



# Regulation of e-cigarette advertising and sponsorship on television and radio

Amendments to the Ofcom Broadcasting Code and  
the BCAP Code: the UK Code of Broadcast Advertising

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## About this document

This statement sets out amendments Ofcom is making to the Broadcasting Code and amendments that we have instructed the Broadcast Committee of Advertising Practice (“BCAP”) to make to the BCAP Code: the UK Code of Broadcast Advertising.

The changes arise from the UK Government’s implementation of the Tobacco Products Directive 2014 (“TPD”). Among other provisions, the TPD prohibits advertisements for electronic cigarettes and refill containers in broadcast television and radio services. It also prohibits programme sponsorship which has the aim or effect of promoting such products.

In order to implement these provisions of the TPD, the Secretary of State for Health has directed Ofcom under section 321(6) of the Communications Act 2003 to make specified changes to rules in the relevant codes. Ofcom will enforce the rules in the Broadcasting Code, and the Advertising Standards Authority will enforce the rules in the BCAP Code.

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

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## Section 1

# Statement

- 1.1 This statement sets out the changes Ofcom will make to our Broadcasting Code<sup>1</sup>, and that we have instructed the Broadcast Committee of Advertising Practice (“BCAP”) to make to its BCAP Code: the UK Code of Broadcast Advertising (“the BCAP Code”)<sup>2</sup> as a result of directions from the Secretary of State for Health (the “Directions”)<sup>3</sup>. The Directions are intended to implement certain parts of the Tobacco Products Directive 2014 (“TPD”)<sup>4</sup>.

## Legal background

- 1.2 Under section 319(1) of the Communications Act 2003 (“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”.
- 1.3 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:
- “that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented” (subsection (h));
  - “that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with” (subsection (i)); and
  - “that the unsuitable sponsorship of programmes included in television and radio services is prevented” (subsection (j)).
- 1.4 Section 321 of the Act sets out the objectives that standards set under section 319 in relation to advertisements, sponsorship and product placement must meet. This includes, under section 321(5), a requirement for Ofcom to consult the Secretary of State about the descriptions of advertisements that should not be included in programmes, and forms and methods of sponsorship and of product placement that should not be employed. Section 321(6) empowers the Secretary of State to give directions as to matters in section 321(5), and places Ofcom under a duty to comply with any such direction.

## Ofcom, ASA and BCAP arrangements regarding sponsorship and advertising

- 1.5 The rules for sponsorship of television programmes are set out in Section Nine (Commercial References in Television Programming) of the Broadcasting Code and the rules for commercial communications in radio programming are set out in Section Ten (Commercial Communications in Radio Programming).

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<sup>1</sup> See: [http://stakeholders.ofcom.org.uk/binaries/broadcast/code-july-15/Ofcom\\_Broadcast\\_Code\\_July\\_2015.pdf](http://stakeholders.ofcom.org.uk/binaries/broadcast/code-july-15/Ofcom_Broadcast_Code_July_2015.pdf)

<sup>2</sup> See: [https://www.cap.org.uk/Advertising-Codes/~/\\_media/Files/CAP/Codes%20BCAP%20pdf/The%20BCAP%20Code.ashx](https://www.cap.org.uk/Advertising-Codes/~/_media/Files/CAP/Codes%20BCAP%20pdf/The%20BCAP%20Code.ashx)

<sup>3</sup> See Annex 1

<sup>4</sup> See: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0040&from=EN>

- 1.6 In relation to advertising, in 2005, Ofcom entered into co-regulatory arrangements with BCAP and the Advertising Standards Authority (“ASA”). These co-regulatory arrangements were renewed in an updated Memorandum of Understanding (“the MoU”) in October 2014<sup>5</sup>.
- 1.7 Under the terms of the MoU, BCAP has lead responsibility for keeping advertising rules under review, and is considered the ‘owner’ of the BCAP Code. The ASA is responsible for securing compliance with those rules, through the day-to-day enforcement of the BCAP Code. However, to ensure the relevant standards objectives set out in the Act are met, Ofcom retains ultimate regulatory responsibility for approving any changes to the advertising rules.

## **The Tobacco Products Directive 2014**

- 1.8 The TPD came into force in April 2014, replacing previous regulations about the manufacture, presentation and sale of tobacco and related products. In order to comply with EU law, the TPD must be implemented in all EU Member States by 20 May 2016.
- 1.9 Article 20 of the TPD concerns electronic cigarettes and refill containers. Among other things:
- it prohibits “commercial communications on the radio, with the aim or direct or indirect effect of promoting electronic cigarettes and refill containers” and “any form of public or private contribution to radio programmes with the aim or direct or indirect effect of promoting electronic cigarettes and refill containers”.
  - it states that “audiovisual commercial communications [...] are prohibited for electronic cigarettes and refill containers”, defining “audiovisual commercial communications” as set out in the Audiovisual Media Services Directive.
- 1.10 Among other provisions, the TPD therefore prohibits advertisements for electronic cigarettes and refill containers in television and radio services. It also prohibits sponsorship of programmes on television and radio services which has the aim or direct or indirect effect of promoting electronic cigarettes or refill containers.

