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**By post and email**

**The Advertising Standards Authority and Committees of Advertising Practice response to the Scottish Government's Consultation on Electronic Cigarettes and Strengthening Tobacco Control in Scotland.**

## **1 Introduction**

1.1 This evidence is provided by the Advertising Standards Authority (ASA) and Committees of Advertising Practice, CAP and BCAP (the 'ASA system').

1.2 We are committed to upholding high standards in advertising, and recognise the important role that advertising regulation has to play in ensuring that e-cigarette advertising is responsible.

1.3 We would like to take this opportunity to answer consultation question 9 regarding proposals to regulate domestic advertising and promotion of e-cigarettes. These answers also inform questions 8 and 10.

1.4 Ads for e-cigarettes are subject to general rules developed by the Committees of Advertising Practice (collectively known as CAP) and independently administered by the ASA. They require that ads are legal, decent, honest and truthful. Since November 2014 e-cigarettes have also been subject to product specific advertising rules.

1.5 The ASA system acts as the first line of control for ensuring advertising is responsible. In developing its policy towards the regulation of e-cigarette advertising, we ask that the Scottish Government recognises and does not seek to duplicate the role and work of the established advertising self-regulatory system in ensuring ads for these products are responsible.

1.6 This submission provides:

- A brief overview of the UK advertising regulatory system

- A response to consultation question 9 which includes an overview of the new rules governing e-cigarette advertising that were developed by the Committees of Advertising Practice following public consultation in 2014
- Examples of ASA action against e-cigarette advertising to date

## 2 Overview of the ASA system

2.1 Advertising in the UK is regulated by the self-and co-regulatory ASA system. We have been regulating advertising in non-broadcast media since 1962. Our remit was extended to include TV and radio advertising in 2004, and we began regulating companies own websites and social media in 2011.

2.2 The Advertising Codes (the Codes) are written and maintained by CAP. The Codes cover advertising across media, including that which appears on billboards and leaflets. More information on what we cover can be found at <http://www.asa.org.uk/Consumers/What-we-cover.aspx>.

2.3 The ASA is the independent body responsible for administering the Codes. In 2013 it received 31,136 complaints about 18,580 ads. Its action led to 4,161 ad campaigns being changed or withdrawn.<sup>1</sup>

2.4 The system is entirely funded by industry, through an arms-length levy. This ensures a proper separation between the system's regulatory functions and its industry funders.

2.5 The ASA system takes a 360° approach to regulation. In addition to handling complaints, it pro-actively monitors ads across both national and local media to make sure standards are being maintained.

2.6 CAP, recognising that prevention is better than cure, provides a wealth of training and advice services for advertisers (most of which are free) to help them understand their responsibilities under the Codes, meaning fewer problem ads appear in the first place. CAP gave advice on over 160,000 occasions in 2013.<sup>2</sup>

2.7 Through its new five-year strategy<sup>3</sup>, the ASA is committed to being proactive and having more impact in how it regulates. Its ambition is to make every UK ad a responsible ad. As part of this work it has recently held a public consultation on new Prioritisation Principles which will provide a framework to guide it in how it allocates its resources and prioritises its work.<sup>4</sup> The final principles will be published in Spring 2015.

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<sup>1</sup>ASA Annual Report 2013 [http://www.asa.org.uk/About-ASA/~media/Files/ASA/Annual%20reports/AR%202013%20Online%20version\\_v3\\_FINAL.ashx](http://www.asa.org.uk/About-ASA/~media/Files/ASA/Annual%20reports/AR%202013%20Online%20version_v3_FINAL.ashx)

<sup>2</sup> Ibid

<sup>3</sup> <http://www.asa.org.uk/About-ASA/Strategy.aspx>

<sup>4</sup> <http://www.asa.org.uk/News-resources/Media-Centre/2014/Prioritisation-Principles-consultation.aspx#.VlrUgSusV8E>

2.8 The ASA system is widely viewed as an example of a best practice self-regulator:

“The Government recognises the ASA as a highly successful model of both self and co-regulation; and that the UK’s advertising regulatory system is well respected and seen as a gold standard worldwide.”<sup>5</sup>

### **3 A response to consultation question 9**

**3.1 Q9) *In addition to the regulations that will be introduced by the Tobacco Products Directive do you believe that the Scottish Government should take further steps to regulate domestic advertising and promotion of e-cigarettes.***

3.2 With legislation around the promotion of e-cigarettes not coming into effect until 2016, the ASA system has moved quickly to establish a responsible framework for advertising of e-cigarettes in the UK. New rules specifically for e-cigarette advertising have been added to the Advertising Codes and came into effect on the 10 November 2014. These rules are now being administered by the ASA.

