

Consultation on the advertising of electronic cigarettes (2016):

CAP and BCAP's evaluation of responses



1. Introduction

After a period of consultation the Committee of Advertising Practice (CAP) is implementing a new rule in its Code and publishing an accompanying guidance note to reflect the legal prohibitions on the advertising of some electronic cigarettes which came into effect in May 2016.

The Broadcast Committee of Advertising Practice (BCAP) have co-endorsed the guidance note where it is relevant to broadcast advertising. CAP is also implementing a change to its Code to allow marketers to make health claims in lawful media.

This document provides CAP's (and where relevant BCAP's) evaluation of significant points made by respondents to their consultation. It should be read alongside the [original consultation document](#).

CAP and BCAP are still evaluating some issues. For this reason questions 22 – 26 inclusive are not included in this document. These will be evaluated separately in due course.

1.1 WHO Framework Convention on Tobacco Control

Consistent with the guidance given in the World Health Organisation (WHO) Framework Convention on Tobacco Control those respondents who CAP and BCAP understand are either tobacco companies, their partners, subsidiaries or representatives are indicated in bold and underlined text in the below table.

2. List of respondents and their abbreviations used in this document

	Organisation	Abbreviation
1	Action on Smoking and Health	ASH
2	Action on Smoking and Health Scotland	ASH Scotland
3	Action on Smoking and Health Wales	ASH Wales
4	Advertising Association	AA
5	Association of Convenience Stores	ACS
6	Berkshire West Tobacco Control Alliance	BWTCA
7	Blackpool Council	BC
8	Boots UK Ltd	Boots
9	<u>British American Tobacco UK</u>	<u>BAT</u>
10	British Medical Association	BMA
11	Cancer Research UK	CRUK
12	Chartered Trading Standards Institute	CTSI
13	Durham County Council	DCC
14	Electronic Cigarette Industry Trade Association	ECITA
15	<u>Fontem Ventures</u>	<u>Fontem</u>
16	Freedom to Vape	FTV
17	Fresh (North East of England Tobacco Control)	Fresh
18	Healthier Futures	HF
19	Incorporated Society of British Advertisers	ISBA
20	Independent British Vape Trade Association	IBVTA
21	Internet Advertising Bureau UK	IAB
22	<u>Japan Tobacco International</u>	<u>JTI</u>
23	Johnson & Johnson Ltd	JNJ
24	Liberty Flights	LF

	Organisation	Abbreviation
25	National Federation of Retail Newsagents	NFRN
26	New Nicotine Alliance	NNA
27	Newcastle City Council	NCC
28	News Media Association	NMA
29	Petrol Retailers Association	PRA
30	Planet of the Vapes	POV
31	<u>Philip Morris Limited</u>	<u>PML</u>
32	Proprietary Association of Great Britain	PAGB
33	Public Health, St Helens	PHSH
34	Radiocentre	Radiocentre
35	Royal College of Physicians	RCP
36	Royal College of Radiologists	RCR
37	Smoke Free County Durham Tobacco Alliance	SFCDTA
38	Smoke Free Newcastle	SFN
39	<u>Smoke Free Northumberland Alliance</u>	<u>SFNA</u>
40	The Wave and Swansea Sound	TWSS
41	UK Centre for Tobacco and Alcohol Studies	UKCTAS
42	UK Health Forum	UKHF
43	<u>UK Vaping Industry Association</u>	<u>UKVIA</u>
44	Vape Club Limited and Vape Base Limited	VC
45	Wakefield Tobacco Alliance	WTA
46	Welsh Government	Welsh Gov
47	A private individual	Mr A.

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

<u>In media subject to the regulations:</u>			
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.			
	Respondent/s	Comments	CAP's evaluation:
1.1	AA, ACS, ASH, ASH Scotland, ASH Wales, BAT, BC, Boots, BWTCA, CRUK, CTSI, DCC, ECITA, Fresh, Fontem, IBVTA, ISBA, JNJ, JTI, NCC, NFRN, PSHH, PML, RCR, SFCDTA, SFN, SFNA, UKCTAS, UKHF, WTA	The respondents listed on the left supported the proposal.	CAP agrees.
1.2	FTV, LF, NNA, PML, VC	The respondents listed on the left agreed with the proposal but said that many accessories were likely to be outside the scope of the prohibition. Examples given by respondents included: batteries, power units and drip are outside scope of the law.	When assessing ads under the new rules, the ASA will judge them as a whole and in context. CAP considers that ads for the types of accessories listed would not be prohibited unless they were indirectly promoting a prohibited product. For example by showing or referring to a nicotine-containing e-cigarette.
1.3	HF	Agree but 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	CAP agree and have amended the relevant references.