## **Details of implementation**

- 1.11 The UK Government is implementing the relevant provisions of the TPD via Directions issued to Ofcom under section 321(6) of the Act by the Secretary of State for Health. These Directions are set out in Annex 1.
- 1.12 Ofcom is required under the terms of these Directions to make specified changes to the Broadcasting Code and the BCAP Code. Accordingly, Ofcom is neither consulting on these amendments to the Broadcasting Code, nor conducting an impact assessment on them. The amendments to the Broadcasting Code and to the accompanying Guidance Notes are set out in Annex 2.
- 1.13 Under the terms of the MoU, Ofcom is instructing BCAP to make the necessary amendments to the BCAP Code. BCAP will confirm these changes in a separate document. The text of a letter from Ofcom to BCAP setting out the amendments is in Annex 3.

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<sup>5</sup> See: [http://stakeholders.ofcom.org.uk/binaries/consultations/asa-re-authorisation/statement/Memorandum\\_of\\_Understanding\\_2014.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/asa-re-authorisation/statement/Memorandum_of_Understanding_2014.pdf)

- 1.14 The changes set out in this Statement will come into effect on 20 May 2016.
- 1.15 The Government intends to implement other relevant provisions of the TPD via Regulations under section 2(2) of the European Communities Act 1972. In particular, these provisions relate to services which are regulated by Part 4A of the Act (on-demand programme services), and Schedule 11A of the Act (product placement). Ofcom will make any further necessary amendments to the Broadcasting Code and the Guidance Notes, and the Rules and Guidance for on-demand programme services, shortly after the Regulations come into force on 20 May 2016.

### **Implications for the Broadcasting Code**

- 1.16 The Directions require Ofcom to make changes in the Broadcasting Code to the sponsorship rules for television programmes and the commercial communications rules for radio programming. These amendments will affect Section Nine and Section Ten.
- 1.17 In summary, Ofcom will:
- insert the definitions of “electronic cigarette”, “refill container”, “sponsored programming” and “sponsor” from the Directions into the relevant sections of the Broadcasting Code;
  - insert specific prohibitions on sponsored programming with the aim or direct or indirect effect of promoting electronic cigarettes and refill containers on television and radio;
  - include a consequential exemption of electronic cigarettes and refill containers from the existing rules which prohibit programme sponsorship on television and commercial references on radio by products which cannot be advertised on those media; and
  - reflect these changes in amendments to the Guidance Notes to the Broadcasting Code<sup>6</sup>.
- 1.18 The amendments to the Broadcasting Code are set out in full in Annex 2.

### **Implications for the BCAP Code**

- 1.19 BCAP introduced rules regulating broadcast advertising of e-cigarettes on an interim basis in 2014<sup>7</sup>. These rules are contained in Section 33 of the BCAP Code (Electronic Cigarettes). The preamble to this section states, with regard to the TPD: “The rules in this section do not pre-empt the requirements of the Directive but serve as an interim measure. When more is known about the application of the Directive in the UK, BCAP will clarify what role its Code will have after the new law has been given effect.”
- 1.20 The Directions issued by the Government to Ofcom include changes to the rules on e-cigarettes contained in the BCAP Code. Under the terms of the MoU between Ofcom and BCAP, Ofcom will therefore instruct BCAP to bring these amendments into force.

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<sup>6</sup> See: <http://stakeholders.ofcom.org.uk/broadcasting/guidance/programme-guidance/bguidance/>

<sup>7</sup> See: <https://www.cap.org.uk/News-reports/Media-Centre/2014/~-/media/Files/CAP/Consultations/ecig%20consultation/Regulatory%20Statement.ashx>



1.21 In summary, BCAP will:

- insert the definitions of “electronic cigarette” and “refill container” from the Directions into the relevant sections of the BCAP Code;
- disapply the existing rules in Section 33 of the BCAP Code insofar as they relate to electronic cigarettes and refill containers, as defined by the Directions;
- add electronic cigarettes and refill containers, or any advertisement which has the aim or direct or indirect effect of promoting such a product, to the list of categories prohibited from advertising on television and radio in Section 10 of the BCAP Code (Prohibited Categories); and
- make further consequential amendments to Section 10 of the BCAP Code to ensure its compatibility with Section 33.

1.22 The amendments to the BCAP Code are set out in Annex 3.

1.23 Because Section 33 of the BCAP Code was introduced on an interim basis, Ofcom expects BCAP now to consider whether, and if so how, the rules in Section 33 – which at present continue to apply to non-nicotine-containing e-cigarettes and related products – are to co-exist with the new prohibition on advertising nicotine-containing electronic cigarettes and refill containers.

**Annex 1**

# The Directions from the Government to Ofcom



Department  
of Health

Department of Health  
6th Floor Wellington House  
133-155 Waterloo Road  
SE1 8UG

1 March 2016  
[www.dh.gov.uk](http://www.dh.gov.uk)

Graham Howell  
Secretary to the Corporation  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
SE1 9HA

Dear Mr Howell,

I am writing in relation to the role of Ofcom in implementing certain rules relating to the advertising of e-cigarettes as required under Article 20(5) of the revised Tobacco Products Directive (TPD).

The Department of Health agreed with Ofcom last year that we would direct Ofcom to implement, on our behalf, some of the provisions of the advertising ban in Article 20 on broadcast media through their codes.

Please find attached a copy of the Directions which have been signed by Jane Ellison MP, Parliamentary Under Secretary of State for Public Health. Ofcom lawyers and officials have been sighted and have agreed the text set out in the Directions, as have DCMS lawyers and officials.

I would be grateful if you could advise me when the codes have been amended in order to implement these rules, as we are required to notify the European Commission of all our transposition measures in late May this year and will require copies of the amended codes in order to do so.

