E-cigarettes: health claims and public health advertisements

A consultation on CAP and BCAP's proposal to allow lawful ads to make health claims for e-cigarettes and how CAP proposes to regulate public health messages which refer to e-cigarettes

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Contents

1. Executive Summary

This consultation deals with two distinct issues:

The first, which occupies the majority of this document, concerns the proposal by the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) ["the Committees"] to change a rule in each of their Codes to remove the prohibition on health claims being made for e-cigarettes. If approved this allow such claims, where they can be substantiated and are not misleading, to be made in lawful advertisements.

In large part this proposal is prompted by the improvements in product quality made in recent years as well as the positive statements made by public health stakeholders about e-cigarettes' relative safety compared with smoked tobacco.

However, as this document discusses, a small number of stakeholders are not supportive of such a move. It is also important for those who support the change in principle to understand what claims will and will not be possible and how they will need to be substantiated, if CAP and BCAP ultimately decide to enact the proposal.

The last chapter of the document deals with the second, separate issue: it proposes a change to the scope of the existing e-cigarette rules in the CAP Code (and not, for reasons explained in chapter 7, the BCAP Code) to allow the ASA the discretion not to apply the e-cigarette content rules to public health messaging which refers to e-cigarettes but which is not likely to promote a particular e-cigarette product or brand.

The consultation will close at **5pm on Monday 16 October.**

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 UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code). The CAP Code covers marketing communications across all non-broadcast media including marketing communications on marketers' own websites.

Marketers have primary responsibility for complying with the CAP Code and advertisements must comply with it. Advertisements that are judged not to comply with the Code must be withdrawn or amended.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 an upheld ruling by the Advertising Standards Authority (ASA), or further sanctions including the denial of media space.

CAP's members include organisations that represent advertising, promotional and direct marketing and media businesses. Through their membership of CAP 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, Energy and Industrial Strategy (BEIS) and the Courts as a first line of control in protecting consumers and the industry.

Further information about CAP is available at www.asa.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, 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.asa.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 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 rulings are published on the ASA's website 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 at 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 advertising of unlicensed, nicotine-containing electronic cigarettes and this is reflected in Appendix 2 of the CAP Code.

3.3 Effect of the European Tobacco Products Directive on the BCAP Code

A revised European Tobacco Products Directive was agreed in April 2014 and introduced restrictions on the advertising of unlicensed, nicotine-containing e-cigarettes in various broadcast and non-broadcast media. EU member states were required to implement the Directive by 20 May 2016.

The UK Government implemented the restrictions on broadcast advertising via Directions to Ofcom. Under the terms of the Memorandum of Understanding between Ofcom and BCAP, Ofcom instructed BCAP to make the necessary changes to the BCAP Code which resulted in the creation of rule 10.1.11 and took effect on 20 May 2016 as required. More information is available on Ofcom's website. BCAP's announcement can be found here.

4. Policy and legal context

E-cigarettes are now a commonplace consumer product. There are approximately 2.8 million people who use e-cigarettes in Great Britain, up from 700,000 in 2012.[1] This rapid rise in prevalence has been accompanied by significant regulatory changes both for the products themselves and their advertising.

In 2014 CAP and BCAP put in place sector-specific advertising rules controlling the content, placement and scheduling of e-cigarette advertisements to answer concerns from the public and industry alike as to how they could be advertised.

In May 2016 the European Tobacco Products Directive 2014/40/EU (TPD) came into effect in all EU member states and brought a wealth of advertising prohibitions for unlicensed, nicotine-containing products. As noted in section 3.3 of the previous chapter the prohibitions on broadcast advertising were transposed directly into the BCAP Code. The prohibitions on non-broadcast advertising were transposed into Part 7 of The Tobacco and Related Products Regulations 2016 (TRPR) which, after a period of consultation, CAP approximated in its own Code in February 2017.

The law has complex effects, prohibiting ads for some products, but not others, and only in certain media. CAP's rule (22.12) and the accompanying Advertising Guidance explain the nature of the prohibitions at length.[2] In brief, ads for nicotine-containing e-cigarettes and e-liquids which are not licensed as medicines (a definition which describes the overwhelming majority of products on the market) can only be advertised in the following media:

- outdoor advertising, including digital outdoor advertising
- posters on public transport (not leaving the UK)
- cinema
- direct hard copy mail
- leaflets
- private, bespoke correspondence between a marketer and a consumer
- media which are targeted exclusively to the trade
- limited factual claims about products on marketers' websites and the like

Non-nicotine products which are designed so they cannot be refilled with nicotine can be advertised in all media but must not indirectly promote nicotine products in media where nicotine products cannot be advertised; for example by sharing a brand name.[3] CAP and BCAP are not currently aware of any ads for, or the existence of, separately-branded, exclusively-non-nicotine products.

