

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

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Executive Summary

The Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) [“the Committees”] are consulting on new rules and guidance in response to changes in the law prohibiting the advertising of some types of electronic cigarettes (e-cigarettes) and e-liquids in some media channels.

Although the legislative position is already set, CAP is seeking views on its proposals to reflect these prohibitions in its Code. CAP and BCAP jointly are seeking views on their proposals for guidance and on whether the content rules they put in place in 2014 remain proportionate. They also seek responses on proposals relating to the acceptability of advertisements for e-cigarette retailers, which do not feature products.

The consultation is open for one calendar month and closes at **5pm on Monday 31 October**

Policy context

Recent years have seen the rapid and well-documented rise in popularity of e-cigarettes. In response to this in 2014 the European Parliament passed a revised [Tobacco Products Directive 2014/40/EU](#) (TPD) which contains a wealth of quality, safety and efficacy requirements for nicotine-containing e-cigarettes¹ which are not licensed as medicines. It also imposes extensive restrictions on where they can be advertised. However this legislation was subject to a two-year hiatus before it became effective in member states; this happened in May 2016.

Later in 2014, CAP and BCAP put in place interim content rules for all e-cigarette advertisements in new sections in their Codes. They committed to look at the issue again once the TPD became law.

Understanding the Tobacco Products Directive and its effects

The implementation of the TPD in the UK was conducted by the Department of Health (DH). The prohibitions on non-broadcast advertising were written into UK legislation via the [Tobacco and Related Products Regulations 2016](#) (TRPR or “the Regulations”). The prohibitions on broadcast advertising were placed directly into rule 10.1.11 of [Section 10 \(Prohibited Categories\)](#) on 20 May 2016; more information about that process can be found [here](#).²

These advertising prohibitions have complicated effects. They provide a patchwork of prohibitions which can be hard to understand, particularly for those not already familiar with the law. To understand the prohibitions it is important to know that:

1. The legal prohibitions apply only to advertisements for e-cigarettes and e-liquids which contain nicotine and which are not licensed as medicines. So advertisements for licensed products and those without nicotine are not caught and can lawfully appear in any medium so long as they do not cross-promote prohibited products in media subject to the law and are compliant with CAP and BCAP content rules.
2. Similarly the advertising prohibitions apply only to certain media channels. Prohibited channels include TV, radio, print, online and other electronic media. Permitted channels include direct mail, cinema, outdoor media and leaflets. The distinction between prohibited and permitted media types comes as a result of the limits on the European Parliament’s jurisdiction when it comes to prohibiting advertising and not from an underlying policy rationale regarding the relative impact of different media.
3. Despite the broad ban on advertising online the law allows factual claims about products made on marketers’ own website but prohibits promotional claims. This provides significant regulatory challenges in how to draw the line between these types of claim.
4. Finally 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.

¹ In this document the term ‘e-cigarette’ is used for brevity but should, unless otherwise stated, be understood to include e-cigarettes and their component products, including e-liquids.

² Ofcom’s concurrent announcement which includes copies of the Direction received from DH can be found [here](#).

These restrictions and the challenges they present stem from the law under consideration rather than CAP or BCAP policy. **The prohibitions are already decided and this consultation cannot invite views on the extent or proportionality of the advertising prohibitions.** Rather CAP and BCAP are exploring only **how to reflect the law in their own Codes and guidance in an optimal way.** The Committee consider that the advertising self-regulatory system should remain both the established means of enforcement in this sector and at the forefront of providing advice and training to industry.

[The law in Scotland](#)

The legislative position on the advertising of e-cigarettes in TRPR applies throughout the UK. Devolved nations may choose to apply greater restrictions but currently only Scotland is exploring this option:

[The Health \(Tobacco, Nicotine etc. and Care\) \(Scotland\) Act](#) became law in Scotland in May 2016. It provides powers for Scottish Ministers to prohibit and restrict the advertising of vapour products (both those which contain nicotine and those which do not) through secondary legislation which is not yet in place. CAP understands that the Scottish Government will consult in due course as to what additional prohibitions they may wish to apply through further legislation. Marketers operating in Scotland are advised to stay abreast of legislative developments and take legal advice if necessary.

[How this consultation is set out](#)

This consultation comprises two parts. Part A contains CAP's proposals on how it intends to approximate the non-broadcast advertising prohibitions contained in TRPR in its Code and the guidance it intends to supply on the interpretation of the resultant new rules. Part B contains proposals relevant to both CAP and BCAP. This includes proposals for joint CAP and BCAP guidance on how marketers can avoid indirectly promoting products for which advertising is prohibited, the permissibility of advertisements for e-cigarette retailers which do not refer to products and whether the content rules for e-cigarette advertisements remain fit for purpose for regulating lawful advertisements.