In media subject to the 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.

	Respondent/s	Comments	CAP's evaluation:
2.1	AA, ASH, ASH Scotland, ASH Wales, BAT, BC, Boots, BMA, BWTCA, CRUK, CTSI, DCC, Fontem, Fresh, HF, JNJ, JTI, NCC, NMA, NNA, PSHH, RCR, SFCDTA, SFN, SFNA, UKCTAS, UKHF, WTA	The respondents listed on the left agreed with the proposal.	CAP agrees.
2.2	ECITA, FTV, IBVTA, ISBA, LF, NFRN, NUKVIA, VC	The organisations listed on the left disagreed with the proposal and considered that the word “can” was too broad. They each expressed one or more of the following points: <ul style="list-style-type: none">• That products not intended to be caught would be brought within scope, particularly given the wide definition used within the CAP Code. Particularly generic components and e-liquid ingredients.• That capturing non-nicotine products was excessive and amounted to gold-plating of the legislation.• Products that were designed and labelled as non-nicotine should not be prohibited from advertising• Clarity was required as to what extent this would apply to accessories• A tighter definition is required here before reaching a position.	CAP disagrees. The law restricts ads for any product which “can” be used to consume nicotine vapour. This prohibition therefore also catches advertisements for non-nicotine and refillable products if they can be refilled with a nicotine e-liquid. This mirrors the position taken by the Department of Health.

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.

	Respondent/s	Comments	CAP's evaluation:
3.1	AA, ACS, ASH, ASH Scotland, ASH Wales, BAT, BC, Boots, BWTCA, CRUK, CTSI, DCC, ECITA, Fresh, Fontem, FTV, HF, IBVTA, JNJ, JTI, ISBA, LF, NCC, NNA, NFRN, PHSH, PML, RCR, SFCDTA, SFN, SFNA, UKCTAS, UKHF, UKVIA, VC, WTA	The respondents listed on the left supported the proposal.	CAP agrees.

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

	Respondent/s	Comments	CAP's evaluation:
4.1	RCR	Any device that normalises smoking behaviour should be prohibited.	CAP is not currently aware of evidence which suggests that it should apply more stringent prohibitions than those set out in the law or CAP's own rules.

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.			
	Respondent/s	Comments	CAP's evaluation:
5.1	AA, ACS, ASH, ASH Scotland, ASH Wales, BAT, BC, Boots, BWTCA, CRUK, DCC, Fontem, Fresh, FTV, IBVTA, ISBA, JNJ, JTI, LF, HF, NCC, NNA, PHS, RCR, SFCDTA, SFN, SFNA, UKCTAS, UKHF, UKVIA, VC, WTA	The respondents on the left agreed with the proposal.	CAP agrees.
5.2	CTSI	Yes, but would welcome some further clarification of what constitutes a magazine vs a periodical. Also whether a catalogue produced for a consumer is also deemed to be a magazine.	<p>CAP is reflecting the terminology used in the law and considers that magazine, as a wider definition, is likely to capture all periodicals (which are typically defined as magazines published at regular intervals).</p> <p>CAP considers that product catalogues produced by manufacturers / retailers are likely to be more akin to leaflets and direct hard copy mail and therefore permitted however the ASA will have to assess individual cases.</p>
5.3	ACS, NFRN	We would welcome clarification in CAP's accompanying guidance whether it would be the retailer stocking the magazines which includes an e-cigarette advertisement or the publication, or both, that would be making the offence.	Primary responsibility for observing the Code falls on marketers. Others involved in preparing or publishing

			marketing communications, such as agencies, publishers and other service suppliers, also accept an obligation to abide by the Code.
5.4	ECITA	<p>Question why CAP's proposed rule states "targeted exclusively" while the legislation exempts publications "intended exclusively" for trade audiences. The change from a prohibition of intent to one of marketing/promotion/content seems unhelpful and has the potential to cause future problems.</p> <p>Question why this prohibition is necessary in e-cigarette-specific publications, for example.</p>	<p>This is to harmonise the rule with other similar rules and references in CAP's Code and guidance.</p> <p>The legal prohibition applies to the media type and does not take account of the content of the publication.</p>

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

<p>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.</p>			
	Respondent/s	Comments	CAP's evaluation:
6.1	AA, ACS, ASH, ASH Scotland, ASH Wales, BAT, BC, Boots, BWCTA, CRUK, CTSI, DCC, Fontem, Fresh, FTV, HF, IAB, IBVTA, ISBA, JNJ, JTI, LF, NCC, NFRN, NNA, PSHS, PML, RCR, SFCDTA, SFN, SFNA, UKCTAS,	<p>The respondents on the left supported the proposal. Many of those respondents emphasised the need for the guidance note to be comprehensive and regularly updated – particular on the issue of social media.</p>	CAP agrees.

