

ASA system submission to the Department of Health and Social Care consultation on Tobacco and Related Products Regulations 2016

1. Background and Introduction

- 1.1. This submission is provided by the Advertising Standards Authority (ASA), the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the ‘ASA system.’
- 1.2. The ASA is the UK’s independent advertising regulator. We have been administering the non-broadcast Advertising Code (written and maintained by CAP) for 58 years and the broadcast Advertising Code (written and maintained by BCAP) for 16, with our remit further extended in 2011 to include companies’ advertising claims on their own websites and in social media spaces under their control.
- 1.3. We are responsible for ensuring that advertising is legal, decent, honest and truthful and our work includes undertaking proactive projects and acting on complaints to tackle misleading, harmful or offensive advertisements. We are committed to evidence-based regulation and we continually review new evidence to ensure the rules remain fit-for-purpose.
- 1.4. In addition to investigating ads, we also provide a wealth of training and advice services (most of which are free) for advertisers, agencies and media to help them understand their responsibilities under the Codes and to ensure that fewer problem ads appear in the first place. CAP and BCAP provided 722,523 pieces of advice and training in 2020.
- 1.5. The ASA system is providing this written submission in response to the Department of Health and Social Care consultation on Tobacco and Related Products Regulations 2016.

2. The Advertising Codes and the Tobacco and Related Products Regulations 2016

- 2.1. The ASA is the UK’s regulator for advertising across media. This includes TV, radio, online, social media, cinema, newspapers and outdoor spaces. Our Codes contain rules which require ads not to mislead, harm, offend or be otherwise irresponsible.
- 2.2. The Codes also contain specific sections and rules which address certain sectors and types of advertising which, over time, required additional regulatory protections. The Tobacco and Related Products Regulations (TRPR), which implemented Directive 2014/40/EU (TPD), became law in the UK on 20 May 2016, and are reflected in Section 22 of the CAP Code.
- 2.3. Prohibitions on broadcast advertising with the aim or direct or indirect effect of promoting unlicensed, nicotine-containing e-cigarettes and e-liquids under the TPD were implemented into Section 10 of the BCAP Code under direction from the Government based on powers conferred by the Communications Act 2003. Broadcast advertising for non-nicotine containing e-cigarettes products or e-cigarettes which are licensed as medicines or medical devices are subject to rules under Section 33 of the BCAP Code.
- 2.4. Under the TRPR, nicotine-containing products and their components (which will be referred to as ‘e-cigarettes’ for the sake of brevity) are prohibited from being advertised in certain media, unless they are licensed as medicines. Except for media targeted exclusively to the trade, marketing communications promoting e-cigarettes which are not licensed as medicines are not permitted in the following media:
 - Newspapers, magazines and periodicals

- Online media and some other forms of electronic media
- 2.5. The law applies comprehensive restrictions online. However the provision of factual information by retailers on their own websites and social media accounts is not prohibited by the law because the consumer has specifically had to seek out that information by visiting the website or account. Information provided in this context must only be factual and not promotional in nature.
 - 2.6. The law does not provide clarity on what constitutes factual versus promotional content and the ASA makes careful assessments of individual complaints based on the content and context of the material in question. CAP has published extensive [Advertising Guidance](#) which sets out how the prohibitions should work in practice.

3. The advertising rules and e-cigarettes

- 3.1. The ASA system takes extremely seriously its regulation of ads for products which present the potential for harm. The Advertising Codes contain rules on e-cigarettes that sit on top of the Regulations and other Code provisions that require ads not to mislead, harm or cause serious or widespread offence.
- 3.2. The ASA's rules state that advertising for e-cigarettes:
 - must be socially responsible
 - must not target or feature children, or include content which is likely to appeal particularly to children
 - must not confuse e-cigarettes with tobacco products
 - must not mislead about product ingredients or where they may be used
 - must not make medicinal claims and must take care with health claims
- 3.3. As with all age-restricted products, there are strict rules around the advertising of e-cigarettes, to protect children and young persons, both in terms of the content of ads and their placement. It's therefore important for advertisers to avoid anything likely to reflect or be associated with youth culture, any characters likely to be of particular appeal to under 18s, and anyone behaving in an adolescent or juvenile manner. Adverts mustn't feature anyone who is, or appears to be, under the age of 25 and must ensure ads are targeted responsibly.
- 3.4. Given that the advertising of tobacco products to the public is prohibited, e-cigarette ads mustn't promote any design, imagery or logo that might be associated with a tobacco brand.
- 3.5. Similarly, ads for e-cigarettes mustn't promote the use of a tobacco product or show the use of a tobacco product in a positive light and it must be clear that the product being advertised is an e-cigarette.
- 3.6. When advertising a product that contains nicotine, the ad must make this clear. This is likely to be required where a range of products is being advertised, if some of those products contain nicotine.
- 3.7. While the use of e-cigarettes in public spaces is not prohibited by law, policy on their use varies and as such, claims that e-cigarettes may be used anywhere are unlikely to be considered acceptable.