Where any e-cigarette is lawfully advertised, irrespective of whether or not it contains nicotine or whether or not it is licensed as a medicine, it must comply with all the general and product specific rules which CAP and BCAP placed in their Codes in 2014.

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[1] Use of electronic cigarettes (vapourisers) among adults in Great Britain; Action on Smoking and Health; May 2016. http://ash.org.uk/information-and-resources/fact-sheets/use-of-electronic-cigarettes-vapourisers-among-adults-in-great-britain/

[2] CAP's original consultation document (pp 4-5) and the Department of Health's Guidance on their transposition of the TPD provide more background on the legal basis of these prohibitions.

[3] CAP and BCAP's Advertising Guidance includes advice for marketers on how to avoid indirect promotion of nicotine products.

5. The prohibition on health claims and stakeholders' views on change

As noted in the previous chapter, in 2014 CAP and BCAP implemented specific content rules in Chapters 22 and 33 of their respective Codes setting out how e-cigarettes can be advertised.

5.1 The current rules on health claims

Currently the CAP Code contains the following rule:

> **22.5** Marketing communications must not contain health or medicinal claims unless the product is authorised for those purposes by the MHRA. E-cigarettes may be presented as an alternative to tobacco but marketers must do nothing to undermine the message that quitting tobacco use is the best option for health.

The corresponding rule in the BCAP Code is as follows:

> **33.5** Advertisements must not contain health or medicinal claims unless the product is authorised for those purposes by the MHRA. E-cigarettes may be presented as an alternative to tobacco but marketers must do nothing to undermine the message that quitting tobacco use is the best option for health.

Except for the difference in numbering and the reference to "advertisements" in the BCAP Code rather than "marketing communications" in the CAP Code these two rules are identical in wording and effect.

These rules contain two distinct prohibitions: on "medicinal" claims and on "health" claims. The prohibition on medicinal claims is a legal requirement and mirrors relevant rules in the Medicines section of both Codes. Medicinal claims include smoking cessation and reduction claims of the like seen in ads for licensed nicotine replacement therapies (NRT) and a product would need authorisation from the MHRA before such claims could be made for it. As this position emanates from the interpretation of legislation by a statutory regulator CAP and BCAP cannot change it and it will remain in place.

The prohibition on health claims prohibits any claim that a relationship exists between an e-cigarette or one of its constituents and health. This prevents a range of claims, including that e-cigarettes are healthier or safer than smoking tobacco. CAP and BCAP put this prohibition in place in 2014 because at that time there was no specific regulatory framework for e-cigarettes as a product category and there were significant concerns about the variability in quality and safety about products on the market.

However since that time the sector has moved on significantly. The industry itself has started to develop product standards, including the publication in 2015 of a Publicly

Available Specification (PAS).[4] TRPR has brought with it a wealth of safety, efficacy and reporting requirements which the industry is now implementing.

These changes caused CAP and BCAP to question whether they could continue to justify an outright prohibition on health claims. They therefore invited respondents to their 2016 consultation to submit views and evidence on whether the Codes might allow for substantiated health claims to be made for unlicensed e-cigarettes. There were 47 respondents to the consultation overall. Of these, 33 respondents provided views and evidence in response to the question about health claims.

5.2 Arguments in favour of health claims being permitted

The following respondents expressed their support for ads for e-cigarettes being able to include some sort of positive health claim:

1. ASH 2. ASH Scotland 3. ASH Wales 4. British American Tobacco* 5. Boots UK Ltd 6. Berkshire West Tobacco Control Alliance 7. Cancer Research UK 8. Durham County Council 9. Fontem Ventures* 10. Fresh (North East of England Tobacco Control) 11. Freedom to Vape 12. Independent British Vape Trade Association 13. Japan Tobacco International* 14. Liberty Flights	15. Newcastle City Council 16. New Nicotine Alliance 17. News Media Association 18. Philip Morris Limited* 19. Petrol Retailers Association 20. Royal College of Physicians 21. Smoke Free County Durham Tobacco Alliance 22. Smoke Free Newcastle 23. UK Centre for Tobacco and Alcohol Studies 24. UK Health Forum 25. Vape Club Ltd / Vape Base Ltd 26. Wakefield Tobacco Alliance 27. UK Vaping Industry Association* *indicates a tobacco company, subsidiary or representative

