



Regulation of e-cigarette product placement and sponsorship on broadcast television and on- demand programme services

Amendments to the Ofcom Broadcasting Code and
Rules and Guidance

Statement

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About this document

This statement sets out amendments Ofcom is making to the Broadcasting Code (and the associated Guidance Notes) and the Rules and Guidance: Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services. It should be read alongside our previous statement entitled *Regulation of e-cigarette advertising and sponsorship on television and radio: Amendments to the Ofcom Broadcasting Code and the BCAP Code: the UK Code on Broadcast Advertising*.

The amendments set out in this statement reflect changes made to the Communications Act 2003 by the Government. Among other provisions, the Government has introduced prohibitions on the product placement of electronic cigarettes and refill containers on broadcast television and in on-demand programme services. The Government has also introduced prohibitions on the sponsorship of on-demand programme services and of programmes included in on-demand programme services for the purpose of promoting electronic cigarettes or refill containers.

The changes to the rules set out in this statement come into effect on 20 May 2016.

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Section 1

Statement

- 1.1 This statement sets out changes Ofcom is making to our Broadcasting Code¹ (“the Code”), Guidance Notes to the Broadcasting Code (“the Guidance Notes”)², and Rules and Guidance: Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services³ (“the Rules and Guidance”). These changes reflect amendments to the Communications Act 2003 (“the Act”) which were recently announced by the Government.
- 1.2 On 18 April 2016, the Government laid before Parliament the Tobacco and Related Products Regulations 2016 (“the Regulations”) which amend, among other things, section 319, Schedule 11A (product placement) and Part 4A (on-demand programme services) of the Act⁴. The purpose of these amendments is to transpose certain provisions of the EU Tobacco Products Directive 2014 (“TPD”)⁵. The Regulations are due to come into force on the same day we are publishing this statement.
- 1.3 This statement should be read alongside our previous statement *Regulation of e-cigarette advertising and sponsorship on television and radio: Amendments to the Ofcom Broadcasting Code and the BCAP Code: the UK Code on Broadcast Advertising*⁶, which set out changes to the Code and the BCAP Code: the UK Code of Broadcast Advertising. The changes set out in that earlier statement were the result of directions to Ofcom from the Secretary of State for Health, which transposed other provisions of the TPD.
- 1.4 The earlier statement concerned the regulation of advertising and sponsorship by e-cigarettes and refill containers on broadcast television and radio. The current statement relates to product placement of e-cigarettes and refill containers on broadcast television and in on-demand programme services (“ODPS”), and to sponsorship by e-cigarettes and refill containers in ODPS. The changes to the relevant codes detailed in both of these statements come into effect on 20 May 2016.

Legal background and regulatory arrangements

- 1.5 Under section 319(1) of the Act, Ofcom is required to set “such standards for the content of programmes to be included in television and radio services as appear to [it] best calculated to secure the standards objectives”.
- 1.6 The standards objectives are set out in section 319(2) of the Act and, of particular relevance to the subject matter of this statement, include a provision “that the product placement requirements referred to in section 321(3A) are met in relation to

¹ See: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>

² See: <http://stakeholders.ofcom.org.uk/broadcasting/guidance/programme-guidance/bguidance/>

³ See: http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/rules_and_guidance.pdf

⁴ See: <http://www.legislation.gov.uk/ukpga/2003/21>

⁵ See: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0040&from=EN>

⁶ See: <http://stakeholders.ofcom.org.uk/binaries/broadcast/e-cigarettes/e-cigarette.pdf>

programmes included in a television programme service (other than advertisements)".⁷

