

New rules for the marketing of e-cigarettes

CAP and BCAP's Joint Regulatory Statement



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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 implementing new rules for the marketing of electronic cigarettes. The rules add to those already in place, which ensure advertisements for e-cigarettes must not mislead, harm, offend or otherwise be socially irresponsible.

After a rapid rise in popularity of e-cigarettes and a concurrent increase in the advertising of them, CAP and BCAP (“B/CAP” or “the Committees”) considered that new rules were required to offer reassurance to the public and clarity to industry over how these products may be advertised. In early 2014 they proposed a draft set of rules and conducted a public consultation to inform their views on the nature and extent of rules to apply.

The final rules are provided and discussed in the following sections. They apply a level of protection that the Committees consider to be fair and proportionate, balancing the need to protect consumers with the need to allow marketers freedom of commercial speech. B/CAP are however mindful of the relative infancy of the e-cigarette market and the emerging evidence base and intend to monitor the effect of the rules, conducting a formal review after 12 months.

The rules will come into effect on **Monday 10 November 2014** at which time the ASA will begin to enforce compliance with them. Until that date the ASA will continue to investigate complaints under the current general rules.

2. Background

2.1 E-cigarettes: rise in popularity

Recent years have seen a well-documented rise in the use and availability of e-cigarettes with an estimate 2.1 million people¹ now using them in the UK. Their rise in popularity has been mirrored by a growing debate amongst the public, policymakers and public health professionals about their potential impact, good and bad, on public health outcomes. 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 act as a gateway to nicotine or tobacco for the young or non-smokers.

2.2 The decision to consult

Concurrent with their popularity, advertising for e-cigarettes has been growing steadily in non-broadcast media for some time. The CAP Code provides general protections from misleading, offensive, harmful or otherwise irresponsible advertising under which the ASA has investigated numerous complaints about e-cigarette advertising. Up until now the CAP Code has not had any specific rules concerning the advertising of e-cigarettes.

The BCAP Code, covering broadcast advertising, provides the same general protections but it also includes broadly-written prohibitions in the Tobacco section of the Code that have severely limited advertising for products which share characteristics with tobacco products. These prohibitions have led the ASA to uphold complaints about various e-cigarette advertisements². Aside from those prohibitions, which inadvertently apply to e-cigarette advertisements, the BCAP Code also has had no specific provisions for e-cigarettes.

The Committees consider that e-cigarettes' particular characteristics, their potential for harm, for addiction and their relationship with tobacco, carry a reasonable expectation of specific regulatory protection in relation to how they may be advertised. CAP and BCAP are concerned to ensure that advertising is responsible and consider that new rules are the best way to deliver that protection and to clarify to the industry what they regard as responsible marketing in this sector, taking into account the views of a wide range of stakeholders. BCAP is also keen to address the aforementioned difficulties being presented by the Tobacco rules, which is dealt with in detail in section 5.3.

B/CAP launched a joint consultation in February 2014 in which they proposed new rules drawn in part from their experience setting rules for sectors that have presented similar public policy issues, such as alcohol and gambling. However, the Committees have been mindful that e-cigarettes are a unique product with their own complexities and, unlike with alcohol and gambling, strong arguments are made for e-cigarettes' 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 results of that consultation are set out in the following sections and the accompanying evaluation of responses.

¹ ASH: Use of electronic cigarettes in Great Britain. http://www.ash.org.uk/files/documents/ASH_891.pdf

² More information about the issues presented by the BCAP Tobacco rules can be found in section 4.3 of the [original consultation document](#), which also includes links to relevant ASA adjudications

2.3 The Tobacco Products Directive

The new [European Tobacco Products Directive](#) governing the manufacture, presentation and sale of tobacco and related products (including e-cigarettes) was signed on 3 April 2014. The UK Government is required to transpose its provisions by 20 May 2016, with a further transitional period for *non-compliant* e-cigarette products until 20 November 2016. It will allow e-cigarettes to remain as consumer goods subject to various quality controls and limitations on nicotine content, however marketers wishing to apply for a medicines authorisation will be able to do so. Additionally there will be specific prohibitions on categories of advertising.