UKHF, WTA	
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7. Are there any types of media that you consider to be information society services which are not referenced above?			
	Respondent/s	Comments	CAP's evaluation:
7.1	ASH Scotland	Communication apps, including (but not limited to) Snapchat, Whatsapp, Facebook Messenger and Telegram, could be used in a similar manner to text or email messaging and should be included in this statement.	CAP agrees. Please see the Advertising Guidance note.
7.2	LF	Request clarity on how the rules apply to marketplace shops such as eBay or Amazon and the sale of second hand goods online by an individual. 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.	The law and the CAP rules apply to businesses operating online. Private classified advertising by members of the public is not subject to the Code. Cinema is not an information society service for the purposes of the law.
7.3	SFNA	Non-trade memory/data/USB devices given as freebies at conferences/public events that have the potential to store adverts.	The CAP Code does not apply to promotional items given away for free, but may apply to the advertising surrounding that promotion depending on its context.
7.4	BWCTA	Yes. Twitter. Instagram.	CAP agrees. Marketers' activities online, for example on their website and on social media, are caught by the prohibitions.
7.5	FTV	Stop Smoking Services should not be classified as information society services.	Information Society Services are types of media rather than types of marketer or message.
7.6	IAB	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	CAP agrees. CAP agrees. These have been added.

		<p>in augmented reality and virtual reality environments.</p> <p>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.</p>	The applicability of the Code in these circumstances is addressed in specific CAP guidance.
7.7	VC	MHRA have previously confirmed that opt-in email is acceptable provided age verification had occurred, they could opt out at any time. Consider .co.uk website should be permitted if it can be geo-blocked.	The legal prohibition covers email and other electronic messaging. CAP is not currently aware of a clear legal rationale for opt-in email being acceptable in all instances. CAP has provided guidance on how advertisers can minimise the risks of this approach in its guidance note.

8. Are there any types of online media listed above or otherwise which you think should not be categorised as an information society service?			
	Respondent/s	Comments	CAP's evaluation:
8.1	BAT, IBVTA, LF, PML, UKVIA	Factual information in emails and texts messages where consumers have 'opted in' and therefore can be deemed to have requested that information should be permitted.	See 7.7
8.2	LF	<p>Request clarification on the acceptability of advertising in vapour forums where users must be logged in.</p> <p>Request clarification on whether marketers can respond to user questions, replying to a specific request for information, similar to those received by customer service departments etc.</p>	<p>CAP considers that such advertising is likely to be prohibited. The law prohibits advertisements in information society services</p> <p>The CAP Code does not apply to private correspondence between marketers and consumers.</p>
8.3	UKVIA	<p>Request clarity on whether these restrictions only apply to UK based websites</p> <p>How are social media sites, such as Facebook (which can determine user location and profile), be treated?</p>	The law applies to "information society services" provided to recipients in the UK. The ASA will make individual assessments of cases where the marketer is not UK-based and may refer complaints to the relevant regulator in the country

			in question.
8.4	JTI	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.	CAP is reflecting its understanding of how the law applies online. This application is different to the in-store environment.

A.5. Prohibition on 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.			
	Respondent/s	Comments	CAP's evaluation:
9.1	AA, ACS, ASH, ASH Scotland, ASH Wales, BAT, BC, Boots, BWTCA, CRUK, CTSI, ECITA, Fontem, FTV, IAB, IBVTA, ISBA, JNJ, JTI, HF, LF, NNA, PSHH, RCR, SFNA, UKCTAS, UKHF, UKVIA, VC, WTA	The respondents listed on the left agreed with the proposal.	CAP agrees.
9.2	NNA	Disagree that the prohibition on online ads prevents the advertiser from incentivising the consumer to access its website by means of click through ads given that CAP has stated that ads are permissible for e-cigarette retailers.	CAP considers that there is scope for businesses to advertise their existence in media subject to the Regulations however questions remain about the extent of this. CAP has addressed this issue in its Advertising Guidance note.
9.3	NFRN	Call for clarity for the restrictions for retailers' websites as distinct from marketers' websites.	See 9.3

9.4	PML	In addition to retailers, TRPR allows manufacturers and distributors to give certain factual, non-promotional information on their websites.	CAP agrees.
9.5	Boots	Promotional marketing (e.g. two-for-one deals etc) should be permitted on websites which transacts only in the UK in the same way as a bricks-and-mortar shop.	CAP considers that claims about this sort of activity on websites are likely to be prohibited by TRPR and the rule. However this does not prevent marketers listing, in a factual way, the pricing structure for multi-buy deals, for example.

