



Consultation on the advertising of electronic cigarettes: CAP and BCAP's proposals for changes to their Codes and guidance in response to the Tobacco Products Directive taking effect in the UK.

Response from Fresh

Background

Fresh is the North East of England's comprehensive regional tobacco control programme. The programme is commissioned by all 12 local authorities in the region to deliver work across a multi-component strategy to help smokers to quit, protect people from tobacco-related harm and prevent young people from starting to smoke. Fresh was the UK's first regional tobacco control programme, set up in 2005 when the North East's smoking rates were the worst in the country with around a third of the adult population smoking. Since then, rates have fallen faster in this region than any other region in England and now stand at 18.7%.

We welcome the opportunity to respond to this consultation. Many thanks to ASH for their support in preparing this response.

1. Do you agree that CAP's proposal to prohibit advertisements which have the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components which are not authorised as a medicine/medical device is consistent with the law? If not, please explain why.

Yes.

2. Do you agree that the prohibition should apply to advertisements for non-nicotine and refillable products which can be refilled with nicotine-containing e-liquid? If not, please explain why.

Yes.

3. Do you agree that advertisements for products in the list above would be lawful under TPRR and that CAP therefore does not need to prohibit them? If not, please explain why.

Yes.

4. Do you have any further views regarding the types of products for which advertising should or should not be prohibited?

Yes.

5. CAP's proposal is to prohibit marketing communications for nicotine-containing e-cigarettes, which are not authorised as medicines, in newspapers, magazines and periodicals which are not targeted exclusively to a trade audience. Do you agree that this is consistent with the law? If not, please explain why.

Yes.

6. CAP's proposal is to prohibit advertisements in information society services and to reflect this in the CAP Code as a prohibition on "advertisements in online media and some other forms of electronic media." This would be accompanied by a reference to a new guidance note which explains the legal framework and lists specific media types that are likely to be prohibited, as above.

Do you agree that this proposal is consistent with the law? If not, please explain why.

Yes.

7. Are there any types of media that you consider to be information society services which are not referenced above?

No.

8. Are there any types of online media listed above or otherwise which you think should not be categorised as an information society service?

No.

9. Do you agree that the law allows for factual claims on marketers' own websites? If not, please explain why.

We agree that factual claims on marketers' own websites need to be protected and we would argue that this protection needs to go beyond websites to include other forms of permitted advertising. Satisfactory peer reviewed evidence around the safer nature of electronic cigarettes has increased considerably since the CAP code was drafted, outlining the potential health benefits of smokers switching. Three examples are:

- The Royal College of Physicians report in May 2016 '*Nicotine without smoke: tobacco harm reduction*'¹ recommended that "in the interests of public health it is important to promote the use of e-cigarettes, NRT and other non-tobacco nicotine products as widely as possible as a substitute for smoking in the UK." The report also recommends that regulation of e-cigarettes should be proportionate and should not be allowed significantly to inhibit the development and use of harm-reduction products.
- Data from English Stop Smoking Services shows that electronic cigarettes, when used alone or in combination with other stop smoking products, achieve short-term abstinence rates that are comparable to the most effective products (i.e. Varenicline) and consistently higher than success rates achieved by clients using traditional Nicotine Replacement Therapy (NRT).
- An expert review of the evidence in 2015 by Public Health England² concluded that e-cigarettes are around 95% safer than smoked tobacco and they can help smokers to quit.

One of the problems in not allowing factual claims in adverts promoting electronic cigarettes is that smokers take information from a variety of sources including sensationalist newspaper reports where headlines do not match the findings of reports.

An example of a factual statement we would approve of would be "does not contain tar."

10. Do you agree that in principle the above types of claim are, all other things being equal, factual in nature and should therefore be permitted? If not, please explain why.

We believe the above type of claim should be protected on both websites and other marketing activities that are still permitted. This would also have the added advantage of ensuring electronic cigarettes are able to be marketed more effectively at existing smokers, with messages that smokers thinking about quitting and worried about the risks of tobacco may find more appealing. Adverts for electronic cigarettes have been banned on the grounds of appearing to glamorise the smoking of tobacco products or encouraging non-smokers to take up e-cigarettes. Factual claims would give companies and/ or trade bodies another avenue to avoid these lifestyle routes and gain a market advantage over a product that kills 1 in 2 lifelong users (tobacco). It is noted some of the language about the harm of tobacco on some electronic

1 <https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0>

2 <https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review>

cigarette websites is similar to that used within tobacco control about the harm of smoking and harmful chemicals in tobacco.

11. Are there any other claims / types of claims you consider are factual in nature and should appear on this list?

As well as factual claims that can be substantiated, we believe there is also a case to explore a system in which quotes from respected peer-reviewed journals or reports from respected medical and public health organisations can be used to promote electronic cigarettes *so long as it is clear the quote applies to the class of product, and not the one being advertised*. We are aware that estimates such as "95% safer" (PHE) may not apply to all products – so it may be that this type of advert is more suitable for a trade association rather than individual companies. If electronic cigarette companies believe perception of harms is deterring take up among smokers, there is much to be gained from working together to address this.

It may also be necessary to impose a condition that the use of quotes must be with written permission of the organisation.

12. Do you agree that the above types of claims [in the consultation document] are likely to be promotional in nature and should be prohibited? If not, please explain why.

Yes.

13. Are there any other types of generic claims that should be included in this list?

No.

14. Do you have any other comments to inform CAP's consideration of whether a claim is factual or promotional?

No.

15. Do you agree that social media pages might, in principle, be capable of meeting the criteria set out for websites in the section A.5.1. above? If not, please explain why.

Please provide any examples and evidence you might have in support of your response.

Yes. We recommend that CAP should take the position that 'sharing' an item on social media is not a function of the business but is instead a function of how people

respond to a particular item. We would add that the content of the social media item should be informational and not promotional and therefore should not encourage sharing.

16. Do you agree that the media channels set out above are not prohibited by law from carrying advertisements for unlicensed, nicotine-containing e-cigarettes? If not, please explain why.

Yes.

17. Do you support the revised wording in Section 22? If not, please explain why and how you think it should be amended.

No. We believe it would be clearer to change the wording to read “Rule 22 applies to both electronic cigarettes which come under the EU Tobacco Products Directive and those authorised as medicines, except where there is a carve out for medicines in rules 22.5 and 22.12.”

18. Do you support the proposed wording of the, newly created, rule 22.12? If not, please explain why and how you think it should be amended.

No. The heading ‘Online media and some other forms of electronic media’ needs to be expanded to make it clear what ‘other forms of media’ are included.

19. Do the criteria above provide a workable framework for identifying marketing communications that are likely to indirectly promote unlicensed, nicotine-containing e-cigarettes that are not authorised as medicines?

Yes.

20. Are there any criteria you consider should be added to the list?

No.

21. Should CAP allow advertisements for e-cigarette retailers so long as those advertisements do not refer to products which cannot be advertised?

Yes.

22. Do you agree with BCAP’s proposal to allow e-cigarette retailers to advertise their services on TV and radio? If not, please explain why.

Yes.

23. Do you agree with BCAP's proposed additional text for rule 10.1.11? If not, please explain why.

Yes.

24. Do you have information or evidence which can inform CAP and BCAP's future consideration as to whether they might allow for substantiated health claims to be made for unlicensed e-cigarettes?

See our answer to Question 11 above. In order to address the serious misperceptions about relative risk we believe it is essential that generic statements about the relative risk can be made. If there were considered to be 'substantiated health claims' then we would consider that this should be allowed by CAP and BCAP. The sort of claim that should be allowed should be along the lines that "electronic cigarette use is considered by Public Health England and the Royal College of Physicians to be much less harmful than smoking" and should link to the relevant statements. We note that this would require the removal of the words 'health or' from Rule 33.5.

25. Should BCAP remove rule 33.8 for the reasons given above? If not please explain why.

Yes.

26. Do you have any other comments or evidence for CAP and BCAP in relation to the ongoing suitability of their e-cigarette rules for the regulation of lawful advertisements?

There are two primary types of concerns raised about electronic advertising and these are summarised and addressed briefly here:

- The concern that restricting it will adversely affect uptake by smokers. However, awareness of electronic cigarettes is widespread among adults – the vast majority of the public, smokers and non-smokers, have heard of electronic cigarettes and knowledge of them grew at a time when advertising was not widespread.
- The concern that electronic cigarette advertising encourages youth smoking and use by adults who have never smoked. However, the most recent 'Smoking, Drinking and Drug Use' survey records the lowest smoking rates among children since records began in 1982.

We recommend that reviews of the guidance issued take place regularly in light of research, legal decisions and changes to the market.

Consultation on the advertising of electronic cigarettes

Healthier Futures is a Social Enterprise dedicated to helping people live longer, healthier and happier lives. We are pleased to respond to CAP and BCAP's proposals for changes to their Codes and guidance in response to the Tobacco Products Directive taking effect in the United Kingdom. We acknowledge the health benefits for smokers switching to e-cigarettes but recognise that nicotine is a highly addictive substance and should not be seen by non-smokers as a product with health benefits in its own right.

In media subject to the regulations:

1. Do you agree that CAP's proposal to prohibit advertisements which have the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components which are not authorised as a medicine / medical device is consistent with the law? If not, please explain why.

A: Yes . However, we recommend that CAP uses the term "licensed as a medicine/medical device" rather than "authorised" to remain consistent with the Tobacco and Related Products Regulations

2. Do you agree that the prohibition should apply to advertisements for non-nicotine and refillable products which can be refilled with nicotine-containing e-liquid? If not, please explain why.

A: Yes

In media subject to the Regulations:

3. Do you agree that advertisements for products in the list above would be lawful under TPRR and that CAP therefore does not need to prohibit them? If not please explain why.
4. Do you have any further views regarding the types of products for which advertising should or should not be prohibited?

A: Yes , however we do not know how a consumer would differentiate between a product containing nicotine and one not containing nicotine and therefore advertisements for non-nicotine products may inadvertently promote prohibited products

5. CAP's proposal is to prohibit marketing communications for nicotine-containing e-cigarettes, which are not authorised as medicines, in newspapers, magazines and periodicals which are not targeted exclusively to a trade audience. Do you agree that this is consistent with the law? If not, please explain why.

A: Yes

6. CAP's proposal is to prohibit advertisements in information society services and to reflect this in the CAP Code as a prohibition on "advertisements in online media and some other forms of electronic media". This would be accompanied by a reference to a new guidance note which explains the legal framework and lists specific media types that are likely to be prohibited, as above.

Do you agree that this proposal is consistent with the law? If not, please explain why.

7. Are there any types of media that you consider to be information society services which are not referenced above?

8. Are there any types of online media listed above or otherwise which you think should not be categorised as an information society service?

A: Yes, we agree that the proposal is consistent with the law. We would recommend that any guidance is regularly reviewed and updated in light of changes to media used by consumers

9. Do you agree that the law allows for factual claims on marketers' own websites? If not, please explain why.

A: Yes

10. Do you agree that in principle the above types of claim are, all other things being equal, factual in nature and should therefore be permitted? If not, please explain why.

11. Are there any other claims / types of claims you consider are factual in nature should appear on this list?

A : Yes , we agree that the points listed are factual in nature . We would add that there are other factual matters that are required to be provided by virtue of consumer protection legislation for example name of manufacturer or importer, safety instructions, hazard labelling. In addition Healthier Futures believes that some careful statements regarding

relative risk should be permitted such as “electronic cigarette use is considered by Public Health England and the Royal College of Physicians to be much less harmful than smoking for current smokers” as long as these statements are in context and it is clear that electronic cigarettes are NOT suitable for non-smokers

12. Do you agree that the above types of claims are likely to be promotional in nature and should be prohibited? If not please explain why.

13. Are there other types of generic claims that should be included in this list?

14. Do you have any other comments to inform CAP’s consideration of whether a claim is factual or promotional?

A Q 12: Yes

A Q13: No but as above, any statements about products being relatively lower risk or relatively less harmful should be placed in full context.

A Q14: We recommend that the guidance is reviewed regularly and updated in light of new research, legal decisions, changes in the market.

15. Do you agree that social media pages might, in principle, be capable of meeting the criteria set out for websites in the section A.5.1. above? If not, please explain why.

Please provide any examples and evidence you might have in support of your response.

A: Clearly social media pages may meet the criteria for websites set out in section A5.1. Many local communities have “Buy and Sell” pages set up on Facebook or other social media platforms – advertisements for all sorts of products appear in such pages whether the consumer has requested them or not.

16. Do you agree that the media channels set out above are not prohibited by law from carrying advertisements for unlicensed, nicotine-containing e-cigarettes? If not, please explain why.

A: Yes

17. Do you support the revised wording in Section 22? If not please explain why and how you think it should be amended.

A: No. The second sentence of the last paragraph of section 22 is unclear and we do not understand what is meant by it. In addition there is a typo in the third line which says “sections” plural when it should be ‘section’ singular. As mentioned in the answer to Question 1, reference should consistently be to “licensed products” rather than authorised products.

18. Do you support the proposed wording of the, newly created, rule 22.12? If not please explain why and how you think it should be amended.

A: No. The guidance note is currently unclear, particularly in terms of what “other online media” are included and requires specification

19. Do the criteria above provide a workable framework for identifying marketing communications that are likely to indirectly promote unlicensed, nicotine-containing e-cigarettes that are not authorised as medicines?

A: Yes

20. Are there any criteria you consider should be added to the list?

A: No, not that we are aware of at this point.

In media subject to the Regulations:

21. Should CAP allow advertisements for e-cigarette retailers so long as those advertisements do not refer to products which cannot be advertised?

A: No. We are really unclear how an advertisement for an e-cigarette retailer would be possible without reference to products which cannot be advertised

22. Do you agree with BCAP’s proposal to allow e-cigarette retailers to advertise their services on TV and radio? If not, please explain why.

23. Do you agree with BCAP’s proposed additional text for rule 10.1.11? If not, please explain why.

A: No, we are concerned that retailers will take advantage of use of other methods to indirectly promote their products through use of colour, imagery, and name. All tactics that the tobacco industry has used over many years to promote / advertise their products, including as a means to circumvent advertising restrictions.

24. Do you have information or evidence which can inform CAP and BCAP’s future consideration as to whether they might allow for substantiated health claims to be made for unlicensed e-cigarettes?

A: No

25. Should BCAP remove rule 33.7 for the reasons given above? If not please explain why.

A: Yes

26. Do you have any other comments or evidence for CAP and BCAP in relation to the ongoing suitability of their e-cigarette rules for the regulation of lawful advertisements?

A: Regular review of guidance issued in light of research, legal decisions and changes to the market.

CAP/BCAP Consultation on the advertising of electronic cigarettes

Submission by the Internet Advertising Bureau UK – October 2016

Introduction

- 1 The Internet Advertising Bureau (IAB UK) is the industry body for digital advertising in the UK. It represents over 1200 businesses engaged in all forms of online and mobile advertising, including media owners and advertising technology businesses.
- 2 The IAB's five key objectives are to:
 - Prove the value of digital media by delivering 'best in class' industry research and breaking down barriers to advertising spend;
 - Enable a trustworthy and responsible medium through cross-industry standards and self-regulation;
 - Educate and inspire marketers through intensive learning programmes and thought-leading events;
 - Improve ad trading efficiency through measurement guidelines and creative standards; and
 - Advocate for an optimum policy and regulatory environment for the market to continue to thrive.

Further information is available at www.iabuk.net.

- 3 In our submission we have addressed only those consultation questions of particular relevance to digital advertising and our members.

CAP and BCAP's proposals for changes to their Codes and guidance in response to the Tobacco Products Directive taking effect in the UK

A.4. Prohibition on advertising in online media and some other electronic media

6. CAP's proposal is to prohibit advertisements in information society services and to reflect this in the CAP Code as a prohibition on "advertisements in online media and some other forms of electronic media". This would be accompanied by a reference to a new guidance note which explains the legal framework and lists specific media types that are likely to be prohibited, as above.

Do you agree that this proposal is consistent with the law? If not, please explain why.

- 4 We are not able to comment from a legal perspective but CAP's proposal to include in the CAP Code a prohibition on e-cigarette "advertisements in online media and some other forms of electronic media"¹ appears to us to be consistent with the provisions in the Tobacco and Related Products Regulations 2016 (TRPR).

¹ For the avoidance of doubt, we assume that this prohibition will be situated within a specific section of the Code that relates only to e-cigarette advertising.

- 5 We support the proposal for CAP to produce a guidance note providing more detail on the legal framework and the types of online/electronic media likely to be prohibited and are happy to provide support to CAP as it develops its note.

7. Are there any types of media that you consider to be information society services which are not referenced above?

- 6 The list included in the consultation appears to be comprehensive. We recommend that the terminology used in the guidance note is more closely aligned to standard industry terminology in the interests of clarity and ease of understanding. We are happy to work with CAP to address this as it develops its guidance note.
- 7 There are some types of online marketing not included in the list that we suggest should be, such as all messenger-based advertising (not just text messaging, commonly used to mean SMS messaging). The list should also include paid advertising placements in social media, as distinct from a marketer's own activity on social media (notwithstanding the point in part A.5.3. of the consultation about social media accounts being akin to marketers' own websites and therefore able to carry factual information) and, for the avoidance of doubt, refer to paid promotions in third parties' blogs, vlogs, social media, etc. In order to ensure it is future-proof, the list should also include advertising in augmented reality and virtual reality environments.
- 8 It should also be made clear whether non-paid-for activity, such as providing free products to people who may choose to post a review of them online, is or is not prohibited, and similarly whether sponsorship is permitted. While this type of activity does not fall within CAP's remit, for completeness it would be useful to signpost to relevant guidance elsewhere.

A.5. Prohibition of promotional claims on retailers' websites

9. Do you agree that the law allows for factual claims on marketers' own websites? If not, please explain why.

- 9 We agree with CAP's assessment that the law allows for factual claims on marketers' own websites as described in section A.5.1. of the consultation document. Part 7 of the TRPR defines 'electronic cigarette advertisement' as 'an advertisement with—
- (a) the aim of promoting an electronic cigarette or refill container; or
 - (b) the direct or indirect effect of promoting one.'
- 10 This clearly focuses on promotional information as opposed to factual information.

15. Do you agree that social media pages might, in principle, be capable of meeting the criteria set out for websites in the section A.5.1. above [i.e. they can provide factual information to the consumers who have sought out information]? If not, please explain why.

Please provide any examples and evidence you might have in support of your response.

- 11 We agree that brands' or retailers' social media accounts could meet the criteria set out for websites, if they are able to set controls for access that ensure that the information that they contain is provided 'on demand' as opposed to being actively promoted. Some of the larger social media platforms already prohibit advertising of e-cigarettes in their (paid) advertising policies (for example Facebook² and Twitter³ prohibit the promotion of e-cigarettes) and so marketers are already restricted in terms of their paid-for social media activity.
- 12 A presence on social media does not in itself constitute advertising. Many brands use social media as a means of two-way communication with their customers. Controls exist on the larger social media platforms which, if used appropriately, would enable marketers to provide factual information through their social media accounts where a consumer seeks it out, without 'promoting' or 'advertising' it.
- 13 On Twitter, a user would only see content from a particular brand if they chose to follow that account, i.e. they sought it out, or if another account that they follow re-tweeted the content. With the new rules, this could only be factual information and, if re-tweeted organically, would not in our view be prohibited by Regulation 43 of the TRPR, which states:

'No person may in the course of a business include, or procure the inclusion of, an electronic cigarette advertisement in an information society service...'

In the example above, the content would not be an advertisement (as promotional information would not be permitted), and the person (brand) would not themselves have included it or procured its inclusion.
- 14 A Twitter user may be shown suggestions of accounts to follow, based on their interests, activities, etc., which could include an e-cigarette brand. However the user would only be shown the name of the account, without any content from the account. In that scenario the user would only have access to information if they chose to look at that account.
- 15 Facebook offers businesses controls to manage who can view their pages. This includes settings that limit who can publish content on the page or 'tag' other users, and age restrictions, as well as settings that manage how people can find the page (e.g. whether it is suggested to other users or not). In this way access to the page can be managed to at least the same level – if not with a greater degree of control – than a brand's/retailer's own website. See Appendix 1 for an illustration of these controls.
- 16 In our view, therefore, a social media account that contains factual information and is managed appropriately (on a 'demand' rather than 'broadcast' basis), could be capable of meeting the criteria set out for websites in CAP's consultation document.