3.3 These rules were introduced against a backdrop which has seen the popularity of e-cigarettes increase rapidly in recent years. With this rise there has been a widespread interest in the potential public health benefits of e-cigarettes as an alternative to tobacco. However, there are concurrent concerns about the fact that they contain nicotine; their efficacy and safety; their potential to renormalise smoking, and questions over whether they may act as a gateway to nicotine or tobacco for the young or non-smokers.

3.4 Whilst ads for e-cigarettes have always been regulated under CAP’s more general Code rules (e.g. on misleadingness and social responsibility), product specific rules for e-cigarette ads were not in place until recently. Bearing the wider societal debate in mind, and concerns on both sides of the public health debate, the new advertising rules for e-cigarettes were introduced by CAP to provide clarity for advertisers and to ensure they continue to be promoted in a responsible way.

3.5 The rules place an emphasis on the protection of young people and ads must avoid containing anything that promotes the use of a tobacco product or that shows the use of a tobacco product in a positive light. They were introduced following a full public consultation and in accordance with CAP’s commitment to better regulation principles.

### **3.6 Summary of Broadcast and Non Broadcast Rules:**

3.6.1 The rules place an emphasis on the protection of young people and ads must avoid containing anything that promotes tobacco branding or the use of a tobacco product or that shows the use of a tobacco product in a positive light. The rules were subject to full public consultation and apply across all media.

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<sup>5</sup> Rt Hon Jeremy Hunt MP, in his previous position as Secretary of State for Culture, Media and Sport, in a letter to Rt Hon Chris Smith of Finsbury, ASA Chairman, 2 March 2012

### 3.6.2 The rules also state that e-cigarette adverts:

- must not be likely to appeal to under 18s
- must not feature people who are or seem to be under 25
- must not encourage non-smokers or non-nicotine users to use e-cigarettes
- must make clear that the product is an e-cigarette and not a tobacco product.
- must state that the advertised product contains nicotine, where that is the case.

3.6.3 Non-broadcast advertisements are subject to placement restrictions to lessen the chance of e-cigarette ads being seen by children. Ads on TV and radio are subject to scheduling restrictions to reduce the chance of e-cigarette advertisements being seen or heard by children. Furthermore, unless manufacturers obtain an authorisation for their product from the Medicines and Healthcare products Regulatory Agency, ads for e-cigarettes cannot convey health benefits or claim that they are 'safer' or 'healthier' than smoking tobacco.

3.6.4 The non-broadcast and broadcast rules have been harmonised. Whilst ads for e-cigarettes have been able to appear on TV, previously actual depictions of e-cigarettes in those ads were prohibited by an outdated rule that had been broadly written before the invention of e-cigarettes to prevent tobacco brandsharing. The changes mean that e-cigarettes can now be shown, including in use, in ads across UK media, on the condition that they comply with the strict new rules.

3.6.5 As well as the above rules, e-cigarette ads must continue to comply with all the other general rules in the Codes which prevent, for example, misleading, offensive, harmful or otherwise irresponsible advertising.

3.6.6 Consultation question 10 asks how respondents may wish to regulate various types of media and particular advertising and marketing practices. In relation to those specific practices we should point out that:

a. & b. advertising on billboards and leaflets is permitted but must comply with the rules described above.

c. brandstretching (for example of tobacco branding) is expressly prohibited by the new rules.

d. giving a product away for free (i.e. the simple act of handing it out) would not in its own right be likely to be advertising subject to the CAP Code. However, any promotional messaging surrounding that activity, e.g. a website or leaflet that encouraged a consumer to register to get a free product, is likely to be considered advertising and would therefore need to be compliant, both with the above e-cigarette rules and the specific sales promotions rules which place additional requirements on promoters to ensure that

promotions are safe and conducted responsibly; for example by not encouraging excessive consumption.