- 1.7 Section 321(1)(a) of the Act states that the standards set by Ofcom to secure the standards objectives "must include [...] general provision governing standards and practice in product placement" in broadcast television programmes. Schedule 11A of the Act sets out the product placement requirements in greater detail. The Government has amended section 319 and Schedule 11A of the Act and we explain below how we are reflecting these amendments in Section Nine of the Code (Commercial References in Television Programming).
- 1.8 Since 1 January 2016, Ofcom has been the sole regulator (other than in relation to advertising) for ODPS under Part 4A of the Act. Part 4A contains requirements in relation to ODPS, in particular section 368(G) sets out requirements relating to sponsorship of ODPS and of programmes included within ODPS, and section 368(H) sets out requirements relating to the prohibition of product placement in ODPS. These provisions have also been amended by the Regulations and we explain below how we are reflecting these amendments in Rule 12 (Sponsorship), Rule 13 (Prohibition of Product Placement and Exceptions), and the associated guidance, of the Rules and Guidance.
- 1.9 Finally, the Advertising Standards Authority is Ofcom's co-regulator in relation to advertising content in ODPS. Section 368(F) of Part 4A of the Act contains requirements in respect of advertising in ODPS. These provisions are reflected in Appendix 2 (Advertising Rules for On-Demand Services Regulated by Statute) to the CAP Code: the UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing ("the CAP Code"), which is owned by the Committee of Advertising Practice⁸. We understand that the amendment to section 368(F) of the Act, prohibiting advertising of electronic cigarettes and refill containers in ODPS, will also be reflected in a revised CAP Code.

Implications for the Broadcasting Code

- 1.10 As noted above, the rules covering product placement in television programmes are set out in Section Nine (Commercial References in Television Programming) of the Code. Ofcom is making a number of amendments to these rules.
- 1.11 In summary, Ofcom is:
 - inserting definitions of "electronic cigarette" and "refill container";
 - removing an existing prohibition on the product placement of electronic or smokeless cigarettes in programmes produced under UK jurisdiction;
 - inserting a new prohibition on the product placement of electronic cigarettes or refill containers in all programmes; and
 - reflecting these changes in amendments to the Guidance Notes to Section Nine.

⁷ See: Section 321(2)(fa) of the Act.

⁸ See: <https://www.cap.org.uk/Advertising-Codes/~media/Files/CAP/Codes%20CAP%20pdf/The%20CAP%20Code.ashx>

1.12 The amendments to the Code and the Guidance Notes are set out in full in Annex 1.

Implications for the Rules and Guidance

1.13 As noted above, the rules covering sponsorship and product placement in ODPS are set out in the Rules and Guidance. Ofcom is making a number of amendments to this document.

1.14 In summary, Ofcom is:

- inserting definitions of “electronic cigarette” and “refill container”;
- inserting a prohibition on sponsorship of ODPS or programmes included in ODPS for the purpose of promoting electronic cigarettes or refill containers;
- inserting a prohibition on product placement of electronic cigarettes or refill containers; and
- making minor amendments to the guidance associated with the rules covering sponsorship and product placement.

1.15 The amendments to the Rules and Guidance are set out in full in Annex 2.

Annex 1

Amendments to the Broadcasting Code and the Guidance Notes

Amendments to Section Nine: Commercial References in Television Programming

- A1.1 The changes to the rules in Section Nine of the Broadcasting Code set out below come into effect on 20 May 2016, alongside other changes set out in our previous statement *Regulation of e-cigarette advertising and sponsorship on television and radio: Amendments to the Ofcom Broadcasting Code and the BCAP Code: the UK Code on Broadcast Advertising*. The reissued Broadcasting Code amalgamating all of these changes is available at <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>.

Product placement (and prop placement)

[...]

9.11 The product placement of the following products, services or trade marks is prohibited:

- a) cigarettes or other tobacco products;
- b) placement by or on behalf of an undertaking whose principal activity is the manufacture or sale of cigarettes or other tobacco products; or
- c) prescription-only medicines; or
- d) electronic cigarettes or refill containers.

Meaning of “electronic cigarette”:

An electronic cigarette is a product that (i) can be used for the consumption of nicotine-containing vapour via a mouth piece, or any component of that product, including a cartridge, a tank and the device without cartridge or tank (regardless of whether it is disposable or refillable by means of a refill container and a tank, or rechargeable with single use cartridges), and (ii) is not a medical product within the meaning of regulation 2 of the Human Medicines Regulations 2012 or medical device within the meaning of regulation 2 of the Medical Devices Regulations 2002.