The new CAP and BCAP rules do not pre-empt the requirements of the Directive but serve, at least, as an interim measure. B/CAP understand that the Department of Health is now working to establish what effect the Directive will have in the UK. When more is known about the effect of the Directive in the UK, CAP and BCAP will clarify what role their Codes will have in relation to e-cigarette advertising in future.

2.4 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 wish 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.

3. Rules which CAP and BCAP are implementing

This section discusses the rules which CAP and BCAP will implement. The content rules are deliberately harmonised to be the same in both Codes, except for the difference in descriptor used in each Code: the term “marketing communications” is used to describe non-broadcast advertising in the CAP Code, whereas “advertisements” is used to describe broadcast advertising in the BCAP Code.

The CAP and BCAP Codes naturally approach targeting / scheduling restrictions in a different way. Those rules are set out separately in sections 4 and 5. Section 5 also addresses BCAP’s implementation of mandatory central clearance for radio advertising and the necessary changes to the BCAP Tobacco rules. The rules which B/CAP consulted on but, following an evaluation of consultation responses, have chosen not to implement are discussed in section 6. Advertisements for e-cigarettes must also comply with all relevant other rules in both Codes. In section 7 some additional discussion is provided on the main issues raised through the consultation process, and the rationale behind the key decisions made.

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, typically 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 in the Codes discourages excessive use. Although B/CAP received various suggestions from respondents as to types of creative approaches they might consider irresponsible, above and beyond the approaches identified in other rules for e-cigarette advertising, B/CAP did not consider any were so harmful as to require outright prohibition within this rule. Instead, B/CAP are implementing the rule in its briefest form with a view to supplementing it with guidance as ASA casework begins to define the boundaries of responsible advertising for this sector.

Rule 2: *Marketing communications / 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.*

Many respondents raised concerns that the rules drafted by B/CAP did not go far enough in preventing advertisements invoking tobacco brand identity. As discussed in section 7.2 B/CAP have added this rule, which is a variation on the text proposed by many respondents to answer those concerns.

Rule 3: *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.*

Rule 4: *Marketing communications / advertisements must make clear that the product is an e-cigarette and not a tobacco product.*

Rule 3 remains in the form originally proposed by B/CAP. It recognises the relationship that e-cigarettes have with tobacco and prohibits any positive reference to tobacco use.

B/CAP acknowledge that there is significant concern about the potential indirect promotion of tobacco products via advertising for e-cigarettes but are also mindful that the similarity of e-cigarettes to tobacco products is a chief appeal to those seeking a tobacco alternative.

Neither this rule, nor the broader rule framework within which it sits, prohibits products being shown, or shown in use, either in broadcast or non-broadcast advertising, so long as it is clear that the product is an e-cigarette and not a tobacco product (see section 7.3). The rule should therefore be read in conjunction with Rule 4. Rule 4 has been augmented since consultation with the words "...and not a tobacco product" to clarify its purpose, operating alongside rule 3.

Rule 5: *Marketing communications / 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.*

Advertisers may obtain a licence for their product from the MHRA. Such a licence would typically allow marketers to make smoking cessation and reduction claims in the same way as other licensed nicotine replacement therapy (NRT). Marketing for such products is subject to the rules in section 12 of the CAP Code and section 11 of the BCAP Code. Claims that e-cigarettes are an "alternative" to tobacco may be made.

Although the rule remains mostly in the form originally proposed, the second sentence has been augmented slightly to include the requirement "...but marketers must do nothing to undermine the message that quitting tobacco use is the best option for health". This responds to comments made by various consultation respondents and seeks to make clear that, although unlicensed e-cigarettes may not make smoking cessation / reduction claims and may be described as an alternative to tobacco, advertisers should be cautious not to imply anything other than cessation of tobacco offers the best chance for health improvement.

Rule 6: *Marketers must not use health professionals to endorse electronic cigarettes.*

This rule is a new addition as a result of the consultation and is consistent with the prohibition on health claims.

