

CAP and BCAP Consultation on the Marketing of E-Cigarettes

24th April 2014

About Fresh – Smoke Free North East

This response to the CAP and BCAP consultation document is submitted on behalf of Fresh – Smoke Free North East. Fresh was set up in May 2005 as the UK's first dedicated regional tobacco control programme. The North East historically had the highest smoking rates in England with consequent impact on health inequalities. The FRESH programme has been working in partnership with a number of regional and national agencies and also with all 12 localities to tackle tobacco issues and has implemented a comprehensive package of measures covering eight key strands of activity. These strands are designed to support three key objectives of motivating and supporting smokers to quit, protecting from secondhand and other tobacco related harm and to prevent the uptake of smoking. The North East through its concerted efforts to reduce smoking has achieved the biggest decline in adult smoking rates, with a fall from 29% in 2005 to 21% in 2011. The programme has also received the Gold Medal at the inaugural Public Health Awards of the Chief Medical Officer in 2009.

Relevant Facts

The following are relevant facts about “electronic cigarettes” that should guide the final rules on how they are advertised.

1. Electronic cigarettes are not cigarettes in any meaningful sense; they are nicotine delivery systems that do not contain tobacco, and where the nicotine is delivered orally to the user in the form of vapour rather than in the form of smoke. They are therefore much closer in reality to other non-tobacco licensed nicotine products, such as sprays, patches and gum, than they are to cigarettes.
2. Nicotine is an addictive drug that can be toxic in relatively low doses. However, by far the greatest harm caused by cigarettes results from other toxic ingredients of cigarette smoke.¹
3. Electronic cigarettes are therefore significantly less harmful than smoked tobacco, and are currently primarily used by smokers as an aid to cutting down on cigarette use or quitting smoking altogether.^{2 3}
4. Nonetheless, advertising and promotion of products containing an addictive drug should always be subject to close supervision by regulatory authorities, since addiction undermines the principle of informed consent by adult consumers.

Latest estimates by Action on Smoking and Health (ASH) indicated that in 2013 there were 1.3 million current users of electronic cigarettes in the UK, and the number has continued to grow since then. This number is almost entirely made of current and ex-smokers; with perhaps as many as 400,000 people having fully replaced smoking with e-cigarette use.³ In the North East, latest YouGov survey data suggests that around 13% of adults have tried e-cigarettes. There is little evidence to suggest that anything more than a negligible number of never smokers regularly use the product. Research carried out for ASH also suggests that

¹ Royal College of Physicians. Harm reduction in nicotine addiction: helping people who can't quit. A report by the Tobacco Advisory Group of the Royal College of Physicians. London: RCP, 2007.

² West, R. Brown, J. Beard, E. Trends in electronic cigarette use in England. Smoking Toolkit Study. March 2014. <http://www.smokinginengland.info/latest-statistics/> accessed 2nd April 2014.

³ Use of e-cigarettes in Great Britain among adults and young people (2013). ASH. London. May 2013. http://www.ash.org.uk/files/documents/ASH_891.pdf accessed 2nd April 2014.

there is no current compelling evidence to suggest that young people are using electronic cigarettes as a “gateway” to smoking.³ However, this could change particularly if advertising and promotion of electronic cigarettes glamourises the use of these products and promotes their use to young people.

Under the EU Tobacco Products Directive cross-border advertising of electronic cigarettes will be unlawful after the Directive comes into effect (likely in about mid-2016), unless they are authorised as medicinal products. This means that no TV, radio, electronic or print advertising will be allowed. The advertising permitted will essentially be limited to advertising which only has domestic reach such as billboard, bus and point of sale. The UK Medicines and Healthcare Products Regulatory Agency (MHRA) has said that it: “continues to encourage companies to voluntarily submit medicines licence applications for electronic cigarettes and other nicotine containing products as medicines”.⁴

This is an evolving market and it is highly likely that novel nicotine containing products, which do not fit within the category of ‘electronic cigarettes’ will enter the market. We therefore recommend that these rules cover all non-tobacco nicotine containing products, not just electronic cigarettes, so that they remain fit for purpose as the market evolves. This generic point applies to all the rules.