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.			
	Respondent/s	Comments	CAP's evaluation:
10.1	AA, ACS, ASH, ASH Wales, BAT, BC, Boots, BWTCA, CRUK, CTSI, ECITA, Fontem, FTV, IBVTA, ISBA, JNJ, JTI, LF, NFRN, NNA, PHS, PML, RCR, SFNA, UKCTAS, UKHF, VC, WTA	The respondents listed on the left agreed. Many highlighted the need for guidance or called for more clarification than that provided.	CAP agrees.
10.2	ASH Scotland	Agree, however, the restriction on promotional naming should apply to flavours as well as devices, and a guidance note on how this will be determined may be appropriate.	CAP considers that the law allows claims about flavours however these will need to be factual rather than promotional in nature. Where claims are promotional they are likely to be prohibited.
10.3	HF	Agree. Consider 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.	CAP agrees and has amended its list of claims in the attached guidance note.
10.4	DCC, Fresh, NCC, SFCDTA, SFN,	We believe that claims should be limited to these types of factual claims in all media to reduce the risk of e-cigarettes being glamorised.	CAP is not aware of evidence that suggests that it currently needs to apply stronger content rules to lawful advertisements but remains open to submissions from those who wish to make the case for greater restrictions.

10.5	ECITA	We would agree, however there are some factual statements which do not seem likely to escape classification as promotional. For example, it would be permissible for a website to have a 15% sale, and reflect this in the product pricing, however, marking products as being discounted by 15% would seem to be prohibited as promotional. Having price promotions that consumers cannot be informed of does not seem helpful to either the consumers or the vendors.	CAP agrees that changes in price are unlikely to be caught by the prohibition, but that drawing attention to them in a promotional way is likely to be prohibited.
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11. Are there any other claims / types of claims you consider are factual in nature should appear on this list?			
	Respondent/s	Comments	CAP's evaluation:
11.1	ASH, ASH Wales, CRUK, UKHF, WTA, DCC, Fresh, NCC, RCP, UKCTAS, SFCDTA, SFN	Generic statements about relative risk should be allowed, 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 Public Health England and the RCP statements to this effect. We believe such generic statements of relative risk are essential given the evidenced growing misperceptions of the relative risks of vaping and smoking.	While noting the rationale for such claims, CAP considers that such claims are likely to serve to promote products online and therefore be in breach of the new Regulations and the CAP rule. However CAP is still examining whether its content rules should allow for substantiated health claims to be made in lawful media.
11.2	ISBA	Factual statements about breakthrough developments and their benefits should be permitted. 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.	See 11.1. CAP agrees.
11.3	LF	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 should be permitted.	Factual descriptions of flavours are likely to be acceptable. CAP has expanded its lists of claims that it considers are likely to be viewed by the ASA as factual and promotional. In the absence of more clarity in law the

			ASA will make individual assessments about other kinds of claims.
11.4	NNA	<p>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.</p> <p>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).</p>	<p>CAP agrees.</p> <p>See 11.1</p>
11.5	CTSI	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	CAP agrees. See 10.3
11.6	Boots	Mandatory warning and hazard statements should be included as factual information.	CAP agrees.
11.7	BAT	<p>Marketers should be able to set out information regarding technological developments, new product features, and performance features, provided that this information is descriptive and factual in nature.</p> <p>Substantiated comparative claims with intra-brand e-cigarette products, competitor products, and tobacco products which aid customer understanding of and ability to distinguish products. Factual claims about e-cig emissions or capabilities, for example, are meaningless without comparison with other products or tobacco.</p> <p>Consider that the following categories of “factual” information would be permissible: customer testimonials, review forms, free shipping claims, subscription selling, links to public health reports about e-cigarettes</p>	See 11.1
11.8	Fontem	<p>Statements affirming packaging and/or battery safety (e.g. “child-safe”, “tamper-proof” etc.) if a product is compliant with relevant regulation, ISOs or other recognised standards; Environmental information such as “recyclable”;</p> <p>Statements affirming compliance with product quality standards if a product has been approved by third-party bodies or institutes (e.g. “BSI approved”);</p> <p>Statements accurately affirming the substantiated results of clinical trials and other scientific studies e.g. air quality, peer-reviewed clinical studies.</p>	<p>CAP agrees</p> <p>CAP agrees</p> <p>See 11.3</p>
11.9	FTV	The mix percentage of propylene glycol and vegetable glycerine (PG/VG) is a vital piece of information to provide because it determines whether that liquid is suitable for a particular e-cigarette arrangement or heating coil; this is factual and central to educated consumer choice.	CAP agrees.