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

A.1 The legislative prohibitions on non-broadcast advertising

A.1.1 Introduction

The prohibitions on non-broadcast advertising contained in the TPD were transposed into UK legislation via the [Tobacco and Related Products Regulations 2016](#) (TRPR or “the Regulations”) which became law on 20 May 2016. The ASA does not enforce the law: rather, it enforces the CAP Code and therefore advertising prohibitions are required to be contained in the Code if the ASA is to enforce them. This part of the consultation is concerned with how best to approximate the prohibitions in the Regulations into the CAP Code.

In transposing the Directive the Department of Health have stated that they have conducted the minimal implementation necessary to comply with the requirements of the Directive. Their announcement in relation to advertising can be found [here](#).

The Directive and the Regulations prohibit advertisements for, or which indirectly promote, e-cigarettes and e-liquids as defined by the Directive, specifically those which contain nicotine and which are not authorised as medicines or medical devices. However, because of the jurisdictional limits of the Directive and the minimal transposition approach taken by the Department of Health, the Regulations are limited in the scope of media to which they apply.

The overall picture therefore is of advertising prohibitions which apply in many, but not all media channels and only to advertisements for some types of products.

A.1.2 CAP's policy objectives in reflecting the Regulations in its Code

Through this consultation CAP seeks to reflect the legal prohibitions contained in the Regulations in clear language, but not to exceed those prohibitions. Code rules and guidance that result from this process will therefore always need to be read in light of the law.

The Regulations paint a complex regulatory picture. They apply only to advertisements for certain products and only in particular media channels. The letter of the law itself does not naturally and comprehensively describe every type of advertising channel, or permutation of channels, in which an e-cigarette advertisement should be prohibited.

When finalising the legislation the Department of Health set out in its own [guidance](#) what they considered would be the effect of the advertising restrictions. CAP has had regard to that document in coming to its own view on the effect of the law.

While CAP has made every effort to provide comprehensive proposals it must also be satisfied that there is sufficient clarity behind any prohibitions or limitations which it places in its Code or guidance. CAP may choose not to approximate prohibitions in its Code if as a

result of this consultation or otherwise it comes to the view that the legal position is not sufficiently clear in some areas or that it is, for example, too complex for the ASA to reasonably be expected to administer it. In any case the ASA always reserves the right to refer complainants to the relevant statutory regulator where the complaint relates to a Code rule that reflects a legal provision for a regulated product.³

A.1.4 How proposed changes to the Code are set out

Each section of this part of the document sets out the relevant section of the law and accompanying questions as to whether respondents agree with CAP's understanding of the law. The actual proposed changes to the Code which will result are set out in Chapter A.7.

³ See the CAP Code, [Scope of the Code](#), section IV.I.

A.2 Products for which advertisements are prohibited

The advertising restrictions in the Regulations apply to advertisements for certain types of products and only in media channels which are subject to the Regulations. In this chapter CAP seeks to clarify which types of products are subject to advertising restrictions according to the law. The media channels in which these restrictions apply are covered separately in the following chapters.

For brevity only relevant extracts from the Regulations are included below. Respondents are encouraged to read this section alongside the full text of the legislation which can be found [here](#).

A.2.1 Products for which advertisements are prohibited

[Regulation 2\(1\)](#) provides the following definition of products to which it applies:

“electronic cigarette” means a product that—

(a) can be used for the consumption of nicotine-containing vapour via a mouth piece, or any component of that product, including a cartridge, a tank and the device without cartridge or tank (regardless of whether the product is disposable or refillable by means of a refill container and a tank, or rechargeable with single use cartridges); and

(b) is not a medicinal product or medical device;

On the basis of this definition CAP proposes to restrict advertisements for e-cigarettes which contain nicotine and their components which are not authorised as medicines or medical devices. Additionally because the law restricts ads for any product which “can” be used to consume nicotine vapour (see Part 2(a) above), CAP considers this prohibition will apply to advertisements for non-nicotine and refillable products if they can be refilled with a nicotine e-liquid.

A.2.2 Direct and indirect effect

[Regulation 41\(1\)](#) prohibits ads for unlicensed, nicotine-containing electronic cigarettes in this way:

In this Part “electronic cigarette advertisement” means an advertisement with—

(a) the aim of promoting an electronic cigarette or refill container; or

(b) the direct or indirect effect of promoting one.

CAP therefore intends to prohibit marketing communications which have either the “direct or indirect effect” of promoting nicotine-containing e-cigarettes and their components which are not authorised as medicines or medical devices. The issue of what might constitute “indirect” promotion in practice is explored further in chapter A.5.

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.

A.2.3 Products for which advertisements are permitted

Given its understanding of the Regulations as set out above, CAP considers that, in media subject to the Regulations, it does not need to prohibit advertisements 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 fluid⁴
- medicines and medical devices (which are subject to separate medicines advertising legislation – see section XX)

Advertisements for such products will still need to comply with all relevant CAP Code rules.