² <https://www.facebook.com/policies/ads>

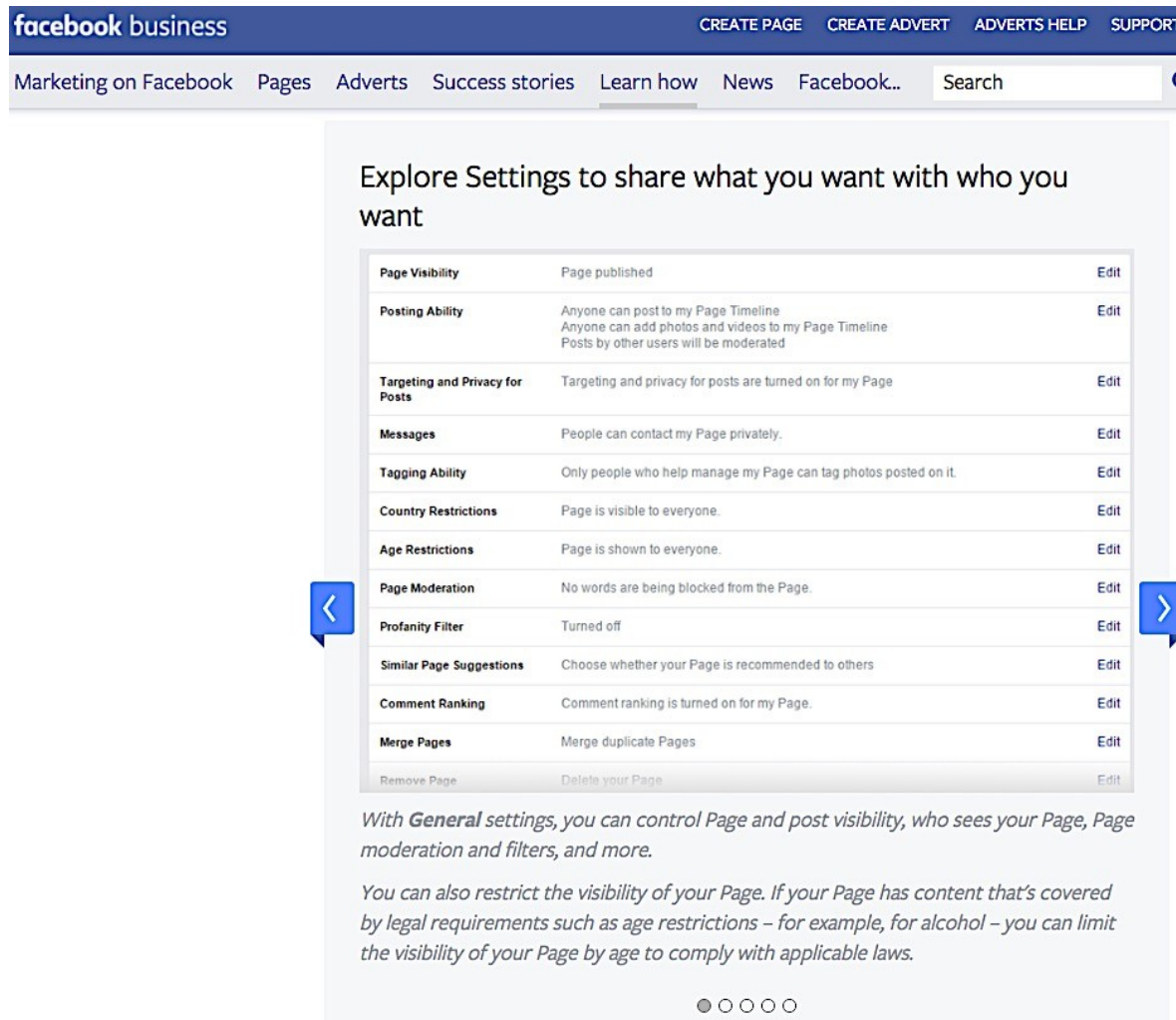
³ <https://support.twitter.com/articles/20170424>

16. Do you agree that the media channels set out above are not prohibited by law from carrying advertisements for unlicensed, nicotine-containing e-cigarettes? If not, please explain why.

17 In relation to digital out-of-home advertising (DOOH), we agree that this would be out of scope of the regulations and would therefore be permitted to carry advertising for unlicensed, nicotine-containing e-cigarettes – as long as it were provided on a broadcast basis, and not on individual request. CAP notes in its consultation that it could be possible for DOOH to fall within the definition of an ‘information society service’, depending how it is utilised. CAP’s guidance note should make this clear.

Appendix 1: Illustration of Facebook page controls for businesses

<https://www.facebook.com/business/learn/facebook-page-settings/>



The screenshot shows the Facebook Business settings interface. At the top, there's a navigation bar with 'facebook business' on the left and 'CREATE PAGE', 'CREATE ADVERT', 'ADVERTS HELP', and 'SUPPORT' on the right. Below this is a secondary navigation bar with 'Marketing on Facebook', 'Pages', 'Adverts', 'Success stories', 'Learn how', 'News', and 'Facebook...'. A search bar is also present. The main content area is titled 'Explore Settings to share what you want with who you want'. It features a table of settings with columns for the setting name, its current value, and an 'Edit' link. The settings listed are: Page Visibility (Page published), Posting Ability (Anyone can post to my Page Timeline), Targeting and Privacy for Posts (Targeting and privacy for posts are turned on for my Page), Messages (People can contact my Page privately), Tagging Ability (Only people who help manage my Page can tag photos posted on it), Country Restrictions (Page is visible to everyone), Age Restrictions (Page is shown to everyone), Page Moderation (No words are being blocked from the Page), Profanity Filter (Turned off), Similar Page Suggestions (Choose whether your Page is recommended to others), Comment Ranking (Comment ranking is turned on for my Page), and Merge Pages (Merge duplicate Pages). At the bottom of the table is a 'Remove Page' option with the subtext 'Delete your Page'. Below the table, there are two paragraphs of explanatory text and a set of four navigation dots.

Page Visibility	Page published	Edit
Posting Ability	Anyone can post to my Page Timeline Anyone can add photos and videos to my Page Timeline Posts by other users will be moderated	Edit
Targeting and Privacy for Posts	Targeting and privacy for posts are turned on for my Page	Edit
Messages	People can contact my Page privately.	Edit
Tagging Ability	Only people who help manage my Page can tag photos posted on it.	Edit
Country Restrictions	Page is visible to everyone.	Edit
Age Restrictions	Page is shown to everyone.	Edit
Page Moderation	No words are being blocked from the Page.	Edit
Profanity Filter	Turned off	Edit
Similar Page Suggestions	Choose whether your Page is recommended to others	Edit
Comment Ranking	Comment ranking is turned on for my Page.	Edit
Merge Pages	Merge duplicate Pages	Edit
Remove Page	Delete your Page	Edit

With **General** settings, you can control Page and post visibility, who sees your Page, Page moderation and filters, and more.

You can also restrict the visibility of your Page. If your Page has content that's covered by legal requirements such as age restrictions – for example, for alcohol – you can limit the visibility of your Page by age to comply with applicable laws.



Independent
British Vape Trade
Association

Dear Sirs,

Consultation on the advertising of electronic cigarettes

The Independent British Vape Trade Association (IBVTA) welcomes the opportunity to respond to this consultation.

Founded by some of the UK's leading independent manufacturers, importers, distributors, and vendors, IBVTA is a not-for-profit trade association representing all responsible and ethical independent vaping businesses in the UK irrespective of the size of their companies and operations. All IBVTA members are free from any control or ownership by the tobacco or pharmaceutical industries.

IBVTA members account for more than 50 per cent of the independent market of UK manufactured and imported devices and e-liquids, making IBVTA the largest trade association in this sector.

Based in the heart of Westminster, IBVTA is supported by a dedicated secretariat and a science and regulatory committee made up of engineers, chemists, and pharmacists.

The mission of IBVTA is to provide credible knowledge and guidance to support the independent vaping sector and promote constructive interaction between this industry sector and the scientific community, vapers, policy makers, and the general public.

IBVTA fosters research and manufacturing excellence in order to deliver a robust yet proportionate consumer regulatory landscape that adequately reflects the needs of vaping stakeholders and recognises vaping as a sector in its own right.

It is important to set out the context in which this consultation is taking place, with particular reference to the latest independent information regarding the safety and efficacy of vaping.

Vaping is not smoking and vape products are not tobacco products. There is no tobacco or smoke involved with vaping. It is therefore disappointing that many of these advertising restrictions and the proposed guidance seem to have been drafted with tobacco in mind.

There is never a situation where it is better to smoke than it is to vape and we now know that vaping is at least 95 per cent less harmful than smoking according to both Public Health England (PHE) and the Royal College of Physicians¹.

Currently there are at least 2.8 million vapers in the UK². All of these vapers are now smoking significantly fewer or no tobacco cigarettes as a direct result. In addition to this PHE now acknowledges that vaping is the number one tool used by smokers to help them quit³. The recently updated Cochrane review confirmed that vaping helped smokers quit with no significant side effects⁴. Finally, vaping is contributing to record low numbers of smokers in both England⁵ and Scotland⁶. All of this should be cause for celebration and not a basis for restrictions on the legitimate promotion of vape products.

Figures produced by the ONS show that 99.9 per cent of vapers are adult current or former smokers⁷. In addition, recent research produced by the anti-smoking charity ASH⁸ demonstrated that children are not vaping in significant numbers. The survey found that regular use of vape products amongst children and young people is rare and is

¹ <https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review> and <https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0>

² http://www.ash.org.uk/files/documents/ASH_891.pdf

³ <https://www.gov.uk/government/news/quitting-smoking-sweeps-the-nation-as-stoptober-returns>

⁴ <http://www.bmj.com/content/354/bmj.i4993>

⁵ <http://www.bbc.co.uk/news/health-37406105>

⁶ <http://www.gov.scot/Publications/2016/09/4029/1>

⁷ <http://www.ons.gov.uk/ons/rel/ghs/opinions-and-lifestyle-survey/adult-smoking-habits-in-great-britain--2013/stb-opn-smoking-2013.html>

⁸ <http://metro.co.uk/2014/04/27/e-cigs-cleared-of-being-route-into-smoking-4710734/>

confined almost entirely to those who currently or have previously smoked⁹. Of those young people that do vape, the majority use nicotine free products¹⁰.

Research undertaken by Queen Mary University in London¹¹ found that a child trying a tobacco cigarette for the first time is 50 per cent likely to become a regular smoker. The same research found no evidence that a child trying vaping for the first time goes on to become a regular vaper. A recent study by John Moores University found that, 'Overall seven out of eight young people had never accessed vape products'¹².

Furthermore, there is no evidence of vaping acting as a gateway to smoking. If there were smoking rates would be rising as vaping has become more popular, instead smoking rates are at their lowest levels, including amongst children. According to ASH, the most recent survey found the lowest recorded smoking rates among children ever: only 18 per cent of 11 to 15-year-olds had tried smoking in 2014 compared with 42 per cent in 2003¹³.

This is encouraging news and a clear demonstration that the current CAP Code for the advertising of vape products is working.

We fully understand that these new advertising restrictions are as a result of the UK Government implementing the Tobacco Products Directive in the form of the Tobacco and Related Products Regulations. That said, we believe there are no grounds to justify these restrictions. Critically, we are deeply concerned that these restrictions will further entrench the dominant position of the tobacco industry by making it increasingly difficult for the legitimate vape industry to sensibly promote their businesses and the products they manufacture and sell; products that are 95 per cent less harmful than tobacco. Finally, and most importantly, these restrictions will make it harder for smokers to access credible information about vaping and will send out a confusing message to smokers and vapers, leading some to believe that vaping is as bad as smoking and therefore needs to be subjected to similar restrictions for the purposes of advertising.

IBVTA Consultation Response

1. Do you agree that CAP's proposal to prohibit advertisements which have the direct or indirect effect of promoting nicotine containing e-cigarettes and their components which are not authorised as a medicine/medical device is consistent with the law? If not, please explain why.

IBVTA is of the opinion that CAP's proposal to prohibit advertisements which have a direct or indirect effect of promoting nicotine containing vaping devices and their components which are not authorised as a medicine/medical device is a valid interpretation of the Tobacco and Related Products Regulations. However, IBVTA does not support this prohibition as we believe the restrictions imposed on our members are without any justification and serve only to restrict smokers' access to information about a product that is 95 per cent less harmful than the tobacco products they currently smoke¹⁴ and which is 60 per cent¹⁵ more likely to help them quit than conventional NRT products that have at least a 90 per cent¹⁶ failure rate? Why would any regulator want to do this?

2. Do you agree that the prohibition should apply to advertisements for non-nicotine and refillable products which can be refilled with nicotine-containing e-liquid? If not, please explain why?

No. The prohibition appears to be a valid interpretation of unnecessarily proscriptive regulation, but its application to products that do not contain nicotine could be construed as "gold-plating" of the regulation. In understanding that legislation requires the reporting and control of devices that can be used to vaporize nicotine containing fluids for inhalation, we do not believe that such controls should be unnecessarily extended to advertising.

⁹ http://www.ash.org.uk/files/documents/ASH_891.pdf

¹⁰ <http://www.usnews.com/news/articles/2015-12-16/most-teen-e-cigarette-users-dont-vape-nicotine>

¹¹ Research undertaken by Professor Peter Hajek, Director of the Tobacco Dependence Research Unit at Queen Mary University of London

¹² John Moores University – 'Young People's Perceptions and Experiences of Electronic Cigarettes'

¹³ <https://www.theguardian.com/society/2016/sep/06/e-cigarette-vaping-ads-children-underestimate-smoking-risks-study-tobacco-cigarettes>

¹⁴ <https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review> and

<https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0>

¹⁵ Study carried out on 5,000 smokers, by Professor Robert West looking at the success rate of different methods to stop smoking: nicotine gum, nicotine patches, nothing, or e-cigarettes. Reported on BBC Breakfast 28 April 2014

¹⁶ Dr Jed Rose, Director of the Duke Center for Smoking Cessation and a Professor in the Department of Psychiatry and Behavioral Sciences at Duke University Medical Center, speaking at the Global Forum on Nicotine (Warsaw, Saturday 6th June 2015):

<http://gfn.net.co/downloads/2015/Plenary%202/Jed%20Rose.pdf>



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3. Do you agree that advertisements for products in the list above would be lawful under TRPR and that CAP therefore does not need to prohibit them? If not, please explain why.

IBVTA agrees that advertisements for products in the list above would be lawful under TRPR and that CAP therefore does not need to prohibit them.

4. Do you have any further views regarding the types of products for which advertising should or should not be prohibited?

IBVTA believes that advertising should not be prohibited for any non-nicotine containing vape products, regardless of whether they can later be filled with nicotine containing e-liquid.

5. CAP's proposal is to prohibit marketing communications for nicotine-containing e-cigarettes, which are not authorised as medicines, in newspapers, magazines, and periodicals which are not targeted exclusively to a trade audience. Do you agree that this is consistent with the law? If not, please explain why.

IBVTA is of the opinion that CAP's proposal to prohibit marketing communications for nicotine-containing e-cigarettes, which are not authorised as medicines, in newspapers, magazines, and periodicals which are not targeted exclusively to a trade audience is a valid interpretation of the Tobacco and Related Products Regulations. However, we do not believe there to be any evidence based justification for the ban.

There is no evidence that such advertising was having a negative impact. It is not acting as a gateway to vaping for non-smokers: figures produced by the ONS show that 99.9 per cent of vapers are adult current or former smokers¹⁷. It was not leading to children and young people taking up vaping: according to ASH, the most recent evidence showed the lowest recorded smoking rates among children ever, with only 18 per cent of 11 to 15-year-olds having tried smoking in 2014 compared with 42 per cent in 2003¹⁸. The real effect of this advertising was introducing thousands of smokers to vaping and contributing to the lowest smoking rates on record in both England¹⁹ and Scotland²⁰. There are still over seven million smokers in England alone, and regulators should avoid depriving them of access to information about a product that is 95 per cent less harmful than the tobacco products they currently smoke²¹ and which is 60 per cent²² more likely to help them quit than conventional NRT products. Such conventional products have at least a 90 per cent²³ failure rate.

Under these restrictions, it would be impossible for an IBVTA member to place a promotional advertisement in a magazine for adult vapers that was distributed via the post. However, it would be perfectly legal for the same IBVTA member to have an advertisement on the side of a school bus that travelled through a densely populated area past several schools. How can such a situation possibly be justified?

6. CAP's proposal is to prohibit advertisements in information society services and to reflect this in the CAP Code as a prohibition on "advertisements in online media and some other forms of electronic media". This would be accompanied by a reference to a new guidance note which explains the legal framework and lists specific media types that are likely to be prohibited, as above.

Do you agree that this proposal is consistent with the law? If not, please explain why.

IBVTA's considered opinion is that this particular area of the consultation cannot be answered with a simple "yes" or "no" answer.

¹⁷ <http://www.ons.gov.uk/ons/rel/ghs/opinions-and-lifestyle-survey/adult-smoking-habits-in-great-britain--2013/stb-opn-smoking-2013.html>

¹⁸ <https://www.theguardian.com/society/2016/sep/06/e-cigarette-vaping-ads-children-underestimate-smoking-risks-study-tobacco-cigarettes>

¹⁹ <http://www.bbc.co.uk/news/health-37406105>

²⁰ <http://www.gov.scot/Publications/2016/09/4029/1>

²¹ <https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review> and <https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0>

²² Study carried out on 5,000 smokers, by Professor Robert West looking at the success rate of different methods to stop smoking: nicotine gum, nicotine patches, nothing, or e-cigarettes. Reported on BBC Breakfast 28 April 2014

²³ Dr Jed Rose, Director of the Duke Center for Smoking Cessation and a Professor in the Department of Psychiatry and Behavioral Sciences at Duke University Medical Center, speaking at the Global Forum on Nicotine (Warsaw, Saturday 6th June 2015): <http://gfn.net.co/downloads/2015/Plenary%20Jed%20Rose.pdf>

Whilst we agree that the TRPRs require that advertisements be prohibited in online and certain electronic media our position is that the term 'advertisements', in this context refers to promotional material which the consumer has not sought out.

Article 5.1 states:

CAP considers that the law does not prevent the provision of information by a retailer in media subject to the Regulations when both of the following criteria are met:

- *The consumer has specifically requested information, and*
- *The information with which the consumer is then presented is factual and not promotional.*

CAP's position on this point echoes that of the Department of Health who have stated:

"The Directive ... does not prevent the provision of information by a retailer or manufacturer about a product [at the request of a consumer]."²⁴

Considering the aligned position of CAP and the Department of Health it must be concluded that informative, non-promotional, content on online media (and some other forms of electronic media) that must be sought out by consumers cannot be considered 'advertisements'. As such it follows that content which satisfies this 'two-part test' falls outside of the scope of the Regulation 43 prohibitions.

The three main "information society services" used by IBVTA members would be: Twitter, Facebook, and Google. One of the justifications for banning advertising on these sites is to prevent a non-vaper/smoker coming across promotional advertising for vape products. Based on this, it is legitimate to assume that there is evidence of non-smokers/vapers being initiated into vaping as a result of advertising on these social media websites.

Social media advertising was not acting as a gateway into vaping for non-smokers: figures produced by the ONS show that 99.9 per cent of vapers are adult current or former smokers²⁵. It was not leading to children and young people taking up vaping: according to ASH, the most recent evidence showed the lowest recorded smoking rates among children ever: only 18 per cent of 11 to 15-year-olds had tried smoking in 2014 compared with 42 per cent in 2003²⁶.

Social media websites such as Twitter and Facebook operate using algorithms which dictate what content is accessible to any given user. These algorithms ascertain a user's interests and preferences to tailor the provision of content to that user. Put simply, unless a user has previously expressed significant interest in a business (or a product related to that business) through searches or by frequently visiting webpages related to that business (or product), it is virtually impossible for a user to be exposed to this content. On a practical basis, this means that only consumers seeking out information on any given product or business will be able to access this content. The general public will not be exposed to this content whilst browsing their social media feeds.

Considering the 'two-part test' previously mentioned above it follows that informative, non-promotional, content which is posted only on businesses own social media groups, pages, forums, or profiles, must be considered to be outside of the scope of the Regulation 43 prohibitions. This is on the basis that this content does not constitute an advertisement and has been sought out by the user in question.

It is important for regulators to remember that the tobacco industry had decades to establish their brands and product before any restrictions were placed on their ability to advertise. It is also important to note that the tobacco industry established their brands in an age prior to the advent of social media. Vaping by comparison is 95 per cent less harmful than smoking and is recognised as contributing²⁷ towards the lowest smoking rates on record, yet despite this, vaping is to be subjected to evidence free tobacco style advertising restrictions. Why?