4. E-cigarette advertising and health claims / smoking cessation claims

- 4.1. Ads for e-cigarettes are prohibited from featuring medicinal claims, unless the product in question is authorised for those purposes by the Medicines and Healthcare Products Regulatory Agency (MHRA).
- 4.2. As stop-smoking claims are medicinal and require a relevant marketing authorisation from the MHRA, ads for e-cigarettes cannot claim that the product can act as a stop-smoking device unless it has been specifically authorised for that purpose by the MHRA. Marketers also need to take care to avoid claims which might imply that the product is suitable as a stop-smoking device, for example by making references to 'Stoptober'.
- 4.3. On 8 November, CAP and BCAP announced the removal of the prohibition on health claims made for e-cigarettes in advertising, which meant that advertisers may make health claims if they hold robust, product specific, supporting evidence to substantiate the claims. The emerging consensus among public health experts appears to be that e-cigarettes are less harmful than smoked tobacco, but are not completely 'safe' and the evidence doesn't support any positive health benefits from vaping other than as an alternative to tobacco. Therefore, claims of absolute safety and positive health benefits of e-cigarettes are unlikely to be acceptable.
- 4.4. E-cigarettes may be presented as an alternative to tobacco, but must not undermine the message that quitting tobacco use is the best option for health and shouldn't in any way encourage non-smokers or non-nicotine-users to use e-cigarettes.
- 4.5. Claims that an e-cigarette is less harmful than smoking tobacco are likely to be acceptable, provided that there is robust evidence that relates to the product, there's no implication that it can help cut down or quit tobacco use, and it's in a medium not prohibited by the Regulations.

5. Heated Tobacco

- 5.1. The ASA has in recent years received a number of complaints concerning the advertising of heated tobacco products. At present, heated tobacco products are regulated under the Regulations and classed as a novel tobacco product. The Regulations don't, however, contain specific restrictions on the advertising of heated tobacco products. The ASA understands the government's position on heated tobacco advertising is subject to restrictions under the Tobacco Advertising and Promotion Act 2002.
- 5.2. In the absence of government guidance (and therefore clarity on the legal requirements for heated tobacco advertising) the ASA currently refers complaints concerning heated tobacco advertising to DHSC, as the relevant statutory enforcement body in such cases, on the basis that the issues of those complaints relate to a legal provision for a regulated product.

6. Complaints and Investigations data related to e-cigarettes

- 6.1. All complaints received by the ASA are assessed against the Advertising Codes to determine whether we will take up the complaint. It's worth noting that around 80% of complaints don't raise any problems under our rules, allowing us to resolve the issue without the need to take action against an advertiser.
- 6.2. Some companies and organisations, following receipt of a complaint, agree to amend or withdraw their ad without the need for a formal investigation. We refer to these as Informal Resolutions.
- 6.3. If it's not that simple, or we think there's potentially a serious problem under the rules, a formal investigation may be needed. We'll seek evidence from the advertisers (and input from expert public health bodies where necessary), evaluate the case, and draw up a recommendation. The ASA Council will consider the recommendation but is free to come to its own conclusion on whether to Uphold or Not Uphold the case.