Yours sincerely,

Jeremy Mean  
Deputy Director, Tobacco Control & Physical Activity

**DIRECTIONS OF THE SECRETARY OF STATE TO OFCOM UNDER SECTION  
321(6) OF THE COMMUNICATIONS ACT 2003**

***Recitals***

***The Communications Act 2003***

1. OFCOM is required by section 319(1) of the Communications Act 2003 ("the Act") to set such standards for the content of programmes to be included in television and radio services as appear to them best calculated to secure the standards objectives.
2. The standards objectives at section 319(2) of the Act include, in particular, requirements:
  - (i) that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with;
  - (j) that the unsuitable sponsorship of programmes included in television and radio services is prevented.
3. The standards set by OFCOM must be contained in one or more codes (section 319(3)).
4. Section 325 of the Act requires OFCOM to ensure that broadcasting licences include conditions requiring compliance with OFCOM's standards code so far as it relates to advertising, sponsorship and product placement. OFCOM has statutory enforcement powers over licence holders, including power to direct compliance, to impose a financial penalty or to revoke a licence (Broadcasting Acts 1990 and 1996).
5. Under section 321(1) of the Act, the standards set by OFCOM to secure certain of the standards objectives in section 319(2) must include general provisions governing standards and practices in advertising sponsorship, and may include provisions prohibiting advertisements, forms and methods of advertising or sponsorship, and forms and methods of product placement.
6. Section 321(6) imposes a duty on OFCOM to comply with any direction given to it by the Secretary of State as to the following matters (being the matters listed in section 321(5) of the Act):
  - (a) the descriptions of advertisements that should not be included in programme services;
  - (b) the forms and methods of advertising and sponsorship that should not be employed in or in connection with the provision of such services; and

(c) the form and methods of product placement that should not be employed in the provision of a television programme service (including the descriptions of products, services or trademarks for which product placement should not be employed).

7. In setting standards under section 319 of the Act, OFCOM is also required to take account of such of the international obligations of the United Kingdom as the Secretary of State may notify to them for the purposes of that section (section 319(7)). An "international obligation" includes any EU obligation (section 405(1)).

#### ***The Tobacco Products Directive 2014***

8. Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC ("the Tobacco Products Directive 2014") came into force in April 2014 and must be implemented in all EU Member States by 20 May 2016.
9. Article 20 of the Tobacco Products Directive 2014 makes provision about electronic cigarettes and refill containers.
10. Article 20.5 requires Member States to prohibit the advertising of these products in the press, radio broadcasting, audio visual media services and information society services, and to prohibit certain forms of sponsorship. The full text of article 20.5 is as follows:

"Member States shall ensure that:

- a) commercial communications in Information Society services, in the press and other printed publications, with the aim or direct or indirect effect of promoting electronic cigarettes and refill containers are prohibited, except for publications that are intended exclusively for professionals in the trade of electronic cigarettes or refill containers and for publications which are printed and published in third countries, where those publications are not principally intended for the Union market;
- b) commercial communications on the radio, with the aim or direct or indirect effect of promoting electronic cigarettes and refill containers, are prohibited;
- c) any form of public or private contribution to radio programmes with the aim or direct or indirect effect of promoting electronic cigarettes and refill containers is prohibited;
- d) any form of public or private contribution to any event, activity or individual person with the aim or direct or indirect effect of promoting electronic cigarettes and refill containers and involving or taking place in several Member States or otherwise having cross-border effects is prohibited;
- e) audiovisual commercial communications to which Directive 2010/13/EU of the European Parliament and of the Council applies, are prohibited for electronic cigarettes and refill containers."

11. The Tobacco Products Directive 2014, and more particularly article 20.5, is an international obligation of the United Kingdom for the purposes of the Act.
12. These Directions are given in order to secure that provision about the following matters is included in the standards code:
  - (a) that advertisements for electronic cigarettes and refill containers in linear broadcast television and radio services are prohibited;
  - (b) that sponsorship of programmes within linear television and radio services with the aim or direct or indirect effect of promoting electronic cigarettes or refill containers is prohibited.
13. For the avoidance of doubt, nothing in these Directions prevents OFCOM from making other amendments to its standards codes insofar as they relate to electronic cigarettes, refill containers or any other matter in future, provided OFCOM takes into account the international obligations of the United Kingdom as required by section 319(7) of the Act.
14. Necessary provision to implement other elements of article 20.5, including in particular in relation to services which are regulated by Part 4A of the Act (on-demand programme services) is to be made by regulations under section 2(2) of the European Communities Act 1972.

#### **Directions to OFCOM**

**Accordingly the Secretary of State gives the following Directions:**

1. These Directions are given in accordance with section 321(6) of the Act.
2. OFCOM is directed to ensure, by means of amendments to its standards codes, that:
  - (a) advertisements in television and radio programme services for electronic cigarettes and refill containers are prohibited;
  - (b) sponsorship of programmes within radio and television programme services with the aim or direct or indirect effect of promoting electronic cigarettes or refill containers is prohibited.
3. The means by which OFCOM is directed to ensure the above is in particular to make the following amendments to its standards codes:
  - (a) the insertion of the following new paragraph in rule 10.1 (prohibited categories) of the UK Code of Broadcast Advertising;

**"electronic cigarettes and refill containers or any advertisement which has the aim or direct or indirect effect of promoting such a product";**

**(b) in rule 10.1.3 of the UK Code of Broadcast Advertising in place of the words "for electronic cigarettes" to insert the words "for products";**

**(c) in the introductory statement to rules 10.3 to 10.5 of the UK Code of Broadcast Advertising, in place of the words "for electronic cigarettes" to insert the words "for products";**