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?**

⁴ CAP and BCAP are currently unaware of any refillable products which have been designed to take only non-nicotine cartridges.

A.3 Prohibition on advertising in newspapers and magazines

[Regulation 42](#) of TRPR states:

(1) No person may in the course of a business publish, or procure the publication of, an electronic cigarette advertisement in a newspaper, periodical or magazine.

(2) No person may in the course of a business sell, offer for sale or otherwise make available to the public a newspaper, periodical or magazine containing an electronic cigarette advertisement.

(3) Paragraphs (1) and (2) do not apply—

(a) to a newspaper, periodical or magazine which is intended exclusively for professionals in the trade of electronic cigarettes or refill containers;

CAP considers that the law is clear in this area and proposes therefore to prohibit advertisements for nicotine-containing e-cigarettes which are not authorised as medicines in newspapers, magazines and periodicals, unless they are targeted exclusively to a trade audience.

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

As set out below, CAP considers that the Regulations contain an almost complete prohibition on online advertising. However the next chapter (A.5.) sets out how marketers may lawfully sell and make certain claims about their products on their own websites.

A.4.1 Information Society Services

[Regulation 43](#) of TRPR states:

- (i) *No person may in the course of a business include, or procure the inclusion of, an electronic cigarette advertisement in an information society service provided to a recipient in the United Kingdom.*

An “information society service” is defined by [Directive EU 2015/1535](#), Article 1(1)(b) as being:

...any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. For the purposes of this definition:

- (i) *‘at a distance’ means that the service is provided without the parties being simultaneously present;*
- (ii) *‘by electronic means’ means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;*
- (iii) *‘at the individual request of a recipient of services’ means that the service is provided through the transmission of data on individual request.*

[Recital 18 of the original Directive](#) explains that:

Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services; the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an employee and his employer is not an information society service; activities which by their very

nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.

In aggregate CAP considers that this prohibition is likely to prevent advertisements in the following media, and perhaps others:

- email
- text message
- marketers' activities online, for example on their website and on social media (notwithstanding the carve-outs explained in the next chapter)
- online ("display") advertisements in paid-for space (including banner or pop-up advertisements and online video advertisements),
- paid-for search listings; preferential listings on price comparison sites; viral advertisements (see III I);
- in-game advertisements;
- commercial classified advertisements;
- advergames that feature in display advertisements;
- advertisements transmitted by Bluetooth;
- advertisements distributed through web widgets
- online sales promotions and prize promotions

This list is not exhaustive however and the deciding factor in any CAP or ASA decision as to whether a marketing communication is prohibited will be whether the media channel is, or is likely to be, an information society service for the purposes of the law.

CAP considers that the prohibition on advertisements in information society services can be summarised for the purposes of the Code as a prohibition on "advertisements in online media and some other forms of electronic media" accompanied by a reference to a guidance note which repeats the information given in this chapter about the legal basis for the prohibition and its likely effect in practice.

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.5. Prohibition on promotional claims on retailers' websites

The prohibition on advertising in information society services extends to marketers' own websites. However CAP considers that the law does not result in a complete prohibition on communications in this medium.

A.5.1 The effect of the law

As described in Chapter 1 of this document, the Regulations prohibit the "advertising", either directly or indirectly, of e-cigarettes in online media. 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.

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. However the prohibition on online ads directly or indirectly promoting nicotine containing e-cigarettes (see Chapter 4), prevents the advertiser from incentivising the consumer to access its website by means of click-through ads.

CAP proposes to set out this position in a guidance note accompanying the prohibition on advertisements in online media.

<p>9. Do you agree that the law allows for factual claims on marketers' own websites? If not, please explain why.</p>
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A.5.2 Factual vs Promotional Information

While the Regulations draw a distinction between factual and promotional information, it is not one which CAP typically makes.

The inherently creative nature of advertising provides significant scope for claims to be made, and interpreted, in many different ways, including when they are presented as matters of fact. This is a complex area and, in relation to the Code, it will be for the ASA Council to interpret what is factual or promotional - though the courts may have the ultimate say.

For these reasons CAP cannot provide definitive lists of acceptable and unacceptable claims. However CAP proposes to set out in a guidance note accompanying the new rules the types of claim that it considers in principle are likely to be permitted and those which are likely to be prohibited. While CAP intends to ask the ASA Council to have regard to that guidance once it is completed, CAP cannot bind the ASA's decision and it will be for the ASA to decide on a case by case basis when a claim about a nicotine containing e-cigarette on a website is factual (and therefore acceptable) and when it is promotional (and therefore prohibited).

Notwithstanding other factors in their presentation that might make them unacceptable, 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

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?

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.

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.5.3 Applicability to social media](#)

Marketers’ social media activity is caught within the definition of information society services and CAP therefore considers that it cannot contain advertising as defined in the Regulations.