- 6.4.** Between 20 May 2016 (when the rule prohibiting ads which have the aim, direct, or indirect effect of promoting e-cigarettes was introduced into the BCAP Code) and 31 January 2021 we dealt with 55 complaints about 25 broadcast ads ('cases') related to e-cigarette advertising. Of those 25 cases, 10 were categorised as misleading, 11 were categorised as harmful or irresponsible, and 4 were categorised as other.
- 6.5.** Those 25 cases resulted in 23 being withdrawn or closed without additional investigation; with 2 investigations were informally resolved based on receipt of the advertisers' assurance that they would withdraw or amend the ad.
- 6.6.** Between 1 February 2017 (when the rule prohibiting the advertising of unlicensed, nicotine-containing electronic cigarettes in some non-broadcast media was introduced in the CAP Code) and 31 January 2021 we dealt with 170 complaints about 137 e-cigarette ads ('cases') in non-broadcast media. Of those 137 cases, 35 were categorised as misleading, 79 were categorised as harmful or irresponsible, 13 were categorised as offensive, and 10 were categorised as other.
- 6.7.** Those 137 cases resulted in 105 being withdrawn or closed without additional investigation; 8 Advice Notices issued without further action taken; 4 investigations informally resolved based on receipt of the advertisers' assurance to withdraw or amend the ad; 13 formal rulings of which 10 were Upheld; and 7 were referred to the CAP Compliance team for follow-up enforcement action.
- 6.8.** There are particular trends across the complaints received by the ASA (although not all of these will have merited further action under our rules). It is worth noting that the vast majority of complaints to the ASA are from the general public.
- 6.9.** Trends in e-cigarette complaints in broadcast media included:
- Ads using up-beat music and colourful graphics, leading to concerns that e-cigarettes were presented as 'fun', 'youthful', and generally appealing.
 - Ads being scheduled during the day when children might be watching. An investigation into this issue was withdrawn, following analysis of the BARB TV audience data.
 - Concerns around references to products being 'licensed by the Department of Health', implying official endorsement or that it is a medicine.
 - MHRA approval of products and conflating smoking cessation aid with being an alternative to traditional cigarettes.
 - Concerns about misleading claims that e-cigs are 'safer' or an effective way to stop smoking.
 - Casting of 'glamorous' or 'good-looking' people in ads which may glamorise the use of the product.
 - Concerns about the indirect promotion of smoking when products still contain nicotine.
- 6.10.** Trends in e-cigarette complaints in non-broadcast media included:
- Concerns about the use of influencers to advertise e-cigarettes (including placement on platforms popular with young people such as TikTok).
 - Ads which complainants' felt featured medicinal claims about being 'healthier'.

- Concerns about misleading implied claims that e-cigarettes can help reduce cravings/need for traditional cigarettes when they, themselves, contain nicotine.
- Describing the taste of products in an appealing way. Also the use of bright, vivid colours in ads, leading to concerns about promotional presentation.
- The general aspirational tone of ads (including attractive graphics, emphasis on new technology), leading to concerns about promotional claims.
- Placement of ads on buses used to transport school children, at bus stops used by school children, and in cinemas before under-18-rated films.
- Concerns about associating products with youthful activities (going to gigs and crowd surfing, for example).
- Promotional offers for products which may indirectly promote nicotine-containing e-cigarettes. Incorporation of other substances in e-liquids such as THC or CBD.
- Complaints about vaping shops or retail placement. These are generally out of remit.
- Concerns about use of cartoon animations which might appeal to children.
- Concerns about ads featuring young people appearing to be under 25.
- Ads featuring a call-to-action and therefore encouraging non-smokers to take up vaping. Also concerns about references to 'starter packs' and not making clear the products are for existing smokers.
- A general conflation of e-cigarettes, heated tobacco products, nicotine pouches and nicotine inhalers in the mind of the public.

6.11. Examples of some of our rulings on e-cigarette advertising include:

Instagram rulings: In 2019, we ruled against Instagram ads by four different e-cigarette brands ([British American Tobacco](#), [Ama Vape](#), [Global Vaping Group](#), [Attitude Vapes](#)). In all four rulings the ASA found that the ads breached the Codes because they contained promotional content and featured people under the age of 25.

Promotional claims: In 2020, we ruled against [Nicoventures Retail](#) for claims on the Vype e-cigarette website and a YouTube ad for Vype e-cigarettes. We found that the website breached the Codes for containing product descriptions and saving claims which were deemed to be promotional. The YouTube ad was banned for featuring a collaboration with well-known fashion designer, Henry, which was deemed to be promotional.

Media prohibitions: In 2017, we ruled against a magazine ad [Vape Station](#). We ruled that the ad promoted e-cigarettes in a magazine, a medium subject to advertising restrictions for e-cigarettes. We told Vape Station to ensure that ads for their stores in media covered by the Regulations didn't show images of, make claims about or reference the brand name of unlicensed e-cigarettes.