Of critical importance is the fact that unlike the tobacco industry, vaping has developed exclusively in the age of social media. As a consequence, a majority of IBVTA members have built their businesses around an ability to market and communicate with vapers via Twitter and Facebook. Removing their ability to do this will not just prevent

²⁴ <https://www.gov.uk/government/publications/proposals-for-uk-law-on-the-advertising-of-e-cigarettes/publishing-20-may-not-yet-complete>

²⁵ <http://www.ons.gov.uk/ons/rellghs/opinions-and-lifestyle-survey/adult-smoking-habits-in-great-britain--2013/stb-opn-smoking-2013.html>

²⁶ <https://www.theguardian.com/society/2016/sep/06/e-cigarette-vaping-ads-children-underestimate-smoking-risks-study-tobacco-cigarettes>

²⁷ <https://www.gov.uk/government/news/quitting-smoking-sweeps-the-nation-as-stoptober-returns>



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them communicating with vapers, it will have a critical impact on their business as a significant amount of their online sales are driven by this social media activity.

In an industry where products have a three – six-month lifespan communicating with vapers via social media is incredibly important. In addition to this, in an industry that is subject to a significant amount of misinformation, social media provides one of the few ways our members can mitigate falsehoods in a timely fashion.

Based on the established position of the Department of Health with regard to e-mail newsletters²⁸ and the fact that there is no evidence to support the restrictions as they are currently proposed, we propose that the vape industry should be allowed to engage in non-promotional social media activity. Any alternative is to once again restrict smokers' access to information about a product that is 95 per cent less harmful than the tobacco products they currently smoke²⁹ and which is 60 per cent³⁰ more likely to help them quit than conventional NRT products that have at least a 90 per cent³¹ failure rate? Why would any regulator want to do this?

We would therefore recommend that it is appropriate that CAP reflects the position outlined above within the code. We suggest that the following amendment to the proposed rule 22.12 is appropriate:

22.12 Except for media targeted exclusively to the trade, advertisements with the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components which are not authorised as medicines are not permitted in the following media:

- *Newspapers, magazines and periodicals*
- *Online media and some other forms of electronic media*

Factual claims, content, and communications are permitted providing the following conditions are met:

- *The consumer has explicitly, or implicitly, requested information, and*
- *The information with which the consumer is then presented is factual and not promotional.*

7. Are there any types of media that you consider to be information society services not referenced above?

No.

8. Are there any types of online media listed above or otherwise which you think should not be categorised as an information society service?

IBVTA's considered opinion is that this particular area of the consultation is more complex than perhaps CAP realise and therefore cannot be answered with a simple "yes" or "no" answer.

CAP and the regulators should not be in the business of developing black and white lists of what should and should not be allowed because this issue is too complex. It should be about the nature of the communication and therefore there should be no restricted lists where IBVTA members cannot communicate with people who have voluntarily signed up to receive those communications.

Based on the established position of the Department of Health with regard to e-mail newsletters and the fact that there is no evidence to support the restrictions as they are currently proposed, we propose that the vape industry should be allowed to engage in non-promotional social media activity provided it fulfils the criteria we set out in answer to question six. Any alternative is to once again restrict smokers' access to information about a product that

²⁸ E-mail from the Department of Health to IBVTA 12th September 2016, previously shared with CAP

²⁹ <https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review> and <https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0>

³⁰ Study carried out on 5,000 smokers, by Professor Robert West looking at the success rate of different methods to stop smoking: nicotine gum, nicotine patches, nothing, or e-cigarettes. Reported on BBC Breakfast 28 April 2014

³¹ Dr Jed Rose, Director of the Duke Center for Smoking Cessation and a Professor in the Department of Psychiatry and Behavioral Sciences at Duke University Medical Center, speaking at the Global Forum on Nicotine (Warsaw, Saturday 6th June 2015): <http://gfn.net.co/downloads/2015/Plenary%202/Jed%20Rose.pdf>

is 95 per cent less harmful than the tobacco products they currently smoke³² and which is 60 per cent³³ more likely to help them quit than conventional NRT products that have at least a 90 per cent³⁴ failure rate? Why would any regulator want to do this?

9. Do you agree that the law allows for factual claims on marketers' own websites? If not, please explain why.

IBVTA agrees that the law allows for factual claims on marketers' own websites. The consultation justifies this position with the following statement:

"For practical purposes CAP considers that because a consumer makes an explicit choice to visit a marketer's website it is acceptable for websites to contain factual but not promotional information about products."

The Department of Health has used a similar justification to allow factual information to be communicated via a subscription only e-mail newsletter³⁵. As set out in answer to question six, the above CAP justification can and should be allowed to allow factual information to be communicated via social media.

10. Do you agree that in principle the above types of claim are, all other things being equal, factual in nature and should therefore be permitted? If not, please explain why.

IBVTA agrees in principle that the above types of claim are, all other things being equal, factual in nature and therefore should be permitted on company websites, e-mail newsletters, social media, and other information society services.

11. Are there any other claims/types of claims you consider are factual in nature that should appear on this list?

In addition to the claims set out in the list above, the Department of Health has made clear that IBVTA members can make reference to price, including stating a reduced price for the clearance of end of line or superseded products where this is not presented in a promotional manner or advertised online³⁶.

PHE have set out that businesses can quote statements such as, "vaping is 95 per cent less harmful than smoking", provided they attribute the quote to PHE³⁷. Businesses are encouraged to place such statements on posters and display them in their shops and even in their windows. Given that businesses are allowed to make factual claims on their websites and in their newsletters, it should by logical extension, also be possible for them to quote PHE statistics in the same manner as they can in their shops and also to extend this to their social media activity.

Additional claims that should be allowed under an allowance that they are factual should be as follows:

- Nicotine and/or vapour delivery where substantiated by objective tests
- Battery capacity
- Atomizer resistance
- Fluid capacity

12. Do you agree that the above types of claims are likely to be promotional in nature and should be prohibited? If not, please explain why.

IBVTA does not agree that the above list of claims are likely to be promotional in nature and therefore should be prohibited. The first bullet point states, "descriptive language that goes beyond objective, factual claims, for example the use of adjectives." There are three adjectives in that sentence alone, but they do not diminish the objective and factual nature of the proposal.

³² <https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review> and <https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0>

³³ Study carried out on 5,000 smokers, by Professor Robert West looking at the success rate of different methods to stop smoking: nicotine gum, nicotine patches, nothing, or e-cigarettes. Reported on BBC Breakfast 28 April 2014

³⁴ Dr Jed Rose, Director of the Duke Center for Smoking Cessation and a Professor in the Department of Psychiatry and Behavioral Sciences at Duke University Medical Center, speaking at the Global Forum on Nicotine (Warsaw, Saturday 6th June 2015): <http://gfn.net.co/downloads/2015/Plenary%202/Jed%20Rose.pdf>

³⁵ E-mail from the Department of Health to IBVTA 12th September 2016, previously shared with CAP

³⁶ E-mail from the Department of Health to IBVTA 12th September 2016, previously shared with CAP

³⁷ E-mail from PHE to IBVTA 1st August 2016, previously shared with CAP



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As we made clear in answer to questions five and six, current promotional activity, far from having any negative effect is actually playing a role in encouraging record numbers of adult smokers to switch to vaping. We therefore see no justification for any additional restrictions to be imposed upon it.

The tobacco industry was allowed to advertise freely for generations before it was subjected to these kinds of restrictions. During that time companies were able to establish their brands to such an extent that they were not impacted by the advertising bans when they were introduced. The independent vape industry which manufactures and sells a product that is 95 per cent less harmful than smoking³⁸ is being subjected to these restrictions after just eight years. For a significantly less harmful product that is successfully helping record numbers of smokers to quit, this seems a perverse situation and one that can only serve to benefit to tobacco industry.

Vaping is about more than simply inhaling nicotine. Vapers choose their e-liquid and devices based on the sensation they will create. That is why vaping has proven so successful in helping smokers quit compared to one size fits all NRT products. Our members therefore need to be able to describe as closely as possible what a liquid will taste like and how a particular device will work in terms of vapour production etc.

Many vape businesses have used imagery to create connotative meaning around their brands and products to establish brand awareness and trust with their consumers. To date this has had no negative impact and has contributed to record numbers of smokers quitting. If companies are prevented from using this type of imagery it will have a negative impact on the relationship between the product, the brand, and the consumer.

13. Are there other types of generic claims that should be included in this list?

No.

14. Do you have any other comments to inform CAP's consideration of whether a claim is factual or promotional?

No.

15. Do you agree that social media pages might, in principle, be capable of meeting the criteria set out for websites in the section A.5.1 above? If not, please explain why.

A.5.1 states:

"CAP considers the law does not prevent the provision of information by a retailer in media subject to the Regulations when both of the following criteria are met:

- *The consumer has specifically requested information, and*
- *The information with which the consumer is then presented is factual and not promotional."*

Social media pages in *practice* are designed to fulfil this criterion. These social media websites operate using algorithms. Put simply, unless an individual has previously expressed an interest in vaping through a Google search or visiting a vaping related website, it is virtually impossible for vaping related items to appear in their social media feed.

Virtually all IBVTA members have a page on Facebook and a Twitter account. If a member of the public wishes to access this information, then they need to follow their Twitter accounts or like their page on Facebook. At any time, they can decide to unlike or unfollow.

Social media therefore *can* meet this criterion and therefore IBVTA members should be allowed to engage in non-promotional social media activity. Any alternative is to once again restrict smokers' access to information about a

³⁸ <https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review> and <https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0>

product that is 95 per cent less harmful than the tobacco products they currently smoke³⁹ and which is 60 per cent⁴⁰ more likely to help them quit than conventional NRT products that have at least a 90 per cent⁴¹ failure rate? Why would any regulator want to do this?

Please provide any examples and evidence you might have in support of your response.

16. Do you agree that the media channels set out above are not prohibited by law from carrying advertisements for unlicensed, nicotine-containing e-cigarettes? If not, please explain why.

IBVTA agrees that the media channels set out above are not prohibited by law from carrying advertisements for unlicensed, nicotine-containing vape products.

17. Do you support the revised wording in Section 22? If not, please explain why and how you think it should be amended.

IBVTA agrees that the revised wording in Section 22 is based on a valid interpretation of the Tobacco and Related Products Regulations. However, IBVTA does not support the revised wording as we believe the restrictions imposed on our members are without any justification and serve only to restrict smokers' access to information about a product that is 95 per cent less harmful than the tobacco products they currently smoke⁴² and which is 60 per cent⁴³ more likely to help them quit than conventional NRT products that have at least a 90 per cent⁴⁴ failure rate? Why would any regulator want to do this?

18. Do you support the proposed wording of the newly created rule 22.12? If not, please explain why and how you think it should be amended.

IBVTA does not support the proposed wording of the newly created rule 22.12. We believe that this wording is based on an overly rigid interpretation of the regulations and one that goes beyond what the Department of Health and PHE would like to see.

As we have set out in our answers to questions six and 15, it is perfectly possible within the regulations for IBVTA members to engage in non-promotional social media activity. Furthermore, the Department of Health has made it clear that our members can engage with their customers via a subscription newsletter⁴⁵. We also know that a far wider definition of factual claims needs to be considered by the CAP Code. We would therefore encourage CAP to adopt our revised rule 22.12 as set out in our answer to question six.

19. Do the criteria above provide a workable framework for identifying marketing communications that are likely to indirectly promote unlicensed, nicotine-containing e-cigarettes that are not authorised medicines?

IBVTA members produce a whole range of flavoured e-liquids. Each flavoured liquid will be sold in a range of nicotine strengths from zero upwards. To our knowledge, no IBVTA members produce a range of nicotine free e-liquids/devices under a dedicated brand. These restrictions will either force IBVTA members to develop such a range at a significant cost, or, as is more likely, simply prevent them from advertising. This seems incredibly restrictive.

It is possible to advertise a bottle of nicotine-free e-liquid provided it fulfils the above criteria, but not to advertise a vaping device which at point of sale contains no liquid. This is justified because the device *could* be used with a nicotine-containing fluid, however, it could also be used with a nicotine-free e-liquid. However, it is possible to advertise a vaping device that contains nicotine-free e-liquid at point of sale.

³⁹ <https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review> and <https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0>

⁴⁰ Study carried out on 5,000 smokers, by Professor Robert West looking at the success rate of different methods to stop smoking: nicotine gum, nicotine patches, nothing, or e-cigarettes. Reported on BBC Breakfast 28 April 2014

⁴¹ Dr Jed Rose, Director of the Duke Center for Smoking Cessation and a Professor in the Department of Psychiatry and Behavioral Sciences at Duke University Medical Center, speaking at the Global Forum on Nicotine (Warsaw, Saturday 6th June 2015): <http://gfn.net.co/downloads/2015/Plenary%202/Jed%20Rose.pdf>

⁴² <https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review> and <https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0>

⁴³ Study carried out on 5,000 smokers, by Professor Robert West looking at the success rate of different methods to stop smoking: nicotine gum, nicotine patches, nothing, or e-cigarettes. Reported on BBC Breakfast 28 April 2014

⁴⁴ Dr Jed Rose, Director of the Duke Center for Smoking Cessation and a Professor in the Department of Psychiatry and Behavioral Sciences at Duke University Medical Center, speaking at the Global Forum on Nicotine (Warsaw, Saturday 6th June 2015): <http://gfn.net.co/downloads/2015/Plenary%202/Jed%20Rose.pdf>

⁴⁵ E-mail from the Department of Health to IBVTA 12th September 2016, previously shared with CAP



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A practical solution would be to allow all nicotine-free products to be advertised as long as it was clearly stated that the product in question did not actually contain nicotine.

20. Are there any criteria you consider should be added to the list?

No. See answer to question 19.

21. Should CAP allow advertisements for e-cigarette retailers so long as those advertisements do not refer to products which cannot be advertised?

IBVTA believes that CAP should allow advertisements for vape product retailers on the basis that there is no legally justifiable basis by which CAP should prohibit advertisements for products which fall outside of the scope of the Regulations.

22. Do you agree with BCAP's proposal to allow e-cigarette retailers to advertise their services on TV and radio? If not, please explain why.

IBVTA agrees with BCAP's proposals to allow vape product retailers to advertise their services on television and radio.

23. Do you agree with BCAP's proposed additional text for rule 10.1.11? If not, please explain why.

Rule 10.1.11 states that IBVTA members could advertise their services, but would be prohibited from promoting individual products. Based on this we would like to have included within this text wording that would allow IBVTA members to promote vaping in general.

24. Do you have information or evidence which can inform CAP and BCAP's future consideration as to whether they might allow for substantiated health claims to be made for unlicensed e-cigarettes?

As we set out in our answer to question 11, PHE, supported by the Department of Health, already allows IBVTA members to quote "vaping is 95 per cent less harmful than smoking", provided they attribute the quote to PHE⁴⁶. Businesses are encouraged to place such statements on posters and display them in their shops and even in their windows.

Considering the above, it is not logical that our members cannot then place such factual statements on their websites, their social media pages, and on their products.

Such statements allow the adult smoking population to better understand the products and the level of risk associated with them. It is critical to allow businesses to make such factual statements for not only the reasons outlined above but also on the basis that without access to such information the smoking population is not able to make a fully informed decision about vaping products.

To restrict businesses ability to make such factual, substantiated, health claims is to the detriment of public health. This is especially true when we consider that general public understanding of product safety is incredibly poor and misinformation is highly prevalent in both the press and online. The 2016 ASH survey indicates that 25 per cent of people incorrectly perceive vaping products to be as harmful as, or more harmful than, traditional cigarettes. In contrast, only seven per cent of people in 2013 had the same, incorrect, understanding.

25. Should BCAP remove rule 33.7 for the reasons given above? If not, please explain why.

Virtually all vapers use an e-liquid that contains nicotine, they buy it specifically because it contains nicotine. Therefore, stating on an advert that the product contains nicotine seems nonsense. However, the reason why this statement is placed on advertisements is not to *inform* vapers or smokers that the product contains nicotine, but

⁴⁶ E-mail from PHE to IBVTA 1st August 2016, previously shared with CAP

rather to *warn* them and in effect try and put them off buying the product. In other words, to try and put them off switching from smoking to vaping.

This is based on the misperception that nicotine in the context of vaping is dangerous.

Pure nicotine is a toxic substance and should be handled with care. However, the literature LD50 (5 to 50 mg/kg) for humans is highly contentious and there is significant data indicating the true LD50 value is far higher⁴⁷. The vast majority of e-liquid on the UK market is below 2.0 per cent nicotine strength. Warnings of serious toxicological incidents resulting from e-liquid exposure are unjustified and not supported by available studies⁴⁸.

E-liquid has a very low level of toxicity whether it is 18mg/ml or 36mg/ml.

The vast majority of e-liquids contain pharmaceutical grade nicotine. It is MHRA and FDA approved and the same as that used in NRT products. Nicotine is addictive when consumed via cigarette smoke. However, as Professor Linda Bauld and others have made clear, nicotine when consumed in a form other than tobacco is not a particularly addictive substance⁴⁹.

Robert West, Professor of Health Psychology and Director of Tobacco Studies at University College London's Department of Epidemiology and Public Health said, "E-cigarettes are about as safe as you can get. We know about the health risks of nicotine. Nicotine is not what kills you when you smoke tobacco. Vaping is probably about as safe as drinking coffee."⁵⁰

The National Institute for Health and Care Excellence (NICE) and the MHRA have ruled that long-term use of nicotine is not detrimental to the health of the user⁵¹. A ruling that was specifically sought to allow clinicians to prescribe nicotine containing products to pregnant women.

Based on the true risk posed by nicotine in the context of vaping and the fact that it is what vapers want, IBVTA believes it would be sensible to remove rule 33.7.

26. Do you have any other comments or evidence for CAP and BCAP in relation to the ongoing suitability of their e-cigarette rule for the regulation of lawful advertisements.

The existing CAP guidance was supported by a broad range of stakeholders from public health to industry. Critically, it was working. In the main industry were promoting their products in a responsible way and thousands upon thousands of smokers were switching to vaping. There is no evidence to suggest that any of this advertising was leading to an uptake in vaping amongst children or non-smokers.

The TPD has done a huge disservice to an accepted standard of advertising that has served both industry and regulators well.

The new CAP guidance as set out in this consultation effectively places a significant ban on the legitimate marketing activities of IBVTA members and in many cases, will destroy established business models. There will be no positive outcome from this as there was no problem that needed addressing. As we have made clear, these restrictions will only make it harder for smokers to find out about vaping and for vapers to find out about new and more effective products. Why would any regulator want to deny a smoker access to information that could help them quit?

Independent British Vape Trade Association
50 Broad Way
London SW1H 0RG

⁴⁷ Mayer, B. Arch toxicol. (2014), 88: 5-7

⁴⁸ Epidemiological trends in electronic cigarette exposures reported to U.S. Poison Centers J. P. Vakkalanka , L. S. Hardison, Jr. , C. P. Holstege, Clinical Toxicology, June 2014, Vol. 52, No. 5 : Pages 542-548; Chatham-Stephens K, Law R, Taylor E, Melstrom P, Bunnell R, Wang B, Apelberg B, Schier JG (2014) Notes from the field: calls to poison centers for exposures to electronic cigarettes - United States, September 2010-February 2014. MMWR Morb Mortal Wkly Rep 63: 292-293; and Ordonez JE, Kleinschmidt KC, Forrester MB (2014) Electronic Cigarette Exposures Reported to Texas Poison Centers. Nicotine Tob Res

⁴⁹ <http://www.scottishparliament.tv/category.aspx?id=19&page=1&sort=date>

⁵⁰ The Guardian newspaper 05 June 2013

⁵¹ <http://www.nice.org.uk/guidance/ph45>

Consultation on the advertising of electronic cigarettes

CAP and BCAP's proposals for changes to their Codes and guidance in response to the Tobacco Products Directive taking effect in the UK

ISBA RESPONSE:

1. **Do you agree that CAP's proposal to prohibit advertisements which have the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components which are not authorised as a medicine / medical device is consistent with the law? If not, please explain why.**
Yes
2. **Do you agree that the prohibition should apply to advertisements for nonnicotine and refillable products which can be refilled with nicotinecontaining e-liquid? If not, please explain why**
This wide interpretation seems to go beyond the law. The restriction should be interpreted to any mention of an alternative, nicotine based use, not the theoretical possibility
3. **Do you agree that advertisements for products in the list above would be lawful under TPRR and that CAP therefore does not need to prohibit them? If not please explain why.**
Yes
4. **Do you have any further views regarding the types of products for which advertising should or should not be prohibited?**
No
5. **CAP's proposal is to prohibit marketing communications for nicotine-containing e-cigarettes, which are not authorised as medicines, in newspapers, magazines and periodicals which are not targeted exclusively to a trade audience. Do you agree that this is consistent with the law? If not, please explain why.**
Yes
6. **CAP's proposal is to prohibit advertisements in information society services and to reflect this in the CAP Code as a prohibition on "advertisements in online media and some other forms of electronic media". This would be accompanied by a reference to a new guidance note which explains the legal framework and lists specific media types that are likely to be prohibited, as above. Do you agree that this proposal is consistent with the law? If not, please explain why.**
Yes, although the Guidance will need to be a living document to account for the changing nature of the online environment.
7. **Are there any types of media that you consider to be information society services which are not referenced above?**
No
8. **Are there any types of online media listed above or otherwise which you think should not be categorised as an information society service?**
We are not aware of any, but in case of doubt the ASA should only proceed with caution
9. **Do you agree that the law allows for factual claims on marketers' own websites? If not, please explain why.**
Yes

10. Do you agree that in principle the above types of claim are, all other things being equal, factual in nature and should therefore be permitted? If not, please explain why.