However, as with websites, CAP considers that potentially there is scope for some content on social media pages to sit outside the scope of the Regulations if the same criteria as set out above are met. Specifically, that they have to only be sought out by consumers and contain factual claims not promotional claims.

Generally speaking social media pages are publicly accessible and platform functionality allows their content to be shared simply and as widely as possible. For these reasons CAP's view is that social media pages are often likely to produce content which presents consumers with information about products which they have not sought out or requested, and so in the normal course of their operation are less likely to be outside scope of the Regulations in the way that websites can be.

However, social media platforms operate varying degrees of privacy options for business pages. In CAP's view it is possible that such settings might be used to significantly restrict the distribution (including by "posting") of content on a business page to such a level that, like a website, it can only be found by those who are actively seeking it.

In these circumstances CAP considers that such content might be lawful and therefore should not be prohibited by the CAP Code, giving effect to the general prohibition on marketing communications in online media.

CAP welcomes respondents' views on this matter and any information and examples as to how a social media presence might be structured in compliance with the tests set out above.

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

The previous chapters set out CAP's best understanding of which media channels are prohibited from carrying advertisements for unlicensed, nicotine-containing electronic cigarettes.

CAP's understanding of TRPR is that the following non-broadcast media channels are not subject to the Regulations and can carry advertising for unlicensed, nicotine-containing electronic cigarettes:

- 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

However CAP and the ASA will have to interpret the new prohibitions in the CAP Code in light of the law. Developments in technology and the way media are merged may lead CAP or the ASA to take a different view in relation to a specific piece of marketing material.

Marketing communications for any e-cigarette (including medicines and non-nicotine products) in these media channels will still need to comply with all relevant general and e-cigarette-specific CAP rules.

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.7 Proposed changes to the CAP Code

In line with the proposals described in the previous chapter CAP will modify Section 22 (Electronic cigarettes).

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

In light of the changes discussed in this document CAP proposes to reorder and update the paragraphs at the beginning of the Section 22 (Electronic Cigarettes) of the CAP Code to explain the legal context and the scope and purpose of the rules. The current version of the full section can be found at Annex A. One major difference that respondents should note is that the section currently states that marketers may have obligations in relation to their advertising under chemical classification, labelling and packaging legislation. CAP intends to remove that reference given that the Tobacco and Related Products Regulations 2016 provide a comprehensive regulatory framework for the sector. The proposed new introductory text is as follows:

Section 22: Proposed new introductory text	<p>22 Electronic Cigarettes</p> <p>The Tobacco and Related Products Regulations 2016</p> <p>The Tobacco and Related Products Regulations 2016 (‘the Regulations’) became law in the UK on 20 May 2016. The Regulations implement Directive 2014/40/EU (on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC).</p> <p>The Regulations prohibit the advertising of nicotine-containing e-cigarettes which are not authorised as medicines, but only in some media channels. These prohibitions are set out in rule 22.12. CAP has produced a Guidance Note which explains the legal basis for and effect of these prohibitions, particularly in relation to the types of claims marketers may make online and how they might avoid indirectly promoting prohibited products in media subject to the Regulations through marketing non-nicotine or other products.</p> <p>Overview</p> <p>Other than in rule 22.12 which relates only to unlicensed, nicotine-containing products, for the purposes of this section “electronic cigarette” means a product that is intended for inhalation of vapour via a mouth piece, or any component of that product, including but not limited to cartridges, tanks and e-liquids. Therefore rules 22.1 – 22.11 apply to marketing communications for, and which refer to, electronic cigarettes and related products, including but not limited to e-shisha and e-hookah products, whether or not they contain nicotine.</p> <p>The e-cigarette market continues to innovate rapidly and new products may emerge which may not be caught precisely by the above definition. The ASA may apply these rules in circumstances where it considers that an advertised product is sufficiently similar to warrant the protection provided by this section.</p> <p>The majority of e-cigarettes are currently sold as consumer goods, however marketers may seek a medicines authorisation for their product from the Medicines and Healthcare Products Regulatory Agency (MHRA). Except for rule 22.12 this sections applies to marketing communications for electronic cigarettes which are authorised by the MHRA. For products authorised as medicines, the rules in section 12 (Medicines, medical devices, health-related products and beauty products) apply in addition to any other relevant CAP rules.</p>
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17. Do you support the revised wording in Section 22? If not please explain why and how you think it should be amended.

A.7.2 Creation of rule 22.12

Rules 22.1 – 22.11 will remain as they are and continue to apply to lawful e-cigarette advertisements, whether the products being advertised contain nicotine or do not. CAP proposes to provide the following rules to prohibit advertisements that would be rendered illegal by the Regulations:

Proposed new rule	<p>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:</p> <ul style="list-style-type: none">• Newspapers, magazines and periodicals• Online media and some other forms of electronic media <p>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.</p>
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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.