		We would argue that informing prospective purchasers that e-cigarettes are 95% safer than lit tobacco is also a factual claim considering it has been endorsed by Public Health England 2 and the Royal College of Physicians.	See 11.1
11.10	UKVIA	Claims about new products, product origin and that a product is the best-selling item within a range should be permitted.	See 11.1
11.11	IBVTA	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 online. 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. 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	CAP agrees that factual statements of price are likely to be acceptable. See 11.1 and 11.3
11.12	JTI	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.	CAP agrees.
11.13	JNJ	Names of flavours should also be non-promotional / factual.	CAP agrees, so long as the names are not promotional in nature.
11.14	PML	Descriptions of the operation of the product / instructions particularly given the speed of innovation and the changing nature of products. 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. Withholding it damages the consumer’s ability to make an informed choice.. Non-promotional information on the absence of certain ingredients from a particular product and the aerosol generated should be permitted. Information about nicotine content and delivery should be permitted. Given that such information is required by the pre-market regulatory notification process it is by definition factual and not promotional. 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.	See 11.3 The prohibitions applied by TPD and TRPR provide new prohibitions which go beyond those in European consumer law. CAP agrees but see 11.1 and 11.3 See 11.3

11.15	VC	Organic customer reviews. New or best selling claims that are substantiated. Origin of product. Permanent (non-promotional) price drops. Loyalty schemes should be permitted provided there is no cross-promotion of a nicotine product. Such schemes already operate without naming any specific products. Points are simply earned for amounts spent on purchases.	See 11.3
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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.			
	Respondent/s	Comments	CAP's evaluation:
12.1	AA, ASH, ASH Scotland, ASH Wales, BC, BWTCA, CRUK, CTSI, DCC, Fresh, HF, JNJ, NCC, NFRN, PHSH, RCR, SFCDTA, SFN, SFNA, UKCTAS, UKHF, WTA	The respondents listed on the left agreed with the proposal.	CAP agrees.
12.2	BAT, ECITA, Fontem, FTV, ISBA, JTI, LF, NNA, PML, UKVIA	Prohibiting the use of adjectives is far too broad to be reasonable. Marketers need to be able to describe the complexity of e-liquid flavours. Such a restriction would only inhibit consumers' ability to choose the right product. Writing an adjective-free, factual, non-promotional, description of a flavour would seem to be a broadly impossible task. 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. CAP's position on the use of adjectives should be more nuanced.	CAP agrees that the proposal in relation to adjectives was too restrictive and has removed it from the guidance. See 11.3
12.3	BAT, Boots, Fontem	Price reductions, savings claims and multi-buy offers should be permitted.	CAP considers that claims of this sort are likely to be promotional in nature and therefore prohibited, though this would not prohibit prices being structured in this way if attention was not drawn to them.
12.4	BAT, Fontem, FTV, JTI, LF	Comparisons between e-cigarettes within a retailer's range or with competitors should be permitted. Explaining factually how products vary within the market constitutes providing information and is especially important in light of the fact that the market is so nascent.	See 11.3
12.5	IBVTA, JTI, LF	Prohibiting 'significant imagery' so uniformly is detrimental. Imagery can only be a breach of the TPD Regulations if it is promotional in nature. Existing use of imagery has had no detrimental effect.	The guidance gives this only as an example and the ASA will have to make case by case

			assessments.
12.6	BAT	Agree that the inclusion of “significant imagery” to the extent that it is entirely unrelated to the product may be promotional, but this will depend on the particular image and the context.	CAP agrees.

13. Are there other types of generic claims that should be included in this list?			
	Respondent/s	Comments	CAP and BCAP’s evaluation:
13.1	ASH Scotland	Comparative claims with cigarettes or other tobacco products.	See 11.1
13.2	JNJ	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.	CAP has expanded its list of promotional claims in light of consultation responses. See guidance note.
13.3	PML	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.	See 13.2 See 11.1