**(d) such amendments as are necessary to provide for the disapplication of the rules contained in section 33 of the UK Code of Broadcast Advertising insofar as they relate to electronic cigarettes and refill containers;**

**(e) the insertion of the following new rule in the appropriate place in each of sections 9 (commercial references in television programming) and 10 (commercial communications in radio programming) of the OFCOM Broadcasting Code:**

**"Sponsored programming with the aim or direct or indirect effect of promoting electronic cigarettes and/or refill containers is prohibited";**

**(f) the insertion of the following statement at the end of each of rules 9.16 and 10.6 of the OFCOM Broadcasting Code:**

**"This rule does not apply to electronic cigarettes and refill containers which are subject to rule [insert references to relevant new rules inserted by paragraph 3(e) of these Directions]."**

**(g) the insertion of the following definitions:**

**(i) "electronic cigarette" and "refill container" as defined in paragraphs 5(b) and 5(e) of these Directions respectively, in an appropriate place in each of sections 9 and 10 of the OFCOM Broadcasting Code and the sections 10 and 33 of the UK Code of Broadcast Advertising; and**

**(ii) "sponsor" and "sponsored programming" as defined in paragraph 5(f) and 5(g) of these Directions respectively, in an appropriate place in section 10 of the OFCOM Broadcasting Code.**

**4. The amendments to the standards codes to be made in accordance with these Directions must come into force at the beginning of 20th May 2016.**



5. In these Directions:

- (a) "advertisement" means an advertisement to which the UK Code of Broadcast Advertising applies;
- (b) "electronic cigarette" means 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), but
  - (ii) is not a medicinal product within the meaning of regulation 2 of the Human Medicines Regulations 2012<sup>1</sup> or medical device within the meaning of regulation 2 of the Medical Devices Regulations 2002<sup>2</sup>;
- (c) "Ofcom Broadcasting Code" means the code governing standards for the content of programmes, including standards and practice in the sponsoring of programmes included in television and radio programme services, as drawn up in accordance with section 319 of the Act, revised July 2015;
- (d) "radio programme service" means a radio programme service to which the Ofcom Broadcasting Code and the UK Code of Broadcast Advertising apply;
- (e) "refill container" means a receptacle that—
- (i) contains a nicotine-containing liquid, which can be used to refill an electronic cigarette, but
  - (ii) is not a medicinal product within the meaning of regulation 2 of the Human Medicines Regulations 2012<sup>3</sup> or medical device within the meaning of regulation 2 of the Medical Devices Regulations 2002<sup>4</sup>;
- (f) "sponsor" means any public or private undertaking or individual (other than a broadcaster or programme producer) who contributes to the costs of programming with a view to promoting the name, image, products, services, trade marks or activities of that undertaking or individual;
- (g) "sponsored programming" means programming (including a programme, channel, programme segment or block of programmes) that has had

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<sup>1</sup> S I 2012/1916

<sup>2</sup> S I 2002/618, amended by S I 2008/2936

<sup>3</sup> S I 2012/1916

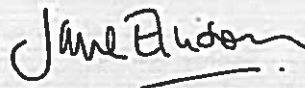
<sup>4</sup> S I 2002/618, amended by S I 2008/2936



some or all of its costs met by a sponsor and includes advertiser-funded programmes;

- (h) "television programme service" means a television programme service to which the OFCOM Broadcasting Code and the UK Code of Broadcast Advertising apply;
- (i) "UK Code of Broadcast Advertising" means the code governing standards and practice in advertising of television and radio programme services, as drawn up in accordance with section 319 of the Act, 1st edition 1st September 2010;
- (j) other terms have the meaning given to them by the Act.

Signed



on behalf of the Secretary of State for Health

Dated 29 February 2016

## Annex 2

# Amendments to the Broadcasting Code and the Guidance Notes

## Amendments to Section Nine: Commercial References in Television Programming

A2.1 The changes to the rules in Section Nine of the Broadcasting Code set out below will come into effect on 20 May 2016:

### Sponsorship

**Meaning of “sponsored programming”:**

Sponsored programming (which may include a programme, channel, programme segment or block of programmes) is programming that has had some or all of its costs met by a sponsor. It includes advertiser-funded programmes.

**Meaning of “sponsor”:**

Any public or private undertaking or individual (other than a broadcaster or programme producer) who is funding the programming with a view to promoting its products, services, trade marks and/or its activities.

**Meaning of “sponsor reference”:**

Any reference to the sponsor's products, services or trade marks.

**Meaning of “costs”:**

Any part of the costs connected to the production or broadcast of the programming.

**Note:**

- 1) The rules seek to enshrine editorial independence is preserved and a distinction is maintained between editorial and advertising. They also aim to protect against unjustifiable sponsorship, and to ensure that sponsorship arrangements adhere to the principle of transparency.
- 2) With the exception of the sponsorship credits, any reference to a sponsor that appears in a sponsored programme as a result of a commercial arrangement with the broadcaster, the programme maker or a connected person will be treated as product placement and must comply with Rules 9.6 to 9.14.

### Content that may not be sponsored

9.15 News and current affairs programmes must not be sponsored.

**Meaning of “current affairs programme”:**

See meaning under Rule 9.12.

### Prohibited and restricted sponsors

9.15 News and current affairs programmes must not be sponsored.

9.16 Programming (including a channel) may not be sponsored by any sponsor that is prohibited from advertising on television. This rule does not apply to electronic cigarettes and refill containers which are subject to Rule 9.16(a).