These responses,[5] while not identical, generally coalesced around the following key arguments:

- Public Health England (PHE) and the Royal College of Physicians have made public their view that e-cigarettes are significantly less harmful than smoking. The PHE report expressed the view that e-cigarettes are around 95% less harmful than smoked tobacco. Respondents argued that there is now a consensus amongst many public health professionals in the UK that e-cigarettes are less harmful than smoking and have a role to play in reducing tobacco harms.

- There are serious misperceptions amongst the general public, repeatedly identified in evidence, about the relative risk of e-cigarettes. Many people wrongly believe that they are as, or more, harmful than smoked tobacco and the current prohibition on health claims is preventing this problem being corrected. In 2016 only 15% of adults correctly

[4] Vaping products, including electronic cigarettes, e-liquids, e-shisha and directly-related products. Manufacture, importation, testing and labelling Guide.
[5] CAP and BCAP have published these and other responses to their 2016 consultation here.

identified that e-cigarettes are a lot less harmful than smoking, whereas 21% correctly identified they were a lot less harmful than smoking in 2013.[6]

- There is no basis in UK or European law (including the TPD and TRPR) for prohibiting in advertising substantiated health claims which are not misleading.

- Factual information about the relative risk of e-cigarettes compared to cigarettes can inform and influence the purchasing decisions of adult consumers who choose to use nicotine. Restricting them from receiving such information is not justified.

- Product standards have increased significantly since 2014 and, with the inception of TPD, there are now extensive reporting standards for the category. By 20 May 2017 the following information will need to have been generated and provided to MHRA for review which creates a set of standards by which all legitimate products will be measured in order to be sold:

    - Toxicological data for each ingredient.
    - Emissions data on the e-liquid, the hardware device and combinations of the two.
    - A description of the production process from raw materials to finished product.
    - Data on the nicotine dose provided by each e-liquid and hardware device.
    - Prohibition of use of ingredients classified as carcinogenic, mutagenic or reproductive toxicant

- Generic statements about the relative risks of e-cigarettes should be permitted in advertising in order to educate the public of the relative harms of nicotine and tobacco, and potentially influence smokers to stop smoking using e-cigarettes.

5.3 Arguments for the prohibition to be retained

The following respondents argued that the prohibition should be retained:

1. Blackpool Council
2. British Medical Association
3. Johnson & Johnson Ltd
4. Proprietary Association of Great Britain
5. Royal College of Radiologists
6. The Welsh Government

These respondents made the following key points:

- E-cigarettes might be less harmful than smoked tobacco but they are not harm-free.

- A Cochrane Review of 13 completed studies on smoking cessation, published in December 2014, found that while recognition of the potential health benefits from

[6] ASH SmokeFree GB Surveys; Use of electronic cigarettes (vapourisers) among adults in Great Britain http://ash.org.uk/information-and-resources/fact-sheets/use-of-electronic-cigarettes-vapourisers-among-adults-in-great-britain/

smokers switching to e-cigarettes can be found in expert opinion, the quality of the evidence overall is low.

- Liberalising the regime for claims would be inconsistent with the Tobacco Products Directive which prohibits such claims on pack and requires compulsory risk warnings.

- NICE's Smoking Harm Reduction guideline (PH45) states that only licensed nicotine-containing products are explicitly listed as safe, cost effective approaches to reduce the harm of smoking.

- Medicines licensing provides the appropriate channel for those who wish to make health claims.

- Allowing such claims would result in a more liberal regime for claims than that which exists for medicines, but could also potentially reduce confidence in licensed nicotine-containing products.

- The World Health Organization (WHO) has recommended that "Until such time as a given electronic nicotine delivery system is deemed safe and effective and of acceptable quality by a competent national regulatory body, consumers should be strongly advised not to use any of these products, including electronic cigarettes."