14. Do you have any other comments to inform CAP’s consideration of whether a claim is factual or promotional?			
	Respondent/s	Comments	CAP and BCAP’s evaluation:
14.1	LF	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?	See 11.1 See 11.3
14.2	Boots	A “promotional” statement such as the examples given in the response to question 12 can be factual as well. Descriptive language and subjective claims would clearly be advertising and therefore prohibited under the Tobacco and Related Products Regulations 2016. Similarly competitions and prize draw activity would be have the effect of promoting electronic cigarettes and as such prohibited. Pricing reductions and multi-buy activities are permitted in bricks and mortar stores and as such to avoid anti-competitiveness the same should apply to online retailers. Such activity should be confined only to the web page where the transactional decision to purchase is made and the ability to add to basket/	See 11.3 CAP understands that the law applies a more restrictive position online than it does in-

		proceed to checkout is present.	store.
14.3	BAT	"Factual" claims by reasonable definition should include claims conveying information that is descriptive, objective and supported by robust evidence and data. Propose considering whether objective, "factual" information can be properly provided regarding e-cigarettes' attributes in comparison with the "general market" in addition to "other e-cigarette products" referred to in the Consultation	See 11.3
14.4	Fontem	Recommend that CAP define a claim as factual on the basis that it is information that enables smokers to make informed decisions about e-cigarettes. Fontem would suggest that the following criteria be applied to identify factual claims: Statements that describe products in a way that accurately reflects their main features; Statements that accurately place products within a wider (factual) context so customers can find the product best suited to their needs; Factual information on the price structure of products that delivers transparency and value for customers; Substantiated evidence from clinical trials, air quality studies and other types of scientific investigation into the functioning and effects of e-cigarettes.	See 11.3
14.5	PML	We consider it prudent not to overly restrict the list of material that could be non-promotional. 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.	See 11.3

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.

	Respondent/s	Comments	CAP's evaluation:
15.1	AA, ASH Scotland, ASH Wales, BC, Boots, CRUK, HF, ISBA, JTI, NNA, PSH, RCR, SFNA UKCTAS,	The respondents listed on the left considered that a social media presence might be capable of meeting the criteria.	CAP agrees but considers that the law is not clear. Please see the Advertising Guidance.
15.2	ASH, DCC, Fresh, NCC, NNA, SFCDTA, SFN, UKHF, WTA	Notwithstanding their view above, the respondents listed on the left made the following points: 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	CAP has provided what guidance it can on the likely acceptability of social media pages / accounts.

		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'.	
15.3	BAT, ECITA, Fontem, FTV, IAB, IBVTA, LF, NNA, PML, UKVIA, VC	<p>The respondents on the left considered that social media presence was compatible with the law and made the following points:</p> <ul style="list-style-type: none"> • Consumers choose to follow and like, or unfollow and unlike pages / material as they see fit. For this reason consumers will only see information they have requested, consistent with the law. So long as the information with which the consumer is then presented is factual and not promotional this too will be consistent with the law. • Organic sharing of material by consumers is not a function of the business and should not be prohibited by TRPR. • Social media platforms operate varying degrees of privacy options for business pages, and such settings could be used to significantly restrict the distribution of content so that it can only be accessed by those actively seeking it. On Twitter, for example, there is the option to tweet 'protected tweets' which are only visible to the brand's followers. • CAP should also consider that for reasons of security and consumer protection it is necessary that e-cigarette manufacturers and retailers operate their own named and branded social media pages on popular platforms, to ensure that false or counterfeit pages or users are not providing consumers with misleading information or even carrying out illegal activities. • Yes and as stated above we believe that Facebook in particular is a social media platform that provides the necessary controls required to ensure that content is only seen by those who should access it. • A presence on social media does not in itself constitute advertising. Social media is a key area where marketers respond in a non-promotional manner to consumer questions about products and their correct use. • Even when a user is shown, as a suggestion, an e-cigarette account to follow, based on their interests etc., this would only be the name of the account, without any content from the account. • 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. 	CAP notes the points made and agrees that, where a social media presence is set up to be analogous to a website in terms of how it is found by consumers then it may well be lawful and compliant with the Code. However the ASA will have to make individual judgements.

15.4	BWTCA	No. The way information is currently supplied across the internet provides the media supplies with little control of how this is displayed to the receiver for e.g. cookies could enable third party advertising to appear on social media pages/ screen of the viewer, 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'	CAP considers that where social media activity by businesses promoting controlled products, is served to consumers who have not opted to receive it, this would almost certainly be in breach of the law.
15.5	ACS	Consider that the social media pages of e-cigarette marketers' who sell other products (not related to e-cigarettes) such as convenience retailers' should be prohibited.	CAP considers that such a position would be in excess of what the law requires.
15.6	JNJ	Agree in principle but question the status of reposted content.	See 15.4

