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By email

**The Advertising Standards Authority and Committees of Advertising Practice
response to the Health and Sport Committee's call for written views on the Health
(Tobacco, Nicotine etc. and Care)(Scotland) Bill**

1. Introduction

1.1 The Advertising Standards Authority, the Committee of Advertising Practice and the Broadcast Committee of Advertising Practice (the 'ASA system') welcome the opportunity to respond to the Health and Sport Committee's call for written views on the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill.

1.2 We are grateful for the invitation to the ASA to discuss our response and the practical aspects of the Nicotine Vapour Products (NVP) proposals with the Health and Sport Committee in September 2015.

1.3 We would like to provide our views in relation to Question 1, which asks whether respondents support the Bill's provisions in relation to NVPs. Based on the available evidence, we think the current advertising rules for e-cigarettes, which were updated on the 10 November 2014, provide the correct level of protection for consumers across the UK.

1.4 The ASA system previously submitted a response to the Scottish Government's Consultation on Electronic Cigarettes and Strengthening Tobacco Control in Scotland (Annex A). To supplement and update this response, the ASA system wishes to make the following key points:

2. Sector-specific rules

2.1 On the 10 November 2014, after a period of public consultation, CAP and BCAP put in place specific rules for the advertising of e-cigarettes in the UK. Those rules apply across all media and are administered by the ASA.

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Chairman Rt Hon Lord Smith of Finsbury **Chief Executive** Guy Parker

ASA Council Kate Bee, Alan Bookbinder, Rachel Childs, Roisin Donnelly, Ray Gallagher, Wesley Henderson, David Hepworth, John Mayhead, Suzanne McCarthy, Sir Martin Narey, Shireen Peermohamed, Hamish Pringle and Sam Younger

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2.2 The rules place an emphasis on the protection of young people and ads must avoid containing anything that promotes tobacco. The rules address key concerns about the advertising of e-cigarettes:

- Ads must not be likely to appeal to people under 18, especially by reflecting or being associated with youth culture (including using celebrities popular with young people)
- People shown using e-cigarettes or playing a significant role must neither be nor seem to be under 25
- Ads must not be directed at those under 18 either through the choice of media or the context in which they appear
- Ads must not encourage non-smokers or non-nicotine users to use tobacco products and must do nothing to promote tobacco smoking
- Ads must make clear that the product is an e-cigarette, not a tobacco product, and must not cross-promote tobacco brands
- Ads must not contain health claims or (illegal) medicinal claims

2.3 More detail on the rules and relevant policy decisions can be found in CAP and BCAP's Joint Regulatory Statement (Annex B) and in Annex A.¹

3. Evidence base

3.1 CAP and BCAP will always consider whether any new evidence has regulatory implications for the Advertising Codes, where necessary taking into account the public health context. In the e-cigarette sector, that context includes concerns around the safety of e-cigarettes and their potential to 'normalise', and be a gateway in to, smoking. It also includes the arguments and evidence for the potentially significant public health benefit at the population level if smokers or would-be smokers switch some or all of their tobacco consumption to e-cigarettes and the part responsible advertising might play in encouraging that switching.

3.2 When the new rules were introduced, CAP and BCAP were mindful that there had already been at least two years of steadily increasing advertising of e-cigarettes, mostly in non-broadcast media. Despite the increase in advertising, the evidence base showed then, and continues to show now, that the use of e-cigarettes amongst children and young people remains rare and confined to those who currently or have previously smoked tobacco.²

3.3 Similarly e-cigarettes are used almost exclusively by adult current and ex-smokers and that use amongst never smokers remains negligible.³ The available evidence does not

¹ CAP and BCAP's Joint Regulatory Statement <https://www.cap.org.uk/News-reports/Consultations/Closed-consultations/CAP-BCAP-consultation-on-ecigs.aspx#.VbeSkU1OW70>

² *Use of electronic cigarettes in children in Great Britain – May 2015*, ASH Fact Sheet. Data taken from YouGov Poll. http://www.ash.org.uk/files/documents/ASH_959.pdf.

³ *Use of electronic cigarettes among adults in Great Britain – May 2015*, ASH Face Sheet, Data taken from YouGov Poll. http://www.ash.org.uk/files/documents/ASH_891.pdf

show a gateway effect from e-cigarettes into smoking. The CAP and BCAP rules reflect the gradient of risk and, were this evidential picture different, the rules would be different.

4. Pre-clearance

4.1 It is a licence condition of all UK broadcast television channels that the ads they air comply with the BCAP Code. All the major broadcasters operate a regime of pre-clearance via Clearcast which ensures that ads are examined carefully prior to broadcast to ensure compliance.⁴ In the rare event that a broadcast ad is found to breach the Code it is removed from air instantly using the same system.

