

# Electronic cigarette advertising prohibitions

CAP's Regulatory Statement on how it will approximate the Tobacco and Related Products Regulations 2016 in its Code



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## 1. Executive Summary

After a period of consultation CAP is adding a new rule to its Code prohibiting the advertising of unlicensed, nicotine-containing e-cigarettes and their components in some non-broadcast media channels.

The new rule approximates requirements in legislation which came into effect in 2016. CAP is also publishing [Advertising Guidance](#) which explains the context of the rule and how it should be applied.

The rule takes effect in the Code from today, **Wednesday 1 February 2017**.

## 2. Background

### 1.1 Legal background

In May 2016 the [Tobacco and Related Products Regulations 2016](#) (“TRPR” or “the Regulations”) came into effect. This UK law transposes a revised [European Tobacco Products Directive](#) (“the Directive”) agreed in 2014.

Article 20(5) of the Directive contains prohibitions on the advertising of nicotine-containing electronic cigarettes (e-cigarettes) which are not licensed as medicines. The prohibitions on advertising in non-broadcast media have been reflected in a minimal way in [Part 7](#) of the Regulations by the [Department of Health \(DH\)](#).<sup>1</sup>

The Directive also contains prohibitions on broadcast advertising. These prohibitions were transposed directly into the Ofcom Broadcasting Code and the BCAP Code in May 2016 following a formal Direction from the DH. Since that time the advertising of nicotine-containing e- cigarettes on TV or radio has been prohibited outright. BCAP’s announcement from that time can be found [here](#).

### 1.2 CAP’s decision to consult

In late 2014, the Committee of Advertising Practice (CAP) put in place strict content, placement and scheduling rules for the marketing of e-cigarettes which apply across all non-broadcast media and which have been enforced by the Advertising Standards Authority (ASA) in numerous formal and informal cases.

The coming into effect of the Regulations in May 2016 made advertisements for some e-cigarettes illegal in many media channels. The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code) does not reflect the law by default and the ASA, which can only administer the rules in the Advertising Codes, has hitherto not been able to police compliance with the prohibitions.<sup>2</sup>

CAP’s consideration was, and remains, that its Code should approximate the law alongside its existing e-cigarette rules (which continue to apply to lawful advertisements). This allows the self-regulatory system to remain the established means for regulating advertising across the sector, providing as much certainty and consistency as possible to marketers, consumers and other stakeholders alike.

In October 2016 CAP conducted a consultation on proposals to approximate the prohibitions in the Regulations in the CAP Code and to provide guidance on its interpretation. The outcome is set out in the next chapter though for brevity this document

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<sup>1</sup> The Department of Health have stated that they have conducted only the minimal approach to the transposition of Article 20(5). Their statement can be found [here](#).

<sup>2</sup> Since the Regulations came into effect the ASA has continued to apply the CAP and BCAP rules to advertisements which it considers to be lawful. When it has received complaints about ads in media subject to the Regulations it has advised the marketer of the change in the law and encouraged them to take legal advice, but not taken enforcement action.

does not rehearse the full policy detail and readers may wish to refer to the [original consultation document](#).

### 1.3 BCAP issues

The consultation also included some issues related only to the BCAP Code. Specifically the proposal to remove BCAP rule 33.7 and to amend rule 10.1.11. BCAP is still evaluating these issues and the outcome of that process will be announced in due course.

### 1.4 On-demand programme services

In 2010 Ofcom [designated the ASA](#) to regulate advertising on on-demand programmes services (ODPS). The Communications Act 2003 contains a list of products which cannot be advertised on ODPS and this list is reflected in [Appendix 2 of the CAP Code](#).

[Regulation 46 of TRPR](#) amends the list in the Communications Act to include a prohibition on ads for unlicensed, nicotine-containing electronic cigarettes. Appendix 2 of the CAP Code now reflects this change in rule 30.8.3.