- a) Sponsored programming with the aim or direct or indirect effect of promoting electronic cigarettes and/or refill containers is prohibited.

**Meaning of “electronic cigarette”:**

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), but (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 receptacle that (i) contains a nicotine-containing liquid, which can be used to refill an electronic cigarette, but (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.

- 9.17 Sponsorship must comply with both the content and scheduling rules that apply to television advertising.

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

- A2.2 The changes to the accompanying Guidance Notes set out below will come into effect at the same time as the amendments to Section Nine of the Broadcasting Code:

### **Sponsorship**

[...]

#### **Content that may not be sponsored**

##### **Rule 9.15**

#### **News and current affairs programmes must not be sponsored.**

- 1.134 The prohibition on the sponsorship of news and current affairs programmes is a direct requirement of the AVMS Directive (Article 10(4)).
- 1.135 News includes any programme or newflash containing local, national or international news.
- 1.136 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.
- 1.137 Short specialist reports that accompany news (e.g. sport, travel and weather reports) may be sponsored – that such content does not itself comprise material that constitutes news or current affairs. To avoid the impression that news content is part of a sponsorship arrangement, the sponsored report must be distinct from the news (e.g. by using different presenters and sets).

## Prohibited and restricted sponsors

### Rule 9.16

**Programming (including a channel) may not be sponsored by any sponsor that is prohibited from advertising on television. This rule does not apply to electronic cigarettes and refill containers which are subject to Rule 9.16(a).**

1.138 Examples of prohibited advertisers include: political parties; tobacco brands; prescription only medicines; guns and gun clubs; and obscene material. Full details of prohibited advertisers are included in the BCAP Code, which can be found at: <http://www.cap.org.uk/The-Codes/BCAP-Code/BCAP-TV-Code.aspx>.

1.139 Rule 9.16 excludes electronic cigarettes and refill containers because there is an explicit prohibition on sponsorship by these products in Rule 9.16(a). Section Nine of the Code sets out the definitions of “electronic cigarettes” and “refill containers”. These can also be found in the glossary at the end of these Guidance Notes. In summary, an electronic cigarette is a product that can be used for the consumption of nicotine-containing vapour, and a refill container is a receptacle containing a nicotine-containing liquid which can be used to refill an electronic cigarette, in both cases excluding medical products or devices (as defined by the Human Medicines Regulations 2012 or the Medical Devices Regulations 2002 respectively). For the avoidance of doubt, non-nicotine-containing e-cigarettes and related products are not covered by this prohibition.

**a) Sponsored programming with the aim or direct or indirect effect of promoting electronic cigarettes and/or refill containers is prohibited.**

1.140 Ofcom will determine what constitutes an “aim”, a “direct...effect” or an “indirect effect” on a case-by-case basis.

### Rule 9.17

**Sponsorship must comply with both the content and scheduling rules that apply to television advertising.**

~~4.139~~ 1.141 Sponsorship arrangements and sponsorship credits must comply with advertising content and scheduling rules, as set out in the BCAP Code. This means, for example, a children’s programme cannot be sponsored by a food or drink high in fat, salt or sugar and sponsorship credits must not include material likely to lead to harm. Full details of the relevant content and scheduling restrictions can be found at: <http://www.cap.org.uk/The-Codes/BCAP-Code/BCAP-TV-Code.aspx>.

~~4.140~~ 1.142 Licensees should note that sponsorship credits are also subject to Rules 9.19 to 9.25.

A2.3 The rest of the Ofcom Guidance Notes to Section Nine will be renumbered accordingly.

A2.4 The following definitions will also be inserted (in the appropriate place alphabetically) into the Glossary in Annex 3 to the Guidance Notes to Section Nine:

**Electronic cigarette** 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), but (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.

**Refill container** A receptacle that (i) contains a nicotine-containing liquid, which can be used to refill an electronic cigarette, but (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.

## Amendments to Section Ten: Commercial Communications in Radio Programming

A2.5 The changes to the rules in Section Ten of the Broadcasting Code set out below will come into effect on 20 May 2016:

### General Rules

[...]

**10.6** No programming may be subject to a commercial arrangement with a third party that is prohibited from advertising on radio. This rule does not apply to electronic cigarettes and refill containers which are subject to Rule 10.6(a).

**10.6(a)** Sponsored programming with the aim or direct or indirect effect of promoting electronic cigarettes and/or refill containers is prohibited.

**10.7** Commercial references in programming must comply with the advertising content and scheduling rules that apply to radio broadcasting.

**10.8** Commercial references that require confrontation or substantiation prior to broadcast must be cleared for broadcast in the same way as advertisements.

#### Programming

Programming comprises all broadcast material other than spot advertisements.

#### Spot advertisements

Spot advertisements comprise advertising broadcast in commercial breaks.

#### Commercial arrangement

A commercial arrangement is a contract, or any other formal understanding, between a broadcaster (or any agent or employee of the broadcaster) and a third party (or third parties).

Examples of a commercial arrangement include programming sponsorship, competition prize donation and premium rate service provision. Programming that is subject to a commercial arrangement will therefore generally include payment and/or the provision of some other valuable consideration in return for a commercial reference (whether promotional or not).

#### Commercial reference

For the purposes of this section of the Code, a commercial reference is a reference in

programming to a brand, trademark, product and/or service that:

- is subject to a commercial arrangement; or
- promotes the station/broadcaster's own products or services.