Meaning of “refill container”:

A refill container is a receptacle that (i) contains a nicotine-containing liquid, which can be used to refill an electronic cigarette; and (ii) is not a medicinal product within the meaning of regulation 2 of the Human Medicines Regulations 2012 or medical device within the meaning of regulation 2 of the Medical Devices Regulations 2002.

In addition to Rules 9.6 to 9.11, Rules 9.12 to 9.13 also apply to product placement included in all programmes produced under UK jurisdiction:

Meaning of “programmes produced under UK jurisdiction”:

“programmes produced under UK jurisdiction” means any programme produced or commissioned by either:

- a) the provider of the television programme service or any person connected with that provider

- (except in the case of a film made for cinema); or
- b) any other person with a view to its first showing taking place in a television programme service under the jurisdiction of the United Kingdom (for the purposes of the AVMS Directive).

9.12 Product placement is not permitted in the following:

- a) religious programmes;
b) consumer advice programmes; or
c) current affairs programmes.

Meaning of “current affairs programme”:

A current affairs programme is one that contains explanation and/or analysis of current events and issues, including material dealing with political or industrial controversy or with current public policy.

9.13 The product placement of the following is prohibited:

- a) alcoholic drinks;
b) foods or drinks high in fat, salt or sugar (“HFSS”);
c) gambling;
d) infant formula (baby milk), including follow-on formula;
e) all medicinal products;
f) ~~electronic or smokeless cigarettes~~, cigarette lighters, cigarette papers, or pipes intended for smoking; or
g) any product, service or trade mark that is not allowed to be advertised on television.

Note:

HFSS food and drink products are defined by the nutrient profiling scheme which was devised by the UK’s Food Standards Agency for use by Ofcom. This can be found at:

<http://food.gov.uk/healthiereating/advertisingtochildren/nutlab/nutprofmod>

Amendments to the Guidance Notes to Section Nine: Commercial References in Television Programming

- A1.2 These amendments to the Guidance Notes to Section Nine of the Broadcasting Code also come into effect on 20 May 2016, and follow other amendments which have already been announced. The reissued Guidance Notes amalgamating all of these changes is available at <http://stakeholders.ofcom.org.uk/broadcasting/guidance/programme-guidance/bguidance/>.

Product placement (and prop placement)