## 3. CAP Decisions

### 3.1 Consultation evaluation

CAP has now evaluated the responses to its consultation. Forty seven responses were received in total:

- 12 responses from civil society organisations (e.g. NGOs, charities, academics, academic institutions)
- 22 responses from industry (e.g. companies or trade associations)<sup>3</sup>
- 12 responses from national or local government and related bodies
- 1 response from a member of the public

A point-by-point evaluation of significant comments is published separately; however CAP is satisfied that it can now approximate the advertising prohibitions in its Code. In practice CAP is implementing a new rule in its Code accompanied by detailed Advertising Guidance to aid in its interpretation.

The rule and the Advertising Guidance represent CAP's attempt to set out their best understanding of the law in as clear a way as possible without exceeding its requirements. However they are not, and cannot be, exhaustive. As CAP made clear in its consultation document the Regulations are complex: they apply only to ads for unlicensed, nicotine-containing products and therefore not to licensed or non-nicotine products. They apply only in certain media and not others and there are significant areas of legal uncertainty about the correct application of the prohibitions, particularly online. There is also the potential for ads for unrelated products to be caught by the prohibitions while ads for e-cigarette businesses (distinct from products) may not be caught, depending on their content and where they appear.

The result is a patchwork of prohibitions that can be hard to understand for those already familiar with the law. These issues stem from law which has already been decided, rather than CAP policy. CAP cannot change the extent or proportionality of the advertising prohibitions but notes the strength of feeling against the legislation evident in many consultation responses.

### 1.2 Changes to the CAP Code

In its consultation CAP proposed a revised introduction to Section 22 (Electronic Cigarettes). Some respondents requested drafting changes for clarity, which have been made. In addition, on the advice of a trade body respondent, CAP has retained the paragraph concerning the potential requirements of chemical classification, packaging and labelling legislation.

Therefore the CAP Code section on electronic cigarettes will be amended with a new introduction as follows:

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<sup>3</sup> Four of the industry respondents were tobacco companies and one was a trade body which included various tobacco companies in its membership.

## **22 Electronic Cigarettes**

### **The Tobacco and Related Products Regulations 2016**

The Tobacco and Related Products Regulations 2016 ('the Regulations') became law in the UK on 20 May 2016. The Regulations implement Directive 2014/40/EU (on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC).

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

#### **Overview**

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

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

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

Additionally the section will be amended to include a new rule (22.12) prohibiting the advertising of unlicensed, nicotine-containing e-cigarettes in print media, online and some other forms of electronic media. The new rule is as follows:

**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 the Advertising Guidance.

### 1.3 Advertising Guidance

For the reasons set out in the consultation document and at the beginning of the chapter the law, and therefore the rule, have complex effects. CAP has produced [Advertising Guidance](#) setting out how the rule should be applied in light of its best understanding of the law. This Advertising Guidance is largely self-explanatory and its content is not repeated in this document. As far as possible CAP has tried to take account in the Advertising Guidance concerns raised by consultation respondents to try and provide further detail where it can.

Where CAP has not been able to achieve clarity about the effect of the law it has given the best advice it can in the circumstance and / or has framed it in terms of risk. BCAP has also endorsed the content of the Guidance for those circumstances in which it may be relevant to the interpretation and application of [Rule 10.1.11 of the BCAP Code](#).

The ASA Council has agreed to have regard to the Advertising Guidance in their rulings, however it does not bind their decisions. The Advertising Guidance is published concurrently with this document and will be updated and supplemented as and when more clarity is achieved.

### 1.4 Limitations and next steps

The rule and the Advertising Guidance provide a framework for CAP and the ASA to approximate the law and police compliance with it. However, the complexities of the law mean this may not be possible in all instances. In relevant cases the ASA will have regard to existing statutory enforcement bodies and reserves the right to refer complainants to the relevant statutory regulator. CAP's view is that over time ASA rulings will add clarity to the interpretation of the rule which will be reflected in CAP advice.

### 1.5 Health claims

In its consultation CAP and BCAP sought views on whether they needed to retain the prohibition on all health claims currently in place in CAP Code rule 22.5 and BCAP Code rule 33.5. CAP and BCAP received a number of responses on this issue which they are still evaluating and intend to run a separate consultation on that issue in due course.

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