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

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

As set out in Part A, the CAP Code will in due course prohibit advertisements from directly or indirectly promoting nicotine-containing e-cigarettes and e-liquids. As noted in the Executive Summary the BCAP Code already does this.

B.1.1 Guidance

CAP and BCAP are aware of the number and diversity of products on the market at present and that it is commonplace for e-cigarette brands and sellers to promote both nicotine-containing and non-nicotine containing products within the same retail environment, brand or range. However, with the change in the Code, marketers will have to ensure that advertisements for non-nicotine products in media subject to the regulations do not have the indirect effect of promoting a nicotine product. It is also possible that an advertiser of an unrelated product may breach the prohibition on indirectly promoting unlicensed, nicotine-containing e-cigarettes.

CAP and BCAP's view is that to allow a non-nicotine e-cigarette to be advertised in media subject to the Regulations under the same brand name as a nicotine product would have the effect of indirectly promoting the nicotine brand. In CAP and BCAP's view such a practice would be in breach of the prohibition on indirect promotion.

CAP and BCAP intend to publish a guidance note to accompany the prohibitions in their Codes which will help stakeholders, particularly marketers and the ASA, interpret the prohibition on indirect promotion. CAP and BCAP will ask the ASA Council to have regard to the finalised guidance: however, that guidance as published will not constitute rules and will not bind the ASA Council when ruling on complaints.

That guidance document will state that CAP and BCAP consider that 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?

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

As described above, pending the outcome of this consultation the CAP Code will prohibit marketing communications with the direct or indirect effect of promoting an unlicensed, nicotine-containing e-cigarette.

However CAP considers that the prohibition in law does not necessarily prevent advertisements which promote the existence of an e-cigarette retailer but do not show or refer to actual products. Therefore CAP intends that ads for e-cigarette retailers which do not have the effect of promoting an e-cigarette (for example by showing or referring to a product) and do not trigger any of the criteria used to identify indirect promotion above should, all other factors being equal, not be prohibited.

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?

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

As set out in the Executive Summary the prohibition on the advertising of e-cigarettes was inserted in response to a statutory direction from the Department of Health and Ofcom.

Specifically rule 10.1 of the BCAP Code lists, in a series of sub-rules, those products and services which are prohibited from advertising. As of 20 May 2016 rules 10.1 and 10.1.11 read as follows:

10.1	Advertisements for products or services coming within the recognised character of or specifically concerned with these are not acceptable:
10.1.11	electronic cigarettes and refill containers or any advertisement which has the aim or direct or indirect effect of promoting such a product For the purposes of this rule: “Electronic cigarette” means a product that can be used for the consumption of nicotine-containing vapour via a mouth piece, or any component of that product, including a cartridge, a tank and the device without cartridge or tank (regardless of whether it is disposable or refillable by means of a refill container and a tank, or rechargeable with single use cartridges), but is not a medicinal product within the meaning of regulation 2 of the Human Medicines Regulations 2012 or medical device within the meaning of regulation 2 of the Medical Devices Regulations 2002. A “refill container” means a receptacle that contains a nicotine-containing liquid, which can be used to refill an electronic cigarette, but is not a medicinal product within the meaning of regulation 2 of the Human Medicines Regulations 2012 or medical device within the meaning of

regulation 2 of the Medical Devices Regulations 2002.

This rule is not intended to prohibit advertisements for (i) nicotine-containing electronic cigarettes which are licensed as medicines or medical devices [as described above], (ii) non-nicotine-containing liquids and refill containers, (iii) non-nicotine-containing disposable e-cigarettes and (iv) rechargeable e-cigarettes which are designed to be fitted only with cartridges containing non-nicotine containing e-liquid. Such products may be advertised subject to all relevant rules in the BCAP Code, including those in Section 33.

However, unlike the CAP Code this section of the BCAP Code includes another rule that pre-dates the inclusion of e-cigarettes on the above list and addresses the subject of indirect promotion in the following terms:

10.2 No advertisement may indirectly promote an unacceptable product or service. For example, advertisements must not refer the audience to a website or a publication if a significant part of that website or publication promotes a prohibited product or service.

In BCAP's view, rule 10.2 adds an additional prohibition that would effectively prohibit any TV or radio advertisement for an e-cigarette retailer, even when it did not show or refer to a product, because its natural function would be to refer audiences to places where they could buy them, in the way prohibited by that rule.

BCAP considers that this additional layer of protection is justified in relation to other products and services on this list (for example guns and prostitution) but does not accord with BCAP's policy consideration that e-cigarettes and retailers who sell them should be able to advertise wherever they may lawfully do so.

With this in mind BCAP proposes to append rule 10.1.11 with the following text, which would then mean that 10.2 would not apply:

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.

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

B.2.1 Overview

In 2014 CAP and BCAP implemented specific content rules in Chapters [22](#) and [33](#) (included as Annex A and B of this document respectively) of their respective Codes in relation to how e-cigarettes can be advertised. Those rules were implemented on an interim basis until more was known about the effect of the Tobacco Products Directive.