**Meaning of “sponsor” (see Rule 10.6(a)):**

“Sponsor” means any public or private undertaking or individual (other than a broadcaster or programme producer) who contributes to the costs of programming with a view to promoting the name, image, products, services, trade marks or activities of that undertaking or individual.

**Meaning of “sponsored programming” (see Rule 10.6(a)):**

“Sponsored programming” means programming (including a programme, channel, programme segment or block of programmes) that has had some or all of its costs met by a sponsor and includes advertiser-funded programmes.

**Meaning of “electronic cigarette” (see Rules 10.6 and 10.6(a)):**

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), but (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” (see Rules 10.6 and 10.6(a)):**

A receptacle that (i) contains a nicotine-containing liquid, which can be used to refill an electronic cigarette, but (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.

**Transparency**

Listeners should know when material is broadcast in return for payment or other valuable consideration. Signalling is the means by which transparency is achieved.

Transparency of a commercial arrangement should be achieved through the appropriate signalling of a brand, trademark, product and/or service of a third party (or third parties) that has paid for broadcast exposure – by, for example: including a sponsorship credit; reference to the donor of a prize; the promotion of a premium rate number for listener interaction in programming.

**Signalling**

Broadcasters are required to give, at appropriate times, clear information within programming, to inform listeners of any commercial arrangement affecting that programming.

Appropriate signalling is therefore essential in complying with Rule 10.1. There are four aspects to consider when assessing what signalling is appropriate, to ensure compliance:

- Wording – this must be clear, to ensure immediate transparency of the commercial arrangement;
- Positioning – transparency of the commercial arrangement generally requires signalling at the outset of each instance of broadcast material subject to it;
- Frequency – longer output that is subject to a commercial arrangement may require signalling at appropriate intervals;
- Identity (of the third party) – transparency of the commercial arrangement requires the third party's relevant title to be stated on air.

Broadcasters should ensure that broadcast material appearing either to be a station campaign or to provide any independent assessment of products/services is genuinely independent and not subject to a commercial arrangement. Signalling commercial references in, for example, consumer advice/affairs programming therefore requires particular care, as it is essential that the broadcast of paid-for promotions of goods and services is not presumed to be independent observation/ comment.

**Specialist factual strands**

Specialist factual strands in or around news bulletins or news desk presentations might include, for example, travel, sport, finance and weather.

**Factual programming, including matters of political or industrial controversy and matters relating to current public policy**

Broadcasters should note that all programming must comply with Section Five of the Code. Commercial references broadcast under such an arrangement are also subject to Section 7 of The Broadcasting Committee of Advertising Practice UK Code of Broadcast Advertising. In addition, broadcasters are reminded that Rule 2.2 applies to **all** factual programming (i.e. factual items must not materially mislead the audience).

**Commercial references that require confirmation or substantiation**

Examples include, but are not limited to: complex factual claims (including those that are capable of objective substantiation); market leadership claims; special offer prices; comparisons with competitors; superlative claims; claims and offers involving significant limitations and exclusions; “free” claims; testimonials; endorsements; and claims that may be of particular interest to children.

## Amendments to the Guidance Notes to Section Ten: Commercial Communications in Radio Programming

- A2.6 The changes to the accompanying Guidance Notes set out below will come into effect at the same time as the amendments to Section Ten of the Broadcasting Code:

### Introduction: General guidance

[...]

The following descriptions apply to terms used throughout Section Ten guidance (other terms are described under guidance to specific rules):

- **programming** – defined in the Code as “all broadcast material other than spot advertisements”, this includes, but is not limited to, the following, each of which can be of any duration:
  - programmes (e.g. breakfast show);
  - segments within programmes (e.g. ‘the golden hour’);
  - features within programmes (e.g. ‘song of the hour’);
  - stand-alone features (e.g. drivetime travel updates); and
  - commercial references (as, or within, any of the above);
- **commercial arrangement** – this is a contract, or any other formal understanding, between a broadcaster (or any agent or employee of the broadcaster) and a third party (or third parties).

Examples of a commercial arrangement include: programming sponsorship (for description of ‘sponsorship’, see below), competition prize donation and premium rate

(or similar revenue-share) service provision. Programming that is subject to a commercial arrangement will therefore generally include payment and/or the provision of some other valuable consideration in return for a commercial reference – whether promotional or not (for description of ‘commercial reference’, see below).

Commercial arrangements are generally written and, for the avoidance of doubt, include marketing agreements and contra-deals (i.e. ‘barter’ arrangements between parties concerning the exchange of goods or services without any payments being made);

- **third parties (with which commercial arrangements are made)** – these include not-for-profit organisations and those with a non-commercial purpose;
- **commercial reference** (for the purposes of Section Ten of the Code only) – this is a reference in programming to a brand, trade mark, product and/or service that:
  - is subject to a commercial arrangement between the broadcaster (or any agent or employee of the broadcaster) and a third party (or third parties); or
  - promotes the station/broadcaster’s own products or services.