As a general point the use of the descriptor ‘e-cigarette’ or ‘electronic cigarette’ has exacerbated general concern about these products and misunderstandings about what they are and their risk profile. Increasingly users themselves are referring to these products as ‘vapourisers’, their use as ‘vaping’ and users as ‘vapers’. We think it would be helpful if CAP required this terminology and prohibited the use in advertising of the words ‘e-cigarette’ or ‘electronic cigarette’ and descriptions of their use as ‘smoking’ and users as ‘smokers’. If this is not considered possible at the very least it should be required that the full term ‘electronic cigarette’ be used and not the shortened form ‘e-cigarette’ as this provides a clearer description of what they are.

General Principles

We therefore recommend that the revised set of rules adopted by CAP and BCAP following this consultation should be consistent with the following principles:

- Marketing communications should be responsible and not undermine current health messages on the benefits of quitting.
- Marketing communications should not promote the use of tobacco and only show tobacco in a negative light if at all.
- Electronic cigarettes must be shown as an alternative to tobacco in marketing communications.
- Electronic cigarettes and other nicotine containing products should not be advertised in ways or through channels that could reasonably be expected to make them appealing to non-tobacco users.
- Marketing communications must state whether the product contains nicotine, and if it does state that nicotine is highly addictive.
- Marketing communications should only be aimed at those who are current smokers and/or those who are using nicotine containing products.
- Marketing communications should not be likely to appeal to those under 18, should not feature people who may seem under the age of 25 and should state that the product is unsuitable for under 18s.
- Marketing communications should not directly promote websites or provide a call to action to access another marketing channel that contravenes the rules.

⁴ MHRA. [Nicotine Containing Products](#). Web page accessed 2nd April 2014.

- The media and scheduling of marketing communications and advertisements should be restricted to limit exposure to under-18s.
- The rules identified below as amended, are also appropriate for both electronic cigarettes without nicotine, those licensed as medicines, alongside existing rules for promoting medicines, and non-licensed electronic cigarettes with nicotine.
- We believe that further rules are needed to prohibit electronic cigarettes marketing on the basis of flavour(s).
- We also would like proposals for specific rules and guidance for electronic cigarettes marketing on social media.
- Regulation of unlicensed electronic cigarettes and other nicotine containing products should be consistent with that for licenced products. For example, celebrity endorsement and free samples are not allowed for licenced nicotine containing products and should not be allowed for electronic cigarettes either.

Answers to Consultation Questions

Rule 1: Marketing communications/advertisements for e-cigarettes must be socially responsible.

Question 1: Do you agree with the inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement?

Suggested revision to rule 1 to read (revisions in bold): Marketing communications/advertisements for **electronic cigarettes and other nicotine containing products** must be socially responsible.

Question 2: What specific advertising approaches if any, that are not covered by the following rules do you consider might be identified as problematic within the wording of the rule?

We agree with the principle that electronic cigarette advertising and promotion should be socially responsible. This rule should be more tightly worded, so that it establishes some key tests of social responsibility. These would include:

1. Explicit reference to the fact that electronic cigarettes and other nicotine containing products are an alternative to tobacco, and that they are therefore not suitable for use by people who do not currently consume tobacco products. They should also not promote dual use of both e-cigarettes and tobacco cigarettes which may undermine quit attempts.
2. Wording which suggests that electronic cigarettes and other nicotine containing products have positive qualities, as a consequence of the addictive nature of the product, should be prohibited. An example would be the use of the word “satisfying”, which was frequently used in relation to cigarettes in the era of widespread tobacco advertising. Any “satisfaction” for consumers is likely to be largely a consequence of relief from nicotine withdrawal symptoms.
3. Advertising should contain reference to the need to store and use electronic cigarettes, refill containers, chargers and other nicotine containing products safely and away from children.

Rule 2: Marketing communications / 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 from being shown.

Question 3: Do you agree with inclusion and wording of this rule? If not please explain why and provide any suggestions you may have for improvement.

Suggested revised wording to rule 2 in bold

Rule 2: Marketing communications / advertisements must contain nothing **which promotes any design, colour, imagery, logo style that might be associated in the audiences' mind with a tobacco product. They must also contain nothing** which promotes the use of a tobacco product or shows the use of a tobacco product in a positive light. Cigarette-like products **must not be shown in ways that could reasonably be expected to promote smoking or tobacco products.**"

Question 4: Do you have any comments or evidence which can help to inform CAP and BCAP's role of preventing the indirect promotion of tobacco products while still permitting electronic cigarettes to be advertised?