4.2 Companies who market in non-broadcast media have access to CAP's Copy Advice service, which educates and advises industry on how to make sure their advertising is compliant with the CAP Code before it appears. This includes a [dedicated advice webpage on e-cigarette advertising](#) and access to free one-to-one advice, provided within 24 hours.⁵

5. ASA enforcement

5.1 In the eight months⁶ since the inception of the new rules the ASA received a total of 644 individual complaints about e-cigarette advertisements. Approximately 250 of those complaints objected to e-cigarettes being advertised at all. These complainants often take the view that e-cigarettes are the same as tobacco in some way or present the same health risks, or that they can act as a gateway to tobacco. Given the growth of the e-cigarette sector and the strength and divergence of opinion, we expect to continue to receive such complaints. However, our decision to allow responsible advertising for e-cigarettes, subject to strict rules, is based on a consultation in which the majority of respondents supported responsible advertising and on an evidence base (discussed above) that continues to show that the products are overwhelmingly used by smokers as a tobacco alternative.

5.2 The remaining complaints related to 88 actual cases (cases broadly correspond to ads). In a pattern consistent with our wider work, 71 of those cases did not need to be taken forward, generally because the complaint did not raise issues under the Codes. For example, in one case the complaint was that the ad was making a smoking cessation claim for an unlicensed product and in another the complainant felt that the ad was encouraging illegal drug use. However, after obtaining copies of these ads and assessing them, we did not consider that they were likely to be interpreted by most consumers in the ways suggested by the complainants. In another case the complainant believed that she had seen an e-cigarette advertisement on a children's channel, but enquiries with the broadcaster and our media monitoring databases revealed this not to be the case.

5.3 Of the remaining 17 cases, six were judged by the ASA Council not to be in breach of the rules and were closed. A further six presented minor or clear cut breaches of the

⁴ Clearcast <http://www.clearcast.co.uk/>

⁵ CAP AdviceOnline Electronic Cigarettes <https://www.cap.org.uk/Advice-Training-on-the-rules/Advice-Online-Database/Electronic-cigarettes.aspx>

⁶ 10 November 2014 to 30 June 2015 inclusive

Codes and were resolved on an informal basis by the advertiser agreeing to make changes to their ads to bring them in line with the Codes. Five cases were formally investigated and ruled on by the ASA Council. Of those, four were found to be in breach of the Code either in whole or in part, and one was found not to be in breach.

5.4 In the same period we received a total of 19,062 complaints and 10,186 cases about all ads⁷ meaning that e-cigarette advertisements account for 3.4% of complaints and 0.9% of ASA casework since the inception of the new rules. In that light our view is that the number and nature of e-cigarette complaints and cases does not reveal a systemic problem with the sector's advertising at the moment.

6. Review of the rules

6.1 CAP and BCAP recognise the importance of ensuring that the rules for e-cigarettes remain fit-for-purpose. For that reason, in November the ASA system will conduct a formal 12 month review, looking particularly at the detailed data from ASA complaints and investigations during that time and conducting a monitoring exercise to look at media and issues that have not been brought to our attention by complainants.

6.2 The review will evaluate the up-to-date evidence base on e-cigarette use and trends and will also explore whether there is scope for bespoke research on, for example, whether ads for e-cigarettes are likely to particularly appeal to under 18s. If any of these factors give us concerns about either the rules themselves or the way in which we administer them, we are committed to making any changes that are required.

7. The ASA System's views on Question 1

7.1 The ASA System understands that a strict transposition of the Tobacco Products Directive (TPD) would allow some non-broadcast domestic marketing to remain. The Bill at issue empowers ministers to enact a comprehensive ban on domestic advertising of NVPs. We think the current rules continue to provide the right level of protection for consumers across the UK and are capable of continuing to do so should the Scottish Parliament, or ministers subsequently, allow any advertising in this sector to remain.

7.2 Additionally the Health and Sport Committee will be aware that the TPD does not apply to e-cigarettes licensed as medicines. It is important to note therefore that advertising of medicinal e-cigarettes will legally be able to continue across the UK in all media even after the transposition of the TPD. Recognising that advertisements for such products still present many of the same concerns as unlicensed products, the CAP and BCAP rules on e-cigarette advertising, in addition to rules on the advertising of medicines, will apply to these advertisements.

7.3 In light of the current evidential picture, the ASA system considers that e-cigarette advertising, when conducted responsibly and in line with the relevant rules, has a significant positive role to play in attracting more smokers to a tobacco-free source of nicotine.

⁷ In the 12 months of 2014 we received 37,073 complaints about 17,002 cases across all sectors.

8. Summary

8.1 We recognise the key concerns surrounding the use of e-cigarettes. The e-cigarette rules, developed by CAP and BCAP and administered by the ASA, are comprehensive and robust. The ASA system will shortly be conducting a review of the rules and is committed to making any changes to the rules should the up-to-date evidence base on e-cigarette use and trends indicate that change is required.

8.2 Current evidence appears to show the potentially significant public health benefit at the population level if smokers or would-be smokers switch some or all of their tobacco consumption to e-cigarettes. Responsible advertising has the potential to encourage that switching.

8.3 If the Scottish Parliament, or ministers subsequently, allow any advertising in this sector to remain, we think the current rules continue to provide the right level of protection for consumers across the UK.

8.4 We welcome the opportunity and look forward to working further with the Health and Sport Committee on the practical aspects of the NVP proposals.

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