Yes,

11. Are there any other claims / types of claims you consider are factual in nature should appear on this list?

Yes, it is important that marketers can inform consumers of how the product works and also of new technology.

Factual statements about breakthrough developments and their benefits should be permitted.

A total ban on the use of adjectives is disproportional and unacceptable.

Comparative claims relating to technological differences is desirable from a consumer point of view and should not be automatically prohibited.

Information about the content of the product, including what is not in it, is essential consumer information.

Dosage delivered is a legal requirement and needs to be included for web content.

12. Do you agree that the above types of claims are likely to be promotional in nature and should be prohibited? If not please explain why.

See 11 above

13. Are there other types of generic claims that should be included in this list?

See 11 above

14. Do you have any other comment

No

15. Do you agree that social media pages might, in principle, be capable of meeting the criteria set out for websites in the section A.5.1. above? If not, please explain why. Please provide any examples and evidence you might have in support of your response.

Yes, the possibility should be allowed for.

16. Do you agree that the media channels set out above are not prohibited by law from carrying advertisements for unlicensed, nicotine-containing e-cigarettes? If not, please explain why.

Yes

17. Do you support the revised wording in Section 22? If not please explain why and how you think it should be amended.

Yes

18. Do you support the proposed wording of the, newly created, rule 22.12? If not please explain why and how you think it should be amended

Yes

19. Do the criteria above provide a workable framework for identifying marketing communications that are likely to indirectly promote unlicensed, nicotinecontaining e-cigarettes that are not authorised as medicines?

Broadly yes, but subject to the points above and the Guidance.

20. Are there any criteria you consider should be added to the list?

No

21. Should CAP allow advertisements for e-cigarette retailers so long as those advertisements do not refer to products which cannot be advertised?

Yes

22. Do you agree with BCAP's proposal to allow e-cigarette retailers to advertise their services on TV and radio? If not, please explain why.

Yes

23. Do you agree with BCAP's proposed additional text for rule 10.1.11? If not, please explain why

Yes

24. Do you have information or evidence which can inform CAP and BCAP's future consideration as to whether they might allow for substantiated health claims to be made for unlicensed e-cigarettes?

No

25. Should BCAP remove rule 33.7 for the reasons given above? If not please explain why.

Yes

26. Do you have any other comments or evidence for CAP and BCAP in relation to the ongoing suitability of their e-cigarette rules for the regulation of lawful advertisements?

No

Ian Twinn
Director of Public Affairs
ISBA – the Voice of British Advertisers
iant@isba.org.uk

Johnson & Johnson Ltd

Response to CAP/BCAP's Consultation on the advertising of electronic cigarettes

[Part A: CAP's proposal to approximate the advertising prohibitions in the Tobacco and Related Products Regulations 2016 in the CAP Code](#)

[A.2 Products for which advertisements are prohibited](#)

[A.2.2 Direct and indirect effect](#)

In media subject to the regulations:

1. Do you agree that CAP's proposal to prohibit advertisements which have the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components which are not authorised as a medicine / medical device is consistent with the law? If not, please explain why.
2. Do you agree that the prohibition should apply to advertisements for non-nicotine and refillable products which can be refilled with nicotine-containing e-liquid? If not, please explain why.

Johnson & Johnson Ltd (hereafter named JNJ): Agree.

[A.2.3 Products for which advertisements are permitted](#)

No prohibition for the following products so long as they do not have the direct or indirect effect of promoting an unlicensed nicotine product: non-nicotine liquids, non-nicotine disposable e-cigarettes (those not able to be refilled), non-disposable e-cigarettes designed to only take cartridges with non-nicotine containing fluid¹, medicines and medical devices.

In media subject to the Regulations:

3. Do you agree that advertisements for products in the list above would be lawful under TPRR and that CAP therefore does not need to prohibit them? If not please explain why.
4. Do you have any further views regarding the types of products for which advertising should or should not be prohibited?

JNJ response: Agree. No further comment

[A.3 Prohibition on advertising in newspapers and magazines](#)

5. CAP's proposal is to prohibit marketing communications for nicotine-containing e-cigarettes, which are not authorised as medicines, in newspapers, magazines and periodicals which are

¹ CAP and BCAP are currently unaware of any refillable products which have been designed to take only non-nicotine cartridges.

not targeted exclusively to a trade audience. Do you agree that this is consistent with the law? If not, please explain why.

JNJ response: Agree with CAP's proposal to prohibit advertising for unlicensed nicotine-containing e-cigarettes in newspapers, magazines and periodicals not intended exclusively to a trade audience.

A.4. Prohibition on advertising in online media and some other electronic media

6. CAP's proposal is to prohibit advertisements in information society services and to reflect this in the CAP Code as a prohibition on "advertisements in online media and some other forms of electronic media". This would be accompanied by a reference to a new guidance note which explains the legal framework and lists specific media types that are likely to be prohibited, as above. Do you agree that this proposal is consistent with the law? If not, please explain why.

7. Are there any types of media that you consider to be information society services which are not referenced above?

8. Are there any types of online media listed above or otherwise which you think should not be categorised as an information society service?

JNJ response: Agree with CAP's proposal to prohibit advertising in online media for unlicensed nicotine-containing e-cigarettes. However, the list of online media should include in-App advertisements. No further change is proposed to the proposed list of information society services.

A.5. Prohibition on promotional claims on retailers' websites

A.5.1 The effect of the law

9. Do you agree that the law allows for factual claims on marketers' own websites? If not, please explain why.

JNJ response: Agree

A.5.2 Factual vs Promotional Information

Claims likely to be factual in nature and permitted under the Code are: 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 (however, see "promotional marketing" below), instructions as to how products can be used, product ingredients, flavours, nicotine content.

10. Do you agree that in principle the above types of claim are, all other things being equal, factual in nature and should therefore be permitted? If not, please explain why.

11. Are there any other claims / types of claims you consider are factual in nature should appear on this list?

JNJ response: Agree in principle that the claims listed are factual in nature. However, it should be added that the name of the flavours should also be non-promotional and factual.

Claims promotional in nature and therefore not prohibited under the Code are: descriptive language that goes beyond objective, factual claims, for example the use of adjectives; 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 sales promotions includes: "two for the price of one" offers, money-off offers, text-to-wins, instant-wins, competitions and prize draws; significant imagery that is not related to the product; comparative claims with other e-cigarette products or the general market.

12. Do you agree that the above types of claims are likely to be promotional in nature and should be prohibited? If not please explain why.

13. Are there other types of generic claims that should be included in this list?

14. Do you have any other comments to inform CAP's consideration of whether a claim is factual or promotional?

JNJ response: Agree. The claims listed are likely to be promotional in nature and should therefore be prohibited for unlicensed nicotine-containing e-cigarettes.

Other types of generic claims that should be added to the list include descriptive language that would suggest directly or indirectly benefits of any kind from using the product (e.g. health claims) , significant imagery related to the product using celebrities or consumer testimonials/quotes to endorse the product, promotional claims linked to sales such as "top-selling", "market leader" claims.

A.5.3 Applicability to social media

15. Do you agree that social media pages might, in principle, be capable of meeting the criteria set out for websites in the section A.5.1. above? If not, please explain why.

Please provide any examples and evidence you might have in support of your response.

JNJ response: Agree in principle. However, in practice, applying the criteria set for websites to social media platforms may seem difficult to monitor and implement especially when it comes to the restriction of the distribution. For instance, social media platforms such as Twitter, Instagram, etc. can post content for their followers but this content may be re-posted and therefore be "pushed" to the general public who would not have been actively seeking it, including people under 18s (e.g. Instagram/Twitter's terms of services allow individuals as young as 13 years of age to use their service).

A.6. Non-broadcast media channels not subject to TRPR

Permitted channels for unlicensed, nicotine-containing electronic cigarettes include: outdoor advertising, including digital outdoor advertising, posters on public transport (not leaving the

UK), cinema, direct hard copy mail, leaflets, publications / websites etc. targeted exclusively to the trade.

16. Do you agree that the media channels set out above are not prohibited by law from carrying advertisements for unlicensed, nicotine-containing e-cigarettes? If not, please explain why.

JNJ response: Agree. However, allowable advertising, specifically outdoor advertising, should be restricted from being placed within a reasonable distance of schools and other premises where children are likely to be the main attendees and as such where they are likely to be disproportionately exposed to such advertising.

A.7 Proposed changes to the CAP Code

A.7.1 Changes to the introductory text of Section 22 (Electronic Cigarettes). See p.17

17. Do you support the revised wording in Section 22? If not please explain why and how you think it should be amended.

JNJ response: Agree.

A.7.2 Creation of rule 22.12

Proposed new rule	22.12 Except for media targeted exclusively to the trade, advertisements with the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components which are not authorised as medicines are not permitted in the following media: <ul style="list-style-type: none">• 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 guidance note.
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18. Do you support the proposed wording of the, newly created, rule 22.12? If not please explain why and how you think it should be amended.

JNJ response: Agree.

Part B: Other issues relevant to both the CAP and BCAP Codes

B.1 Preventing indirect promotion of nicotine-containing e-cigarettes

B.1.1 Guidance

Advertisements which feature 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 direct response mechanic relating to a nicotine e-cigarette;
- a strapline, celebrity, licensed character or branding which is synonymous with a nicotine-product.

19. Do the criteria above provide a workable framework for identifying marketing communications that are likely to indirectly promote unlicensed, nicotine-containing e-cigarettes that are not authorised as medicines?

20. Are there any criteria you consider should be added to the list?

JNJ response: Agree. However, criteria should also include the use of testimonials/quotes from consumers and advertising which features influencers (e.g. Vlogger, Blogger, etc.) which may not be considered as “celebrity” by the general public but who can still encourage/endorse the consumption of the product.

B.1.2 CAP’s position on non-broadcast marketing communications for e-cigarette retailers which do not promote products

In media subject to the Regulations:

21. Should CAP allow advertisements for e-cigarette retailers so long as those advertisements do not refer to products which cannot be advertised?

JNJ response: Agree so long as they do not refer to products which cannot be advertised or any criteria listed in section B1.1.1.

B.1.3 BCAP’s position on TV and radio advertisements for e-cigarette retailers which do not promote products

Proposed additional text for rule 10.1.11

E-cigarette retailers may also advertise their services, provided that they do not promote individual products prohibited by this rule.

22. Do you agree with BCAP’s proposal to allow e-cigarette retailers to advertise their services on TV and radio? If not, please explain why.

23. Do you agree with BCAP's proposed additional text for rule 10.1.11? If not, please explain why.

JNJ response: Agree. No additional text is proposed for the amended rule 10.1.11.

B.2. Ongoing suitability of current CAP and BCAP content, placement and scheduling rules

B.2.2 Health claims

24. Do you have information or evidence which can inform CAP and BCAP's future consideration as to whether they might allow for substantiated health claims to be made for unlicensed e-cigarettes?

JNJ response: we endorse CAP/BCAP's position to continue prohibition of health claims for e-cigs which are not licensed as medicines, regardless if the manufacturer holds substantiation for such claims.

Firstly, the UK legislation on tobacco and related products dictates that compulsory health warning is to be displayed on 30% of the front and back of packs about the highly addictive nature of nicotine. In addition, claims on pack that a product has some health benefits are prohibited. Allowing health claims in advertising would be inconsistent with the on-pack restrictions for tobacco and related products and therefore potentially misleading for the consumers.

Secondly, in the UK, NRT products are approved for indications such as "safer alternative to smoking for smokers and those around them". In NICE Harm Reduction guidance (PH45), only licensed nicotine-containing products are explicitly listed as safe, cost-effective approaches to reduce the harm of smoking. This guidance complements NICE guidance on smoking cessation (PH10), making it clear that harm reduction is an integrated part of the smoking cessation strategy. Thus, a claim that e-cigarettes are healthier/safer than smoking tobacco (or any variants) is in effect a health claim if not a medicinal claim. Therefore, allowing such claims is effectively encouraging medicinal advertising for unlicensed e-cigarettes and would not only provide a more liberal regime for claims than that which exists for medicines, but also potentially reduce confidence in the currently licensed nicotine-containing products.

Finally, prohibition of health claims for unlicensed e-cigarettes should also be reinforced with the prohibition of any direct or indirect association with established public health campaigns focused on tobacco cessation or harm reduction e.g. NHS campaigns such as "Stoptober".

B.2.3. Nicotine-disclosure rules in the BCAP Code

Rule 10.1.11 now prohibits all broadcast advertisements for unlicensed, nicotine-containing e-cigarettes so there are no circumstances in which such a product could be advertised and need

to comply with rule 33.7 “Advertisements must state clearly if the product contains nicotine. They may include factual information about other product ingredients”.

25. Should BCAP remove rule 33.7 for the reasons given above? If not please explain why.

JNJ response: Yes

[B.2.4. Other comments](#)

26. Do you have any other comments or evidence for CAP and BCAP in relation to the ongoing suitability of their e-cigarette rules for the regulation of lawful advertisements?

JNJ response: No

Consultation on the advertising of electronic cigarettes

Response from JTI

31 October 2016

Japan Tobacco International

Japan Tobacco International (JTI) is part of the Japan Tobacco group (JT Group) of companies, a leading international e-cigarette and tobacco product manufacturer.

JTI has its UK headquarters in Weybridge, Surrey, and has a long-standing and significant presence in the UK. With the acquisition of two major e-cigarette brands, E-Lites and Logic, JTI has also become a global player in the e-cigarette business. E-Lites first launched in the UK in 2009, and offered the first USB rechargeable kit on the market. Logic began in the United States and is the number one e-cigarette brand in New York.

E-Lites and Logic are important extensions to JTI's portfolio and, as part of JTI, these brands now have access to:

- JTI's extensive manufacturing expertise – enabling standards of product quality to be further enhanced;
- The JT Group's wider technological, research and scientific resources – including a UK R&D Centre – facilitating compliance with future regulatory requirements, driving the development of next generation products to meet evolving consumer expectations, and delivering ever better electronic cigarette products; and
- JTI's global distribution network in over 120 countries.

Gallaher Limited is the registered trading company of JTI in the UK.

Address

JTI, Members Hill
Brooklands Road
Weybridge
Surrey
KT13 0QU

Confidentiality

JTI is happy for this response to be made public.

Introduction

JTI supports reasonable and proportionate regulation that is carefully defined, necessary and appropriate to achieve a clearly articulated and legitimate public policy objective. Regulation should be made in accordance with internationally-accepted Better Regulation principles, which are supported by the UK Government and the European Commission. In essence, these principles require regulation to be transparent, accountable, proportionate, consistent and targeted at cases where action is needed.

JTI actively seeks dialogue, either written or oral, with government authorities around the world regarding the regulation of nicotine containing products including electronic cigarettes and tobacco. JTI has a right – and an obligation – to express its point of view regarding regulation that affects its products and the industry. It is our belief that we have the responsibility, when engaging in a consultation process, to be open and transparent in our dialogue with government authorities, and to propose alternative, less restrictive and more targeted solutions that meet Better Regulation principles where we believe proposed regulations to be excessive.

JTI believes that:

- Adults should be free to choose whether they wish to use electronic cigarettes and no one should use them without understanding the risks associated with doing so;
- All marketed electronic cigarettes should comply with all relevant regulations, such as those concerning general consumer product safety, electrical safety and consumer protection from misleading marketing claims;
- Regulation of electronic cigarettes should aim to keep electronic cigarettes out of the hands of minors and to remind users of the risks associated with their use;
- Governments and regulators should avoid excessive regulation that prevents adult consumers from choosing these products.

- 1. Do you agree that CAP's proposal to prohibit advertisements which have the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components which are not authorised as a medicine / medical device is consistent with the law? If not, please explain why.**

Yes, we agree that CAP's proposal is consistent with the law and that it applies advertising prohibitions to a limited scope of media as anticipated following the Department of Health's minimal transposition of the TPD.

- 2. Do you agree that the prohibition should apply to advertisements for non-nicotine and refillable products which can be refilled with nicotine-containing e-liquid? If not, please explain why.**

Yes, insofar as the question refers to products which contain a non-nicotine e-liquid, **and** are refillable, **and** can be refilled (without user modification) with nicotine-containing e-liquid. But the distinction between nicotine-containing and non-nicotine containing products is extremely important: Non-nicotine-containing products which cannot be refilled with nicotine-containing e-liquid are clearly beyond the scope of the EU's revised Tobacco Products Directive 2014/40/EU and its UK implementing regulations, The Tobacco and Related Products Regulations 2016 (*hereafter TPD and/or the TPD Regulations*), and therefore should not fall into the scope of CAP/BCAP's revised Code.

- 3. Do you agree that advertisements for products in the list above would be lawful under TPRR and that CAP therefore does not need to prohibit them? If not please explain why.**

Yes.

- 4. Do you have any further views regarding the types of products for which advertising should or should not be prohibited?**

The TPD's regulation of e-cigarette advertising could potentially damage this important emerging product sector. The evidence suggests that e-cigarette advertising, prior to the implementation of TPD, has not had the effect of attracting significant numbers of non-smokers into vaping. Public Health England's 2015 report, *E-cigarettes: an evidence update*, found that:

Despite some experimentation with [e-cigarettes] among never smokers, [e-cigarettes] are attracting very few people who have never smoked into regular [e-cigarette] use.¹

For that reason, swingeing restrictions on advertising are unnecessary and we agree with the UK Department of Health's decision not to seek to extend the scope of the restrictions beyond those specifically outlined in the TPD. It is incumbent on the CAP and BCAP, therefore, to adopt a similarly pragmatic approach in interpreting the TPD Regulations so as to ensure that adult smokers and vapers are supported in making informed choices about these products.

¹ E-cigarettes: an evidence update, Public Health England, August 2015

- 5. CAP’s proposal is to prohibit marketing communications for nicotine-containing e-cigarettes, which are not authorised as medicines, in newspapers, magazines and periodicals which are not targeted exclusively to a trade audience. Do you agree that this is consistent with the law? If not, please explain why.**

Yes, we agree that CAP’s proposal to prohibit marketing communications for nicotine-containing e-cigarettes, which are not authorised as medicines, in newspapers, magazines and periodicals which are not targeted exclusively to a trade audience is consistent with the law in that this prohibition clearly falls within the limited scope of media anticipated following the Department of Health’s minimal transposition of the TPD.

- 6. CAP’s proposal is to prohibit advertisements in information society services and to reflect this in the CAP Code as a prohibition on “advertisements in online media and some other forms of electronic media”. This would be accompanied by a reference to a new guidance note which explains the legal framework and lists specific media types that are likely to be prohibited, as above. Do you agree that this proposal is consistent with the law? If not, please explain why.**

The definition of “information society services” (“ISS”) is unclear, and is further complicated by the fact that technology has advanced significantly since the definition was formulated and most recently confirmed in the E-Commerce Directive 2000/31/EC (which itself cross-refers to various predecessor directives to provide the ISS full definition).

We agree that ISS would include “online media” and that broadening this to include “some other forms of electronic media” would be consistent with the law. However, while a list containing examples of the types of online media and other electronic communications likely to fall within the ISS prohibition would be helpful, we would suggest that due consideration should be given by the CAP to both the ongoing public health debate (both on national and international levels) as to the potential risks associated with the use of electronic cigarettes, and the specificity of the advertising prohibitions as they apply to non-ISS media (as confirmed in the DoH’s own guidance), the combined effect of which, and which we support, culminated in the DoH’s minimal transposition of the TPD. Therefore, to the extent there is scope for the CAP to reflect in its Code and guidance a more relevant interpretation of the outdated and overly complicated definition of ISS, particularly in view of the many legitimate non-ISS advertising opportunities which will continue to exist (e.g. sponsorship with no cross border effects), we would be in strong support of such an approach.

- 7. Are there any types of media that you consider to be information society services which are not referenced above?**

No. As stated in answer to Question 6 above, the phrase “some other forms of electronic media” summarises, in general terms, the broad scope of the ISS. It would be helpful to clarify the scope of ISS through guidance as proposed, and to do so in the context of offline advertising opportunities which are clearly permitted by TPD.