5.4 CAP and BCAP's analysis and conclusions

The prohibition on health claims was put in place at the end of 2014 to respond to an identifiable harm: specifically that there was strong evidence of a wide variation in quality, safety and efficacy of products on the market that was of significant concern to the MHRA and other major stakeholders at that time. The question before CAP and BCAP now is whether the evidence continues to support a blanket prohibition on all health claims in the way that it did in 2014.

CAP and BCAP consider that it is clear from the arguments discussed above that the evidential position has changed. A majority of respondents representing NGOs, local authorities and industry alike make the case for change based on clear evidence that major public health stakeholders are now on record regarding e-cigarettes as being markedly safer than tobacco. Meanwhile the industry has been moving towards, and indeed is now required by legislation to evidence, far higher standards than was the case in 2014.

CAP and BCAP also take seriously the points made by the smaller number of respondents who argued for the prohibition to remain in place. The Committees remain aware, for example, that e-cigarettes are not proven to be totally safe and that questions remain (including amongst bodies such as the WHO) about their proper use and their role in smoking cessation. However these points are not themselves reasons to prohibit marketers making claims that their product is less harmful than smoked tobacco if those claims are truthful and backed by evidence. It is important to note that, while TRPR does prohibit such claims on product packs, it does not prohibit them in advertising.

Having carefully weighed all of these arguments CAP and BCAP's view is that the evidence no longer supports an outright prohibition on health claims for e-cigarettes. The Committees are therefore proposing to change their rules to remove this prohibition.

6. CAP and BCAP's proposal for rule change

For the reasons discussed in the previous chapter CAP and BCAP no longer consider that they can justify an outright prohibition on health claims in lawful advertisements for e-cigarettes. They are therefore proposing changes to their existing rules.

6.1 Proposed changes to the rules

CAP proposes to amend rule 22.5 as follows:

Existing text ~~**Removed text**~~	**22.5** Marketing communications must not contain ~~**health or**~~ medicinal claims unless the product is authorised for those purposes by the MHRA. E-cigarettes may be presented as an alternative to tobacco but marketers must do nothing to undermine the message that quitting tobacco use is the best option for health.

BCAP proposes to amend rule 33.5 as follows:

Existing text ~~**Removed text**~~	**33.5** Advertisements must not contain ~~**health or**~~ medicinal claims unless the product is authorised for those purposes by the MHRA. E-cigarettes may be presented as an alternative to tobacco but marketers must do nothing to undermine the message that quitting tobacco use is the best option for health.

6.2 Effect of the proposed rule change

If approved by CAP and BCAP this change rules would mean that marketers would no longer be prohibited from making claims about the relationship between their products and health.

However this would not automatically permit any particular claim. Advertisers would be in the same position as other marketers in the UK who wished to make claims about the health benefits of their products and have to comply with all the relevant CAP and BCAP rules. When making health claims for e-cigarettes they would have to ensure that claims were not misleading and be in possession of robust evidence that supported any claims made for their products, in line with the Advertising Guidance on Substantiation. They would need to be able to produce this evidence to the ASA on request.

In their 2016 consultation CAP and BCAP heard from respondents who supported marketers being able to make what they described as "generic statements about relative risk". The Committees are also anecdotally aware that marketers are keen to repeat favourable claims made by public health bodies about e-cigarettes as a general product category; for example the claim that they are 95% safer than tobacco.

However in the e-cigarette sector, like every other, when a general claim is made in an ad, even if it is quoting a third party source, the ASA is almost certainly likely to regard it as an implied claim for the advertised product. The marketer would therefore have to hold substantiation that the claim made is true for the product/s being advertised. This follows

long-established principles in how advertisements are regulated and to do otherwise would be to allow marketers (including those of substandard products, for example) to circumvent CAP and BCAP's rules by simply quoting from favourable third party publications whenever they wished to make a claim. It is also important to note that the favourable views taken by some public bodies are not held universally.

In summary CAP and BCAP's proposal is the removal of a prohibition which will allow marketers to make claims for which they hold evidence. The Committees are not able to restrict or mandate the types of claims which may result from the proposal being enacted or take a view on the types of claims which might be acceptable.

6.3 Clarification of the prohibition on endorsements by health professionals

Rules 22.6 (CAP) and 33.6 (BCAP) state:

> *[Marketers / Advertisers] must not use health professionals to endorse electronic cigarettes.*

CAP and BCAP wish to clarify that this rule will remain in place even if the prohibition on health claims is removed. The rationale for this prohibition remaining is as follows:

- the use of a health professional in an advertisement might give a misleading impression that a product or a service is beneficial to health (as distinct from being less harmful) or suggest that a product or service is approved, preferred or recommended by the health profession represented, when it is not.