Rule 7: *Marketing communications / advertisements must state clearly if the product contains nicotine. They may include factual information about other product ingredients.*

B/CAP consider that advertisements for products which contain nicotine, an addictive substance, need to make that fact clear in order to avoid harm to consumers. B/CAP also examined whether they might require marketers to make clear when a product did not contain nicotine, but concluded that a straightforward statement about the presence of nicotine in a product was the most proportionate way to advise people of the risk, given the natural limits of time and space.

Rule 8: *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 regard their primary purpose as an alternative to tobacco smoking. CAP and BCAP understand that there is presently little evidence of e-cigarette take-up in never-smokers, but accept that this could change. While it is not the Committees' role to mandate the proper use of e-cigarettes, for example by requiring that advertisements always present them as an alternative to tobacco, they do consider that it is proportionate to provide a rule which prevents, as far as possible, advertisers actively encouraging non-smokers or non-nicotine-users to use e-cigarettes.

The rule does not require every marketing communication to target only tobacco smokers / e-cigarette users explicitly, rather that they must not explicitly encourage those who do not currently use nicotine to start.

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.*

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 introducing this rule and the next, in addition to the Code-specific targeting restrictions, to prevent advertisements being directed at, or appealing to under-18s.

Prompted in particular by a specific recent advertisement, some respondents were concerned that the last sentence of the rule might inadvertently serve to prohibit responsible advertising by preventing, for example, any depiction of juvenile behaviour. The advertisement cited by respondents had grouped tobacco smoking with various juvenile behaviours of which the characters were shown to positively grow out of. While B/CAP does not take a view on the acceptability of specific advertisements the Committees' consider that the ASA may find advertisements to be compliant with the rule if, when taken as a whole and in context, the advertisement is judged to not be of particular appeal to children or young people.

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 rule provides that children and young people do not identify, by age, with those playing a significant role or featured using e-cigarettes in the advertisement. Some consultation respondents considered that the age might be reduced to 18 in order to more effectively appeal to the significant number of tobacco smokers who become established in their nicotine use below the age of 25. While B/CAP understand the rationale put forward, they are also mindful of the strong need to minimise the appeal of advertisements for these products to under-18s generally and particularly those who do not already consume nicotine.

The age of 25 was proposed because by that age people clearly look and sound more adult than adolescent. It also mirrors the minimum age limit in other Code sections and gives more certainty to the advertising industry when creating advertisements and to the ASA Council when deciding if an advertisement has breached the Codes. In that context B/CAP consider that retaining a minimum age limit of 25 is the most proportionate decision.

4. CAP Code-only rule

CAP Rule 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.*

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 is therefore providing this rule for e-cigarette marketing also.

Some respondents suggested that the 25% threshold was not strict enough (it should be lower), or that CAP should consider a means of addressing the actual number of total impacts (the actual number of under-18s who see an ad) as well as thresholds. While it is CAP's intention to minimise as far as possible children and young people's exposure to non-broadcast e-cigarette advertising, CAP is also mindful of the need execute that policy objective without disproportionately limiting advertisers' ability to reach a legitimate audience for their products. Through its experience of setting rules for sectors which present similar societal concerns, and through the ASA's activities in enforcing those rules CAP considers that the 25% threshold continues to describe the appropriate limit at and beyond which it is proportionate to prevent advertising for e-cigarette products, or other products restricted by law for sale to under-18s.

5. BCAP Code-only rules

5.1 Central Clearance for radio advertisements

BCAP Rule 11: *Radio Central Copy Clearance* – *Radio broadcasters must ensure advertisements for e-cigarettes are centrally cleared.*

It is a licence requirement of broadcast services that the advertisements that they air comply with the BCAP Code. 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.

Although central clearance is provided for some radio advertisements by the RACC, the vast array of small, local advertisers and radio stations has meant that local clearance procedures are commonplace. The BCAP Code therefore requires certain categories of radio advertisements to be centrally cleared by the RACC. Those categories of radio advertisements have in common a particular potential to mislead, offend or harm. BCAP considers that procedure is necessary for e-cigarette advertisements also. This provides that such advertisements receive the necessarily high level of pre-broadcast scrutiny to ensure they are appropriately scheduled and do not cause harm.