We agree with the proposed rule as a starting point but believe it needs to be strengthened. In 2013, 91% of smokers and 71% of non-smokers had heard of electronic cigarettes so advertising is not required to raise awareness of the product, but rather to promote individual brands to smokers.³

We recommend the inclusion of a general prohibition on any design, colour, imagery, logos or styles that could create an association with or confusion with any existing tobacco product, or any promotion of smoking-like behaviour. This is in line with the CAP code for tobacco products as set out in 10.3 and 10.4. The need for such a prohibition is clear, since some electronic cigarette brands are or will be produced and promoted by tobacco manufacturers, and it is important that advertising for such brands cannot be used as a covert means of promoting the brand identity of tobacco products.

To provide further clarity we also believe it would be better to ban any reference to tobacco use (including "smoking") except that which is unambiguously negative. We believe that this would reduce the risk of unintentionally promoting tobacco. The application of this rule should also prohibit wording that suggests that consumption of e-cigarettes has positive qualities that may be mistakenly perceived to exist by consumers, as a consequence of the addictive nature of the product. An example would be the use of the word "satisfying", which was frequently used in relation to cigarettes in the era of widespread tobacco advertising. Any "satisfaction" for consumers is likely to be largely a consequence of relief from nicotine withdrawal symptoms.

Rule 3: Marketing communications / advertisements must not contain health or medicinal claims [unless the product is licensed for those purposes by the MHRA]. E-cigarettes may however be presented as an alternative to tobacco.

Question 5: Do you agree with the proposal to prohibit health claims for e-cigarettes? If not, please explain why and provide any suggestions you may have for improvement.

We would recommend replacing a *permission* to present electronic cigarettes as an alternative to tobacco with a *requirement* to do so. This is because, in order to be consistent with the general principles set out above, all advertising and promotion of electronic cigarettes and other nicotine containing products should be directed at existing tobacco users and not at potential new users of nicotine. Suggested revised wording for rule 3 below:

“Marketing communications / advertisements must not contain health or medicinal claims [unless the product is licensed for those purposes by the MHRA]. **Electronic cigarettes and other nicotine containing products should** be presented as an alternative to tobacco.”

Question 6: Do you agree with the proposed definition of health claims for the purposes of this rule? If not, please explain why and provide any suggestions you may have for improvement.

We agree with the proposed wording (including square brackets) of this rule

Question 7: Do you agree with the proposal to prohibit medicinal claims? If not, please explain why and provide any suggestions you may have for improvement.

We agree with the prohibition of medicinal claims, as defined in the rule above. Only those products which have been licensed as medicinal aids should be able to make any claim along such lines.

We believe that e-cigarettes should be promoted explicitly as an alternative to tobacco products. We note the leading reason smokers report having used e-cigarettes is to “help me reduce the amount of tobacco I smoke, but not stop completely” (31%) followed by help in a quit attempt (30%); and “to help me keep off tobacco” (29%).¹ It is therefore consistent with smokers’ perceptions that all e-cigarettes are promoted as an alternative to tobacco. This approach would help ensure that marketing communications and advertisements are not appealing to non-smokers and non-nicotine users.

Rule 4: Marketing communications / advertisements must make clear that the product is an e-cigarette.

Question 8: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you have for improvement.

Widespread concerns about nicotine containing products have been stimulated at least in part by the use of the term “e-cigarette” and the misperception that these products are “smoked”. Therefore we would recommend that the term “vapouriser” be required in preference to ‘e-cigarette’. If this is not accepted then the descriptor “electronic cigarette” is preferable to “e-cigarette”, as we consider this on balance to be more informative. Advertising of such products should not describe them as “smoked”, or use any other descriptor that is misleading and could create confusion with tobacco cigarettes.

Our suggestion for revised wording for rule 4 is:

“Marketing communications / advertisements for **electronic cigarettes should describe them as vapourisers and not use the word e-cigarette, electronic cigarette, or any**

other descriptor that might reasonably be expected to create confusion with cigarettes.”

Rule 5: Marketing communications / advertisements must state clearly if the product contains nicotine [or if it does not]. They may include factual information about other product ingredients.

Question 9: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you have for improvement.

Given that nicotine is very addictive, it is important that e-cigarettes state whether they contain nicotine. In addition, we believe that all advertisements and marketing communications must state that nicotine is highly addictive. Such an approach would be in line with the EU Tobacco Products Directive which will require all e-cigarettes to show the nicotine content and a warning of the addictiveness of nicotine on the product label.

Therefore we recommend the following change to the wording of Rule 5:

“Marketing communications / advertisements must state clearly if the product contains nicotine ***or if it does not. They should clearly state that nicotine is highly addictive if the product contains nicotine.*** They may include factual information about other product ingredients.”