- the distinction between health claims and medicinal claims (which may be made on medicines and medical devices containing medicines only) is not always clear. Endorsement by a healthcare professional, especially one that is synonymous with medical care, may suggest to the audience that the advertised product has medicinal properties even if explicit medicinal claims have not been made.

- the use of a health professional might be otherwise unfair, for example by taking unfair advantage of the public's trust in a profession that it perceives to be objective and independent of commercial influence.

6.4 Relevance to broadcast advertising

As noted in Chapter 4, unlicensed, nicotine-containing e-cigarettes cannot be advertised in broadcast media. This means that, other than licensed products, only separately-branded, specifically non-nicotine products (i.e. those which are, for example, designed not to accept nicotine refills) can be advertised on TV and radio.

To date CAP and BCAP are not aware of the existence of any such product. Given that the success of the e-cigarette market to date has been built largely on products that contain nicotine and / or can be refilled with nicotine e-liquids (in a variety of strengths) it may be the case that such a product will simply not be brought to market.

In that light the proposed rule change in the BCAP Code may well be very limited in its application: however, BCAP consider that it is still worth making in the interests of consistency with CAP's regime and in order to reflect the best available evidence.

6.5 Questions

Question 1
Do you agree with CAP and BCAP's proposal to remove the prohibition on health claims from unlicensed nicotine-containing e-cigarettes? If not please explain why. Please also provide any relevant evidence not already taken into account by CAP and BCAP in making this proposal.

Question 2
Do you agree with CAP and BCAP's proposed changes to the wording of the rules, as set out above? In not please explain why.

7. Public health messaging and e-cigarettes in non-broadcast media

7.1 Scope of this chapter

This chapter concerns CAP's proposal to add additional text to the e-cigarette section of its Code giving the ASA discretion not to apply the rules in that section to public health ads which refer to e-cigarettes.

However BCAP is not proposing a similar course of action for its Code. This is because the BCAP Code directly transposes the European Tobacco Products Directive in prohibiting ads for unlicensed, nicotine-containing e-cigarettes in rule 10.1.11 of the BCAP Code. This implements a formal direction from Ofcom and the Department of Health.

BCAP is presently unclear whether rule 10.1.11 should prohibit or permit public health advertisements which refer to e-cigarettes. While BCAP is aware of separate statements made in Department of Health guidance about the prohibitions not applying to certain types of health campaigns, that exemption is not present in the textual changes BCAP was required to make to its Code.

BCAP is exploring this issue through other channels and considers that it would be inappropriate to consult on the potential disapplication of content rules to such ads until such time as the question of their permissibility under rule 10.1.11 has been answered.

For these reasons the remainder of this chapter concerns a proposal relating to the CAP Code only.

7.2 Overview

The e-cigarette section of the CAP Code was authored in 2014 in the context of significant uncertainty about the long-term future of the sector as a whole. The main concerns that pervaded at that time were that e-cigarette advertisements would renormalize the use of smoked tobacco or that they would encourage nicotine use among young people and non-smokers.

Additionally it was still an open question as to how e-cigarettes would be regulated by the TPD and indeed whether they would survive that process as a consumer product at all. Three years, on the sector is remains albeit operating under much tighter regulatory controls on product standards and marketing only in the limited gaps left by far-reaching advertising prohibitions.

CAP understands that some public health bodies now wish to place advertisements promoting the use of e-cigarettes as a smoking cessation aid and / or as a safer alternative to tobacco. The Department of Health in England has announced its intention to "include within quit smoking campaigns messages about the relative safety of e-cigarettes".[7]

[7] Towards a Smokefree Generation: A Tobacco Control Plan for England; Department for Health (England), July 2017, p.16

The presence of public health ads promoting e-cigarettes, including in media where the sector itself cannot advertise by law, was not envisaged by CAP, nor by consultation respondents, when the rules were authored.

CAP wishes to take this opportunity to provide several points of clarification about the status of such ads under the rules as they stand now and to propose some qualifying text for the e-cigarettes section of its Code.