Some consultation respondents queried why a similar rule does not exist for television advertising. BCAP understands that most, if not all, television advertisements for e-cigarettes will receive pre-broadcast scrutiny and clearance from Clearcast. On that basis BCAP does not consider it necessary to mandate television pre-clearance for this sector.

5.2 Scheduling

In addition to the new content rules BCAP will add a scheduling restriction to its Code to limit under-18s exposure to e-cigarette advertisements. In practice it will do this by adding e-cigarettes to the list of products and services set out in rule 32.2 of the Scheduling section of the Code, which should be considered alongside the BCAP Advertising Guidance Note on Audience Indexing, found [here](#). The specific rule and proposed amendment are set out below:

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*

Some respondents, while agreeing with the principle behind the rule, noted that although some programmes that attract high viewership (e.g. prime time programming or sporting events) may not be 'directed at or likely to appeal' particularly to under 18s, they nevertheless are viewed by large numbers of under 18s. As with the non-broadcast targeting restriction discussed in the previous section, those respondents asked BCAP to consider this 'total impact' in its rules in addition to the existing scheduling restrictions.

BCAP seeks to set rules which are proportionate. This requires policy measures that respond to the need to limit under 18s' exposure to e-cigarette advertising while avoiding a significant intrusion on adult viewing that would disproportionately limit advertisers' ability to reach a legitimate audience for their products. Any policy move seeking to exclude e-cigarette advertising from programmes of broader appeal that are watched by a predominantly adult audience would, in BCAP's view, run counter to this principle.

BCAP considers that adults should be able to view responsible advertising for products of legitimate interest to them, but in cases where the elimination of child impacts does not significantly outweigh the reduction in adult impacts that proportionality will have been lost. There is also the possibility that advertisement spend displaced from a small number of programmes of broader appeal towards a greater number of programmes with a narrower appeal may result in no actual meaningful reduction in the total number of impacts, but only their dispersal. The notion of intrusion into adult viewing also influences BCAP's thinking on the recent findings³ about changing viewing patterns among older children and the usefulness of the current approach to scheduling. Recent research suggests that viewing by older children to adult commercial channels now peaks after 9pm.

The 120 index, which is explained in the BCAP Advertising Guidance Note on Audience Indexing, gives broadcasters the capacity to determine programmes of particular appeal to a youth audience at any time of day, including beyond 9pm, and exclude e-cigarette advertising from those programmes. BCAP considers that the 120 index continues to describe the appropriate limit at and beyond which it is proportionate to prevent a given audience profile from seeing advertising for e-cigarette products, or other products restricted by law for sale to under-18s..

5.3 Corresponding updates to the Tobacco rules

The existing Tobacco rules in the BCAP Code act, inadvertently, to prohibit any depiction of e-cigarettes in broadcast advertising. Upon implementation of these rules, BCAP will modify the Tobacco rules such that Code rules 10.1.3 and 10.3 – 10.5 inclusive do not apply to advertisements for e-cigarettes which are caught within the remit of the new section. Those modifications can be found in Annex C of this document.

³ Children and young people's exposure to alcohol advertising. <http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/alcohol-advertising/>; accessed on 8 October 2014.

6. Rules upon which CAP and BCAP consulted, but are not implementing

6.1 Background

Additionally B/CAP consulted on several other rules which, after further consideration, they consider are not merited. These are set out below.

6.2 Links with gambling, alcohol or illicit drugs.

B/CAP consulted on a rule which would prohibit linking e-cigarettes with gambling, alcohol or illicit drugs. However, the Committees also made clear in the original consultation document that they had doubts about whether this rule was necessary because any e-cigarette advertisement which features or refers to alcohol or gambling already has to comply with the relevant provisions in the Alcohol and Gambling sections of the Codes. B/CAP have therefore had to consider whether the depiction within an advertisement of co-locating e-cigarettes with the responsible depiction of alcohol or gambling is in every circumstance likely to be regarded as irresponsible.