Commercial references therefore include, for example:

- sponsorship credits;
- donated prize descriptions;
- paid-for product references;
- referral of listeners to a station’s website; and
- the promotion of a station event;

Commercial references do not generally include:

- promotions of the licensed service itself, through station idents/jingles etc; or
- trails for programming on the licensed service;

However, such promotions or trails may contain commercial references – for example, sponsorship credits;

- **brand** – this is a marketing identity (by name or sound) associated with an idea, event, product or service, or a range and/or mix of these; and
- **sponsorship** – ~~Sponsored programming (which may include a radio service, programmes or features) is programming that has had some or all of its costs met by a sponsor (where ‘costs’ means any part of the costs connected to the production or broadcast of the programming).~~ **Sponsored programming is programming (including a programme, channel, programme segment or block of programmes) that has had some or all of its costs met by a sponsor and includes advertiser-funded programmes.**

~~A sponsor is any public or private undertaking or natural person (other than the broadcaster or programming producer) who is funding the programming with a view to promoting its products, services, trade marks, image, name, and/or activities.~~ **A sponsor is any public or private undertaking or individual (other than a broadcaster or programme producer) who contributes to the costs of programming with a view to promoting the name, image, products, services, trade marks or activities of that undertaking or individual.**



~~Advertiser-funded programming is sponsored programming.~~

A sponsorship credit (or sponsor credit) identifies the sponsor and the programming that is sponsored. It is a form of commercial reference (see above).

[...]

### **Rule 10.6 to 10.8 Advertising rules apply**

#### **Types of advertising rules**

For the purposes of compliance with Section Ten advertising rules, the BCAP Code contains rules with regard to advertising prohibitions, scheduling restrictions, content requirements and clearance requirements. While the BCAP Code does not refer specifically to “content rules”, these are simply rules that do not concern advertising prohibitions, scheduling restrictions or clearance requirements.

Rules 10.6 to 10.8 contribute to ensuring appropriate consumer protection. In summary:

- Advertisers that are prohibited from advertising under the BCAP Code may not make any form of commercial communication on radio (Note: With regard to e-cigarettes and refill containers, see below under “Prohibited and restricted communications”);
- BCAP content and scheduling rules apply to all commercial references (Note: When applied together with the transparency requirement – Rule 10.1 – this also ensures BCAP scheduling rules apply to programming that is subject to commercial arrangements with third parties); and
- BCAP clearance requirements apply only to commercial references that require confirmation or substantiation prior to broadcast. (Examples include, but are not limited to: complex factual claims – including those that are capable of objective substantiation; market leadership claims; special offer prices; comparisons with competitors; superlative claims; claims and offers involving significant limitations and exclusions; “free” claims; testimonials; endorsements; and claims that may be of particular interest to children.) See also, ‘Clearance’, below.

#### **Material that sounds like a commercial reference**

For the avoidance of doubt, any material that sounds like a commercial reference but does not form part of a commercial arrangement with a third party (e.g. references to the third party but not subject to the commercial arrangement, or a presenter’s personal views, concerning any product or service, that stray into making overt advertising claims about that product or service), remains subject to the rules of the Broadcasting Code. The Broadcasting Code has rules to ensure appropriate consumer protection – e.g. Rules 2.1 (harm) and 2.2 (misleadingness). However, broadcasters should note that, in the event of investigating complaints concerning such material, Ofcom is likely to refer to advertising requirements for appropriate guidance. (See also guidance with regard to ‘clearance’, below, concerning – among other things – ‘natural’ references to brands etc., and guidance to Rule 10.3, above, concerning, specifically, material that appears to be a commercial reference within news).

#### **Prohibited and restricted commercial communications**

Broadcasters should refer to Section 10 (Prohibited Categories) of the BCAP Code, which details prohibited categories of advertising. Advertisements currently prohibited from

broadcast on radio include those coming within the recognised character of, or specifically concerned with, the following:

- breath-testing devices;
- betting systems/products intended to facilitate winning games of chance;
- all tobacco products, rolling papers and filters;
- guns (including replica guns), gun clubs and offensive weapons;
- prostitution and sexual massage services;
- obscene material;
- products for the treatment of alcohol and illegal-substance dependence;
- pyramid promotional schemes; and
- the acquisition or disposal of units in collective investment schemes not authorised or recognised by the FSA, without the prior approval of BCAP; and
- electronic cigarettes and refill containers or any advertisement which has the aim or direct or indirect effect of promoting such a product.

Broadcasters should note that, in addition to Section 10 (Prohibited Categories) of the BCAP Code, there are other advertising prohibitions (detailed within specific advertising categories) – e.g. Section 7 (Political and Controversial Matters), Rule 7.2.1: “No advertisement may be inserted by or on behalf of a body whose objectives are wholly or mainly of a political nature.” (Note: Other Sections of the BCAP Code that contain specific prohibitions comprise: 5 (Children); 11 (Medicines, Medical Devices, Treatments and Health); 14 (Financial Products, Services and Investments); 15 (Faith, Religion and Equivalent Systems of Belief); 24 (Homeworking Schemes); 25 (Instructional Courses); and 30 (Pornography).

As a consequence of the Government’s implementation of the Tobacco Products Directive 2014, Rule 10.6 excludes electronic cigarettes and refill containers from the prohibition on commercial arrangements between programming and third parties that are prohibited from advertising on radio. Rule 10.6(a) makes clear that sponsored programming with the aim or direct or indirect effect of promoting electronic cigarettes and/or refill containers is prohibited. “Electronic cigarette” and “refill container” have the meanings given to them by the definitions in the Code.

## Annex 3

# Letter from Ofcom to BCAP

## Text of the letter from Ofcom to BCAP

**From: Tony Close, Director of Content Standards, Licensing and Enforcement, Ofcom**  
**To: Shahriar Coupal, Director of the Committees, CAP and BCAP**

Dear Shahriar,

This letter concerns the amendments to Sections 10 (Prohibited Categories) and 33 (Electronic Cigarettes) of the BCAP Code, which are relevant to the implementation of certain provisions of the Tobacco Products Directive 2014.