7.3 Public health campaigns and legal prohibitions on the advertising of nicotine-containing e-cigarettes

The Tobacco and Related Products Regulations 2016 only prohibit advertisements (in some non-broadcast media) which directly or indirectly promote a particular e-cigarette product or brand. That limited scope is the reason why e-cigarette businesses may, all other factors being equal, lawfully advertise their existence in media where they cannot lawfully advertise products.[8] CAP considers that this rationale would allow for a public health campaign to refer to e-cigarettes in general terms, though not to promote a named product.

7.4 Application of CAP rule 22.5 to public health messaging

Rule 22.5 is discussed in the previous chapters of this document at length. Readers will note that, even if CAP proceeds to remove the prohibition on "health" claims, those rules still include a prohibition on "medicinal claims". A medicinal claim, made for a licensed product, would include any claim that a product can help in the reduction or cessation of tobacco smoking.

However it should be understood that this pair of rules reflects the prohibition on medicinal claims for specific products contained in the Human Medicines Regulations. It is also reflected in Section 12 of the CAP Code which deals with the advertising of medicines. They therefore apply only to claims made for products and do not prohibit smoking cessation claims made for e-cigarettes generally, rather than a product or brand, by those unconnected with a specific e-cigarette business. This is CAP's understanding of the intention of the underlying law and it is not aware of evidence that would support a prohibition which goes further or which prohibits such claims in a public health context.

7.5 Application of CAP rule 22.6 (CAP) to public health messaging

Rule 22.6 of the CAP Code prohibits the endorsement of e-cigarettes by public health professionals. The policy rationale underpinning this rule is set out in section 6.3 of the previous chapter. It is not intended to have the effect of prohibiting public health advertisements which refer to e-cigarettes.

7.6 Other e-cigarette rules and public health messaging which refers to e-cigarettes

The remaining rules in the 'Electronic cigarettes' section of the CAP Code, as set out in Annex A, currently apply to such campaigns in full. Therefore a public health advertisement

[8] This issue and it associated complexities are explored more fully in the guidance produced by CAP in the wake of its 2016 consultation.

promoting e-cigarettes has to abide by the same content restrictions which apply to brand / product advertising and could not, for example:

- feature anyone who was or appeared to be under 25,
- use a creative treatment likely to be of particular appeal to those under 18,
- be placed in non-broadcast media where under-18s comprised more than 25% of the audience,
- be scheduled in or around broadcast programmes of particular appeal to children,
- contain endorsements by health professionals,
- invite their use by non-smokers or non-nicotine users.

However, CAP considers that it is possible that the ASA may be asked to apply the e-cigarette rules to a public health advertisement, the content and context of which may mitigate some of the harms which these rules seek to prevent and which therefore may justifiably not require the same level of regulatory restriction.

7.7 CAP's proposal

In light of the above CAP is proposing to qualify the scope of the e-cigarette section of its Code in order to make clear that the rules are not intended to necessarily prohibit public health messages.

CAP is proposing to add the following text to the e-cigarette section of its Code. The text copies a similar qualification provided in introductions to the Gambling and Alcohol sections:

Proposed additional text for insertion	These rules are not intended to inhibit responsible marketing communications that are intended to counter tobacco use or tell consumers about smoking-related health or safety themes. Those marketing communications may refer to e-cigarettes generally, but should not be likely to promote a particular product or brand.

7.8 Consequences of this approach

If, after this period of consultation, CAP decides to add the above text to its Code, it will allow public health advertisements to refer to e-cigarettes in general terms with more creative latitude than those for specific brands or products. Such advertisements can already have some scope to appear where the sector itself cannot advertise provided they do not promote a named product. Ultimately it will be for the ASA to decide whether a particular advertisement complies with the criteria above.

However it must be understood that this provisional disapplication of the rules would not be limited to advertisements by government departments and their agencies, for example. It could legitimately apply to any responsible advertisement which countered tobacco use and did not promote a product or brand. This could include those by charities, other NGOs, the e-cigarette industry itself or third parties acting on its behalf. While this is not necessarily problematic, consultation respondents should understand these possible effects when considering whether to support the change proposed above.

7.9 Questions

Question 3

Do you agree with CAP's proposal to add qualifying text to the introductory text of the e-cigarette section of its Code as set out above? If not please explain why.

Question 4

Do you agree with the wording proposed? If not, please explain why and provide your suggestions as to how it should be amended.