B/CAP's consideration is that such a restriction is disproportionate. While B/CAP do not and cannot pre-approve specific creative treatments, it is their view that there are likely to be ways in which advertisements may feature an e-cigarette in an environment in which alcohol is being consumed or gambling conducted without being harmful or irresponsible. This is particularly the case given that, as some respondents have noted, e-cigarettes have a particular appeal as an alternative to tobacco in such environments.

In B/CAP's view it is highly unlikely that any advertisement will be able to link e-cigarettes with illicit drugs in a way that is responsible and the ASA will have the capability to deal with any advertisement which does make that link under the general responsibility rule in this section, or by using rules that prevent harm.

6.3 Use in "unwise" situations.

Mirroring a rule in the Alcohol section of the Codes, B/CAP had also proposed, again on a precautionary basis, a rule which stipulated certain situations in which e-cigarettes should not be depicted because it would be unsafe or unwise. At the time of proposal they had considered that driving was one such circumstance, but had not identified any others and welcomed suggestions.

While B/CAP welcome the feedback provided by respondents, having reviewed it they do not consider that any of those specific suggestions (for example certain locations, in public vehicles) are so unambiguously harmful in all instances that they need to be precluded in the wording of the rule. Some of the suggestions would more appropriately be addressed under other Code rules e.g. rules which prevent anything that is "likely to condone or encourage an unsafe practice" (CAP) or "prejudice health and safety" (BCAP)⁴. With those

⁴ The relevant rules can be found in [Section 4 \(Harm and Offence\)](#) of the CAP Code and [Section 4 \(Harm and Offence\)](#) of the BCAP Code.

protections already in place B/CAP consider that the rule is unnecessary and have elected not to implement it.

6.4 “18 and over” messages

B/CAP consulted on a rule which would require all advertisements to state that products were only suitable for those aged 18 years and over. B/CAP are aware that e-cigarette advertisements commonly include information making clear that the product is for sale only to consumers aged 18 or over. BCAP and CAP Codes do not typically prescribe specific informational messaging in advertisements. A rare example is the requirement in CAP Code rule 11.7 and BCAP Code rule 9.9 that advertisements for specific energy-related products must include the product’s energy efficiency class. Usually when compulsory messages appear in advertisements, it is because other regulators, such as the Financial Conduct Authority (FCA), require them.

While B/CAP welcome efforts that may further the objective of discouraging under 18s from purchasing e-cigarettes the Committees have previously had cause to question the overall value of warning messages⁵. Many consultation respondents shared B/CAP’s scepticism. In light of that and the available evidence, B/CAP consider that the limited effect of warning messages, when weighed against their potential to create warning fatigue, to have a result that is opposite to the one intended and their potential cost to advertisers, make the implementation of an 18 and over message unnecessary. B/CAP consider that the rules provided serve to offer sufficient protection to under 18s.

⁵ Section 7 (proposed rule 11) of the [original consultation document](#) sets out in full CAP and BCAP’s view on compulsory warning messages.

7. Key decisions

7.1 Background

When setting rules B/CAP must take into account advertisers' right to impart information and audiences' right to receive information without undue interference. From this starting point, B/CAP may consider what restrictions, beyond the enduring principles that advertisements should not mislead, harm or offend, might be needed to reduce the potential for harm. In making decisions about the final rules in the light of a developing and relatively immature evidence base, B/CAP have had to weigh up the rights to impart and to receive information with the wide-ranging views of respondents. In that context, B/CAP consider the rules are both proportionate and defensible, but are mindful of the need to keep the rules under review; more information on that is provided in section 8.

The consultation responses raised a number of key concerns and themes, often repeatedly, in relation to different questions and proposed rules. B/CAP's evaluation of those and responses to the ancillary questions asked in the consultation are provided in this section.