Now that CAP and BCAP understand the effects of the TPD more clearly, their intention is that their content and placement rules should continue to apply to ads for lawful e-cigarette products. In non-broadcast media this means that the CAP e-cigarette rules will continue to apply to ads for all types of e-cigarettes (whether or not they contain nicotine or whether they are authorised as medicines) wherever they may be lawfully advertised.

Broadcast media can no longer contain advertisements for unlicensed, nicotine-containing e-cigarettes. Therefore the BCAP e-cigarette rules will apply to permitted advertisements for non-nicotine unlicensed e-cigarettes and those which are authorised as medicines.

Generally CAP and BCAP are of the view that their rules remain fit for purpose but welcome views from respondents who consider that a more or less stringent approach might be necessary. More specifically, both CAP and BCAP are keen to look again at the issue of health claims and BCAP welcomes respondents' views on the continuing need for a nicotine disclosure rule in the BCAP Code.

B.2.2 Health claims

Currently both CAP and BCAP provide the following rule in their Codes:

22.5 (CAP) / 33.5 (BCAP)	Marketing communications [CAP] / Advertisements [BCAP] must not contain health or medicinal claims unless the product is authorised for those purposes by the MHRA. E-cigarettes may be presented as an alternative to tobacco but marketers must do nothing to undermine the message that quitting tobacco use is the best option for health.
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The rule contains two distinct prohibitions: on medical claims and on health claims. The prohibition on medicinal claims is a legal requirement and mirrors relevant rules in the Medicines section⁵ of both Codes. Medicinal claims would include smoking cessation and reduction claims in the same way as other licensed nicotine replacement therapies (NRT) and the product would need authorisation from the MHRA before such claims could be made for it. This position will not change.

The prohibition on health claims is different and prohibits any claim that a relationship exists between an e-cigarette or one of its constituents and health. This therefore prevents a range of claims, including that e-cigarettes are healthier or safer than smoking tobacco. CAP and BCAP put this prohibition in place in 2014 because at that time there was no specific regulatory framework for e-cigarettes as a product category and there were significant concerns about the variability in quality and safety about products on the market.

⁵ CAP rule [12.11](#). BCAP rule [11.4](#).

Since that time the sector has moved on significantly. The industry itself has started to develop product standards, including the publication in 2015 of a Publicly Available Specification (PAS).⁶ The regulatory landscape has also changed; TRPR bring in a wealth of safety, efficacy and reporting requirements which the industry will be implementing in 2016 and beyond.

Concurrently voices in the public health lobby have grown stronger in support of electronic cigarettes. Public Health England (PHE) have said that e-cigarettes are 95% less harmful to health than normal cigarettes and, when supported by a smoking cessation service, help most smokers to quit tobacco altogether.⁷ In July 2016 a coalition of UK public health organisations led by PHE published their consensus view on e-cigarettes. They state that:

*“...E-cigarettes are significantly less harmful than smoking. One in two lifelong smokers dies from their addiction. All the evidence suggests that the health risks posed by e-cigarettes are relatively small by comparison but we must continue to study the long-term effects. And yet, millions of smokers have the impression that e-cigarettes are at least as harmful as tobacco”.*⁸

In light of these wider changes since the rule was put in place CAP and BCAP wish to give consideration to whether the Codes should continue to prohibit health claims or whether there is room to allow limited, robustly substantiated, claims about their comparative safety compared with tobacco.

However the situation is complex. As also acknowledged by PHE, e-cigarettes have not been proven to be completely safe and there is a paucity of evidence in relation to their long-term effects. In addition TRPR’s product requirements will take some time to bed in and the legislation still requires a compulsory health warning to be displayed on 30% of the front and back of packs about the highly addictive nature of nicotine. It also prohibits claims on pack (but not in advertising) that a product:

- is less harmful than other electronic cigarettes or refill containers,
- has vitalising, energising, healing, rejuvenating, natural or organic properties, or
- has other health or lifestyle benefits;

In addition, the law allows for e-cigarettes to be authorised as medicines. When they are so licensed they can make only those claims which are included on the summary of product characteristics. To allow health claims for unlicensed e-cigarettes would provide a more liberal regime for claims than that which exists for medicines, where product standards are significantly higher. CAP and BCAP therefore consider that there might well be grounds for maintaining the prohibition on health claims for those products which are not authorised as medicines.

⁶ [Vaping products, including electronic cigarettes, e-liquids, e-shisha and directly-related products. Manufacture, importation, testing and labelling Guide.](#)

⁷ E-cigarettes: An evidence update, Public Health England, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/457102/E-cigarettes_an_evidence_update_A_report_commissioned_by_Public_Health_England_FINAL.pdf

⁸ E-cigarettes: a developing public health consensus, Public Health England, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/534708/E-cigarettes_joint_consensus_statement_2016.pdf

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?

