4 Further comments

Question 27: Are there any other rules which you believe CAP and BCAP should consider implementing in relation to the advertising of e-cigarettes? Please provide as much detail as possible and any evidence you consider supports the relevant restrictions.

Question 28: Are there any other comments you wish to make in relation to the advertising of e-cigarettes and BCAP's consideration of this issue?

12. Next steps

In addition to being publicised, details of the consultation have been specifically circulated to a cross-section of interested parties including academics, regulatory bodies, government departments, charities, public health professionals, industry and Ofcom licensees. CAP and BCAP are committed to considering all responses carefully and with an open mind and welcome responses from all those who have an interest.

Information on how to respond to this consultation can be found in Annex 1.

The following summarises the consultation process and subsequent stages of CAP and BCAP's consideration of the proposed changes to the Codes:

- In light of the need for CAP and BCAP to implement rules as quickly as possible the consultation will run for eight weeks, and will close at 5pm on Monday 28 April 2014.
- The Committees will evaluate all significant points arising from consultation and explain the reasons behind the decisions they make.
- The consultation evaluation will be published on the CAP website when the outcome of the consultation is announced.

CAP and BCAP will seek to implement rules as soon as is practicable.

For full details of how to respond to the consultation, please see Annex 1.

Annex 1: Responding to this consultation

How to respond

CAP and BCAP invite written comments, including supporting evidence on the proposals contained in this document, by **5pm on Monday 28 April 2014**.

When responding, please state if you are doing so as an individual or a representative of an organisation. Also, please make clear what your individual interest is or who your organisation represents. It will be helpful if you explain fully and clearly why you hold your opinion.

Responses via email with attachments in Microsoft Word format are preferred to assist in their processing.

Please send your response to e-cigarettes@cap.org.uk

If you are unable to reply by email, you may submit your response by post or fax (+44 (0)20 7242 3696), marked with the title of the consultation, to:

E-cigarettes Consultation
Regulatory Policy Team
Committee of Advertising Practice
Mid City Place
71 High Holborn
London WC1V 6QT

Confidentiality

CAP and BCAP consider that everyone who is interested in the consultation should see the consultation responses. In their evaluation document, CAP and BCAP will publish all the relevant significant comments made by respondents and identify all non-confidential respondents. The evaluation will be published with the outcome of the consultation.

All comments will be treated as non-confidential unless you state that all or a specified part of your response is confidential and should not be disclosed. If you reply by email or fax, unless you include a specific statement to the contrary in your response, the presumption of non-confidentiality will override any confidentiality disclaimer generated by your organisation's IT system or included as a general statement on your fax cover sheet.

If part of a response is confidential, please put that in a separate annex so that non-confidential parts may be published with your identity. Confidential responses will be included in any statistical summary of numbers of comments received.

Annex 2: CAP and BCAP rule summary

1. Marketing communications / advertisements for e-cigarettes must be socially responsible.
2. Marketing communications / advertisements must contain nothing which promotes the use of a tobacco product or shows the use of a tobacco product in a positive light. This rule is not intended to prevent cigarette-like products being shown.
3. Marketing communications / advertisements must not contain health or medicinal claims [unless the product is licensed for those purposes by the MHRA]. E-cigarettes may however be presented as an alternative to tobacco.
4. Marketing communications / advertisements must make clear that the product is an e-cigarette.
5. Marketing communications / advertisements must state clearly if the product contains nicotine [or if it does not]. They may include factual information about other product ingredients.
6. Marketing communications / advertisements must not encourage non-smokers or non-nicotine-users to use e-cigarettes.
7. Marketing communications / advertisements must not link e-cigarettes with gambling, alcohol or illicit drugs.
8. Marketing communications / advertisements must not link e-cigarettes with activities or locations in which using them would be unsafe or unwise; such as driving.
9. Marketing communications / advertisements must not be likely to appeal particularly to people under 18, especially by reflecting or being associated with youth culture. They should not feature or portray real or fictitious characters who are likely to appeal particularly to people under 18. People shown using e-cigarettes or playing a significant role should not be shown behaving in an adolescent or juvenile manner.
10. People shown using e-cigarettes or playing a significant role must neither be, nor seem to be, under 25. People under 25 may be shown in an incidental role but must be obviously not using e-cigarettes.
11. Marketing communications / advertisements must state that products are not suitable for under-18s.

CAP-specific rules

12. Marketing communications must not be directed at people under 18 through the selection of media or the context in which they appear. No medium should be used to advertise e-cigarettes if more than 25% of its audience is under 18 years of age.

BCAP-specific rules

13. [Amendment to existing rule 32.2(.7)]:

32.2 These may not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 18:

... **32.2.7** electronic cigarettes

14. Radio Central Copy Clearance – Radio broadcasters must ensure advertisements for e-cigarettes are centrally cleared.

Contact us

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