Written evidence submitted by the Advertising Standards Authority (ECG0015)

1. Background and Introduction

1.1. This submission is provided by the Advertising Standards Authority (ASA), the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the ‘ASA system.’

1.2. The ASA is the UK’s independent advertising regulator. We have been administering the non-broadcast Advertising Code (written and maintained by CAP) for 55 years and the broadcast Advertising Code (written and maintained by BCAP) for over ten, with our remit further extended in 2011 to include companies’ advertising claims on their own websites and in social media spaces under their control.

1.3. We are responsible for ensuring that advertising is legal, decent, honest and truthful and our work includes undertaking proactive projects and acting on complaints to take action against misleading, harmful or offensive advertisements. We are committed to evidence-based regulation and we continually review new evidence to ensure the rules remain fit-for-purpose.

1.4. In addition to investigating ads, we also provide a wealth of training and advice services for advertisers, agencies and media (most of which are free) to help them understand their responsibilities under the Codes and to ensure that fewer problem ads appear in the first place. CAP and BCAP provided over 281,000 pieces of such advice in 2016.

1.5. The ASA is providing this written submission in response to the Science and Technology Committee’s Inquiry into e-cigarettes.

2. Inquiry question: The effectiveness of regulation on the advertising and marketing of e-cigarettes.

2.1. The CAP and BCAP Codes contain rules which apply to all ads and which require them not to mislead, harm, offend or be otherwise irresponsible. The Codes also contain specific sections and rules which address certain sectors and types of advertising which, over time, required additional regulatory protections. Alcohol and gambling are subject to extensive specific rules, as are those ads which address or feature children. The Codes also approximate, and the ASA enforces, the legislative prohibitions on tobacco advertising.

2.2. In all of its work the self-regulatory system takes an evidence-based approach. Its Codes are regularly reviewed and its rules and its regulatory decisions are subject to judicial review.

2.3. The self-regulatory system takes extremely seriously its regulation of ads for those products which present the potential for harm. In 2013 and 2014 CAP and BCAP heard much uncertainty among the public, policymakers and public health professionals about e-cigarettes themselves and how they were advertised. While there was widespread interest about their public health potential as a safer alternative to tobacco there were also concerns about the fact that they contained nicotine, their efficacy and safety, their potential to renormalize tobacco smoking and whether they might act as a gateway to nicotine use amongst the young and / or non-nicotine users. Many of these questions persist today. To answer these concerns, insofar as they related to advertising, CAP and BCAP consulted
and then implemented new sections of rules in each of their Codes which specifically controlled how e-cigarettes may be advertised.

2.4 These rules place a strong focus on the protection of children and non-smokers, requiring ads not to contain content of particular appeal to those under 18 (including, for example, celebrities popular with children), not to feature those who are or seem to be under the age of 25 and not to be placed in children’s media. Other rules require ads not to address non-nicotine users / non-smokers, to disclose nicotine content and not to cross-promote tobacco products or brands, or to promote tobacco in general terms. The full CAP rules can be seen here.

2.5 These rules were welcomed by stakeholders from industry and the public health community alike as setting proportionate protections for an emerging sector.

2.6 Some examples of the ASA’s enforcement of these rules can be seen in their rulings on Must Have Ltd t/a VIP Electronic Cigarettes (24 December 2014), Hubbly Bubbly Ltd (10 June 2015), Zandera Ltd (24 February 2015) and Medipen Ltd (18 May 2016).

2.7 Also in 2014 the European Parliament agreed a revised Tobacco Products Directive (TPD) which included a range of new controls on unlicensed, nicotine-containing e-cigarettes including prohibitions on how they may be advertised. This had to take effect in member states by April 2016.

2.8 The prohibitions on non-broadcast advertising were transposed by the UK Government Department of Health (DoH) into Part 7 of the Tobacco and Related Products Regulations 2016 (TRPR). The prohibitions on broadcast advertising were transposed by DoH, via Ofcom, directly into the BCAP Code using powers in the Communications Act. Ofcom is mandated by Parliament to regulate broadcast advertising which they have contracted out to us. On this basis, we co-regulate broadcast advertising with Ofcom.

2.9 The TRPR recognises by reference to “established means” in Regulation 58 and in paragraph 4.9 of the explanatory memorandum that the self-regulatory system is the first line of control for advertising under this legislation. CAP therefore undertook its own consultation process in 2016 to approximate these legal prohibitions in its own Code. In February 2017 it created a new rule to give effect to these prohibitions.

2.10 The DoH took a minimal approach to implementing the advertising prohibitions in the TPD. The legal prohibitions emanating from the TPD and TRPR apply only to ads which promote (directly or indirectly) certain types of products (those which are unlicensed and which contain nicotine) and only in some media channels. In general terms the prohibited media channels are those which have a cross-EU-border effect.

2.11 The result is that a nicotine-containing e-cigarette may be lawfully advertised on an outdoor poster, in a leaflet and in the cinema. However the same ad would be illegal on television and radio and in magazines and newspapers.