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

Rule 33.7 of the BCAP Code states:

33.7 Advertisements must state clearly if the product contains nicotine. They may include factual information about other product ingredients.

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 this rule.

The rule also applies to products authorised as medicines, but ads for such products must already comply with the relevant rules related to the advertising of medicines, including rule 11.20(.2) which states:

11.20 Advertisements for medicinal products which include a product claim (including legible on-pack product claims within a pack shot) must include this information:
...
11.20.2 the name of the active ingredient, if it contains only one

BCAP considers that this rule is likely to offer, for all practical purposes, the same material protection as rule 33.7 and therefore proposes to remove rule 33.7 from its Code.

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

B.2.4 Other comments

Annexes A and B list the current e-cigarette-specific content rules in the CAP and BCAP Codes.

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?

Responding to this consultation

How to respond

CAP invites written comments and supporting information / evidence on the proposals contained in this document by **5pm on Monday 31 October**.

Responses via email with attachments in Microsoft Word format are preferred to assist in their processing. Please send responses to e-cigarettes@cap.org.uk.

If you are unable to respond by email you may submit your response by fax to +44(0)20 7404 3404 or post to:

**Regulatory Policy Team
Committee of Advertising Practice
Mid City Place, 71 High Holborn
London WC1V 6QT**

Confidentiality

CAP and BCAP consider that everyone who is interested in the consultation should see the consultation responses. In their evaluation document, CAP and BCAP will publish all the relevant significant comments made by respondents and identify all non-confidential respondents. The evaluation and copies of original consultation responses will be published with the outcome of the consultation.

All comments will be treated as non-confidential unless you state that all or a specified part of your response is confidential and should not be attributed to you.

If you reply by email or fax, unless you include a specific statement to the contrary in your response, the presumption of non-confidentiality will override any confidentiality disclaimer generated by your organisation's IT system or included as a general statement on your fax cover sheet.

If part of a response is confidential, please put that in a separate annex so that non-confidential parts may be published with your identity. Confidential responses will be included in any statistical summary of numbers of comments received.

The WHO Framework Convention on Tobacco Control

Consistent with the [guidance](#) given in relation to implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control, consultation respondents who are tobacco companies, their partners or subsidiaries should indicate that clearly in their response. In their evaluation documents CAP and BCAP will indicate where a response has originated from such an organisation.

Annex A: Current CAP Code Chapter 22 (Electronic cigarettes)

Background

For the purposes of this section “electronic cigarette” means a product that is intended for inhalation of vapour via a mouth piece, or any component of that product, including but not limited to cartridges, tanks or e-liquids. The rules in this section apply to marketing communications for, and which refer to, electronic cigarettes and related products, including but not limited to e-shisha and e-hookah products, whether or not they contain nicotine.

The e-cigarette market continues to innovate rapidly and new products may emerge which may not be caught precisely by the above definition. The ASA may apply these rules in circumstances where it considers that an advertised product is sufficiently similar to warrant the protection provided by this section.

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

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

Tobacco Products Directive

The Tobacco and Related Products Regulations 2016 (implementing the European Tobacco Products Directive) became law in the UK on 20 May 2016 and include significant prohibitions on the advertising of nicotine-containing e-cigarettes that are not licensed as medicines. CAP is now examining how it might best approximate those restrictions in its Code and what guidance it may be able to provide to marketers. In the interim marketers are encouraged to seek legal advice on the placement of advertising in non-broadcast media. The rules in this section continue to apply to lawful advertisements.

Rules

- 22.1** Marketing communications for e-cigarettes must be socially responsible.
- 22.2** Marketing communications must contain nothing which promotes any design, imagery or logo style that might reasonably be associated in the audience’s mind with a tobacco brand.
- 22.3** Marketing communications must contain nothing which promotes the use of a tobacco product or shows the use of a tobacco product in a positive light. This rule is not intended to prevent cigarette-like products being shown.
- 22.4** Marketing communications must make clear that the product is an e-cigarette and not a tobacco product.
- 22.5** Marketing communications must not contain health or medicinal claims unless the product is authorised for those purposes by the MHRA. E-cigarettes may be presented as an alternative to tobacco but marketers must do nothing to undermine the message that quitting tobacco use is the best option for health.
- 22.6** Marketers must not use health professionals to endorse electronic cigarettes.

