

# Electronic cigarette advertising prohibitions

Advertising Guidance  
(Non-broadcast and broadcast)

## Foreword

The Committee of Advertising Practice (CAP) offers guidance on the interpretation of the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code) in relation to non-broadcast marketing communications.

The Broadcast Committee of Advertising Practice (BCAP) offers guidance on the interpretation of the UK Code of Broadcast Advertising (the BCAP Code) in relation to broadcast marketing communications.

Advertising Guidance is intended to guide advertisers, agencies and media owners how to interpret the Codes but is not a substitute for those Codes. Advertising Guidance reflects CAP's and/or BCAP's intended effect of the Codes but neither constitutes new rules nor binds the ASA Councils in the event of a complaint about an advertisement that follows it.

For pre-publication advice on specific non-broadcast advertisements, consult the CAP Copy Advice team by telephone on 020 7492 2100, by fax on 020 7404 3404 or you can log a written enquiry via our [online request form](#).

For advice on specific radio advertisements, consult [Radiocentre](#) and for TV advertisements, [Clearcast](#).

For the full list of Advertising Guidance, please [visit our website](#).

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## Overview

In 2017 CAP introduced a new rule in its Code prohibiting the advertising of unlicensed, nicotine-containing electronic cigarettes (e-cigarettes) in certain media. These prohibitions reflect the legislative bans contained in the [Tobacco and Related Products Regulations 2016](#) which implement a revised [European Tobacco Products Directive](#).

The prohibitions originate in law, not from CAP policy, and have complex effects. They apply only to ads for certain types of products and only in certain media. They might also apply or not apply to ads for certain other types of product or service depending on a number of factors.

The rule approximates but does not exceed the law. This guidance attempts to provide what clarity CAP considers it can in the interpretation and enforcement of the rule in light of the law. Although this document is chiefly concerned with the application of a CAP rule to non-broadcast advertising, it is also endorsed by BCAP for application to existing bans on e-cigarette ads in broadcast advertising where relevant.

The ASA Councils have agreed to have regard to this document in enforcing the relevant CAP rule (and where relevant the BCAP rule) but it does not bind them.

**This document constitutes guidance only and in applying the rules the ASA, CAP and BCAP may take legal advice or advice from other statutory bodies to ensure the correct application of the rules in light of the law. The ASA reserves the right to refer complainants to the relevant statutory regulator.**

## The CAP rule

In the CAP Code, which applies to non-broadcast advertising, rule 22.12 states:

*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 marketer's control. Please refer to [this] guidance note.*

The rule prohibits advertisements for nicotine-containing e-cigarettes, e-liquids and component products which are not licensed as medicines by the MHRA, but only in certain media; the specific media channels are listed in the next section.

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In practice ads for the following products are prohibited:

- Nicotine-containing disposable e-cigarettes
- Nicotine-containing e-liquids
- Any e-cigarette which can be used to consume nicotine-containing e-liquid even if it is marketed as being for the consumption of non-nicotine e-liquid.

CAP considers that, notwithstanding other requirements set out in this document, ads for the following products are unlikely to be prohibited:

- non-nicotine liquids
- non-nicotine disposable e-cigarettes (not able to be refilled)
- non-disposable e-cigarettes designed to only take cartridges with non-nicotine containing fluid
- medicinal products (subject to separate medicines advertising legislation)
- e-cigarette components and accessories such as: batteries, power units, drip tips, wicking material, wire and cases, where their presentation does not directly or indirectly promote a product that cannot be advertised in media subject to the prohibitions.