8. Are there any types of online media listed above or otherwise which you think should not be categorised as an information society service?

Yes. Large numbers of consumers search for, learn about and purchase their electronic cigarettes from online sources, and it is vital that they are able to make informed decisions with as much factual information as possible. The TPD has created an obvious anomaly between information which would be available to consumers in a bricks-and-mortar store, and those who are shopping online. CAP has the opportunity and the scope to interpret the TPD in a way which maximises the information available to consumers in either case, and supports them in making an informed choice.

The Code should make clear that, where a consumer has visited the website of an e-cigarette retailer or manufacturer, they have made a legitimate request for information or to view advertisements regarding their chosen brand or product. The clear thrust of the TPD regulations is that online advertising – that is promotional material, the open publication of which has been paid for, and which consumers may not have actively sought out – is to be restricted. It is not the case that the intention was to restrict access to information and advertisements on proprietary websites, such as those of manufacturers or retailers, which consumers have actively visited.

Therefore the Code should recognise that the provision of information within a retailer or manufacturer's website is not included in the scope of the TPD Regulations and that, similarly, the opportunity to advertise on these websites in a manner which reflects legitimate in store advertising should also be permitted.

9. Do you agree that the law allows for factual claims on marketers' own websites? If not, please explain why.

Yes.

10. Do you agree that in principle the above types of claim are, all other things being equal, factual in nature and should therefore be permitted? If not, please explain why.

Yes.

11. Are there any other claims / types of claims you consider are factual in nature should appear on this list?

In addition to the specific point raised in the answer to Question 8, above, it is clear that CAP cannot possibly hope to produce a definitive list of the types of claims which could be considered factual in nature. Instead, the Code should make clear that factual information, presented to consumers within the context of a website which they have deliberately sought out, would be considered acceptable informational content.

12. Do you agree that the above types of claims are likely to be promotional in nature and should be prohibited? If not please explain why.

No. Many of the 'claims' listed are far too broadly defined to provide any useful form of guidance. It is not reasonable to declare that the "use of adjectives" necessarily means a claim is "descriptive language that goes beyond objective, factual claims". CAP should also make clear that "significant imagery that is not related to the product" can only be a breach of the TPD Regulations if it is promotional in nature. Similarly, "comparative claims with other e-cigarette products" can clearly be factual in nature, and are often important to support consumers in making an informed choice.

13. Are there other types of generic claims that should be included in this list?

No.

14. Do you have any other comments to inform CAP's consideration of whether a claim is factual or promotional?

No.

15. Do you agree that social media pages might, in principle, be capable of meeting the criteria set out for websites in the section A.5.1. above? If not, please explain why.

Please provide any examples and evidence you might have in support of your response.

Yes. It is widely understood that many consumers also now prefer to seek customer service communications through social media channels, and it is vital that electronic cigarette businesses, whether suppliers or manufacturers, maximise the availability of their customer service communications to consumers, in order to provide information through whichever channel is most convenient for them.

16. Do you agree that the media channels set out above are not prohibited by law from carrying advertisements for unlicensed, nicotine-containing e-cigarettes? If not, please explain why.

Yes.

17. Do you support the revised wording in Section 22? If not please explain why and how you think it should be amended.

Yes.

18. Do you support the proposed wording of the, newly created, rule 22.12? If not please explain why and how you think it should be amended.

Yes, subject to our responses to Questions 6,7 and 8 above.

19. Do the criteria above provide a workable framework for identifying marketing communications that are likely to indirectly promote unlicensed, nicotine-containing e-cigarettes that are not authorised as medicines?

No. The Code should provide clearer guidance on CAP/BCAP's understanding of what exactly would determine whether a brand or range name, strapline, celebrity, etc is "strongly associated", or "synonymous" with a nicotine product. What test will CAP/BCAP apply in its consideration?

20. Are there any criteria you consider should be added to the list?

The Code should make clear that the use of the 'get up' – colours, imagery etc – of a nicotine brand, but without the use of an actual brand name, is sufficient to breach the code.

21. Should CAP allow advertisements for e-cigarette retailers so long as those advertisements do not refer to products which cannot be advertised?

Yes. The TPD Regulations are clear that it is the advertising and promotion, whether directly or indirectly, of an e-cigarette or refill container that is banned within a limited scope of media. There is no scope within the regulations for a ban on the advertising of e-cigarette retailers, so long as such an advert does not promote a specific e-cigarette or refill container.

22. Do you agree with BCAP's proposal to allow e-cigarette retailers to advertise their services on TV and radio? If not, please explain why.

Yes. As stated in answer to Question 21, above, there is no scope in the TPD Regulations to ban such adverts.

23. Do you agree with BCAP's proposed additional text for rule 10.1.11? If not, please explain why.

Yes.

24. Do you have information or evidence which can inform CAP and BCAP's future consideration as to whether they might allow for substantiated health claims to be made for unlicensed e-cigarettes?

There could be useful benefits for consumers to permitting substantiated health claims of a certain type for unlicensed e-cigarettes. Public Health England's 2015 report, *E-cigarettes: an evidence update*, found that:

Since 2013, perceptions of the relative harmfulness of EC have become less accurate. Significantly larger proportions perceived EC to be at least as harmful as cigarettes in 2014 than in 2013...²

This trend is likely to be a result of the growing pattern of regulators applying heavy-handed tobacco-style restrictions to electronic cigarettes.

25. Should BCAP remove rule 33.7 for the reasons given above? If not please explain why.

Yes.

26. Do you have any other comments or evidence for CAP and BCAP in relation to the ongoing suitability of their e-cigarette rules for the regulation of lawful advertisements?

No.

² E-cigarettes: an evidence update, Public Health England, August 2015

Consultation on the advertising of electronic cigarettes

Respondent: Liberty Flights Limited
Business: Manufacturer, importer and retailer of electronic cigarettes
Date: 26th October 2016

1. Do you agree that CAP's proposal to prohibit advertisements which have the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components which are not authorised as a medicine / medical device is consistent with the law? If not, please explain why.

Yes, we agree for nicotine containing e-cigarettes and e-liquid. However, we feel clarity is required for components such as batteries and drip tips which could be used with non-nicotine containing e-liquid.

2. Do you agree that the prohibition should apply to advertisements for non-nicotine and refillable products which can be refilled with nicotine containing e-liquid? If not, please explain why.

Not in every case. We feel that if the advertisement makes clear the intended use of the device is for refilling with non-nicotine containing e-liquid only then the advert should be allowed. We cannot be held accountable for user choice after purchasing.

3. Do you agree that advertisements for products in the list above would be lawful under TPRR and that CAP therefore does not need to prohibit them? If not please explain why.

Yes, we agree.

4. Do you have any further views regarding the types of products for which advertising should or should not be prohibited?

As detailed in question 1 and 2, we feel that accessories and empty devices should be permitted as these items are not specific to nicotine containing products.

5. CAP's proposal is to prohibit marketing communications for nicotine-containing e-cigarettes, which are not authorised as medicines, in newspapers, magazines and periodicals which are not targeted exclusively to a trade audience. Do you agree that this is consistent with the law? If not, please explain why.

Yes, we agree.

6. CAP's proposal is to prohibit advertisements in information society services and to reflect this in the CAP Code as a prohibition on "advertisements in online media and some other forms of electronic media". This would be accompanied by a reference to a new guidance note which explains the legal framework and lists specific media types that are likely to be prohibited, as above. Do you agree that this proposal is consistent with the law? If not, please explain why.

Yes, we agree.

7. Are there any types of media that you consider to be information society services which are not referenced above?

We would like clarity on how this regulation will be applied to marketplace shops such as eBay or Amazon. Do the same restrictions on content apply to people operating as shops on these sales platforms? What about the sale of second hand goods online by an individual? We believe they should be covered like company websites to create a fair sales environment.

We feel that the cinema should be included, especially as this form of advertising is extremely expensive making it more likely only tobacco owned companies can afford this form of advertising. Independent business will be priced out and put at a disadvantage.

8. Are there any types of online media listed above or otherwise which you think should not be categorised as an information society service?

We feel clarity is needed around the use of emails and texts messages where consumers have 'opted in' and therefore can be deemed to have requested that information. This method of communication is targeted and not in danger of promoting our products outside a list of people who have already purchased from us and are therefore aware of the brand etc. Types of information would include new products and changes to pricing. This was discussed and mutually agreed to be a sensible approach in a meeting between the Department of Health and IBVTA on 21st June. Minutes can be provided on request.

A second area for clarification is vapour forums. These are sites where, with a log in, people can discuss various issues to do with vaping. Within this space we would like clarity on whether the following is acceptable given this is a closed group and the content is not available through internet searches.

- Can e-cigarette brands advertise in this space?*
- If a forum user asks for advice or recommendations can an e-cigarette manufacturer/brand answer that question or would that be deemed promotional? In this example the company is replying to a specific request for information, similar to those received by customer service departments.*

Social media is discussed in later questions.

9. Do you agree that the law allows for factual claims on marketers' own websites? If not, please explain why.

Yes, we agree.

10. Do you agree that in principle the above types of claim are, all other things being equal, factual in nature and should therefore be permitted? If not, please explain why.

Yes, we agree.

11. Are there any other claims / types of claims you consider are factual in nature should appear on this list?

We feel the following information is factual in nature and for the benefit of the consumer:

- *A description of the flavour, such as 'a soft sweet apple' or 'a sharp sour apple' as these two are totally different flavours but are both apple. A consumer would want to know when choosing a product if they are likely to like the flavour.*
- *Description of user experience of devices; this includes comments on the volume of vapour produced, the ease of use, the tightness of the airflow etc. which all helps a consumer pick the right device for their needs.*
- *Specifications relating to products including functionality.*

12. Do you agree that the above types of claims are likely to be promotional in nature and should be prohibited? If not please explain why.

No we do not agree.

- *Prohibiting the use of adjectives is far too broad to be reasonable. There are plenty of places where being able to describe the product is of use to a consumer within an informative, non-promotional environment.*
- *The term 'significant imagery' is too broad and does not allow retailers to make their websites unique. We agree that imagery should not give the impression of lifestyle benefits but to prohibit images so uniformly is detrimental.*
- *We believe comparisons between e-cigarettes within a retailer's range should be allowed so consumers can select the devices with the most appropriate specifications for them and see how devices perform compared to one another.*

13. Are there other types of generic claims that should be included in this list?

No.

14. Do you have any other comments to inform CAP's consideration of whether a claim is factual or promotional?

We would like clarity on a number of other types of information we feel are informative in nature.

- *Comparison of health risks between e-cigarettes (generic, not product specific) and traditional cigarettes where the statements are supported by studies such as PHE 2015 report.*
- *Customer testimonials and reviews (non paid for). We currently have a rating system on our website that consumers use to rate the product after purchase. This is a key tool to other customers looking to try something new. Can the written reviews and star ratings be displayed next to each product?*

15. Do you agree that social media pages might, in principle, be capable of meeting the criteria set out for websites in the section A.5.1. above? If not, please explain why. Please provide any examples and evidence you might have in support of your response.

We agree in principle however we feel social media requires a different approach to websites as its operation is inherently different and we cannot control how visitors to our page share the information they find there. Facebook is an extremely important communication platform for our business and forms the 'front line' for our customer service. We also use it to provide information about product safety, tips for use, updates in scientific study and articles of interest. We want to be able to provide this information without fear of breaching the code. Please can you provide clarity on whether company pages will be permitted especially in light of the fact tobacco companies like Phillip Morris have a Facebook page.

16. Do you agree that the media channels set out above are not prohibited by law from carrying advertisements for unlicensed, nicotine-containing e-cigarettes? If not, please explain why.

Yes, we agree with the exception of cinema advertising as detailed in Q7 response.

17. Do you support the revised wording in Section 22? If not please explain why and how you think it should be amended.

Yes, we support the wording.

18. Do you support the proposed wording of the, newly created, rule 22.12? If not please explain why and how you think it should be amended.

Yes, we support the proposed wording.

19. Do the criteria above provide a workable framework for identifying marketing communications that are likely to indirectly promote unlicensed, nicotine containing e-cigarettes that are not authorised as medicines?

No the framework is not workable, primarily because e-cigarettes do not have different, identifiable designs depending on whether they are used with nicotine or not. Most devices are sold empty and the choice to use nicotine with the device lies with the consumer. It is therefore impossible to distinguish between devices on the basis of potential nicotine content.

By requiring companies to create distinct brands for the nicotine free e-liquid you can adding unnecessary burden and cost to companies already shackled with the cost of TPD compliance. This is not reasonable and should not be required to allow advertising of products not covered by these restrictions.

20. Are there any criteria you consider should be added to the list?

No.

21. Should CAP allow advertisements for e-cigarette retailers so long as those advertisements do not refer to products which cannot be advertised?

Yes, we agree.

22. Do you agree with BCAP's proposal to allow e-cigarette retailers to advertise their services on TV and radio? If not, please explain why.

Yes, we agree.

23. Do you agree with BCAP's proposed additional text for rule 10.1.11? If not, please explain why.

Yes, we agree.

24. Do you have information or evidence which can inform CAP and BCAP's future consideration as to whether they might allow for substantiated health claims to be made for unlicensed e-cigarettes?

<http://www.cochrane.org/news/conclusions-about-effects-electronic-cigarettes-remain-same>

<https://www.rcplondon.ac.uk/news/promote-e-cigarettes-widely-substitute-smoking-says-new-rcp-report>

We feel it is also important to take into account the work being done as part of TPD by manufacturers. In order for a product to be on the market after 20th may 2017 the following needs to have been generated and provided to MHRA for review:

- Toxicological data for each ingredient.*
- Emissions data on the e-liquid, the hardware device and combinations of the two.*
- A description of the production process from raw materials to finished product.*
- Data on the nicotine dose provided by each e-liquid and hardware device.*
- Prohibition of use of ingredients classified as carcinogenic, mutagenic or reproductive toxicant.*

This means at the point of notification we know a huge amount about our products and the emissions produced under normal conditions of use. This has created a set of standards by which all legitimate products will be measured in order to be sold. The resulting technical dossiers on each product are comprehensive and high quality. All manufacturers will have their notifications made available to the public increasing scrutiny on the industry and MHRA have a dedicated website where issue with products can be reported by consumers.

We feel this changes the landscape from when CAP decided to prohibit health claims in 2014 and means a review of the decision is required.

25. Should BCAP remove rule 33.7 for the reasons given above? If not please explain why.

Yes.

26. Do you have any other comments or evidence for CAP and BCAP in relation to the ongoing suitability of their e-cigarette rules for the regulation of lawful advertisements?

In general, we feel there needs to be more room for scope to make evidence based health claims for e-cigarettes vs traditional cigarettes as there is huge weight of evidence to support this. We want consumers to be able to make an informed choice about using the product as a cessation device and support them in moving away from traditional cigarettes, as 2.8 million people have done before them. As with all modern businesses, the online platform is extremely important and the predominate form of communication for our customers so we want to be able to maintain that relationship through social media.

The person dealing with this matter is:

Prof Eugene Milne
Newcastle City Council
Chief Executive's Directorate
Room 256
Civic Centre
Barras Bridge
Newcastle upon Tyne, NE1 8QH

Phone: 0191 2116346

Email: eugene.milne@newcastle.gov.uk

www.newcastle.gov.uk

Regulatory Policy Team
Committee of Advertising Practice
Mid City Plans
71 High Holborn
London
WC1V 6QT
e-cigarettes@cap.org.uk

31 October 2016

If you need this information in another format or language please contact the sender.

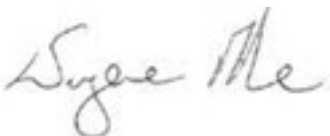
Dear Sir/Madam

Consultation on the advertising of electronic cigarettes

Newcastle City Council welcomes the opportunity to respond to the 'Consultation on the advertising of electronic cigarettes'.

Please find attached at the end of this letter our response to the questions raised in the consultation.

Yours faithfully



**Professor Eugene Milne
Director of Public Health**

General comments

1. Newcastle City Council is the local government authority for Newcastle upon Tyne, serving approximately 260 000 residents. We have four very clear priorities for how we will focus our efforts and resources to make a positive difference to the city. These are:

A working city - creating good quality jobs and helping local people develop the skills to do them.

Decent neighbourhoods - working with local communities to look after each other and the environment.

Tackling inequalities - tackling discrimination and inequalities which prevent people from fulfilling their true potential.

A fit for purpose council - a council which leads our city by enabling and empowering others to achieve

The City Council is part of the World Health Organisation's European Healthy City Movement.

2. We are an active member of the local multi-disciplinary and multi-agency alliance; Smoke Free Newcastle, which we chair. Our Public Health Team commission tobacco control activity locally and lead the delivery of many aspects of it. Our vision is that adult smoking prevalence in the city will be 5% or lower by 2030. However rates remain substantially higher than the England average currently (see <http://www.tobaccoprofiles.info/>), highest among those from the most disadvantaged communities, routine and manual workers, the unemployed, carers and pregnant women. This emphasises the need for us to continue to invest in a comprehensive programme of tobacco control to support smokers to quit, prevent young people from starting to smoke and to protect people from tobacco related harm. Newcastle City Council believe that electronic cigarettes and devices can play a significant role in helping us achieve these aims through harm minimisation and in assisting people to quit.
3. Newcastle City Council is one of the key partners and funders of Fresh; Smoke Free North East, the UK's first dedicated tobacco control office. Additionally the Council is a member of the Smokefree Action Coalition, which is an alliance of over 250 organisations involved in action to address smoking. It was also instrumental in the development of the national Declaration for Tobacco Control and was the first Local Authority to sign this. Newcastle City Council **is not** in any way linked to the tobacco industry.

4. Whether or not the current regulatory framework for the advertising of electronic cigarettes provides the right balance between permitting some advertising to adult smokers and protecting children and non-smoking adults from promotion, (which may have adverse consequences), remains to be seen and needs to be monitored. Newcastle City Council believes that where flexibility can be exercised in order to allow adult smokers access to marketing material such as pricing and product information, including generic information about relative risk, it should.
5. Newcastle City Council are grateful to ASH and Fresh for their support in developing this response.

Answers to Specific Questions: Consultation on the advertising of electronic cigarettes – Responses

Part A: CAP's proposal to approximate the advertising prohibitions in the Tobacco and Related Products Regulations 2016 in the CAP Code

A.2 Products for which advertisements are prohibited In media subject to the regulations:

1. **Do you agree that CAP's proposal to prohibit advertisements which have the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components which are not authorised as a medicine / medical device is consistent with the law? If not, please explain why**

Yes
2. **Do you agree that the prohibition should apply to advertisements for non-nicotine and refillable products which can be refilled with nicotine-containing e-liquid? If not, please explain why.**

Yes
3. **Do you agree that advertisements for products in the list above would be lawful under TPRR and that CAP therefore does not need to prohibit them? If not please explain why.**

Yes
4. **Do you have any further views regarding the types of products for which advertising should or should not be prohibited?**

Yes

A.3 Prohibition on advertising in newspapers and magazines

- 5 CAP's proposal is to prohibit marketing communications for nicotine-containing e-cigarettes, which are not authorised as medicines, in newspapers, magazines and periodicals which are not targeted exclusively to a trade audience. Do you agree that this is consistent with the law? If not, please explain why.**

Yes

A.4. Prohibition on advertising in online media and some other electronic media.

- 6 CAP's proposal is to prohibit advertisements in information society services and to reflect this in the CAP Code as a prohibition on "advertisements in online media and some other forms of electronic media". This would be accompanied by a reference to a new guidance note which explains the legal framework and lists specific media types that are likely to be prohibited, as above.**

Do you agree that this proposal is consistent with the law? If not, please explain why.

Yes

- 7 Are there any types of media that you consider to be information society services which are not referenced above?**

No

- 8 Are there any types of online media listed above or otherwise which you think should not be categorised as an information society service?**

No

A.5. Prohibition on promotional claims on retailers' websites

CAP considers that the following types of claims are likely to be factual in nature and therefore, all other things being equal, permitted under the Code:

- **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 (however, see "promotional marketing" below)**
- **instructions as to how products can be used**
- **product ingredients**
- **flavours**
- **nicotine content**

- 9 Do you agree that the law allows for factual claims on marketers' own websites? If not, please explain why.**

No

We agree that factual claims on marketers' own websites need to be protected and we would argue that this protection needs to go beyond websites to include other forms of permitted advertising. Satisfactory peer reviewed evidence around the safer nature of electronic cigarettes has increased considerably since the CAP code was drafted, outlining the potential health benefits of smokers switching. Three examples are:

- The Royal College of Physicians report in May 2016 '*Nicotine without smoke: tobacco harm reduction*'¹ recommended that "in the interests of public health it is important to promote the use of e-cigarettes, NRT and other non-tobacco nicotine products as widely as possible as a substitute for smoking in the UK." The report also recommends that regulation of e-cigarettes should be proportionate and should not be allowed significantly to inhibit the development and use of harm-reduction products.
- Data from English Stop Smoking Services shows that electronic cigarettes, when used alone or in combination with other stop smoking products, achieve short-term abstinence rates that are comparable to the most effective products (i.e. Varenicline) and consistently higher than success rates achieved by clients using traditional Nicotine Replacement Therapy (NRT).
- An expert review of the evidence in 2015 by Public Health England² concluded that e-cigarettes are around 95% safer than smoked tobacco and they can help smokers to quit.