Encouraging non-smokers to vape: We investigated three outdoor posters for [Blu electronic cigarettes \(an Imperial Tobacco product\)](#) on the grounds that the ads encouraged non-smokers and non-nicotine users to use e-cigarettes. All three ads included text stating 'new MyBlu. Handy and easy vaping'. But also text stating 'for existing adult smokers & vapers only' and 'this product contains nicotine 18+ only. Not a smoking cessation product'. We concluded that the ads did not encourage non-smokers and non-nicotine users to use e-cigarettes.

7. Compliance data related to e-cigarettes

- 7.1. The ASA System Compliance Team ensures the outcome of 'Upheld' ASA rulings are complied with to by all advertisers in cases where the advertisers fail to provide a timely assurance of compliance with ASA directions. The team also proactively monitors ads across different sectors and media to make sure standards are being maintained. When ads are found that clearly break the rules they seek assurances from advertisers - and the clearance centres in the case of broadcast advertising - that those ads are withdrawn or amended. The Compliance Team provides advice and guidance to help advertisers stick to the rules.
- 7.2. Since 20 May 2016, the team have dealt with 180-200 compliance cases related to e-cigarettes. For context, in 2020 the team resolved 96,104 compliance cases.
- 7.3. There is a trend in compliance towards cases related to promotional content and specifically pricing. In 2019, the Compliance Team issued an Enforcement Notice to trade associations and retailers of e-cigarettes and related products, concerning promotional pricing of unlicensed nicotine-containing e-cigarettes on marketers' own websites.
- 7.4. Most recently the team considered eight compliance referral cases following the [British American Tobacco ruling](#) in relation to advertising on Instagram and such ads being prohibited from being made public (and the stipulation that they must still be 'factual in nature').
- 7.5. By the nature of what they do, Compliance will see and take action on the clear-cut cases where the rules have been broken. There are therefore grey areas where other parts of the ASA System will intervene.
- 7.6. One of the most common grey areas is the imagery used in social media posts, such as the British American Tobacco ruling. The ruling indicated that "any image that is not the product" would be considered promotional, but not that advertisers can be unilaterally prevented from using images of their own product without firm precedent.
- 7.7. There is a general grey area around smoking cessation claims which make it difficult for Compliance to take action and is likely to be passed onto our Investigations Team.
- 7.8. Compliance have recently been made aware of cases around 'flavour beads' which are inserted into cigarettes. Compliance are having discussions with Trading Standards about this issue.

8. Copy Advice data related to e-cigarettes

- 8.1. The ASA System Copy Advice Team, is an essential service for advertisers, agencies, media owners and media service providers who want to check how their prospective non-broadcast ads measure up against the CAP Code. Clearcast and Radiocentre operate a clearance system for television and radio ads respectively.
- 8.2. Since 1 February 2017, Copy Advice have received around 267 queries related to e-cigarettes. For context, in 2019 the team answered 6,973 queries from businesses.
- 8.3. Given the nature of Copy Advice's work they have provided advice on a wide spectrum of issues including many beyond the specific rules for e-cigarettes such as misleadingness or offence.
- 8.4. However, there are particular trends in enquiries for e-cigarettes advertising. The most common issues Copy Advice have received enquiries about are smoking cessation claims, media prohibitions, the difference between factual and promotional claims, and appeal to

young people or non-smokers. Enquiries have come from a variety of different sources including manufacturers, vape shops, media owners and other regulators.

- 8.5. The main challenges Copy Advice face is around the practical application of the promotional vs factual distinction where there are still grey areas. There is also sometimes a challenge around whether an ad claim amounts to a medicinal smoking cessation claim or merely presents an e-cigarette as an alternative to tobacco.
- 8.6. Other challenges have included the determination of whether or not an ad indirectly promotes unlicensed non-nicotine containing e-cigarettes, particularly in relation to the advertising of vape shops or retailers. Additionally, there seems to be the potential for some inconsistency whereby cigarette manufacturers or brands are prohibited from advertising in certain media as it could be considered to indirectly promote nicotine-containing e-cigarettes, whereby vape shops or retailers may do so provided that specific brands of nicotine-containing e-cigarettes are not referenced in those ads.
- 8.7. Copy Advice have recently seen a number of enquiries about advertising for nicotine pouches, which involve issues such as health claims or medicinal claims being made for the products.

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