### **Media which are subject to the prohibitions**

The rule in the CAP Code contains two bullet points. The first prohibits advertisements in:

- newspapers
- magazines
- periodicals

The second bullet point prohibits ads in “online media and some other forms of electronic media”. This reflects the legal prohibition on ads in “information society services”. CAP considers that ads placed in the following media channels are, or are likely to be, prohibited, but the list should not be considered exhaustive:

- commercial email, commercial text messaging and other electronic messaging service
- marketers’ activities online, for example on their website and on social media (except for permissible activities described in the sections below)
- online (“display”) advertisements in paid-for space (including banner or pop-up advertisements and online video advertisements),
- paid-for search listings; preferential listings on price comparison sites; viral advertisements

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- paid social media placements, advertisement features and contextually targeted branded content
  - in-game advertisements (including augmented reality and virtual reality environments)
  - commercial classified advertisements;
  - advertisements which are pushed electronically to devices;
  - advertisements distributed through web widgets
  - promotional marketing online;
  - affiliate links;
  - in-app advertising.

### **Media which are not subject to the prohibitions**

The advertising of unlicensed, nicotine-containing e-cigarettes is not prohibited by law or by the CAP Code in the following media, however ads must still comply with all relevant CAP rules about content and placement:

- 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

### **Application of the CAP rule on marketers' own websites and some other places online**

The law applies comprehensive restrictions online. However CAP understands that the provision of factual information by retailers on their own websites is not prohibited by the law because the consumer has specifically had to seek out that information by visiting the website. However information provided in this context must only be factual and not promotional in nature.

The law does not provide clarity on what constitutes factual versus promotional content and the ASA will make careful assessments of individual complaints based on the content and context of the material in question.

Below are some examples of the types of content that, all other factors being equal, are more likely to be factual or promotional in nature. However the lack of clarity in the law

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and the creative nature of advertising mean that CAP cannot hope to provide comprehensive and definitive lists of what falls into each category.

CAP considers that the following types of claims are, all other factors being equal, likely to be **factual** in nature and therefore permissible:

- the names of products (so long as the names are not promotional in nature, for example names which include product claims)
- descriptions of product components including, where applicable, the opening and refill mechanism
- price statements (which might include different bulk prices, reduced prices etc.) (however, see “promotional marketing” below)
- instructions as to how products can be used and stored
- product ingredients, including ratios of diluents
- factual descriptions of flavours, vapour etc.
- nicotine content and delivery per dose
- reference that the product is not recommended for use by young people and non-smokers and warning for specific risk groups;
- contra-indications and possible adverse effects;
- addictiveness and toxicity;
- name and contact details of the producers etc.
- recommendations to keep the product out of reach of children.

In addition CAP considers that **promotional** claims are likely to be prohibited. Some examples of claims / techniques that the ASA might consider promotional are:

- descriptive language that goes beyond objective, factual claims
- promotional marketing, as defined in Section 8 of the CAP Code. Promotional marketing can provide an incentive for the consumer to buy by using a range of added direct or indirect benefits, usually on a temporary basis, to make the product more attractive. A non-exhaustive list of promotional marketing techniques includes: “two for the price of one” offers, money-off offers, text-to-wins, instant-wins, competitions and prize draws. In practice marketers may price their products, and groups of their products, as they see fit but should take care that those prices or pricing structures are not communicated in a promotional way
- significant imagery that is not related to the product
- comparative claims with other e-cigarette products or the general market (and savings claims based on such claims)
- health claims (e.g. that e-cigarettes are safer or healthier than tobacco)
- smoking reduction or cessation claims (which might also be prohibited by CAP’s rules on medicines)

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- testimonials with promotional claims
  - marketing leading or top-parity claims

Where permitted, factual claims are made on marketers own websites, or elsewhere, they must continue to comply with all relevant CAP content rules.

CAP considers that in principle there is likely to be scope for the position described above, relating to factual claims being acceptable on marketers' websites, to apply to some social media activity, however there is no clarity in law as to how this might be achieved. A social media page / account might be considered by the ASA to be analogous to a website and lawfully able to make factual claims if it can only be found by those actively seeking it.

Until such time as more clarity is achieved, marketers wishing to try this approach in a low-risk way should try to ensure that the experience is, as far as possible, analogous to that of a website, i.e. their privacy / discovery settings are set so that claims about unlicensed, nicotine-containing products appear only on the page / account and are factual in nature. Marketers should also review the section below about advertisements for businesses.