One of the problems in not allowing factual claims in adverts promoting electronic cigarettes is that smokers take information from a variety of sources including sensationalist newspaper reports where headlines do not match the findings of reports. An example of a factual statement we would approve of would be "does not contain tar."

10 Do you agree that in principle the above types of claim are, all other things being equal, factual in nature and should therefore be permitted? If not, please explain why.

Newcastle City Council believe the above type of claim should be protected on both websites and other marketing activities that are still permitted. This would also have the added advantage of ensuring electronic cigarettes are able to be marketed more effectively at existing smokers, with messages that smokers thinking about quitting and worried about the risks of tobacco may find more appealing. Adverts for electronic cigarettes have been banned on the grounds of appearing to glamorise the smoking of tobacco products or encouraging non-smokers to take up e-cigarettes. Factual claims

1 RCP. [Nicotine without smoke: Tobacco harm reduction](https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0). London. RCP 2016
<https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0>

2 Public Health England. E-cigarettes: an evidence update. [PHE publications gateway: 2015260](https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review). 28 August 2015. <https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review>

would give companies and/ or trade bodies another avenue to avoid these lifestyle routes and gain a market advantage over a product that kills 1 in 2 lifelong users (tobacco). It is noted some of the language about the harm of tobacco on some electronic cigarette websites is similar to that used within tobacco control about the harm of smoking and harmful chemicals in tobacco.

11 Are there any other claims / types of claims you consider are factual in nature should appear on this list?

Yes

As well as factual claims that can be substantiated, we believe there is also a case to explore a system in which quotes from respected peer-reviewed journals or reports from respected medical and public health organisations can be used to promote electronic cigarettes *so long as it is clear the quote applies to the class of product, and not the one being advertised*. We are aware that estimates such as "95% safer" (PHE) may not apply to all products – so it may be that this type of advert is more suitable for a trade association rather than individual companies. If electronic cigarette companies believe perception of harms is deterring take up among smokers, there is much to be gained from working together to address this.

It may also be necessary to impose a condition that the use of quotes must be with written permission of the organisation.

CAP considers that the following types of claims and activities are likely to be promotional in nature and therefore prohibited:

- **descriptive language that goes beyond objective, factual claims, for example the use of adjectives**
- **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 sales promotions includes: "two for the price of one" offers, money-off offers, text-to-wins, instant-wins, competitions and prize draws.**
- **significant imagery that is not related to the product.**
- **comparative claims with other e-cigarette products or the general market.**

Once finalised, CAP intends to set out these lists in a guidance note accompanying the Code rule prohibiting advertisements in online media.

12 Do you agree that the above types of claims are likely to be promotional in nature and should be prohibited? If not please explain why.

Yes

13 Are there other types of generic claims that should be included in this list?

No

14 Do you have any other comments to inform CAP’s consideration of whether a claim is factual or promotional?

No

15 Do you agree that social media pages might, in principle, be capable of meeting the criteria set out for websites in the section A.5.1. above? If not, please explain why.

Please provide any examples and evidence you might have in support of your response.

Yes

Newcastle City Council recommends that CAP should take the position that sharing is not a function of the business - provided that it does nothing to encourage sharing (for example by urging people to "Like and share this message" in order to receive some kind of incentive). The content of social media should be informational and not promotional, but if it pops up in the timeline of someone who has not sought it out, that is a function of the public response, and not of the business itself. This would avoid the need for overly restrictive 'privacy options'.

A.6. Non-broadcast media channels not subject to TRPR

16 Do you agree that the media channels set out above are not prohibited by law from carrying advertisements for unlicensed, nicotine-containing e-cigarettes? If not, please explain why.

Yes

17 Do you support the revised wording in Section 22? If not please explain why and how you think it should be amended.

No

We believe it would be clearer to change the wording to read “Rule 22 applies to both electronic cigarettes which come under the EU Tobacco Products Directive and those authorised as medicines, except where there is a carve out for medicines in rules 22.5 and 22.12.”

A.7 Proposed changes to the CAP Code

18 Do you support the proposed wording of the, newly created, rule 22.12? If not please explain why and how you think it should be amended.

No

The heading ‘Online media and some other forms of electronic media’ needs to be expanded to make it clear what ‘other forms of media’ are included.

Part B: Other issues relevant to both the CAP and BCAP Codes

B.1 Preventing indirect promotion of nicotine-containing e-cigarettes

19 Do the criteria above provide a workable framework for identifying marketing communications that are likely to indirectly promote unlicensed, nicotine-containing e-cigarettes that are not authorised as medicines?

Yes

20 Are there any criteria you consider should be added to the list?

No

In media subject to the Regulations:

21 Should CAP allow advertisements for e-cigarette retailers so long as those advertisements do not refer to products which cannot be advertised?

Yes

22 Do you agree with BCAP's proposal to allow e-cigarette retailers to advertise their services on TV and radio? If not, please explain why.

Yes

23 Do you agree with BCAP's proposed additional text for rule 10.1.11? If not, please explain why

Yes

B.2. Ongoing suitability of current CAP and BCAP content, placement and scheduling rules

24 Do you have information or evidence which can inform CAP and BCAP's future consideration as to whether they might allow for substantiated health claims to be made for unlicensed e-cigarettes?

See answer to Q11. In order to address the serious misperceptions about relative risk we believe that it is essential that generic statements about the relative risk can be made. If these were considered to be "substantiated health claims" then we would consider that this should be allowed by CAP and BCAP. The sort of claim that should be allowed, should be along the following lines, that "electronic cigarette use is considered by Public Health England (see ref 1) and the Royal College of Physicians (see ref 2) to be much less harmful than smoking" and should link to Public Health England and the RCP statements to this effect. This would require also the words "health or" to be removed from Rule 33.5.

25 Should BCAP remove rule 33.7 for the reasons given above? If not please explain why.

Yes

26 Do you have any other comments or evidence for CAP and BCAP in relation to the ongoing suitability of their e-cigarette rules for the regulation of lawful advertisements?

Yes

There are two types of concern raised about electronic cigarette advertising. On the one hand there is a concern that restricting it will impede uptake by smokers. However, awareness of electronic cigarettes is widespread among adults. The ASH Smokefree GB Survey 2016 survey (carried out in March prior to implementation of the Directive) found that 96% of smokers and 93% of the general population had heard of electronic cigarettes. Knowledge of electronic cigarettes grew rapidly at a time when advertising of these products was not widespread.

On the other hand concerns have also been raised about electronic cigarette advertising encouraging youth smoking uptake and use by adult never smokers and this is one of the reasons why some forms of electronic cigarette advertising were prohibited in the EU Tobacco Products Directive.

The most recent Smoking Drinking and Drug Use survey, of attitudes and behaviour towards smoking among young people aged 11-15 in England, found the lowest recorded smoking rates among children since records began in 1982. It's worth noting that rates have continued to fall since e-cigarette sales first really began to take off in 2010. In 2010 5% of 11-15 year olds were regular smokers falling to 3% in 2014 and in 2010 27% had ever tried smoking, falling to 18% in 2014. Therefore it doesn't look like e-cigarette advertising in advance of the introduction of the interim content rules by CAP and BCAP in November 2014 had an impact on the number of children trying smoking, or becoming regular smokers.

ASH has carried out research annually into attitudes and behaviour with respect to electronic cigarettes and is continuing to monitor these subsequent to the implementation of the advertising restrictions imposed by the EU Tobacco Products Directive.

Regular use (once a month or more) among children was rare and largely among those who currently or have previously smoked. 2% of respondents said they used electronic cigarettes once a month or more, including 1% who used them weekly. These figures are similar to 2015.³ Furthermore, a recent report carried out for Cancer Research UK which reviewed the evidence of the impact of electronic cigarette advertising on children found research showed low brand awareness in the UK, and that susceptibility to tobacco smoking appeared to be no different for children who had been exposed to electronic cigarette advertising than those who hadn't. With respect to adults, use of the

³ ASH. Use of electronic cigarettes (vapourisers) among children in Great Britain. London. October 2016.

electronic cigarettes is confined to current and ex-smokers and use amongst never smokers remains negligible and has not changed since 2012.⁴

Newcastle City Council undertake a bi-annual survey of the health related behaviour of children and young people aged 8-15 years in the city⁵. Since the first survey in 2011, smoking rates among the young people surveyed have shown a significant decline. In 2015, for the first time, the survey asked students aged 12/13 years and 14/15 years, about their e-cigarette use. 33% of pupils responded that they have smoked an electronic cigarette/vaporiser and 2% responded that they use electronic cigarettes/vaporisers 'regularly' (at least once a week). Pupils who have tried e-cigarettes/vaporisers were eight times more likely to state they have tried smoking tobacco (58.8% v 7.0%) and sixteen times more likely to state they smoke tobacco occasionally or regularly (22.4% v 1.4%). Most regular users of e-cigarettes are also regular smokers, using them as an aid to quit smoking or reduce harm from tobacco.

4 L. Angus K. de Andrade M. Ford A. Electronic Cigarette Marketing: Current Research and Policy. Commissioned by Cancer Research UK. October 2016.

5 Newcastle City Council. Young People in Newcastle Secondary Schools 2015. Newcastle City Council and SHEU.



NFRN
The voice of the independent retailer

31/10/2016

NFRN submission to the Committee of Advertising Practice and the Broadcast Committee of Advertising Practice consultation on the advertising of electronic cigarettes

The NFRN is one of Europe's largest employers' associations, representing more than 15,000 independent retailers across the United Kingdom and the Republic of Ireland. Our membership consists of convenience retailers who sell a range of products including groceries, tobacco and alcohol as well as providing general services such as bill payment systems, parcel collection and much more. The E-Cigarette market is relatively new and still growing in the convenience retail market and the NFRN has welcomed regulations including a minimum age of sale.

A recent NFRN survey of our membership found that the majority of our members do sell E-Cigarettes and E-Liquids. Any changes in e-cigarette manufacturing, legislation and advertisement restrictions will have an effect on our members' business. The NFRN is willing to work with the CAP and BCAP on establishing better guidance on the changes in e-cigarette advertising regulations and how it can be best communicated to independent retailers to ensure best compliance and procedure. Retailers will predominately advertise e-cigarettes at point-of-sale in store which is not restricted by the regulations.

- 1. Do you agree that CAP's proposal to prohibit advertisements which have the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components which are not authorised as a medicine / medical device is consistent with the law? If not, please explain why.**

The NFRN is satisfied with the CAP's definition of e-cigarettes and the advertising prohibitions are consistent within the law.

- 2. Do you agree that the prohibition should apply to advertisements for non-nicotine and refillable products which can be refilled with nicotine containing e-liquid. If not, please explain why.**

The NFRN believes that not displaying the brand name of the product online could cause consumer and retailer confusion. By prohibiting advertising for non-nicotine and refillable products would provide simplicity to the regulations, however, the NFRN does not believe that non-nicotine products should be prohibited if they indirectly promote e-cigarettes containing nicotine.

- 3. Do you agree that advertisements for products in the list above would be lawful under TPRR and that CAP therefore does not need to prohibit them? If not, please explain why.**

The NFRN agree that the list is consistent within the law.



NFRN
The voice of the independent retailer

- 4. Do you have any further views regarding the types of products for which advertising should or should not be prohibited?**

The NFRN does not have anything further to add to these types of products.

- 5. CAP's proposal is to prohibit marketing communications for nicotine containing e-cigarettes, which are not authorised as medicines, in newspapers, magazines and periodicals which are not targeted exclusively to a trade audience. Do you agree that this is consistent with the law? If not, please explain why.**

The NFRN would welcome clarification of whether it would be the retailer / shop keeper who stocks the magazines which includes an e-cigarette advertisement or promotion, or the publication, wholesaler, or both, that would be liable for the offence.

- 6. CAP's proposal is to prohibit advertisements in information society services and to reflect this in the CAP Code as a prohibition on "advertisements in online media and some other forms of electronic media". This would be accompanied by a reference to a new guidance note which explains the legal framework and lists specific media types that are likely to be prohibited, as above. Do you agree that this proposal is consistent with the law? If not, please explain why.**

We believe that this proposal is consistent within the law.

- 7. Are there any types of media that you consider to be information society services which are not referenced above?**

The NFRN does not have the information to comment on this.

- 8. Are there any types of online media listed above or otherwise which you think should not be categorised as an information society service?**

The NFRN does not have the information to comment on this.

- 9. Do you agree that the law allows for factual claims on marketer's own websites? If not, please explain why.**

The majority of NFRN retailers do not have websites for their store. While the consultation document sets out that it would be permitted for marketers websites to display factual information about e-cigarettes, the NFRN calls for clarity for the restriction for retailers' websites.

- 10. Do you agree that in principle the above types of claim are, all other things being equal, factual in nature and should therefore be permitted? If not, please explain why.**



NFRN
The voice of the independent retailer

There is a fine line between 'factual' and 'promotional', and therefore the NFRN welcomes the list that the CAP has drafted to provide further clarity; however, we still believe that retailers need more clarification as to what the threshold is between factual and promotional.

11. Are there any other claims / types you consider are factual in nature should appear on this list?

The NFRN does not have the information to comment on this.

12. Do you agree that the above types of claims are likely to be promotional in nature and should be prohibited? If not, please explain why.

Overall, we agree that the claims set out by Cap are likely to be promotional in nature and would be prohibited under the Tobacco Products Directive.

13. Are there other types of generic claims that should be included in this list?

The NFRN does not have the information to comment on this.

14. Do you have any other comments to inform CAP's consideration of whether a claim is factual or promotional?

The NFRN does not have the information to comment on this.

15. Do you agree that social media pages might, in principle be capable of meeting the criteria set out for websites in the section A.5.1 above/ If not, please explain why. Please provide any examples and evidence you might have in support of your response.

The NFRN does not have the information to comment on this.

16. Do you agree that the media channels set out above are not prohibited by law from carrying advertisements for unlicensed, nicotine-containing e-cigarettes? If not, please explain why.

Whilst the NFRN understands that point-of-sale advertising is not within the remit of the CAP code, this consultation sets out a list of what non-broadcast media channels which are unaffected by the new regulations. The NFRN would welcome clarification and guidance within the CAP code that point-of-sale e-cigarette advertising is not prohibited by law to ensure there is no miscommunication to retailers regarding the changes to legislation.

17. Do you support the revised wording in Section 22? If not, please explain why and how you think it should be amended.

The NFRN believe that the revised wording in Section 22 is consistent with the legislation.



NFRN
The voice of the independent retailer

18. Do you support the proposed wording of the newly created rule 22.12? If not, please explain why and how you think it should be amended.

The revised wording in Section 22.12 is consistent with the legislation.

19. Do the criteria above provide a workable framework for identifying marketing communications that are likely to indirectly promote unlicensed nicotine containing e-cigarettes that are not authorised as medicines?

The NFRN does not have the relevant information to contribute.

20. Are there any criteria you consider should be added to the list?

The NFRN does have the relevant information to contribute.

21. Should CAP allow advertisements for e-cigarettes retailers so long as those advertisements do not refer to products which cannot be advertised?

Yes. CAP should allow advertisements for E-Cigarette retailers as long as they do not refer to prohibited products. The information the NFRN has collected from a recent membership survey revealed that that majority of our membership actively sell e-cigarettes and e-liquid, as well as general convenience items and groceries. We believe that for consumer choice, retailers should be permitted to promote in their store.

For further information on our response, please contact William Pryce, Public Affairs Manager, by contacting 020 7017 8864 or email William.pryce@nfrn.org.uk.

The NFRN would like to thank the CAP and BCAP for the opportunity to respond to this consultation.

Yours sincerely,

Paul Baxter
CEO

The News Media Association (NMA) is the voice of national, regional and local news media organisations in the UK – a £5 billion sector read by 48 million adults every month in print and online. Newsbrands - national, regional and local newspapers in print and digital - are by far the biggest investors in news, accounting for more than two-thirds (69 per cent) of the total spend on news provision in the UK.

In questions 3 and 4, question the consultation, CAP lists the below as possible to advertise and asks for feedback about whether the list is over or under inclusive:

- non-nicotine liquids
- non-nicotine disposable e-cigarettes (those not able to be refilled)
- non-disposable e-cigarettes designed to only take cartridges with non-nicotine containing fluid
- medicines and medical devices (which are subject to separate medicines advertising legislation)

The NMA considers that advertising non-nicotine liquids may indirectly promote e-cigarettes if the cartridge complies with the same e-cigarettes that can take nicotine refills. Therefore, advertising non-nicotine liquids that have this specification may fall foul of the Regulations. Further, CAP later acknowledges in B.1.1 that promoting brands that also sell nicotine products has the indirect effect of promoting nicotine products. Given that the same brands may make both non-nicotine and nicotine refills, and that both non-nicotine and nicotine cartridges may be used in the same e-cigarette, the NMA considers it likely that advertising non-nicotine liquids would not generally be permitted under the Regulations.

Question 21 asks: “Should CAP allow advertisements for e-cigarette retailers so long as those advertisements do not refer to products which cannot be advertised?” The NMA considers the point to be more nuanced than this, and that further clarification may be helpful. For example, if advertisements are to be allowed, clarify whether or not a shop that only or mainly sells e-cigarettes and e-cigarette related products, (both being of the type that could not be directly or indirectly promoted or advertised) would itself be able to advertise and if so how, including how this must be distinguished from prohibited direct or indirect promotion of the products. Do also provide clarification by reference as well to advertisement for another type of e-cigarette retailer, if it say sold a huge range of unrelated products, for example a shop like Boots, providing confirmation or otherwise that this would not be indirect promotion. Clarification and illustrations would be helpful whether CAP allows or does not allow retailers’ advertisements.

Question 24 asks: “Do you have information or evidence which can inform CAP and BCAP’s future consideration as to whether they might allow for substantiated health claims to be made for unlicensed e-cigarettes?” The NMA drew the Government’s attention to past public health campaigns conducted through advertisements in the local press and suggests that if such claims can be substantiated that the Government ensures that such public health campaigns can be promoted through lawful advertising.

The NMA would be very happy to help further. Please contact Kerry Nicholson (kerryn@newsmediauk.org) with any questions or comments.



newsmedia
association



CAP / BCAP Consultation on the advertising of e-cigarettes - NNA response

NNA is a consumer led national charity which aims to improve public health and reduce the toll of disease from smoking by improving understanding of reduced risk products such as e-cigarettes. In accordance with article 5.3 of FCTC we confirm that we are completely independent from any nicotine industry including the tobacco, pharmaceutical and vapour industries.

We note and understand B/CAP's instruction concerning the fact that this consultation cannot invite views on the regulations as made, and so limit our comments to an expression of frustration that the restrictions on advertising undermine what should be a key health objective - to reduce the harms caused by smoking by promoting reduced harm products.