Rule 6: Marketing communications / advertisements must not encourage non-smokers or non-nicotine users to use e-cigarettes.

Question 10: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you have for improvement.

We do not agree that it is sufficient to only set a principle that adverts must not *explicitly* encourage those who do not currently use nicotine to start. *Implicit* promotion to intended target groups of consumers is of course an important and well understood part of advertising and marketing, and we therefore wish the rules, taken together, to be so worded as to make it as difficult as possible for any electronic cigarette manufacturer to target those who do not currently use tobacco. Therefore, we would wish to revise as follows:

Rule 6: “Marketing communications / advertisements ***must be aimed at those who currently smoke tobacco or use nicotine containing products.*** They must not ***explicitly or implicitly*** encourage non-smokers or non-nicotine-users to use e-cigarettes”.

Question 11: Do you consider that this rule is proportionate? If you consider that advertising of e-cigarettes expressly to non-users of nicotine is acceptable or if you would prefer a rule which required all marketing to be explicitly addressed only to existing nicotine users please provide your comments and any evidence.

We agree with the inclusion of this rule, with the following proposed amendment. In Question 10. We welcome the statement that the Committees “are concerned that advertising should not be a medium by which people are encouraged to begin or re-establish the use of nicotine”. However, our support for rule 6 depends on acceptance of our modified rule 3

above that, all electronic cigarettes should be *required* to be advertised and promoted as an alternative to tobacco.

Therefore we recommend the following change to the wording of Rule 6:

“Marketing communications / advertisements ***must be aimed at those who currently smoke tobacco or use nicotine containing products.*** They must not ***explicitly or implicitly*** encourage non-smokers or non-nicotine-users to use e-cigarettes

Rule 7: Marketing communications / advertisements must not link e-cigarettes with gambling, alcohol or illicit drugs.

Question 12: Do you agree with the proposal to prohibit linking e-cigarettes with illicit drugs? If not please explain why and provide any suggestions you may have for improvement.

Question 13: Do you consider that alcohol should be included in this rule? Please explain why, and provide any evidence you consider relevant.

Question 14: Do you consider that gambling should be included in this rule? Please explain why, and provide any evidence you consider relevant.

We agree with the inclusion of this rule revised (in bold) to include other nicotine containing products.

“Rule 7: Marketing communications / advertisements must not link ***electronic cigarettes or other nicotine containing products*** with gambling, alcohol or illicit drugs.”

Rule 8: Marketing communications / advertisements must not link e-cigarettes with activities or locations in which using them would be unsafe or unwise; such as driving.

Question 15: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you have for improvement.

Question 16: Are there any other situations, other than driving, in which you consider that e-cigarette use is so demonstrably harmful that their depiction in advertising should be prohibited?

We support the principle of this rule but believe that further guidance could be given on the issue of the use of e-cigarettes in enclosed public spaces and workplaces.

We agree with the inclusion of this rule revised as follows.

“Rule 8: Marketing communications / advertisements must not link ***electronic cigarettes or other nicotine containing products*** with activities or locations in which using them would be unsafe or unwise; such as driving.”

Rule 9: Marketing communications / advertisements must not be likely to appeal particularly to young 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.

Question 17: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you have for improvement.

We support the first sentence of this rule. However, we believe a balance needs to be struck between prohibiting advertising that might promote use of electronic cigarettes to young people and non-smokers and ensuring that advertising which effectively encourages the uptake of such products by smokers is allowed.

To give a concrete example an advertisement which recently ran on British TV was very clearly directed at smokers with an important message 'Friends don't let friends smoke'. This advertisement conformed to the general principles we set out, however strict application of rule 9 as it stands would have prevented it being shown as it included two friends behaving in a juvenile manner. This was part of a narrative about them growing up, getting married and one persuading the other to swap cigarettes for electronic cigarettes.

In principle, we support the inclusion of a rule to prevent marketing communications and advertisements from appealing to people under 18 and agree that they should not reflect or be associated with youth culture or portray characters that would appeal to people under 18. We are also pleased that this rule will prohibit the use of adolescent and juvenile behavior from e-cigarette marketing.

Rule 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.

Question 18: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you have for improvement.