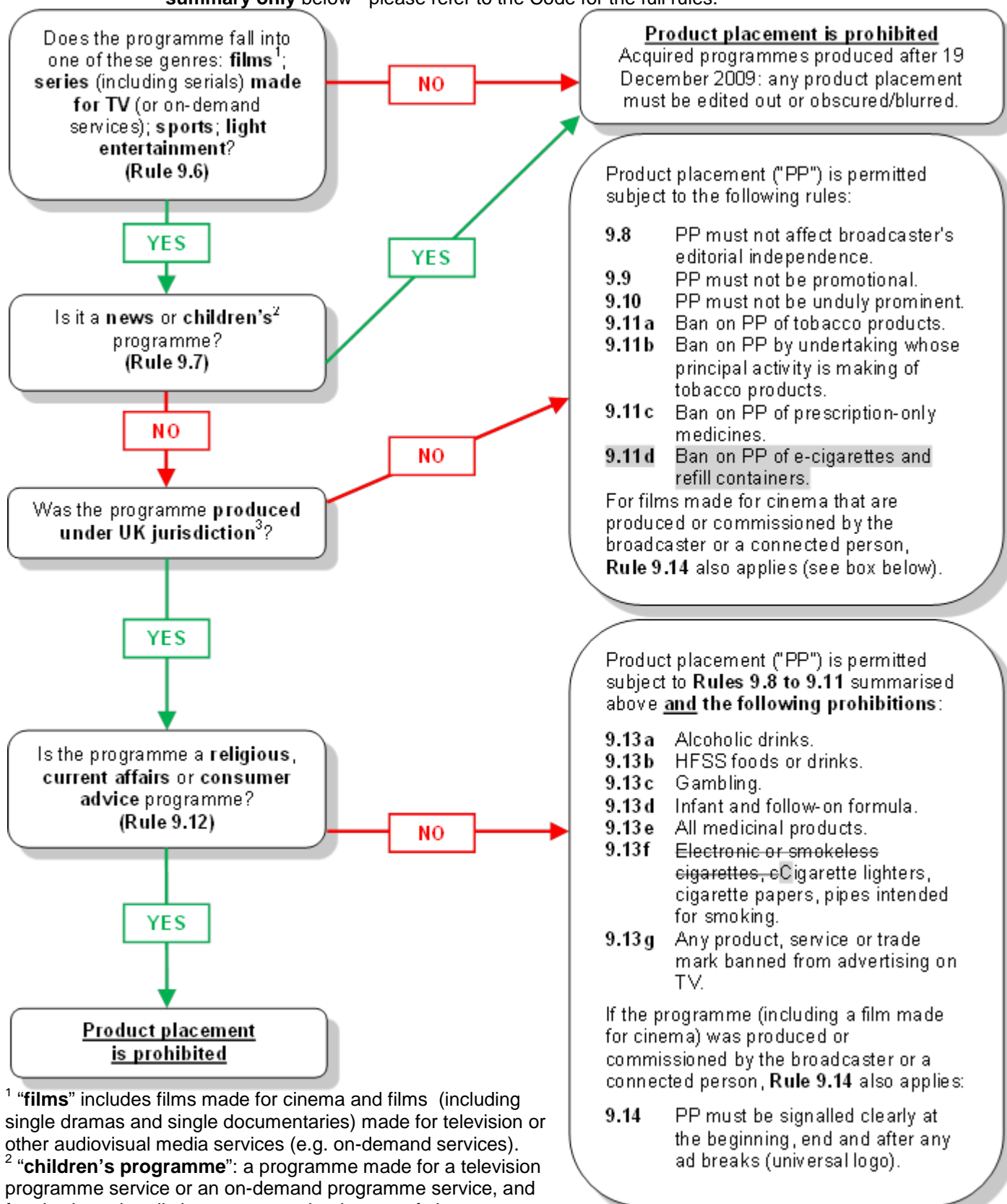
- 1.41 Rules 9.6 to 9.14 apply to programmes produced after 19 December 2009⁹ that contain product placement. (Note: Rule 9.11(d) applies to programmes produced after 19 May 2016¹⁰ that contain product placement.)
- 1.42 Any acquired programmes originally produced before 19 December 2009 that contain product placement must comply with all other relevant Code rules, in particular Rules 9.1 to 9.5.
- [...]

⁹ This is the date that the relevant requirements set out in the AVMS Directive came into force.

¹⁰ This is the date that the relevant requirements set out in the Schedule 11A to the Act came into force.

Can a programme contain product placement and which rules apply?

This flowchart applies to **all programmes** (whether acquired or originated). The rules are set out in **summary only** below - please refer to the Code for the full rules.



¹ "films" includes films made for cinema and films (including single dramas and single documentaries) made for television or other audiovisual media services (e.g. on-demand services).

² "children's programme": a programme made for a television programme service or an on-demand programme service, and for viewing primarily by persons under the age of sixteen.

³ "programme produced under UK jurisdiction": any programme produced or commissioned by either: the provider of the television programme service or any person connected with that provider (except in the case of a film made for cinema); or any other person with a view to its first showing taking place in a television programme service under the jurisdiction of the United Kingdom (for the purposes of the AVMS Directive).

Guidance on individual product placement rules

[...]

What restrictions are there on the types of products, services and trade marks that can be placed in programmes?

Relevant legislation:

- Article 11(4) of the AVMS Directive
- Schedule 11A, paragraph 4 of the Communications Act

Rule 9.11

The product placement of the following products, services or trade marks is prohibited:

- a) cigarettes or other tobacco products;**
- b) placement by or on behalf of an undertaking whose principal activity is the manufacture or sale of cigarettes or other tobacco products; or**
- c) prescription-only medicines; or**
- d) electronic cigarettes or refill containers.**

1.104 The prohibition listed at b) includes non-tobacco products or services which share a brand name associated with a tobacco product (e.g. clothing items). See guidance on Rule 9.13 in relation to the use of prohibited products as props.