The UK Government is implementing these provisions via Directions to Ofcom. Under the terms of the Memorandum of Understanding between Ofcom and BCAP, Ofcom is now instructing BCAP to make the necessary changes to the BCAP Code. These amendments, set out in full below, are to take effect on 20 May 2016.

In summary, BCAP is required to disapply the rules contained in Section 33 insofar as they relate to electronic cigarettes and refill containers, as defined by the Directions. These definitions will be inserted into the relevant sections of the BCAP Code. In addition, BCAP will add electronic cigarettes and refill containers, or any advertisement which has the aim or direct or indirect effect of promoting such a product, to the list of categories prohibited from advertising on television and radio in Section 10. There are also some further minor amendments to Section 10.

In addition, BCAP has proposed further minor amendments to ensure clarity and consistency. Ofcom considers these changes to be acceptable.

Because Section 33 of the BCAP Code was introduced on an interim basis, Ofcom expects BCAP now to consider whether, and if so how, the rules in Section 33 – which at present continue to apply to non-nicotine-containing e-cigarettes and related products – are to co-exist with the new prohibition on advertising nicotine-containing electronic cigarettes and refill containers.

This letter is the formal record of Ofcom's instruction to BCAP regarding these amendments to the BCAP Code.

Yours sincerely

[Signed]

## Amendments to Section 10 of the BCAP Code

### 10 Prohibited categories

#### Principle

Broadcast advertisements for some products or services are not permitted either because those products may not legally be advertised or because of a clear potential for harm or

serious or widespread offence to the audience or to society.

## Background

There are other unacceptable and restricted categories of advertising not listed in this Section, which can be found in these sections: Political and Controversial Matters (Section 7); Children (Section 5); Medicines, Medical Devices, Treatments and Health (Section 11); Financial Products, Services and Investments (Section 14); Faith, Religion and Equivalent Systems of Belief (Section 15); Homeworking Schemes (Section 24); Instructional Courses (Section 25) and Pornography (Section 30).

## Rules

- 10.1 Advertisements for products or services coming within the recognised character of or specifically concerned with these are not acceptable:
- 10.1.1 breath-testing devices and products that are intended to mask the effects of alcohol
  - 10.1.2 betting systems and products that are intended to facilitate winning games of chance
  - 10.1.3 all tobacco products. Also non-tobacco products or services that share a name, emblem or other feature with a tobacco product (as provided for by Rule 10.4), rolling papers and filters. This rule does not apply to advertisements for ~~electronic cigarettes~~ products which are regulated by Section 33
  - 10.1.4 guns (including replica guns), gun clubs and offensive weapons. "Offensive weapons" are items made or adapted to cause injury. References to clay pigeon shoots are permitted only as part of a wider range of outdoor pursuits
  - 10.1.5 prostitution and sexual massage services
  - 10.1.6 obscene material. "Obscene material" is material that offends against the Obscene Publications Act 1959 (as amended)
  - 10.1.7 products for the treatment of alcohol and illegal-substance dependence. Services offering treatment of alcohol and illegal-substance dependence are acceptable if they comply with rule 11.10
  - 10.1.8 pyramid promotional schemes. "Pyramid promotional schemes" are those in which consumers pay or give other consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme, not the sale or consumption of products
  - 10.1.9 the acquisition or disposal of units in collective investment schemes not authorised or recognised by the FCA, without the prior approval of BCAP.
  - 10.1.10 Television only – Escort agencies
  - 10.1.11 electronic cigarettes and refill containers or any advertisement which has the aim or direct or indirect effect of promoting such a product

For the purposes of this rule:

"Electronic cigarette" means a product that can be used for the consumption of nicotine-containing vapour via a mouth piece, or any component of that product,

including a cartridge, a tank and the device without cartridge or tank (regardless of whether it is disposable or refillable by means of a refill container and a tank, or rechargeable with single use cartridges), but is not a medicinal product within the meaning of regulation 2 of the Human Medicines Regulations 2012 or medical device within the meaning of regulation 2 of the Medical Devices Regulations 2002.

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

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

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

### **Tobacco**

These rules do not apply to advertisements for ~~electronic cigarettes~~ products which are regulated by Section 33.

10.3 Advertisements must not promote smoking or the use of tobacco products.

10.4 If it shares a name, emblem or other feature with a tobacco product, a non-tobacco product or service may be advertised only if the advertisement is obviously directly targeted at an adult audience, makes or implies no reference to smoking or to a tobacco product, does not promote tobacco or smoking and does not include a design, colour, imagery, logo style or the like that might be associated in the audience’s mind with a tobacco product.

10.5 Advertisements that might be of particular interest to children or teenagers must not refer to tobacco or smoking, unless that reference obviously forms part of an anti-smoking or anti-drugs message.

## **Amendments to Section 33 of the BCAP Code**

### **Background**

Directive 2014/40/EU (on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC) is now in force but has not yet been given effect in UK law. The UK Government is required to transpose its provisions by 20 May 2016, with a further transitional period for non-compliant e-cigarette

~~products until 20 November 2016. Those provisions include restrictions on advertising.~~

~~The rules in this section do not pre-empt the requirements of the Directive but serve as an interim measure. When more is known about the application of the Directive in the UK, BCAP will clarify what role its Code will have after the new law has been given effect.~~

came into effect in the UK on 20 May 2016. It prohibits advertisements on TV and radio which have the direct or indirect effect of promoting nicotine-containing e-cigarettes and e-liquids. The prohibition is set out in Section 10 (Prohibited Categories) and includes the full legal definitions of the products for which advertising is prohibited.

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

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

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

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