Responses to questions:

- 1 In general we agree that CAPs proposal is consistent with the law, however we would restrict 'components' only to those which are specific to e-cigarettes. Some components, such as batteries, wicking material and wire, have a wide variety of other uses which are unrelated to e-cigarettes.
- 2 No, but we agree that this would be the correct interpretation of the regulations (see also 26).
- 3 We agree
- 4 No
- 5 We agree
- 6 We agree
- 7 No
- 8 No
- 9 We agree that the law allows for factual claims on a marketer's own website. We disagree that the prohibition on online ads prevents the advertiser from incentivising the consumer to access its website by means of click through ads. CAP has stated, correctly in our view, that the prohibitions do not extend to advertisements for e-cigarette retailers so long as they do not promote an actual product which cannot lawfully be advertised. Many independent e-cigarette businesses both manufacture and retail their own products. The exemption for retailers should include manufacturers, provided that the manufacturers name does not have the indirect effect of promoting a specific product. There appears to be no reason why an advert for a retailer or manufacturer could not contain a click through link to their website.
- 10 We agree
- 11 The ratio of diluents (normally propylene glycol and vegetable glycerine) is essential information required by consumers to inform choice in terms of personal preference, compatibility with devices and for those who may have particular sensitivities. In addition, general statements about the relative risk of vaping compared with smoking should be allowed, together with direct quotes from Public Health England or the Royal College of Physicians (see 24).
- 12 Not entirely. It is almost impossible to describe anything without using adjectives and this is particularly the case when trying to describe something as complex as the flavour of e-liquid. The online market is extremely important to both businesses and consumers, but there is no opportunity to try before you buy. For that reason detailed descriptions not unlike those seen for wine or scotch whisky are common and valued by consumers. Any code or guidance should allow adjectives but might perhaps advise against the use of superlatives.
- 13 No
- 14 No

- 15 We agree that social media pages might, in principle, be capable of meeting the criteria set out for websites. We disagree that this might or should be subject to the operation of privacy options. The entire point of social media is to distribute information which will be of interest to the reader. Users are able to tailor this content by following accounts of interest. Some of these accounts may be businesses, or individuals with similar interests. It is unusual therefore, to see content that isn't of interest to the reader, or their social circle. As far as we are aware, it is not possible to prevent the distribution of social media pages unless they are set to private, in which case they cannot be found via a search or viewed by anyone other than followers or subscribers. They would be completely invisible to anyone else searching for the information, for example a smoker looking to switch to e-cigarettes. A great number of smaller independent businesses have built their entire marketing strategy around social media because it is cheap and targeted to people who are interested, and so allows them to have a presence and compete. Consumers also rely very heavily on social media to find information about new products on the market and value the services offered by the small and medium sized businesses. The redistribution (sharing) of social media pages should be considered to have been sought out by consumers via their choice of accounts to follow. We believe therefore that factual content in social media pages should not fall within the scope of the regulations.
- 16 We agree
- 17 Yes
- 18 Yes
- 19 Yes
- 20 No
- 21 Yes, and manufacturers should be allowed to do the same provided that neither the business name nor the advert refer to a specific product which cannot be advertised.
- 22 We agree with the proposal to allow e-cigarette retailers to advertise their services on TV and radio and this should include manufacturers.
- 23 Yes, and this should include manufacturers.
- 24 The justification for allowing substantiated health claims is well documented in this consultation paper. PHE have stated that vaping is 95% safer than smoking, and this was supported by the Report from the Royal College of Physicians which concluded that: "Although it is not possible to precisely quantify the long term health risks associated with e-cigarettes, the available data suggest that they are unlikely to exceed 5% of those associated with smoked tobacco products, and may well be substantially lower than this figure". [<https://www.rcplondon.ac.uk/file/3563/download?token=uVOR0Twz>] This very important message however, is not getting through to the public, not least because the e-cigarette industry is not permitted to make this substantiated health claim. This is a nonsense and is harming the health of smokers who might otherwise switch to the very much safer product. We do not consider the comparison with the medicines regime as valid reason to withhold this vital information from consumers. From our dealings with Public Health England it has become clear that they recognise the harm that the public misperception of the relative risk of vaping compared with smoking creates, and might support allowing substantiated health claims in both adverts and factual content. We suggest therefore, that since the claim that vaping is at least 95% safer than smoking is substantiated by both the PHE and RCP reports, retailers and manufacturers be allowed to make that claim in adverts and factual content which do not refer directly or indirectly to a specific product. In that way the general claim can be made, but not for specific products unless they are able to substantiate the claim for that product. Direct quotes from PHE and RCP reports should be allowed under similar terms.
- 25 Yes
- 26 One of the most damaging aspects of the regulations on advertising of vapour products is the inclusion in the definition of anything which "can" be used to inhale nicotine,



which captures refillable tank systems (ref question 2), which have been found to be the system more likely to help people to stop smoking [<http://ntr.oxfordjournals.org/content/early/2015/06/04/ntr.ntv078.full>]. Once smokers switch to vaping it is the huge variety and ability to personalise devices which keeps many from relapsing to smoking. It is difficult to imagine how consumers will remain informed about these products without the marketing efforts of the companies that manufacture and sell them, or to see any incentive for the companies to invest in the improvement and innovation of their products if they cannot market them to potential customers. Whilst we appreciate the fact that the regulations do appear to capture refillable tanks on the basis that they 'can' be used to inhale nicotine containing vapour, we would wish to see an exemption for those which are marketed as being for use with non-nicotine containing liquids only.

Consultation on the advertising of electronic cigarettes: CAP and BCAP's proposals for changes to their Codes and guidance in response to the Tobacco Products Directive Taking effect in the UK

About PAGB

The Proprietary Association of Great Britain (PAGB) is the UK trade association which represents the manufacturers of branded over-the counter medicines, self care medical devices and food supplements. Our members include manufacturers of Nicotine Replacement Therapies (NRT).

PAGB is committed to supporting the public health community on the journey to a society free from tobacco use and nicotine addiction. PAGB therefore welcomes the opportunity to respond to CAP and BCAP's consultation on the advertising of electronic cigarettes, in particular its request for evidence to inform considerations on whether unlicensed e-cigarettes should be allowed to make substantiated health claims.

If you require any further information, please do not hesitate to contact Donna Castle, Director of Public Affairs and Communications, PAGB at Donna.Castle@pagb.co.uk.

Q.24 Do you have information or evidence which can inform CAP and BCAP's future consideration as to whether they might allow for substantiated health claims to be made for unlicensed e-cigarettes?

PAGB supports CAP and BCAP's position to continue the prohibition of health claims for unlicensed e-cigarettes, regardless of whether the manufacturer holds substantiation for such claims. We believe that to take a more liberal approach would be inconsistent with the Tobacco Products Directive, NICE guidelines and the current regime for licensed nicotine-containing products.

Firstly, the Tobacco Products Directive states that any container pack of the electronic cigarette or refill container must include a health warning, which covers 30% of the surface of the pack.¹ It also states that they must not encourage its consumption "*by creating an erroneous impression about its characteristics, health effects, risks or emissions.*"² Allowing health claims in the advertising of e-cigarettes would therefore be inconsistent with the on-pack restrictions for tobacco and related products, as well as potentially misleading for consumers.

Secondly, in the UK, NRT products are approved by the MHRA for indications such as "*safer alternative to smoking for smokers and those around them.*" In NICE's *Smoking Harm Reduction* guideline (PH45), only licensed nicotine-containing products are explicitly listed as safe, cost-effective approaches to reduce the harm of smoking.³ This guidance complements NICE's *Stop smoking services* guideline (PH10), which makes it clear that harm reduction is an integrated part of the smoking cessation strategy.⁴ Given this, to allow unlicensed e-cigarettes to advertise that they are healthier and/or safer than smoking tobacco (or any variants) is in effect a health claim if not a medicinal claim. By allowing such claims, it would not only provide a more liberal regime for claims than that which exists for medicines, but could also potentially reduce confidence in the currently licensed nicotine-containing products.

Finally, prohibition of health claims for unlicensed e-cigarettes should also include the prohibition of any direct or indirect association with established public health campaigns focused on tobacco cessation or harm, for example, the NHS campaigns such as 'Stoptober'.

-
- ¹ Tobacco and Related Products Regulations 2016
 - ² Tobacco and Related Products Regulations 2016
 - ³ NICE, *Smoking Harm Reduction (PH45)*, June 2013
 - ⁴ NICE, *Stop smoking services (PH10)*, November 2013

Dear Sir / Madam,

I am writing in response to the current consultation on the advertising of electronic cigarettes. I am one of the Directors of www.planetofthevapes.co.uk - a community site for current and potential users of electronic cigarettes. Our site comprises of news, reviews, guides and a very large forum where vapers can discuss products and help each other out when making buying choices, discuss techniques, and support each other with getting the best out of their hardware and eliquid.

Our site has been able to grow at the rate it has due the support that vendors and manufacturers of vaping hardware and eliquid have given us by paying for advertising on our site. Each month our site is visited by hundreds of thousands of readers and the time and effort required to keep a site of this stature up and running, and able to provide the support that it does, is relatively large. It requires man hours and server hardware costs as well as the usual day-to-day costs that all businesses incur. Without advertising our site will not be able to function at the level it currently does. This would be a massive loss to the UK vaping community. Our site has helped thousands of people in making the switch from traditional tobacco products to vaping and we are very proud of this. Here are some examples that show how powerful vaping is as an effective aid for giving up smoking and how the community on our site is able to help:

<https://www.planetofthevapes.co.uk/forums/new-users-corner/new-user-introductions/threads/newbie.122124/>

<https://www.planetofthevapes.co.uk/forums/new-users-corner/new-user-introductions/threads/clueless-long-term-vaper.122577/#post-1336688>

<https://www.planetofthevapes.co.uk/forums/new-users-corner/new-user-introductions/threads/only-taken-50-years-to-get-here.122281/>

We are all aware that the TPD legislation is overly restrictive in several areas, in our opinion advertising is one of them. By introducing restrictions on advertising we are likely to reduce the speed of uptake of smokers switching to vaping. This is counter-productive for the health of existing smokers who should be encouraged to make the switch. We also see the continuing improvements in hardware and eliquids, devices are becoming more reliable, and it is concerning that improvements in vaping technology may not be able to be communicated to existing vapers as effectively as it has been to date.

Having read the consultation, we have little comment to make in regards to the majority of the questions. We feel that CAP is translating the law that has been passed down fairly and responsibly. The main points that we would like to give input to are as follows:

19. Do the criteria above provide a workable framework for identifying marketing communications that are likely to indirectly promote unlicensed, nicotine containing e-cigarettes that are not authorised as medicines?

Within the electronic cigarette industry brand names are not the same as within the tobacco industry and in our opinion the marketing of a company is not the same as a product. We do not feel that the marketing of a manufacturer should be seen in the same light as the marketing of a product.

Whilst the product itself falls under the restriction of an electronic cigarette product we do not see that brands such as Aspire, Kangertech etc. (manufacturers) should be classed in the same way that a Cleito, Subtank etc (products) need to be due to the wording of the legislation. If the proposals concerning the marketing of retailers is carried then the positioning of manufacturer logos would be of help to the viewer in terms of helping them get to the right place to purchase a product that they already want to buy. Through reviews and end-user recommendations via sites like ours we find that vapers tend to have a product in mind they shop online and being able to see who stocks which manufacturer items would be of massive help to them.

We believe that we should be encouraging as many smokers to move over to vaping, and to continue to vape rather than turning back to smoking. With that in mind we should find ways to make their purchasing of new items and the replacing of existing items as easy as possible. By removing the ability for retailers to show which manufacturers they stock it will make for a more frustrating shopping experience for smokers looking to switch and for existing vapers to compare product pricing as quickly as they are able to at present.

21. Should CAP allow advertisements for e-cigarette retailers so long as those advertisements do not refer to products which cannot be advertised?

This is within legislation as far as we can see and your proposal to allow retailer adverts should be supported.

From our understanding it is legal for a tobacconist to advertise their business, as long as no tobacco brand names are mentioned, so, by the same token, it is surely correct that electronic cigarette retailers should also be allowed to advertise their services as long as no restricted products appear in their adverts.

The mood from Government and Health bodies in the UK is that the regulations regarding electronic cigarettes advertising should be lighter-touch than tobacco advertising due to the greatly reduced harm that these devices offer over traditional cigarettes, so to introduce legislation that was stricter than those regulating tobacco products would be of detriment to public health.

22. Do you agree with BCAP's proposal to allow e-cigarette retailers to advertise their services on TV and radio? If not, please explain why.

Yes, we do agree with this proposal for the same reason as our response to question 21. If the adverts do not promote a product that falls within the restricted products definition then these adverts should be allowed.

23. Do you agree with BCAP's proposed additional text for rule 10.1.11? If not, please explain why.

Yes we agree with this proposal.

Other points for clarification

When considering your proposed stance concerning e-cigarette retailers we would also like to raise a point concerning price statements and promotion. Many of our advertisers use discount codes as a way of promoting their businesses within the various vape communities that exist on social media platforms, magazines and sites such as ours. It helps them to attract customers and also gives them a mechanism to see which traffic sources work well – it is valuable feedback for their marketing teams. If your proposals are accepted and retailers are allowed to place adverts to promote their business will they still be able to use price promotion at a store-wide level? The use of a store-wide discount to attract customers would not be covered by the restrictions concerning specific electronic cigarette products and, in our opinion, there is no reason why they should not be allowed. Some clarification on this point would be welcomed as we need to ensure that our site is within the law as we move towards full compliance with the legislation.

I have attached some sample adverts from our site and would like to know whether these adverts are within the proposed guidelines or not.

Advert 1 - an advert for www.vapeclub.co.uk (vape-club.gif)

This advert would need to be amended to remove the brand names as shown in slide two of the ad. The Free Next Day Delivery would be acceptable as it is not promoting a particular electronic cigarette brand or specific product.

Advert 2 - an advert for www.vapesuperstore.co.uk (vape-superstore.gif)

Again this advert does not contain brand or product specific promotion but the free gift, free shipping and discount code promotion needs clarification.

If you would like us to provide any further information on any of the points raised, please do let me know.

Yours sincerely,

Hedley Thomas

Planet of the Vapes



PHILIP MORRIS LIMITED

10 HAMMERSMITH GROVE · LONDON · W6 7AP · UNITED KINGDOM
TEL: +44 (0)20 8222 0700 FAX: +44 (0)20 8222 0994

31 October 2016

CAP consultation on the advertising of electronic cigarettes:

To: Regulatory Policy Team, Committee of Advertising Practice (“CAP”)

From: Philip Morris Limited (“PML”)

Philip Morris Limited (“PML”) welcomes the opportunity to respond to CAP’s and BCAP’s proposals for changes to their Codes and guidance in response to the Tobacco Products Directive taking effect in the UK.

Philip Morris International (“PMI”) has invested more than US\$2 billion over the past decade to design, develop and assess innovative tobacco and non-tobacco products that have the potential to reduce individual health risks and population harm in comparison to smoking combustible tobacco products. We call these products Reduced Risk Products (RRPs).¹ We are represented in the UK e-cigarette market via a leading UK e-cigarette manufacturer, Nicocigs, which markets products under the *Nicocig* (formerly *Nicolites*) and *Vivid* brands.

We recognize that combustible tobacco products are dangerous, and the best way to avoid the harms of smoking is never to start, or to quit. But much more can be done to reduce health risks for the world’s 1.1 billion smokers. Technological innovation is transforming our industry with a wide range of non-combustible nicotine products that have the potential to significantly reduce health risks when compared to continued smoking. PMI has been, and will continue to be, a driving force in this transformation. Our ambition is to lead a full-scale effort to ensure that non-combustible products ultimately replace combustible tobacco products to the benefit of adult smokers, society, our company and our shareholders.

As communicated in an earlier CAP/BCAP consultation (*Philip Morris Limited Comments on the CAP Consultation on the Marketing of E-Cigarettes, 2014*) we believe that advertising and marketing rules for e-cigarettes should:

- Permit communication to adult smokers about the relative risk profile of e-cigarettes and facilitate switching from combustible tobacco products;
- Limit the exposure of advertising to minors;
- Limit the appeal of advertising to non-nicotine users;

¹ Reduced Risk Products (RRPs) is the term the company uses to refer to products with the potential to reduce individual risk and population harm in comparison to smoking cigarettes. PMI’s RRP’s are in various stages of development and commercialization, and we are conducting extensive and rigorous scientific studies to determine whether we can support claims for such products of reduced exposure to harmful and potentially harmful constituents in smoke, and ultimately claims of reduced disease risk, when compared to smoking cigarettes. Before making any such claims, we will rigorously evaluate the full set of data from the relevant scientific studies to determine whether they substantiate reduced exposure or risk. Any such claims may also be subject to government review and authorization, as is the case in the US today.

- Require clear statements that nicotine is an addictive substance and that e-cigarettes are not risk-free;
- Permit scientifically substantiated risk related claims. If a product is scientifically verified as safer than continued smoking cigarettes, adults should know this, and manufacturers should be encouraged to communicate that information so as to encourage adult smokers switching to less harmful products; and
- Ensure a level playing field between bricks-and-mortar retailers and online-only stores, and ensure that enforcement is fair and effective for all market participants.

In the UK, e-cigarettes are now the most common means by which smokers quit combustible tobacco products, and experts have found that smokers are nearly 50% more likely to quit smoking using e-cigarettes than with any other form of support² and 1.3 million former smokers have switched to e-cigarettes³. Across the EU, an estimated 6.1 million smokers have quit smoking using e-cigarettes⁴.

Data show that increases in e-cigarette consumption have not led to more cigarette smoking or to an increase in nicotine consumption⁵. In fact, smoking prevalence has continued to decline in the UK. Indeed, in England it has reached a record low of 16.9%.

It is in this context that PML submits its written evidence to the Committee.



Martin Inkster

Managing Director, UK & Ireland, Philip Morris Limited

² West, R., et al., Estimating the population impact of e-cigarettes on smoking cessation in England, *Addiction*, 2016

³ ASH UK Fact Sheet, *Use of electronic cigarettes (vapourizers) among adults in Great Britain*, May 2016

⁴ Farsalinos KE, Poulas K, Voudris V, Le Houezec J., *Electronic cigarette use in the European Union: analysis of a representative sample 2 of 27 460 Europeans from 28 countries*, *Addiction*, 2016.

⁵ Bauld et al., *E-cigarette uptake among UK youth: experimentation, but little or no regular use in non-smokers*, *Nicotine and Tobacco Research*, 2016

In media subject to the regulations:

Do you agree that CAP's proposal to prohibit advertisements which have the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components which are not authorised as a medicine / medical device is consistent with the law? If not, please explain why.

We agree that this is an appropriate interpretation of the *Tobacco Products Directive (Directive 2014/40/EU)* (the "TPD") and the UK's *Tobacco and Related Products Regulations 2016 (SI 2016 No .507)* (the "TRPRs").

Do you agree that the prohibition should apply to advertisements for non- nicotine and refillable products which can be refilled with nicotine-containing e-liquid? If not, please explain why.

In media subject to the Regulations:

Do you agree that advertisements for products in the list above would be lawful under TPRR and that CAP therefore does not need to prohibit them? If not please explain why.

We agree that advertisements in the media listed would, in our view, not be unlawful under the TRPRs.

Do you have any further views regarding the types of products for which advertising should or should not be prohibited?

We consider that e-cigarette accessories which do not contain nicotine (such as chargers, wall adapters and cases) are not subject to the TRPRs. We would welcome clarity that advertising is permitted for these products.

CAP's proposal is to prohibit marketing communications for nicotine-containing e-cigarettes, which are not authorised as medicines, in newspapers, magazines and periodicals which are not targeted exclusively to a trade audience. Do you agree that this is consistent with the law? If not, please explain why.

CAP's proposal is to prohibit advertisements in information society services and to reflect this in the CAP Code as a prohibition on "advertisements in online media and some other forms of electronic media". This would be accompanied by a reference to a new guidance note which explains the legal framework and lists specific media types that are likely to be prohibited, as above.

Do you agree that this proposal is consistent with the law? If not, please explain why.

We acknowledge that the general prohibition against advertisements for e-cigarettes in information society services in the TPD and the TRPRs.

We are conscious of the challenges that the CAP might face in providing a definitive list of information society services. We agree in principle with the nuanced approach that the CAP has adopted in respect of

certain electronic media (e.g., social media platforms). However, electronic media is a fast evolving sector, and even subtle developments could affect the legal analysis. Therefore, we would require sight of the actual guidance note to understand fully how the CAP qualifies the phrase “*advertisements in online media and some other forms of electronic media.*” It would also be important to understand how the CAP proposes to deal with future developments in the electronic media sector.

We understand the distinctions made in the TRPRs, themselves stemming from the EU Tobacco Products Directive (2014/40/EU) (“TPD”), between different media channels. We welcome CAP’s nuanced approach to distinguish permitted activities in spaces where the “consumer makes an explicit choice to visit a marketer’s website” and we submit that this approach could be extended to make a more clear distinction between solicited and unsolicited communications. Within solicited communications, such as emails to registered customers, information could be provided to consumers on the same basis as that suggested by CAP for marketer’s own websites. This is consistent with maintaining prohibitions on advertising in unsolicited communications, such as online pop-ups advertisements, but goes some way to addressing an arbitrary distinction between allowing billboard advertising but prohibiting emails to consumers who have specifically consented to receive information.

We would welcome guidance in this area in particular, as we note the current lack of visible enforcement against advertisements in online media may be creating a playing field for market participants which is not level.

Are there any types of media that you consider to be information society services which are not referenced above?

As noted above, electronic media is a fast evolving sector. This is reflected in the use of the deliberately broad term “Information Society Services” in the TPD and TRPRs. CAP should also take a broad approach to allow for future technology changes and maintain a level playing field.

Are there any types of online media listed above or otherwise which you think should not be categorised as an information society service?

We would welcome clarity on whether the proposed sections permitting factual information on a marketer’s website and social media extends to marketer’s emails to registered consumers. This would follow the same rationale that the recipient consumer had made an “explicit choice” to receive the relevant information.