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.			
	Respondent/s	Comments	CAP's evaluation:
16.1	AA, ASH, ASH Wales, BAT, BC, Boots, BWTCA, CRUK, DCC, ECITA, Fontem, Fresh, FTV, IBVTA, ISBA, JTI, HF, NCC, NNA, PSHH, PML, SFCDTA, SFN, SFNA, UKCTAS, UKHF, UKVIA, WTA	The organisations on the left agreed.	CAP agrees
16.2	ASH Scotland	At present these media channels are not restricted, although regulations in Scotland covering these areas are expected to come into force within the next two years.	CAP is liaising with the Scottish Government on this issue.
16.3	LF, RCR	Agree but consider that cinema advertising should be.	Cinema advertising is not prohibited by the Regulations.
16.4	ACS, NFRN	We would welcome clarification that point-of-sale e-cigarette advertising is not prohibited by law.	The CAP Code does not apply to point of sale advertising except where there

			is promotional marketing activity. CAP understands that the law does not prohibit promotional marketing at point of (physical) sale and the ASA would investigate complaints about it in the usual way.
16.5	JNJ, RCR	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.	TRPR does not apply placement restrictions for outdoor advertising. CAP considers that its content rules apply the appropriate level of protection for lawful out of home advertising.
16.6	IAB	Agree that digital out-of-home advertising (DOOH) would be out of scope of the regulations as long as it were provided on a broadcast basis, and not on individual request. CAP's guidance note should make this clear.	CAP agrees.
16.7	VC	Yes. Also consider geo-blocked .co.uk websites should be permitted and email newsletters where the consumer has opted in.	CAP is not aware of a legal rationale for geo-blocked websites not being caught by the law. CAP has set out its best understanding of the law as it relates to email in the guidance note.

A.7 Proposed changes to the CAP Code

17. Do you support the revised wording in Section 22? If not please explain why and how you think it should be amended.			
	Respondent/s	Comments	CAP and BCAP's evaluation:
17.1	AA, ACS, ASH Scotland, BAT, Boots, Fontem, FTV, IBVTA, ISBA, JNJ, JTI, LF, NFRN, NNA, PHSH, PML, RCR. SFNA, UKVIA, VC	The organisations listed on the left supported the revised wording.	CAP Agrees.

17.2	ASH, ASH Wales, BC, BWTCA, CRUK, DCC, Fresh, HF, NCC, SFCDTA, SFN, UKCTAS, UKHF, WTA	<p>The organisations on the left made one or more of the following points:</p> <p>No. The second sentence of the last paragraph of section 22 is unclear. The MHRA is both the agency responsible for medicines licensing and for overseeing regulation of electronic cigarettes under the EU Tobacco Products Directive. In this sentence the distinction is not completely clear as it refers to products “which are authorised by the MHRA”.</p> <p>In addition there is a typo in the third line which says “sections” plural when it should be ‘section’ singular. We believe it would be clearer to change this 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.”</p>	CAP agrees and has amended the sentences in question.
17.3	ECITA	Our understanding is that although the TRPR provides instructions on packaging and labelling, this does not abrogate the requirements of CLP. On the basis of this, it would seem useful to leave this reference in place. Otherwise, the wording appears to be useful and fit for purpose. Indeed, the definition of electronic cigarette is more useful than that used in the legislation.	CAP agrees and is retaining the paragraph in question.

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.			
	Respondent/s	Comments	CAP’s evaluation:
18.1	AA, ACS, ASH Scotland, Boots, Fontem, ISBA, JNJ, JTI, LF, NFRN, NNA, PSHH, PML, RCR, UKVIA, VC	The respondents listed on the left supported the wording of the rule.	CAP agrees.
18.2	ASH, ASH Wales, BC, BWTCA, CRUK, DCC, Fresh, FTV, HF, NCC, SFCDTA, SFN, SFNA, UKCTAS, UKHF, WTA	Disagree. In the second bullet ‘Online media and some other forms of electronic media’ the meaning of ‘some other forms of electronic media’ is unclear – what these other forms of media are needs to be specified	These media are specified in the accompanying guidance note.
18.3	BAT	Rule should make clear that factual claims are permitted in emails and text messages.	CAP does not consider that this is necessarily the case.
18.4	ECITA	Rule 22.12 appears to be consistent with the requirements created by the TRPR. However, given the nature of these requirements, we are unable to support them. The existing rules (22.1 to 22.11) provide a framework that is achievable and offers considerable benefit to population health, so our preferred	CAP agrees. Notes the objection.

		outcome would be the deletion of rule 22.12.	
18.5	IBVTA	Do not support the proposed wording which gives an overly rigid interpretation of the regulations.	CAP is satisfied that the rule adequately approximates the law.