1.105 The prohibition listed at d) applies to programmes produced after 19 May 2016¹¹ that contain product placement. The product placement of electronic or smokeless cigarettes was prohibited in programmes produced under UK jurisdiction between 19 December 2009 and 19 May 2016 inclusive. For the avoidance of doubt, whilst the prohibition at (d) in its current form only applies to programmes produced after 19 May 2016, the change does not have the effect of enabling programmes produced between 19 December 2009 and 19 May 2016, the broadcast of which would have been prohibited prior to 20 May 2016, to be broadcast.

1.106 Broadcasters should also ensure they consider legal advice on wider legal controls over the promotion and exposure for sale of tobacco and tobacco-related products, electronic cigarettes and refill containers, and prescription-only medicines.

What are the additional rules that apply to product placement included in programmes produced under UK jurisdiction?

Relevant legislation:

- Schedule 11A, paragraph 6 of the Communications Act

¹¹ This is the date that the relevant requirements set out in the Schedule 11A to the Act came into force.

4.406 **1.107** Rules 9.12 and 9.13 of the Code apply to programmes produced under UK jurisdiction. A meaning of “programmes produced under UK jurisdiction” is set out above Rule 9.12 in the Code. In summary, a programme will be subject to Rules 9.12 and 9.13 if it:

- i) has been produced or commissioned by an Ofcom-regulated broadcaster, or a person connected to such a broadcaster, and is not a film made for cinema; or
- ii) has been made by anyone with the intention of its first broadcast being on an Ofcom-regulated television service

4.407 **1.108** Edits to acquired programmes: In the case of acquired programmes or content (produced after 19 December 2009¹²) that does not meet the criteria set out above, we do not expect that general edits (e.g. for compliance, compilation or re-versioning purposes) would result in such material being considered as produced under UK jurisdiction. However, where a programme is heavily re-versioned, it may become subject to Rules 9.12 and 9.13, depending on the extent of the changes made.

4.408 **1.109** Use of third party content in programmes produced under UK jurisdiction: When a programme that meets the criteria set out above features third party content - such as music videos, film or programme clips - references to placed products, services or trade marks in the third party content are unlikely to meet the definition of product placement *provided the broadcaster, producer or a person connected to either has not directly benefited from the original product placement arrangement*. To ensure such references are not subject to the product placement rules, the broadcaster, producer (or person connected with either) should not enter into any agreement in relation to retaining references to placed products in their own programme.

[...]

What are the additional restrictions on the types of products, services and trade marks that can be placed in programmes produced under UK jurisdiction?

Relevant legislation:

- *Schedule 11A, paragraph 6(2) of the Communications Act*

Rule 9.13

The product placement of the following is prohibited:

- a) alcoholic drinks;**
- b) foods or drinks high in fat, salt or sugar (“HFSS”);**
- c) gambling;**
- d) infant formula (baby milk), including follow-on formula;**
- e) all medicinal products;**
- f) ~~electronic or smokeless cigarettes, cigarette lighters, cigarette papers, or~~**

¹² This is the date that the relevant requirements set out in the AVMS Directive came into force.

**pipes intended for smoking; or
g) any product, service or trade mark that is not allowed to be advertised on television.**