7.2 Prohibiting references to tobacco branding

A number of respondents were concerned that B/CAP's proposed rules did not go far enough to prevent advertisements for e-cigarettes alluding to tobacco branding. B/CAP agree and have introduced an additional rule (rule 2) to prohibit ***“any design, imagery or logo style that might reasonably be associated in the audience's mind with a tobacco brand”***. This wording is a slight variation on that put forward by some respondents and does not include “colour” in the prohibitions. This recognises that colour is likely to be too broad a criterion and may well catch advertising executions that do not actually invoke a tobacco brand. Additionally the revised rule states tobacco “brand” instead of “product”, recognising that e-cigarettes may naturally be associated in the audience's mind with a tobacco product without requiring their advertising to be prohibited.

7.3 Allowing responsible depictions of products, including on television

It is not uncommon for non-broadcast advertisements for e-cigarettes to depict e-cigarette products and e-cigarette paraphernalia e.g. boxes, refills etc. The CAP Code does not explicitly prohibit e-cigarettes being shown, or shown in use, in non-broadcast advertising, provided that such depictions are responsible and compliant with any other relevant rules. That situation will not change with the implementation of the new CAP rules.

Up until now the situation on television has been different. [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. Within that section there are specific rules for tobacco products which are intended to prevent the indirect promotion of tobacco products, particularly through brandsharing across products (for example advertising a t-shirt with a tobacco brand logo). Reflecting the high degree of protection that BCAP and predecessor regulatory bodies have sought to offer in broadcast advertising (and particularly on television) those rules are more restrictive than those found in the relevant legislation or the CAP Code and, with the ASA obliged to apply them, their effect up until

now has been that e-cigarette marketers have not been able to show their products on television. This is an inadvertent and unintended function of those rules.

E-cigarettes are not a tobacco product and are not currently subject to the same legislative controls as tobacco; although B/CAP understands that restriction of sale to those aged 18 and over is imminent. E-cigarettes are also a product of legitimate interest for those looking to consume nicotine without tobacco. While B/CAP understands the concern expressed by many respondents about the representation of smoking-like behaviours, the Committees consider that there is not currently a case for prohibiting the responsible depiction of e-cigarettes, either in broadcast or non-broadcast media, including their depiction in use.

For that reason, BCAP will dis-apply the broad tobacco prohibition in section 10 specifically and only to advertisements which fall within the remit of the new e-cigarette rules. BCAP consider that the new rules, which have strong prohibitions about the indirect promotion of tobacco and which require advertisements to make clear that the product is an e-cigarette and not a tobacco product, achieve the right balance between the legitimate right to commercial speech and the need to protect audiences from potentially harmful material.

7.4 E-cigarettes as an alternative to tobacco

A number of respondents argued that e-cigarettes have a particular role as an alternative to tobacco and that B/CAP should therefore set rules to require that they always be described in that way in advertising. B/CAP however do not consider such a restriction to be proportionate.

While the Committees are mindful that e-cigarettes have a primary appeal to those looking for an alternative to smoking it is not B/CAP's role to dictate the proper use of a consumer good, nor are they aware of an evidence base which might require them to implement such a restriction. B/CAP have considered the issue of compulsory messages previously and again during this consultation, but not been persuaded by the evidence that they produce a worthwhile effect, particularly when weighed against the potential for warning fatigue, effects opposite to the ones intended and the issues and costs to advertisers stemming from the natural confines of time and space.⁶ That is particularly the case in broadcast advertising. B/CAP have provided a separate rule which prohibits any explicit appeal to non-nicotine users.

7.5 Glamorisation and other specific creative treatments

A number of respondents suggested that B/CAP prohibit glamorisation or other specific types of creative treatment. B/CAP wish to set proportionate rules which allow marketers to use varied and creative approaches so long as those approaches are not particularly likely to be attractive to non-smokers or under-18s, and are not harmful, offensive or otherwise irresponsible. Given that the natural function of advertising is to present products in their best light, B/CAP consider that prohibiting glamorisation is too broad a criterion to be instructive to advertisers seeking to make responsible advertisements, or to the ASA when enforcing the rules.

⁶ For more information on B/CAP view on the role of compulsory messages see section 7.4 of this document and section 7 of the [original consultation document](#).