- 22.7** Marketing communications must state clearly if the product contains nicotine. They may include factual information about other product ingredients.
- 22.8** Marketing communications must not encourage non-smokers or non-nicotine-users to use e-cigarettes.
- 22.9** Marketing communications must not be likely to appeal particularly to people under 18, especially by reflecting or being associated with youth culture. They should not feature or portray real or fictitious characters who are likely to appeal particularly to people under 18. People shown using e-cigarettes or playing a significant role should not be shown behaving in an adolescent or juvenile manner.
- 22.10** People shown using e-cigarettes or playing a significant role must neither be, nor seem to be, under 25. People under 25 may be shown in an incidental role but must be obviously not using e-cigarettes.
- 22.11** Marketing communications must not be directed at people under 18 through the selection of media or the context in which they appear. No medium should be used to advertise e-cigarettes if more than 25% of its audience is under 18 years of age.

Annex B: Current BCAP Code Chapter 33 (Electronic cigarettes)

Background

For the purposes of this section "electronic cigarette" means a product that is intended for inhalation of vapour via a mouth piece, or any component of that product, including but not limited to cartridges, tanks or e-liquids. The rules in this section apply to marketing communications for, and which refer to, electronic cigarettes and related products, including but not limited to e-shisha and e-hookah products, whether or not they contain nicotine.

The e-cigarette market continues to innovate rapidly and new products may emerge which may not be caught precisely by the above definition. The ASA may apply these rules in circumstances where it considers that an advertised product is sufficiently similar to warrant the protection provided by this section.

The majority of e-cigarettes are currently sold as consumer goods, however marketers may seek a medicines licence for their product from the Medicines and Healthcare Products Regulatory Agency (MHRA). The rules in this section also apply to marketing communications for electronic cigarettes which are authorised by the MHRA. For products authorised as medicines, the rules in section 11 (Medicines, medical devices, treatments and health) also apply.

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

The Tobacco Products Directive

Directive 2014/40/EU (on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC) came into effect in the UK on 20 May 2016. It prohibits advertisements on TV and radio which have the direct or indirect effect of promoting nicotine-containing e-cigarettes and e-liquids. The prohibition is set out in Section 10 (Prohibited Categories) and includes the full legal definitions of the products for which advertising is prohibited.

E-cigarette products which are not caught by those definitions may continue to be advertised subject to the rules in this section on an interim basis, until such time as BCAP has reviewed their compatibility with the new rules. These are (i) Products which are licensed as medicines or medical devices, (ii) non-nicotine-containing liquids and refill containers, (iii) non-nicotine-containing disposable e-cigarettes and (iv) rechargeable e-cigarettes which are designed to be fitted only with cartridges containing non-nicotine-containing e-liquid. Advertisements for medicines / medical devices must also comply with the rules in Section 11 (Medicines, medical devices, treatments and health).

Therefore, for the purposes of this section only, "electronic cigarette" means a product that can be used for the consumption of vapour via a mouth piece, or any component of that product, including a cartridge, a tank, an e-liquid and the device without cartridge or tank (regardless of whether it is disposable or refillable by means of a refill container and a tank, or rechargeable with single use cartridges), that is not prohibited from being advertised by Section 10.

The e-cigarette market continues to innovate rapidly and new products may emerge which may not be caught precisely by the above definition. The ASA may apply these rules in circumstances where it considers that an advertised product is sufficiently similar to warrant the protection provided by this section.

Depending on the formulation of their product and the means by which it is supplied, advertisers may have obligations relating to their advertising under chemical classification, labelling and

packaging legislation. Broadcasters are advised to take legal advice to ensure compliance with the relevant law.

Rules


- 33.1** Advertisements for e-cigarettes must be socially responsible.
- 33.2** Advertisements must contain nothing which promotes any design, imagery or logo style that might reasonably be associated in the audience's mind with a tobacco brand.
- 33.3** Advertisements must contain nothing which promotes the use of a tobacco product or shows the use of a tobacco product in a positive light. This rule is not intended to prevent cigarette-like products being shown.
- 33.4** Advertisements must make clear that the product is an e-cigarette and not a tobacco product.
- 33.5** Advertisements must not contain health or medicinal claims unless the product is authorised for those purposes by the MHRA. E-cigarettes may be presented as an alternative to tobacco but marketers must do nothing to undermine the message that quitting tobacco use is the best option for health.
- 33.6** Advertisements must not use health professionals to endorse electronic cigarettes.
- 33.7** Advertisements must state clearly if the product contains nicotine. They may include factual information about other product ingredients.
- 33.8** Advertisements must not encourage non-smokers or non-nicotine-users to use e-cigarettes.
- 33.9** Advertisements must not be likely to appeal particularly to people under 18, especially by reflecting or being associated with youth culture. They should not feature or portray real or fictitious characters who are likely to appeal particularly to people under 18. People shown using e-cigarettes or playing a significant role should not be shown behaving in an adolescent or juvenile manner.
- 33.10** People shown using e-cigarettes or playing a significant role must neither be, nor seem to be, under 25. People under 25 may be shown in an incidental role but must be obviously not using e-cigarettes.
- 33.11** **Radio Central Copy Clearance** – Radio broadcasters must ensure advertisements for e-cigarettes are centrally cleared.

Contact us

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