### **Email and other electronic messaging (including direct messaging on social media)**

The law, and therefore the CAP Code, prohibits commercial communications for nicotine-containing, unlicensed e-cigarettes by email and other electronic messaging. However CAP understands that the law allows marketers to respond by email or other electronic message to specific requests from consumers for information on a one-to-one basis. This led some respondents to CAP's 2016 consultation to express the view that marketers should be permitted to send emails about products to marketing lists of consumers who had specifically opted to receive certain information. CAP considers that the law is not sufficiently clear in this area for it to agree with that view and the ASA may find such emails to be in breach of the rule.

Marketers wanting to take this approach may wish to seek their own legal advice. Notwithstanding that, CAP considers that until further clarity is achieved, marketers may reduce, but not eliminate, their risk of an upheld ASA ruling by being able to demonstrate all of the below:

- consumers who receive such a message have specifically opted in to receive the information it contains. More specific and explicit consent is likely to attract a lower risk;

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- marketing lists are properly maintained in line with best database practice and to reflect recipients' preferences about the information they do and do not wish to receive;
  - recipients are given the option to opt-out with every communication, and
  - the information contained in such communications is factual and non-promotional in nature in-line with the guidance given above.

Bespoke conversations which take place between marketers and their customers in private over email or social media direct messaging, for example, are unlikely to be prohibited.

### **“Indirect effect”**

Both the CAP and BCAP rules prohibit advertisements which have not just the direct effect of promoting products, but also the *indirect effect*. Therefore marketers will have to ensure that advertisements for non-nicotine e-cigarettes, for example, in media in which nicotine products are prohibited, do not have the indirect effect of cross-promoting a nicotine product. It is also possible that an advertiser of an unrelated product may breach the prohibition on indirectly promoting unlicensed, nicotine-containing e-cigarettes.

CAP and BCAP's view is that to allow a non-nicotine e-cigarette to be advertised in media subject to the Rule 22.12 or BCAP rule 10.1.11 under the same brand name as a nicotine product would have the effect of indirectly promoting the nicotine brand and therefore be in breach of the rules.

In summary CAP and BCAP consider that advertisements which feature any of the following are likely to be in breach of the prohibition on indirect promotion:

- a brand or range name under which a nicotine e-cigarette is sold. That name could be featured on non-nicotine products or other products but is strongly associated with a nicotine product.
- an identifiable nicotine e-cigarette
- a strapline, celebrity, licensed character or branding which is synonymous with a nicotine-product
- a direct response mechanic relating to a nicotine e-cigarette. In practice this means that banner ads, for example, which link directly to pages or sites where nicotine products can be bought, are unlikely to be acceptable.

BCAP also consider that the above criteria are suitable for the interpretation of the relevant rules in broadcast advertising and the ASA Broadcast Council will have regard to this list in the same way.

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## **Advertisements for businesses rather than products in non-broadcast media**

Mirroring the law, the CAP Code prohibits advertisements for specific products but CAP understands that the law does not go so far as to apply to ads for businesses where those ads do not directly or indirectly promote products.

CAP considers that in non-broadcast media there is limited scope for businesses engaged in the e-cigarette trade to advertise their existence in media subject to rule 22.12. However there is limited legal precedent to guide policy or enforcement decisions in this area. The ASA will need to consider individual cases.

CAP considers that marketers ads for businesses in media subject to the CAP rule are more likely, though not guaranteed, to be acceptable if they do all of the following:

- only advertise the existence of that business rather than (nicotine) products;
- comply with the guidance on “indirect effect” above. Ads which link directly to pages or sites where nicotine products can be bought, for example, are unlikely to be acceptable.
- However CAP considers that there may be more scope for advertisements for businesses to provide direct response mechanics (URLs, contact details etc.), depending on the context and content of the ad and the content to which it links.

Such ads should also comply with all relevant CAP Code rules.

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