Some respondents suggested that the rules replicate provisions provided in the Alcohol and Gambling sections of the Codes. For example, by prohibiting links with sexual success, or limiting their depiction in social situations. However, the content restrictions provided for alcohol and gambling reflect specific concerns that exist for those sectors. E-cigarettes present only some of the same concerns as alcohol and gambling and crucially there are strong arguments for the public health benefits of e-cigarettes. B/CAP therefore do not currently consider that the same content restrictions currently need to apply.

7.6 Prohibiting health claims

Many believe that e-cigarettes are less harmful than tobacco, precisely because they do not contain it. However, B/CAP understand that there is presently no evidential basis which demonstrates that conclusively. E-cigarettes do not currently have to meet any particular safety or efficacy standards, other than those which are common for consumer goods. In June 2013 the MHRA published the results of a consultation and further scientific market research into the safety and quality of unlicensed e-cigarettes. That work showed that across the market there was significant variability in the ingredients and nicotine delivered and an absence of evidence to suggest that they are safe and effective for their intended use.

The MHRA commented that *“Although it is reasonable to assume that using electronic cigarettes is a safer alternative than smoking tobacco cigarettes the long term safety of these components to the consumer remains unknown at this stage.”*⁷ B/CAP’s own consultation indicates that situation has not changed and the prohibition received broad support from the public health community. In that light B/CAP consider that they currently need to set and communicate a broad prohibition on any claims that e-cigarettes are able to convey health benefits or that they are ‘safer’ or ‘healthier’ than smoking tobacco. This does not prevent marketers presenting their products as alternatives to tobacco, nor does it prevent them making factual statements about what the product does or does not contain: e.g. “no tar”, “no tobacco”-type claims. This restriction does not apply to advertisements for e-cigarettes which are authorised by the MHRA, which may make claims consistent with the summary of product characteristics. Consistent with the ban on health claims, B/CAP have also added a separate rule which prohibits endorsement of products by health professionals.

7.7 Mirroring smokefree legislation

A number of respondents suggested that B/CAP implement a rule which would prohibit depictions of e-cigarette use in places where tobacco smoking was currently prohibited by law. However, B/CAP understands that while some workplaces and public venues have prohibited their use, others have not and the ability to use e-cigarettes in some of these settings is a legitimate part of the appeal of e-cigarettes for tobacco users seeking an alternative source of nicotine. B/CAP therefore does not wish to prohibit depictions of legitimate use of the product or, in so doing, take a view on where e-cigarettes may legitimately be used. Any direct or implied claims made in advertising about where

⁷ MHRA: The Regulation of Nicotine Containing Products: Public Summary Report, 12 June 2013: <http://www.mhra.gov.uk/home/groups/comms-ic/documents/websiteresources/con286834.pdf>, p. 5

products may or may not be used will need to be responsible, substantiated and not misleading.

7.8 E-cigarettes which are licensed as medicines

Advertisers may obtain an authorisation for their product from the MHRA. Marketing for such products is subject to the rules in section 12 of the CAP Code and section 11 of the BCAP Code. Although such products will, by their nature, have had to meet particular standards of quality and safety, B/CAP considers that their advertising presents many of the same concerns as that for consumer electronic cigarettes. Specifically, they can look like tobacco products, are used in the same way and contain nicotine. For those reasons the new rules will apply to these products also.

7.9 E-cigarettes which do not contain nicotine and other vapour products

Application of the rules to products which don't contain nicotine received widespread support from consultation respondents and B/CAP considers that, irrespective of the presence or absence of nicotine, the nature of the product and the potential for harm, combined with the value of consistency in how they may be advertised warrants the rules being applied to such products also. Respondents were also keen to ensure that the rules applied to the full range of e-vapour products, such as e-shisha and e-hookah products. B/CAP have therefore provided a broad definition at the beginning of their respective Code section to catch all such products and have also made clear that the ASA may act if it encounters advertisements for novel products which do not meet the strict definition but which are sufficiently similar to present the same potential for harm.

7.10 Applicability to social media

A number of consultation respondents pointed out that the marketing of e-cigarettes on popular social networks is commonplace and queried whether or to what extent the new rules applied to such sites, and to online marketing generally.