It is important that e-cigarette marketing communications and advertisements do not appeal to young people. We believe that this rule is needed to help prevent e-cigarette advertisements being attractive to young people. Given the potential risk for people under the age of 18 to identify with those who appear to be 18 and 25 years old, it is reasonable to prohibit people who are or seem to be under the age of 25 being shown in a significant role in e-cigarette marketing communications or advertisements. The rule also offers less room for error and abuse. The rule avoids ambiguity as people shown in marketing communications or advertisements could not be mistaken for people under the age of 18.

Rule 11: Marketing communications / advertisements must state that products are not suitable for under-18s

Question 19: Do you consider that a rule is necessary which requires that ads that products are not suitable for under-18s? Please provide any evidence which you consider may assist CAP and BCAP's consideration of this rule.

Placing an "18+ message" on products may not always produce the desired effect on children and young people. Indeed there is good evidence that tobacco industry youth prevention media campaigns that position smoking as an adult habit are not effective.⁵ We

⁵ American Legacy Foundation, Getting to the Truth: Assessing Youths' Reactions to the truthsm and 'Think. Don't Smoke' Tobacco Countermarketing Campaigns, First Look Report 9, June 2002. Sly, D & Heald, G, Florida Antitobacco Media Evaluation (FAME) Follow-up Report, February 2001. Teenage Research Unlimited, "Counter-

would prefer a revised set of rules, on the principles set out above, which require that electronic cigarettes are never advertised or promoted in a way that could appeal to young people and non-tobacco users.

Rule 12: 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.

Question 20: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you have for improvement.

We agree with the inclusion and wording of this rule. It could be made more explicit by adding 'or location' after 'context'.

Rule 13: [Amendment to existing BCAP rules to include e-cigarettes in the list of products and services in existing rule 32.2, to prevent e-cigarettes from being “advertised in or adjacent to programmes directed at or likely to appeal particularly to audiences below the age of 18”]

Question 21: Do you agree with e-cigarettes being included in this list of scheduling restrictions?

We agree with the inclusion of electronic cigarettes in this list.

Rule 14: Radio broadcasters must ensure advertisements for e-cigarettes are centrally cleared.

Question 22: Given BCAP's policy consideration, do you agree that all advertisements for e-cigarettes must be centrally cleared?

We agree that all broadcast electronic cigarette advertisements, both radio and TV, should require central clearance prior to publication/transmission. In addition advertisers should be recommended to submit non-broadcast advertisements, both print and electronic, to CAP for copy clearance before publication.

Additional Questions

Question 23: To what extent, if any, do you consider that new rules should apply to e-cigarettes that do not contain nicotine?

Question 24: Do you consider that any additional rules should be considered specifically in relation to the advertising of e-cigarettes that do not contain nicotine?

Electronic cigarettes not containing nicotine clearly have the potential to cause confusion if subject to a different set of advertising rules from nicotine-containing products. However, they may well perform a useful function for former tobacco users who have progressed to

seeking to give up nicotine use altogether. Therefore, they should be subject to the same rules as other electronic cigarettes, subject to Rule 5 above.

Question 25: To what extent if any do you consider that the above rules for e-cigarettes should apply to those which are licensed as medicines?

We would recommend to CAP and to the MHRA that the same rules should apply to electronic cigarettes that are licensed as medicines as to those that are not, except that licensed products should be able to include specific health claims in advertisements where they are well supported by scientific evidence. For example, licensed products should be able to advertise as products licensed as aids to cutting down and stopping smoking. This approach has the significant advantage of ensuring the simplest transition to the rules that will be required when the EU Tobacco Products Directive comes into effect.

Question 26: Do you agree with the proposed definition of e-cigarette? If not, please explain why.

We agree with the proposed definition of electronic cigarettes, as it is taken directly from the wording of the EU Tobacco Products Directive, with the addition of non-nicotine containing products.

Question 27: Are there any other rules which you believe CAP and BCAP should consider implementing in relation to the advertising of e-cigarettes?

Question 28: Are there any other comments you wish to make in relation to the advertising of e-cigarettes and BCAP's consideration of this issue?

Please see the general statement of facts and principles set out at the beginning of this consultation response.

There is no reference to use of social media in the rules as currently drafted and it needs to be made clear that these rules apply equally to social media.

We note that the evidence base for the impact of the advertising and marketing of e-cigarettes is currently limited. We therefore advise that CAP and BCAP provide sufficient flexibility to ensure that its rules can be updated quickly if further evidence shows that changes to its rules are needed to protect public health.

¹ ASH (2013) Use of e-cigarettes in Great Britain among adults and young people (2013)
http://www.ash.org.uk/files/documents/ASH_891.pdf