Question 5

Do you have any other information or evidence that you think might be relevant to CAP's consideration of its regulation of public health advertisements which refer to e-cigarettes?

Responding to this consultation

How to respond

CAP and BCAP invite written comments and supporting information / evidence on the proposals contained in this document by 5pm on Monday 16 October 2017.

Responses via email with attachments in Microsoft Word format are preferred to assist in their processing. Please send responses to e-cigarettes@cap.org.uk.

If you are unable to respond by email you may submit your response by fax to +44(0)20 7404 3404 or post to:

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 and copies of original consultation responses 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.

The WHO Framework Convention on Tobacco Control

Consistent with the guidance given in relation to implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control, consultation respondents who are tobacco companies, their partners or subsidiaries should indicate that clearly in their response. In their evaluation documents CAP and BCAP will indicate where a response has originated from such an organisation.

Annex A: Current CAP Code Section with proposed amendments

The new text proposed in Chapter 7 appears in the 'Overview' section indicated in **bold and underlined** text. The changes to rule 22.5 proposed in Chapter 6 are indicated by bold, underlined and **~~struck-through~~** text. This Code section can be found online here.

22 Electronic Cigarettes

The Tobacco and Related Products Regulations 2016

The Tobacco and Related Products Regulations 2016 ('the Regulations') became law in the UK on 20 May 2016. The Regulations implement Directive 2014/40/EU (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 and repealing Directive 2001/37/EC).

The Regulations prohibit the advertising of nicotine-containing electronic cigarettes (e-cigarettes) which are not licensed as medicines, but only in some media channels. These prohibitions are set out in rule 22.12. CAP has produced Advertising Guidance which explains the legal basis for and effect of these prohibitions, particularly in relation to the types of claims marketers may make online and how they might avoid indirectly promoting prohibited products in media subject to the Regulations through the marketing of non-nicotine or other products.

Overview

Other than in rule 22.12 which relates only to unlicensed, nicotine-containing products, for the purposes of this section "e-cigarette" means a product that is intended for inhalation of vapour via a mouth piece, or any component of that product, including but not limited to cartridges, tanks and e-liquids. Therefore rules 22.1 – 22.11 apply to marketing communications for, and which refer to, e-cigarettes and related products, including but not limited to e-shisha and e-hookah products, whether or not they contain nicotine. The e-cigarette market continues to innovate rapidly and new products may emerge which may not be caught precisely by the above definition. The ASA may apply these rules in circumstances where it considers that an advertised product is sufficiently similar to warrant the protection provided by this section.

The majority of e-cigarettes are currently sold as consumer goods; however marketers may seek a medicines licence for their product from the Medicines and Healthcare Products Regulatory Agency (MHRA). Except for rule 22.12 this section applies to marketing communications for e-cigarettes which are licensed as medicines by the MHRA. For products licensed as medicines, the rules in section 12 (Medicines, medical devices, health-related products and beauty products) apply in addition to any other relevant CAP rules.

Depending on the formulation of their product and the means by which it is supplied, marketers may have obligations relating to their advertising under chemical classification, labelling and packaging legislation. Marketers are advised to take legal advice to ensure compliance with the relevant law.

These rules are not intended to inhibit responsible marketing communications that are intended to counter tobacco use or tell consumers about smoking-related health or safety themes. Those marketing communications may refer to e-cigarettes generally, but should not be likely to promote a particular product or brand.

Rules

22.1 Marketing communications for e-cigarettes must be socially responsible.

22.2 Marketing communications must contain nothing which promotes any design, imagery or logo style that might reasonably be associated in the audience's mind with a tobacco brand.

22.3 Marketing communications 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.

22.4 Marketing communications must make clear that the product is an e-cigarette and not a tobacco product.

22.5 Marketing communications must not contain ~~**health or**~~ medicinal claims unless the product is authorised for those purposes by the MHRA. E-cigarettes may be presented as an alternative to tobacco but marketers must do nothing to undermine the message that quitting tobacco use is the best option for health.

22.6 Marketers must not use health professionals to endorse electronic cigarettes.

22.7 Marketing communications must state clearly if the product contains nicotine. They may include factual information about other product ingredients.

22.8 Marketing communications must not encourage non-smokers or non-nicotine users to use e-cigarettes.

22.9 Marketing communications 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.

22.10 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.

22.11 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.