e. 'Nominal pricing' is sometimes used to describe a situation in which a marketer has ascribed an estimated price to an item (more often known as a 'notional price'); for example a recommended retail price (RRP). While such practices can present regulatory issues (for example in relation to what extent such estimates can be substantiated and are not misleading for consumers) they are not the same as the practice described in the 10.e: "marketing a product by selling at a low price". Assuming that 10.e is describing a situation where a marketer offers a product at a reduced price (or with some other incentive, e.g. a two-for-one deal) for a limited period of time, this may be considered a 'promotional price' or 'sales promotion'. Such practices are permitted for e-cigarettes (as with all sectors) and, indeed, CAP and the ASA's experience is that promotional pricing can be of benefit to consumers provided that it is conducted responsibly; in this instance particularly for smokers looking for an alternative way of consuming nicotine without tobacco. Promotional pricing and any messaging related to it would be likely to be within the remit of the CAP Code wherever it appeared (even at point of sale; see below) and any messaging related to it would therefore need to be compliant with the new e-cigarette rules in addition to the specific rules which apply to all sales promotions and which, as mentioned above have particular requirements above not encouraging excessive or irresponsible use.

f. The Codes do not apply to material at point of sale (unless it is considered a sales promotion) though relevant legislation will almost certainly apply and would usually be enforced by the local Trading Standards office.

g. The Codes do not apply to events sponsorship, however the ASA may apply the Codes where such a commercial relationship is referred to in advertising.

3.6.7 CAP provides significant advice and training services for advertisers, and has published new, dedicated e-cigarette guidance to help the sector get to grips with the new rules that have been introduced and to help ensure they're advertised in a responsible way.

3.6.8 The broadcast and non-broadcast e-cigarette advertising rules, alongside CAP's Regulatory Statement and new guidance for advertisers, are included alongside this response as Annexes 1-4.

#### **4. Examples of recent ASA action**

4.1 The ASA has already taken action against two e-cigarette ads under the new rules. These rulings will be published on the 24 December 2014 on its website.

4.2 Before e-cigarettes were subject to product specific rules they have been subject to general rules covering misleading claims, harm, offence and social responsibility. We have

not hesitated to take action against e-cigarette advertising which has not been compliant with these rules.

4.3 Below are links to two recent e-cigarettes ASA adjudications, full details of which are available on its website [www.asa.org.uk](http://www.asa.org.uk).

[E-Cig Ltd](#) (Nov 2014) – The ASA ruled that this poster ad featuring a woman blowing e-cigarette vapour into man's face presented tobacco imagery in a positive light and that the ad was in breach of the Code.

[Ten Motives](#) (Oct 2014) – The ASA ruled that this circular ad featuring an image of an ice cream, in which the chocolate flake had been replaced with an electronic cigarette would appeal to children and was therefore in breach of the Code.

## **5. Next steps**

5.1 CAP will closely monitor ads subject to the new rules, and a formal review will be conducted in 12 months to assess the application and effectiveness of the new e-cigarette rules.

5.2 We note that in November 2014 The Office of National Statistics' published the results of its Survey on Adult Smoking Habits in Great Britain 2013. The survey revealed that e-cigarettes are almost exclusively used by smokers and ex-smokers. Almost none of those who had never smoked cigarettes were e-cigarette users.<sup>6</sup> This supports other findings which suggest that e-cigarettes are not acting as a gateway to tobacco smoking for young people, with current electronic cigarette use confined almost entirely to those who have already tried smoking.<sup>7</sup> This is against a backdrop of established advertising for these products.

5.3 Nonetheless, CAP's review will consider whether any new evidence has come to light that might have regulatory implications for the Codes.

### **5.4 ASA/CAP and the Tobacco Products Directive**

5.4.1 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 Governments are 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.

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<sup>6</sup> <http://www.ons.gov.uk/ons/rel/ghs/opinions-and-lifestyle-survey/adult-smoking-habits-in-great-britain--2013/stb-opn-smoking-2013.html>

<sup>7</sup> Electronic Cigarettes; [http://www.ash.org.uk/files/documents/ASH\\_715.pdf](http://www.ash.org.uk/files/documents/ASH_715.pdf)

5.4.2 The new e-cigarette advertising rules 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.

## **6 Summary**

6.1 The e-cigarette rules, developed by CAP and administered by the ASA, are comprehensive and robust. We are confident that the ASA system is best-placed for considering concerns about advertising in the first instance, with CAP open to receiving and considering representations supported with appropriate evidence.

6.2 As the first line of control for ensuring advertising is responsible, we ask that in developing its policy towards the regulation of e-cigarette advertising, the Scottish Government recognises the role and work of the established UK advertising self-regulatory system, and does not seek to duplicate our regulatory functions - potentially causing uncertainty for both consumers and those businesses we regulate.

6.3 If the Scottish Government has any concerns about the advertising rules in place, we ask that the self-regulatory system is given the opportunity to assess the evidence and, if necessary, take action.

6.4 We would be happy to meet with the Scottish Government to discuss our role, or to provide further written information on request.

### **6.5 Contact Details**

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