- 4.409 1.112 For the purposes of a), “**alcoholic drinks**” means drinks that contain above 0.5% ABV.
- 4.410 1.113 In respect of b), **HFSS food and drink products** are defined by the nutrient profiling scheme which was devised by the UK’s Food Standards Agency for use by Ofcom. This can be found at:
<http://www.food.gov.uk/healthiereating/advertisingtochildren/nutlab/nutprofmod>
- 4.444 1.114 When considering the appropriateness of allowing the product placement of a **trade mark associated with HFSS foods or drinks**, broadcasters should follow the guidance issued by the Broadcast Committee of Advertising Practice (BCAP) on differentiating HFSS *product* television advertisements from *brand* television advertisements and apply it accordingly. The guidance can be found at:
https://www.cap.org.uk/Advice-Training-on-the-rules/Help-Notes/BCAP_Advertising_Guidance_Notes_3.aspx
- 4.442 1.115 For the purposes of c) “**gambling**” includes:
- any activity that falls within the meaning of “gambling” given in section 3 of the Gambling Act 2005;
 - spread betting; and
 - National Lottery products.
- 4.443 1.116 In respect of d) “**infant formula**” and “**follow-on formula**” have the meanings given in Article 2 of Commission Directive 2006/141/EC amending Directive 1999/21 EC.
- 4.416 1.117 In respect of e), Schedule 11A of The Communications Act makes clear that “**medicinal product**” has the meaning given in section 130 of the Medicines Act 1968. For further guidance, please see the note “A guide to what is a medicinal product” produced by the Medicines and Healthcare products Regulatory Agency (“MHRA”), which can be found at: <http://www.mhra.gov.uk/home/groups/is-lic/documents/publication/con007544.pdf> Please note that this guidance only applies to those medicinal products licensed in the UK.
- 4.447 1.118 In respect of g), details of **prohibited advertisers** can be found in Section 10 of The UK Code of Broadcast Advertising (“BCAP Code”) which can be found at:
<https://www.cap.org.uk/Advertising-Codes/Broadcast.aspx>
- 4.448 1.119 The prohibitions on the product placement of these specific types of products and services do not prevent the legitimate use of such products or services as props, subject to prop placement arrangements. Broadcasters should note the relevant definitions of “product placement”, “prop placement”, “significant value” and “residue value” included at the beginning of Section Nine and in the introduction to the product and prop placement guidance.

A1.3 The rest of the Ofcom Guidance Notes to Section Nine will be renumbered accordingly, overriding the numbering set out in the previous statement

Regulation of product placement and sponsorship by e-cigarettes on broadcast television and on-demand programme services

*Regulation of e-cigarette advertising and sponsorship on television and radio:
Amendments to the Ofcom Broadcasting Code and the BCAP Code: the UK
Code on Broadcast Advertising.*

Annex 2

Amendments to the Rules and Guidance

Amendments to the Rules and Guidance: Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services (ODPS)

- A2.1 The changes to VOD Rules and Guidance set out below come into effect on 20 May 2016. The reissued document reflecting these changes is available at http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/rules_and_guidance.pdf.

Rule 12: Sponsorship¹³

(1) An ODPS or a programme included in an on-demand programme service must not be sponsored—

- (a) for the purpose of promoting cigarettes or other tobacco products, or
- (b) by an undertaking whose principal activity is the manufacture or sale of cigarettes or other tobacco products.

Guidance

This includes non-tobacco products or services which share a brand name with a tobacco product which is prohibited by law from advertising in other UK media. The definition of a 'tobacco product' is set out at the end of this section.

~~*Note that, at the time of publication of this document, we are aware that the Government is considering imminent changes to section 368G in light of the Tobacco Products Directive which would encompass e-cigarettes. If the statutory rules do indeed change to encompass e-cigarettes the statutory rules would (as with other Rules set out in this document) apply without further changes being necessary to this document.*~~

(1A) An ODPS or a programme included in an ODPS must not be sponsored for the purpose of promoting electronic cigarettes or electronic cigarette refill containers.

Guidance:

The definitions of 'electronic cigarette' and 'refill container' are set out at the end of this section.

(2) An ODPS or a programme included in an ODPS must not be sponsored for the purpose of promoting a prescription-only medicine.

Guidance:

Whilst it is possible for a manufacturer of prescription only medicines to sponsor a service or programme, sponsorship announcements may not contain any references to prescription-only medicines.

¹³ Section 368G of the Act.

[...]