The CAP Code applies to all marketing communications on companies' websites, or in other non-paid-for space online under their control, that are directly connected with the supply or transfers of goods or services. Where those criteria are met this would include posts on social media and the like. More information about the scope of the CAP Code can be found [here](#).

8. Implementation and next steps

8.1 Implementation

It is the view of both CAP and BCAP that the new rules set proportionate and responsible standards and are in line with the more general, well established principles in both of their Codes, the legal framework and ASA adjudications. While CAP and BCAP do not consider that the new Code sections are difficult to comply with, they do accept that the e-cigarette industry will need a short period in which to ensure that their advertising is in line with the new rules.

In view of that the new CAP and BCAP Code rules and the modifications to the Tobacco rules in the BCAP Code will take effect on **Monday 10 November 2014** and the ASA will enforce compliance with them from that date. The general provisions in both Codes will continue to apply to e-cigarette advertising until then.

8.2 Review

CAP and BCAP will conduct a review of the rules after 12 months to assess whether they are working as intended and whether the evidence base has developed in a way which requires the Committees to reconsider any of the rules or augment them.

8.3 Announcements concerning the Tobacco Products Directive

As discussed in section 2.3, CAP and BCAP will make further announcements concerning the impact of the Tobacco Products Directive when more is known about its effect in the UK. Interested parties should monitor the CAP website and sign-up for relevant news alerts.

Annex A: CAP Code Section

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 12 (Medicines, medical devices, health-related products and beauty products) 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) is now in force but has not yet been given effect in UK law. The UK Government is required to transpose its provisions by 20 May 2016, with a further transitional period for non-compliant e-cigarette products until 20 November 2016. Those provisions include restrictions on advertising. The rules in this section do not pre-empt the requirements of the Directive but serve as an interim measure. When more is known about the application of the Directive in the UK, CAP will clarify what role its Code will have after the new law has been given effect.

Rules

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

4. Marketing communications must make clear that the product is an e-cigarette and not a tobacco product.
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.
6. Marketers must not use health professionals to endorse electronic cigarettes.
7. Marketing communications must state clearly if the product contains nicotine. They may include factual information about other product ingredients.
8. Marketing communications must not encourage non-smokers or non-nicotine-users to use e-cigarettes.
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.
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 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.

Annex B: New BCAP Code Section and Scheduling rule amendments

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) is now in force but has not yet been given effect in UK law. The UK Government is required to transpose its provisions by 20 May 2016, with a further transitional period for non-compliant e-cigarette products until 20 November 2016. Those provisions include restrictions on advertising. The rules in this section do not pre-empt the requirements of the Directive but serve as an interim measure. When more is known about the application of the Directive in the UK, BCAP will clarify what role its Code will have after the new law has been given effect.

Rules

1. Advertisements for e-cigarettes must be socially responsible.
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.

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.
4. Advertisements must make clear that the product is an e-cigarette and not a tobacco product.
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. Advertisements must not use health professionals to endorse electronic cigarettes.
7. Advertisements must state clearly if the product contains nicotine. They may include factual information about other product ingredients.
8. Advertisements must not encourage non-smokers or non-nicotine-users to use e-cigarettes.
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.
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. **Radio Central Copy Clearance** – Radio broadcasters must ensure advertisements for e-cigarettes are centrally cleared.

Amendment to existing rule 32.2(.7)⁸:

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

⁸ The full text of BCAP Code Section 32 (Scheduling) can be found [here](#).

Annex C: Amendments to BCAP Code section 10 (Prohibited categories)

[Amendments shown in underlined text]

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. This rule does not apply to advertisements for electronic cigarettes which are regulated by section 33.

Tobacco

These rules do not apply to advertisements for electronic cigarettes which are regulated by section 33.

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.

Contact us

Committee of Advertising Practice
Mid City Place, 71 High Holborn
London WC1V 6QT

Telephone: 020 7492 2200
Textphone: 020 7242 8159
Email: enquiries@cap.org.uk

www.cap.org.uk

 Follow us: [@CAP_UK](https://twitter.com/CAP_UK)