Do you agree that the law allows for factual claims on marketers’ own websites? If not, please explain why.

We would like CAP to acknowledge the perverse distinction stemming from TPD and the TRPRs that permits billboard advertising, direct posted mail and promotional offers at point of sale in retail stores, whilst limiting stores which exist only online to communicating “factual” information only. To ensure a level playing field, sellers of all types should be given the same opportunities to communicate product offers, including clearance sales and discounts. This is possible whilst still falling within the TRPRs, as communication of sale offers and discounts can be structured in a factual way to avoid becoming a promotional advertisement.

We agree with the CAP’s approach that the display of factual information should be permissible on marketers’ websites because (i) such information should be non-promotional; and (ii) by visiting the

particular (age restricted) website, consumers have exercised a choice to access the information, so it not be an unsolicited (and therefore prohibited) communication.

The consultation discusses “*marketers*” and “*retailers*” synonymously. We consider that the term “*marketer*” is broader than just a retailer, and could cover manufacturers, distributors and those acting on their behalves. We would like the CAP to clarify that the definition of “*marketer*” in the consultation is consistent with the general definition of the term in section III.g of the CAP Code so as to include “*an advertiser, promoter or direct marketer*”. This would capture retailers as well as those manufacturers who have a role in marketing the product. This would more closely accord with the Department of Health’s (“DoH”) guidance on the advertising of e-cigarettes (published on 20 May 2016). The DoH guidance expressly allows for the display of certain information to consumers both on retailer and manufacturer websites.

We consider it important that, in addition to retailers, manufacturers and distributors may display certain factual, non-promotional information on their websites even if they are not themselves retailers and do not engage in direct-to-consumer sales. Particularly so as these websites may be the first (and sometimes only) port of call for consumers who seek product information. Further, it allows manufacturers to provide a range of information to consumers and control to its accuracy, rather than relying solely on retailers to perform this on their behalf.

Do you agree that in principle the above types of claim are, all other things being equal, factual in nature and should therefore be permitted? If not, please explain why.

This answer jointly responds to questions 10 and 11.

We agree in principle that the information listed on page 14 of the consultation is factual and non-promotional in nature. As such, we support the CAP’s proposal that providing this information on marketers’ websites (construing “*marketer*” in accordance with our response to question 9) should be permissible.

However, we consider there to be scope in the CAP’s final guidance note to expand or clarify this list in the following areas:

A. Descriptions of the operation of the product

The proposed guidance would permit marketers to display on their websites both descriptions of a product’s components as well as instructions as to use. We consider that allowing marketers to include a description of how the product operates would be a natural and logical extension to this information.

For non-nicotine products, a marketer may provide a description of operation on its website. The same case would apply under UK medicines advertising rules for a product that is a non-prescription-only medicinal e-cigarette, so long as the description remains factual, balanced, and consistent with the product’s summary of product characteristics. It would therefore be counterintuitive for nicotine e-cigarettes that are not licensed medicines alone to receive dissimilar treatment.

Technology in the e-cigarette sector is evolving at a fast pace. We consider it important for consumers to be able to penetrate industry jargon and to be able understand a product’s operation on a factual level (e.g., how vaporizer operates, or the operational differences between first, second, third and fourth

generation e-cigarette products). Allowing information on the operation of a product would aid consumers to penetrate such jargon.

From a public policy perspective, the ability to provide accurate and informative descriptions of the way in which a product operates applies the spirit of the UK's consumer protection legislation. Receiving an insight into the mode of operation of a product assists consumers to make informed transactional decisions. Fettering marketers from describing how a product works deprives consumers of the ability to research their purchases properly, and might provide unscrupulous marketers with opportunities to engage in misleading practices.

B. "Free From" information

We note that information permissible on a marketer's website includes a positive list of the ingredients of the product. This is in line with the requirement to list ingredients on packaging, according to Regulation 37(3)(a) of the TRPRs. In our view, the CAP should also allow marketers to include non-promotional information on the absence of certain ingredients from a particular product and the aerosol generated.

We recognise that in other product sectors, such as food and cosmetics, "*free from*" claims are potentially promotional in nature. However, we submit that consumer awareness of ingredients in the e-cigarette sector is generally lower than in better established sectors. For these types of product categories, a positive ingredient list alone may not prevent consumers from making transactional decisions that they otherwise may not have made. As a result, we consider that non-promotional statements that a product does not contain a particular ingredient would assist consumers in making informed product choices.

For example, we are aware that for personal reasons certain consumers might prefer e-liquids that only comprise a vegetable glycerin base (as opposed to propylene glycol or a combination of the two). In such cases, a non-promotional clarification on a marketer's website that the product does not contain propylene glycol, would clearly assist consumers to make informed transactional decisions.

Obviously, where factual ingredient-absence statements do cross the line from informative to promotional content, the ASA should take appropriate action against the advertiser. We accept that this is likely to require a case-specific analysis. However, this should not preclude the possibility of providing this type of information.

Marketers may also wish to inform consumers with particular requirements that their e-liquids are vegetarian friendly or do not contain traces of nuts.

C. Dosage

We note that according to Regulation 36(6) of the TRPRs an e-cigarette must be able to deliver a dose of nicotine at consistent levels under normal conditions of use. Regulation 31(3)(d) provides that this dosage information forms a part of the pre-market regulatory notification process. Regulation 37(3)(b) further provides that each unit pack and any container pack of an e-cigarette must include an indication of the nicotine content of the product and the delivery per dose under normal conditions of use. In light of these provisions of law, we consider that the TRPRs regard a statement of the amount nicotine delivered per dose to be within the boundaries of the provision of information, and not to be promotional. We therefore conclude that the proposed list of information permissible on marketer websites to be provided in the CAP's guidance document should include information regarding the dose administered under normal conditions of use.

In support of our position, we submit that the dosage administered constitutes material information concerning the product. We consider that a statement of the nicotine strength of the e-liquid alone is insufficient to allow consumers to make informed transactional decisions. There is a variability in administered dose across various e-cigarette products (even where the same strength of e-liquid is used). Consumers looking to e-cigarettes as a means to aid quitting smoking might prefer a product with a relatively high administered dose of nicotine, so as to align more closely with nicotine-plasma levels (on a concentration over time basis) associated with combustible tobacco products. As a result, the inclusion of this information would assist marketers comply with their obligations under section 6 of the *Consumer Protection Regulations 2008* (the “CPRs”).

Further, it seems to us counterintuitive that information concerning the dosage administered under normal conditions of use may legitimately appear on an advertisement for an e-cigarette and must appear on the product pack (per Regulation 37(3)(b) of the TRPRs) and yet may not appear on a marketer’s website. There does not seem to be a clear legal or policy reason for this distinction, and we consider that this type of distinction could not have been the true intention of lawmakers.

Are there any other claims / types of claims you consider are factual in nature should appear on this list?

We contend that compiling a non-exhaustive future proof list of non-promotional claims is not plausible. In addition to the response in question 10 above, we consider online sellers should be able to communicate factual information on clearance stock; to describe new product launches as “new”; and give descriptions of product taste which may use adjectives.

Do you agree that the above types of claims are likely to be promotional in nature and should be prohibited? If not please explain why.

We note that the CAP considers that “*descriptive language that goes beyond objective, factual claims, for example the use of adjectives*” is likely to be promotional in nature and therefore prohibited under the proposed guidance. We do not agree with the apparent rigidity of the CAP’s position in so far as it implies that the use of any adjective is necessarily promotional. We are not aware of any express provision of the TPD, the TRPRs (or indeed general consumer advertising law in the UK) that treats adjectives to be unequivocally promotional. We also note the proposed CAP guidance varies from the position under the DoH guidance, which regarded “*overly descriptive*” language, rather than the use of any adjective, to be promotional. We consider that the use of certain adjectives falls clearly within non-promotional communication, and therefore permissible for display on marketer websites. Examples of such adjectives might include “*new*”, “*robust*”, “*consistent*” or “*proprietary*.” Adjectives such as these could clarify information provided to customers rather than being promotional *per se*. We acknowledge that this is ultimately an assessment of fact, influenced in each case by its context. However, it is our submission that the CAP’s position on the use of adjectives should be more nuanced so that excessively descriptive (rather than all) adjectives fall into the category of promotion.

Are there other types of generic claims that should be included in this list?

We consider that marketers should be able to inform consumers of generic claims surrounding potential out-of-pocket savings compared to smoking combustible tobacco products. Factual comparisons of product features and prices with competitor products, to the extent they are not promotional, should also be permitted in order to provide the consumer with appropriate information to inform a purchase. These

should fall outside of the prohibition of promotional comparative claims with other e-cigarette products, as they would be factual comparisons.

Do you have any other comments to inform CAP's consideration of whether a claim is factual or promotional?

In addition to the responses to questions 10 to 12 above, which address various aspects of the distinction between factual and promotional material, we wish to make the general point that the distinction is often highly context-specific, and best assessed on a case-by-case basis.

We consider it prudent not to overly restrict the list of material that could be non-promotional. We have provided a number of examples in responses to certain questions above where the categories of non-promotional material could, and in our view should, be expanded. Fundamentally, the provision of factual information enhances the consumer experience and allows for better informed transactional decisions. This is particularly the case in a relatively new product sector such as e-cigarettes, where product technology develops rapidly, and where consumers are not yet familiar with technical information or jargon. We strongly advocate for a narrow definition of what is deemed promotional and would consider it legally questionable for CAP to over stretch the definition of what is truly promotional.

Do you agree that social media pages might, in principle, be capable of meeting the criteria set out for websites in the section A.5.1. above? If not, please explain why.

Please provide any examples and evidence you might have in support of your response.

We strongly support the principle that in certain cases social media pages are capable of meeting the criteria set out for websites in section A.5.1 of the consultation. This is because they are capable of meeting the dual requirements of being both non-promotional and actively sought out by consumers (and therefore not unsolicited communications). As information technology advances, certain social media have the potential to play a valuable role in providing information to consumers. In particular, it would allow marketers to respond in a non-promotional manner to consumer questions about products and their correct use. We support the CAP's acknowledgement of this fact.

Do you agree that the media channels set out above are not prohibited by law from carrying advertisements for unlicensed, nicotine-containing e-cigarettes? If not, please explain why.

Yes

Do you support the revised wording in Section 22? If not please explain why and how you think it should be amended.

We support the revised wording of Section 22.

Do you support the proposed wording of the, newly created, rule 22.12? If not please explain why and how you think it should be amended.

We support the proposed wording of the new rule 22.12.

Do the criteria above provide a workable framework for identifying marketing communications that are likely to indirectly promote unlicensed, nicotine- containing e-cigarettes that are not authorised as medicines?

We reserved judgement until final guidance available.

Are there any criteria you consider should be added to the list?

In media subject to the Regulations:

Should CAP allow advertisements for e-cigarette retailers so long as those advertisements do not refer to products which cannot be advertised?

We agree that advertisements for e-cigarette retailers including online retailers are permitted under the law.

Do you agree with BCAP's proposal to allow e-cigarette retailers to advertise their services on TV and radio? If not, please explain why.

We agree with this proposal.

Do you agree with BCAP's proposed additional text for rule 10.1.11? If not, please explain why.

We agree with this proposal.

Do you have information or evidence which can inform CAP and BCAP's future consideration as to whether they might allow for substantiated health claims to be made for unlicensed e-cigarettes?

We welcome the decision to revisit the 2014 policy prohibiting "health claims" for unlicensed e-cigarettes. As acknowledged in the consultation paper the prohibition on health claims is different from medicinal claims (a legal requirement enabling smoking cessation claims). A continuation of the health claims rule could prohibit communicating factual, scientifically substantiated, information to consumers about the relative risk of e-cigarettes as compared to cigarettes.

The role of factual risk-related communications in informing consumer purchase decisions and improving public health (by encouraging switching to products that experts agree present less risk of harm than continued smoking) counsel strongly in favour of eliminating the existing prohibition and replacing it with a rule which permits the communication of scientifically substantiated, non-misleading risk related claims. Furthermore, the previously cited justification for the original prohibition no longer exists. Rather than applying a blunt instrument in the form of a ban, these types of communications should be addressed on a case by case basis.

- a) Communicating factual risk-related information about e-cigarettes should be allowed

From an advertising perspective, it is clear that factual information about the relative risk of e-cigarettes as compared to cigarettes can inform and influence the purchasing decisions of adult consumers who choose to use nicotine.

According to section 22.5 of the CAP code and 33.5 of the BCAP code, marketers may present a non-medicinal e-cigarette product as an alternative to tobacco (so long as they do not undermine the message that quitting tobacco use is the best option for health), but could not communicate risk-related information to consumers – i.e. that a certain product presents less risk of harm than continued smoking. This outcome would present consumers with a distorted picture. The word “*alternative*” without any additional qualifying language (e.g., “*less harmful alternative*,” or “*non-combustion alternative*”) implies a certain parity between two products (e.g., parities related to use, function, content and perhaps even risk). For instance, soy milk is an alternative to cow’s milk, but crucially it is also a *non-dairy* alternative. Without qualification, there is a suggestion of an undifferentiated parity. Any implication of this type of parity is factually untrue and unjustifiable, particularly given the public health consensus that e-cigarettes are approximately 95% less risky than cigarettes. Marketers should instead be allowed to present, and consumers should be allowed to receive, a more balanced position consistent with product specific scientific data and reflecting the position of public health and other bodies.

Furthermore, there is a strong public health rationale for not only allowing, but encouraging manufacturers and marketers to communicate risk related information. There is a public health consensus in the UK that switching exclusively to e-cigarettes present less risk of harm than continued smoking. Since CAP and BCAP introduced the prohibition in 2014, a number of public health bodies and even a UK Parliamentary Office have reached this conclusion. For example:

- In August 2016, the Parliamentary Office of Science and Technology reported that, “*A growing body of evidence shows that e-cigarettes are much less harmful than tobacco*”;⁶
- In July 2016, the Royal College of Physicians reviewed the evidence related to e-cigarettes and concluded that, “*the hazard to health arising from long-term vapour inhalation from the e-cigarettes available today is unlikely to exceed 5% of the harm from smoking tobacco*”;⁷ and
- In 2015, the Department of Health Commissioned Public Health England to review the available, evidence related to e-cigarettes. The review, conducted by some of the most respected public health experts in the UK, concluded that “*The current best estimate is that e-cigarettes are around 95% less harmful than smoking*.”⁸

Based on this evidence, public health experts have concluded that e-cigarettes have significant potential to reduce individual risk of developing smoking-related diseases and overall population harm relative to continued cigarette smoking. In short, they take the position that adult smokers switching to e-cigarettes can save lives and improve public health, something that should be encouraged:

*In the interests of public health, it is important to promote the use of e-cigarettes ... as widely as possible as a substitute for smoking in the UK.*⁹

Yet there is concerning evidence that despite clear and strong conclusions from respected public health bodies, misinformation regarding the relative risks of e-cigarettes, which could discourage smokers from switching to them, abounds. For example, adult smokers are becoming less, not more informed about relative risks. According to the government’s Smoking Toolkit Study, contrary to public health experts’ conclusions, only 29% of smokers think e-cigarettes are less harmful than combustible tobacco, down from

⁶ UK Parliamentary Office of Science and Technology, POST-Note Number 533, August 2016 ([here](#)).

⁷ UK Royal College of Physicians, Nicotine without smoke: Tobacco harm reduction, April 2016 ([here](#)).

⁸ Public Health England, E-Cigarettes: an evidence update, August 2015 ([here](#)).

⁹ UK Royal College of Physicians, Nicotine without smoke: Tobacco harm reduction, April 2016 ([here](#)).

40% in 2015.¹⁰ Denying smokers access to factually accurate information regarding the relative risks of nicotine containing products can perpetuate this misunderstanding and raises serious ethical questions:

*Omitting accurate health information that might guide behavior and decisions of **any** (even a few) users of legal products is inconsistent with health literacy and respect for autonomy.*

...

That reduced-harm products are not absolutely 'safe' and more dangerous than using no tobacco/nicotine product does not justify keeping potential consumers of legal products ignorant about this information.¹¹

Beyond remedying this information deficit, allowing the communication of factual risk-related information can encourage adult smokers to switch from cigarettes to e-cigarettes, something public health experts believe should be encouraged. Conversely, denying adult smokers that information could prevent switching and encourage smoking:

This denies smokers real world truthful information about relative risk and may cause more smoking ... This erects a high and unnecessary regulatory barrier to truthful communication – and therefore obscures the most important consumer benefit to consumers.¹²

b) The prohibition on communicating risk-related information is not justified

As a threshold matter, there is no basis in UK or European law for a ban on factual communications of risk-related information. Neither the TPD nor the TRPR ban the communication of factual risk-related information to consumers via the limited communication channels the legislation continues to permit. It would be incongruous for CAP and BCAP to now substitute judgment for that of European Commission and European Parliament by requiring a prohibition that is so clearly not contained in existing law. This would go beyond interpreting and clarifying existing law to creating new law.

Furthermore, CAP and BCAP should not impose a blunt instrument like a ban when there is a compelling public policy rationale for allowing such communications (described above) and an existing, targeted, mechanism for addressing concerns about false or misleading statements. UK consumer protection law already provides a sound mechanism for preventing the provision of information which is not legal, decent, honest and truthful for any consumer product on a case by case basis. Indeed, providing factual information that is fair, balanced, and substantiated, including related to health, is therefore permissible under general advertising law. This should be no different for nicotine e-cigarettes not licensed as medicines.

Additionally, the bases for CAP and BCAP's 2014 policy, as stated in the consultation, no longer exist. As the consultation document explains, there have been substantial developments in the e-cigarette industry, both in terms of products and regulation. Generally, e-cigarette technology has and continues to advance extremely rapidly. The technology available in 2014 pales in comparison to the quality and consistency of the e-cigarettes available today. These changes have been driven in part by the advent of rigorous product,

¹⁰ Smoking Toolkit Study: *trends in electronic cigarette use in England*, STS140122, May 2016

¹¹ Kozlowski, L. and Sweanor, D., *Withholding differential risk information on legal consumer nicotine/tobacco products: The public health ethics of health information quarantines*, International Journal of Drug Policy, 2016, ([here](#)).

¹² Sweanor, D. and Bates, C., Submission to New Zealand consultation on Policy Options for the Regulation of Electronic Cigarettes, 2016 ([here](#)).

ingredient and safety standards, as well as the natural evolution of a highly innovative and developing technology. These developments have substantially reduced the risks CAP and BCAP sought to address through the 2014 prohibition.

The Consultation document suggests that questions about the long-term health effects of e-cigarettes may justify prolonging the ban on factual risk-related communications. This concern is squarely contradicted by the conclusion of the Royal College of Physicians, “*the hazard to health arising from long-term vapour inhalation from the e-cigarettes available today is unlikely to exceed 5% of the harm from smoking tobacco.*”¹³ In short, the Royal College of Physicians, which is best placed to make this assessment, has concluded on the long-term risks. It is unlikely that respected individuals and public health bodies would publicly advance and vigorously defend such conclusions if they did not have substantial comfort that any long-term risks are well below those posed by cigarette smoking. Furthermore, it is unlikely that the broad coalition of stop-smoking groups, such as the National Centre for Smoking Cessation and Training,¹⁴ would recommend e-cigarettes as a smoking cessation tool without comfort that the long-term effects of cigarette smoking substantially exceed the likely risk of e-cigarettes. CAP and BCAP should, in our view, defer to the judgment on the potential long-term impacts of e-cigarettes to these respected physicians and public health experts.

Finally, the Consultation’s comparison of risk-related communications to promotional claims for licensed medical products does not justify the prohibition. Promotional claims for medicinal products are limited in order to be consistent with the pharmacological benefit of the medicinal product – that it treats a disease or provides some form of medical benefit. This is substantially different to risk-related communications for e-cigarettes, which would be limited to factual and scientifically substantiated communications about the relative risks of products consistent with the consensus of the public health community. While we agree that it is important to ensure that the regulatory system should not allow unlicensed products to overreach in terms of consumer communication, as described above, we believe this is best addressed by sensitive, case by case assessment under consumer protection laws and not a wholesale ban of communications.

Should BCAP remove rule 33.7 for the reasons given above? If not please explain why.

We agree with the removal of BCAP rule 33.7.

Do you have any other comments or evidence for CAP and BCAP in relation to the ongoing suitability of their e-cigarette rules for the regulation of lawful advertisements?

¹³ UK Royal College of Physicians, Nicotine without smoke: Tobacco harm reduction, April 2016 ([here](#)) (emphasis added).

¹⁴ National Centre for Stop Smoking Services, *Electronic cigarettes: A briefing for stop smoking services*, 2016, ([here](#)).