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?			
	Respondent/s	Comments	CAP and BCAP's evaluation:
19.1	AA, ASH, ASH Wales, ASH Scotland, BC, Boots, BWTCA, CRUK, DCC, ECITA, Fresh, HF, ISBA, JNJ, NCC, NNA, PSHH, Radiocentre, RCR, SFCDTA, SFN, SFNA, UKHF, UKVIA, VC, Welsh Gov, WTA	The respondents on the left agreed with the criteria proposed.	CAP and BCAP agree.
19.2	ACS, IBVTA, Fontem, FTV, LF, POV	<ul style="list-style-type: none"> Do not agree that the brand name or range name should be restricted when advertising non-nicotine e-cigarette products. Many e-cigarette manufacturers produce both nicotine containing e-cigarettes and non-nicotine containing cigarettes. Forcing them to create new brand names for non-nicotine products, therefore, risks seriously jeopardising brand recognition among their customers, in turn threatening to undermine customer loyalty, sales and understanding of ranges. May also prevent brands advertising and creates significant regulatory burdens. Brand names should be permitted throughout a suite of products as long as it is clearly distinguishable that one is free of nicotine and another not. If this proposal is adopted a transition period should be implemented while marketers 	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, CAP and BCAP consider that the law is clear on this issue and, with the change in the Code, marketers will need 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

		<p>implement specific non-nicotine brand names.</p> <ul style="list-style-type: none"> • Vaping devices that are sold without e-liquid should not be prohibited just on the assumption that they will be used with nicotine products. • All nicotine-free products to be advertised as long as it was clearly stated that the product in question did not actually contain nicotine. 	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.
19.3	BAT	Agree with the criteria. Would appreciate clarity on the meaning of "direct response mechanic".	A direct response mechanic is a mechanism by which an ad can be responded to directly. For example a URL or link directly to a page where products can be purchased.
19.4	JTI	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?	The ASA will make individual judgements on a case-by-case basis, as to whether the effect of a particular claim has the effect of directly or indirectly promoting a nicotine product.

20. Are there any criteria you consider should be added to the list?			
	Respondent/s	Comments	CAP and BCAP's evaluation:
20.1	Welsh Gov	We assume that should any regular means of indirectly promoting unlicensed nicotine-containing products be identified, then these could be added to the list in the future.	CAP and BCAP agree.
20.2	CRUK, JTI, UKCTAS	Brand imagery should be included.	CAP and BCAP consider that the guidance already achieves this.
20.3	JNJ	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.	CAP and BCAP do not consider that these would be helpful principles (i.e. with broad application) in assessing indirect effect.

21. 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?			
	Respondent/s	Comments	CAP's evaluation:
21.1	AA, ACS, ASH, ASH Wales, BWTCA, CRUK,	The respondents on the left supported the proposal. Some respondents requested clarity about how this would apply to manufacturers who did not promote products, and online retailers.	CAP agrees

	DCC, ECITA, Fontem, Fresh, FTV, IBVTA, ISBA, JNJ, JTI, LF, NCC, NFRN, PML, POV, SFCDTA, SFN, SFNA, UKCTAS, UKHF, VC, WTA		
21.2	ASH Scotland, BC, PSHH, BMA, HF, RCR, Welsh Gov.	The respondents listed on the left disagreed with the proposal. Many argued that advertisements for e-cigarette retailers would likely have the indirect effect of promoting unlicensed nicotine-containing e-cigarettes.	<p>CAP understands 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.</p> <p>CAP therefore considers that there is scope for ads for e-cigarette retailers (or other businesses involved in the industry) 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 to be lawful. However, questions remain over the correct application of the law.</p>
21.3	NMA	<p>Consider clarity is needed as to how such a position is compatible with the prohibition on product advertising, particularly in the case of retailers who are mostly selling products which cannot be advertised.</p> <p>Likewise, how are large retailers mostly selling non-e-cig products affected?</p>	<p>See 21.2</p> <p>The advertising prohibitions would apply to ads for prohibited products and all retailers would have to comply. Advertising of large retailers or other products is not necessarily prohibited.</p>
21.4	Boots	<p>If the whole or majority of the advertiser's business is in relation to electronic cigarettes, or the retailer in question's name is synonymous with electronic cigarettes then such advertising would by association have the effect of promoting electronic cigarettes.</p> <p>An advertiser who produces or retails many other products or services and where electronic cigarettes are a small part of the advertiser's business must be permitted to advertise generally so long as there is no reference or association with electronic cigarettes.</p>	See 21.2