Statutory definition of “tobacco product” – section 1 of the Tobacco Advertising and Promotion Act 2002

“Tobacco product” means a product consisting wholly or partly of tobacco and intended to be smoked, sniffed, sucked or chewed.

Statutory definitions of an “electronic cigarette” and an “electronic cigarette refill container” – section 368R(1) of the Act

“Electronic cigarette” means a product that:

- (a) can be used for the consumption of nicotine-containing vapour via a mouth piece, or any component of that product, including a cartridge, a tank and the device without cartridge or tank (regardless of whether it is disposable or refillable by means of a refill container and a tank, or rechargeable with single use cartridges), and
- (b) is not a medical product within the meaning of regulation 2 of the Human Medicines Regulations 2012 or medical device within the meaning of regulation 2 of the Medical Devices Regulations 2002.

“Electronic cigarette refill container” means a receptacle that:

- (a) contains a nicotine-containing liquid, which can be used to refill an electronic cigarette; and
- (b) is not a medicinal product within the meaning of regulation 2 of the Human Medicines Regulations 2012 or medical device within the meaning of regulation 2 of the Medical Devices Regulations 2002.

Rule 13: Prohibition of Product Placement and Exceptions¹⁴

Please note: Rule 13 applies only in relation to programmes the production of which began after 19 December 2009. The prohibition of product placement of electronic cigarettes and electronic cigarette refill containers applies only in relation to programmes the production of which began after 19 May 2016.

Prohibited Product Placement

Product placement is prohibited in children’s programmes included in ODPS.

Guidance:

The statutory definition of “Children’s programme” is set out at the end of this section. Ofcom regards this definition as extending to programmes acquired from overseas but excluding films which were originally made for cinema.

Where a children’s programme is included as a segment of a programme that may contain

¹⁴ Section 368H of the Act

product placement, ODPS providers should ensure that the children's content is set clearly apart and demonstrably free from product placement.

Product placement is prohibited in ODPS if—

- (a) it is of cigarettes or other tobacco products,
- (b) it is by or on behalf of an undertaking whose principal activity is the manufacture or sale of cigarettes or other tobacco products, or
- (c) it is of prescription-only medicines, or
- (d) it is of electronic cigarettes or refill containers.

Guidance:

The prohibitions relating to tobacco products includes non-tobacco products or services which share a brand name with a tobacco product which are prohibited by law from advertising in other UK media. The definition of a 'tobacco product' is set out at the end of this section.

The definitions of 'electronic cigarette' and 'refill container' are also set out at the end of this section.

Product placement of alcoholic drinks must not—

- (a) be aimed specifically at persons under the age of eighteen;
- (b) encourage immoderate consumption of such drinks.

Guidance:

Whether a placement is aimed specifically at people aged under eighteen will be judged not only on the content of the programme but also on the context in which the placement is presented.

"Encourage" and "immoderate" will be judged in the context of the programme itself, having regard to all the surrounding circumstances including any editorial justification and the programme narrative.

[...]

Statutory definition of "tobacco product" – section 1 of the Tobacco Advertising and Promotion Act 2002

"Tobacco product" means a product consisting wholly or partly of tobacco and intended to be smoked, sniffed, sucked or chewed.

Statutory definitions of an "electronic cigarette" and an "electronic cigarette refill container" – section 368R(1) of the Act

"Electronic cigarette" means a product that:

- (a) can be used for the consumption of nicotine-containing vapour via a mouth piece, or any component of that product, including a cartridge, a tank and the device without cartridge or tank (regardless of whether it is disposable or refillable by means of a refill container and a tank, or rechargeable with single use cartridges), and
- (b) is not a medical product within the meaning of regulation 2 of the Human Medicines

Regulations 2012 or medical device within the meaning of regulation 2 of the Medical Devices Regulations 2002.

“Electronic cigarette refill container” means a receptacle that:

- (a) contains a nicotine-containing liquid, which can be used to refill an electronic cigarette; and
- (b) is not a medicinal product within the meaning of regulation 2 of the Human Medicines Regulations 2012 or medical device within the meaning of regulation 2 of the Medical Devices Regulations 2002.