2.12 Of particular note is the application of the law online. TRPR prohibits advertising online generally but allows for limited factual information to be given in the context of marketers own website. This requires the ASA to discern between prohibited “promotional” material and permitted “factual” material in this context.
2.13 CAP has published extensive Advertising Guidance which sets out, to the best of its understanding, how the prohibitions should work in practice. However it should be understood that the complexities of the law mean that there are some areas of uncertainty; which the guidance acknowledges. The ASA has regard to this document in its enforcement activities.

2.14 The ASA is actively policing compliance with the prohibitions described above. Examples of enforcement action can be seen in the following rulings:
- VCUP Trading Ltd t/a Vape Cloud (24 May 2017)
- Nicoventures Ltd t/a Vype (21 June 2017)
- Vape Station (16 Aug 2017)
- Safercigs Ltd (4 Oct 2017)

2.15 E-cigarettes which are licensed as medicines by the MHRA are not subject to the legal prohibitions described above. The ASA is not aware of any e-cigarettes being advertised under the medicines framework.

2.16 E-cigarettes / e-liquids which do not contain nicotine are not subject to the prohibitions described above. However where such a product is advertised in media subject to the prohibitions it must not indirectly promote a nicotine product, for example by sharing a brand name. This issue of indirect effect is discussed further in CAP’s Advertising Guidance.

2.17 Where ads are permitted they must comply with the content and placement rules described in paragraph 2.1, above. Recent examples of ads which are lawful under TPD / TRPR, but have been found to be in breach of these rules can be found in the ASA rulings on Fischen Medical Ltd t/a The Vapes (15 February 2017) and Xtreme Eliquids Ltd (5 April 2017).

2.18 In its Tobacco Control Plan for England, Towards a Smokefree Generation, the UK Government has announced that it “will assess recent legislation such as the Tobacco Products Directive, including as it applies to e-cigarettes, and consider where the UK’s exit [from the European Union] provides opportunity to alter the legislative provisions to provide for improved health outcomes within the UK context.”

3. Quitting smoking and health claims

3.1 Where ads for e-cigarettes are lawful they may not contain claims that products can assist in cutting down or quitting smoking unless the product in question has a medicinal licence from the MHRA. This prohibition is well established and stems from medicines legislation, but is also mirrored in the CAP and BCAP Codes and enforced by the ASA. As noted above no such product is currently on the market to the best of our knowledge. Traditional nicotine-replacement therapies (e.g. gums, patches and inhalators) continue to be advertised within the medicines regulatory framework. Because the prohibition on medicinal claims stems from medicines legislation it applies to ads for products and brands but does not, to the best of the ASA’s understanding, apply to public health ads which promote the use of e-cigarettes as a quit smoking aid in general terms and which do not refer to a product or brand.

3.2 The DoH has stated in its guidance (see “Who the requirements apply to”) that public health campaigns which refer to e-cigarettes are not caught by the prohibitions in TPD / TRPR. As part of their recent ‘Stoptober’ campaign, Public Health England (PHE) placed advertisements in television and other media referring to e-cigarettes as a quit smoking aid. E-cigarette
brands themselves cannot advertise on television, nor where they can be advertised, can they lawfully make stop smoking claims.

3.3 As noted above where ads are lawful they must comply with CAP and BCAP’s strict rules. In addition to prohibiting medicinal claims (for example that products can assist in quitting smoking) CAP and BCAP currently require ads not to make health claims and this includes, for example, claims that products are safer than smoked tobacco. This prohibition reflects concerns at the time the rules were put in place about the extreme variability, efficacy and safety of products on the market at a time before product standards were instituted by the TPD / TRPR.

3.4 Now that such product standards are in place and given the widespread support from public health stakeholders about the potential health benefits of transitioning to e-cigarettes from tobacco, CAP and BCAP have this year consulted on a proposal to remove that prohibition. At the time of writing they are evaluating responses to that consultation.

3.5 If CAP and BCAP enact the proposal it will allow marketers to make claims about the potential health benefits of their products (for example comparing their safety relative to tobacco), but only where they have robust evidence which substantiates that those claims are true for the advertised product. Marketers will not be able to use generalised commentary by public health bodies about the benefits of e-cigarettes unless those claims are true for their specific products. CAP and BCAP will make an announcement on this issue in the New Year.

4. Scotland

4.1 In 2016 the Scottish Parliament passed the Health (Tobacco, Nicotine etc. and Care) Act. Chapter 2 of the Act empowers Ministers to further prohibit or restrict advertising of all e-cigarettes, but does not in itself provide those controls; which would require further, secondary legislation.

4.2 The ASA understands that Scottish Ministers are still considering what prohibitions or restrictions might be required.

5. Conclusion

5.1 In summary, the ASA in now actively enforcing rules that give effect to the legislative prohibitions on ads which promote unlicensed, nicotine-containing e-cigarettes in media subject to TRPR. Where ads for e-cigarettes are lawful the self-regulatory system continues to apply the proportionate rules which it implemented in 2014 and will amend those rules where necessary to ensure that they remain up-to-date and fit for purpose.

24th November 2017