22.12 Except for media targeted exclusively to the trade, marketing communications with the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components which are not licensed as medicines are not permitted in the following media:

- Newspapers, magazines and periodicals
- Online media and some other forms of electronic media

Factual claims about products are permitted on marketers own websites and, in certain circumstances, in other non-paid-for space online under the marketers control. Please refer to the Advertising Guidance.

Annex B: Current BCAP Code Section with proposed amendments

The changes to rule 22.5 proposed in Chapter 6 are indicated by bold, underlined and **~~struck-through~~** text. This section can also be found on online here.

33 Electronic cigarettes

Background

For the purposes of this section "electronic cigarette" means a product that is intended for inhalation of vapour via a mouth piece, or any component of that product, including but not limited to cartridges, tanks or e-liquids. The rules in this section apply to marketing communications for, and which refer to, electronic cigarettes and related products, including but not limited to e-shisha and e-hookah products, whether or not they contain nicotine.

The e-cigarette market continues to innovate rapidly and new products may emerge which may not be caught precisely by the above definition. The ASA may apply these rules in circumstances where it considers that an advertised product is sufficiently similar to warrant the protection provided by this section.

The majority of e-cigarettes are currently sold as consumer goods, however marketers may seek a medicines licence for their product from the Medicines and Healthcare Products Regulatory Agency (MHRA). The rules in this section also apply to marketing communications for electronic cigarettes which are authorised by the MHRA. For products authorised as medicines, the rules in section 11 (Medicines, medical devices, treatments and health) also apply.

Depending on the formulation of their product and the means by which it is supplied, marketers may have obligations relating to their advertising under chemical classification, labelling and packaging legislation. Marketers are advised to take legal advice to ensure compliance with the relevant law.

The Tobacco Products Directive

Directive 2014/40/EU (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 and repealing Directive 2001/37/EC) came into effect in the UK on 20 May 2016. It prohibits advertisements on TV and radio which have the direct or indirect effect of promoting nicotine-containing e-cigarettes and e-liquids. The prohibition is set out in Section 10 (Prohibited Categories) and includes the full legal definitions of the products for which advertising is prohibited.

E-cigarette products which are not caught by those definitions may continue to be advertised subject to the rules in this section on an interim basis, until such time as BCAP has reviewed their compatibility with the new rules. These are (i) Products which are licensed as medicines or medical devices, (ii) non-nicotine-containing liquids and refill containers, (iii) non-nicotine-containing disposable e-cigarettes and (iv) rechargeable e-cigarettes which are designed to be fitted only with cartridges containing non-nicotine-containing e-liquid. Advertisements for medicines / medical devices must also comply with the rules in Section 11 (Medicines, medical devices, treatments and health).

Therefore, for the purposes of this section only, “electronic cigarette” means a product that can be used for the consumption of vapour via a mouth piece, or any component of that product, including a cartridge, a tank, an e-liquid and the device without cartridge or tank (regardless of whether it is disposable or refillable by means of a refill container and a tank, or rechargeable with single use cartridges), that is not prohibited from being advertised by Section 10.

The e-cigarette market continues to innovate rapidly and new products may emerge which may not

be caught precisely by the above definition. The ASA may apply these rules in circumstances where it considers that an advertised product is sufficiently similar to warrant the protection provided by this section.

Depending on the formulation of their product and the means by which it is supplied, advertisers may have obligations relating to their advertising under chemical classification, labelling and packaging legislation. Broadcasters are advised to take legal advice to ensure compliance with the relevant law.

Rules

33.1 Advertisements for e-cigarettes must be socially responsible.

33.2 Advertisements must contain nothing which promotes any design, imagery or logo style that might reasonably be associated in the audience's mind with a tobacco brand.

33.3 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.

33.4 Advertisements must make clear that the product is an e-cigarette and not a tobacco product.

33.5 Advertisements must not contain ~~**health or**~~ medicinal claims unless the product is authorised for those purposes by the MHRA. E-cigarettes may be presented as an alternative to tobacco but marketers must do nothing to undermine the message that quitting tobacco use is the best option for health.

33.6 Advertisements must not use health professionals to endorse electronic cigarettes.

33.7 Advertisements must state clearly if the product contains nicotine. They may include factual information about other product ingredients.

33.8 Advertisements must not encourage non-smokers or non-nicotine-users to use e-cigarettes.

33.9 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.

33.10 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.

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

Contact us

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