

Template for Primary Authority Advice to a group of businesses in a co-ordinated partnership
Commercially Sensitive (When complete)

	
<p>This Primary Authority Advice has been produced by Cambridgeshire County Council in partnership with Brandbank Limited for use by members of the regulated group to help your business comply with the law. If you follow this advice correctly your local trading standards officer should respect this and not ask you to comply with the law in a different way.</p>	
Reference:	CCC/031669
Issue date:	12 th January 2018
Review date:	January 2019
Co-ordinator:	Brandbank Limited (a Nielsen company) 11 Robberds Way Norwich NR5 9JF +44 (0) 330 555 33 44
Primary authority:	Cambridgeshire County Council Current contact details on PA Register
Supporting Regulator:	Not applicable
For publication on Primary Authority Register	YES
PRIMARY AUTHORITY ADVICE	
Relevant Legislation:	The Standardised Packaging of Tobacco Products Regulations 2015 Tobacco Advertising and Promotion Act 2002 The Tobacco and Related Products Regulations 2016 Relevant excerpts are listed in the Annex.
Geographic Applicability:	This Advice applies in England, Wales, Scotland and Northern Ireland.
Scope:	This advice is addressed to businesses in the regulated group which are engaged in business to business supply of tobacco products.
Details of request:	<ol style="list-style-type: none"> 1. What (if anything) must a wholesaler business, operating in the online B2B sector, ensure is present on the digital product 'outer' packaging? 2. What (if anything) must a wholesaler business, operating in the online B2B sector, ensure is not present on the digital product 'outer' packaging?

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	<p>'Outer' packaging means the packaging that contains multiple units of cigarette boxes that a consumer usually buys (usually 12 or so consumer units are contained in 'outer' packaging).</p> <p>The question arises from a need to understand whether brand images (and perhaps other marketing info) shown on outer packaging, can be captured for online use and presented to other businesses.</p>
Advice provided:	<p>The Standardised Packaging of Tobacco Products Regulations 2015</p> <p>These regulations lay down specifications for the format and appearance of a “container packet” and a “unit packet”. In both cases the definition refers to packaging in which a tobacco product is, or is intended to be, presented for retail sale.</p> <p>Restriction on the use of certain elements, set out in regulation 10, again apply only to “the packaging in which a tobacco product is, or is intended to be, presented for retail sale”.</p> <p>There is a prohibition on production and supply of products which are in breach of the specification. The regulations do not address use of images of the products in connection with offering these products for sale.</p> <p>The Tobacco and Related Products Regulations 2016</p> <p>Regulation 12 prohibits the use of an image of a unit pack or container pack of a tobacco product in connection with an offer for sale to a consumer unless the image is of a pack which complies with Part 2 of these regulations and with the 2015 regulations.</p> <p>There is no similar provision in these regulations for images used in connection with business to business transactions.</p> <p>Tobacco Advertising and Promotion Act 2002</p> <p>An image of “outer” packaging within a digital brand package will be considered a tobacco advertisement as defined in S.1 of this act if its purpose or effect is to promote a tobacco product, whether to consumers or to other businesses.</p> <p>S.2 prohibits the publication of a tobacco advertisement. This includes publication of an advert online (S.3A).</p> <p>S.4 details exceptions to the prohibitions in S.2 and S.3A. In particular:</p> <p><i>(1) No offence is committed under section 2, 3 or 3A in relation to a tobacco advertisement—</i></p> <p><i>(a) if it is, or is contained in, a communication made in the course of a business which is part of the tobacco trade, and for the purposes of that trade, and directed solely at persons who—</i></p> <p><i>(i) are engaged in, or employed by, a business which is also part of that trade, and</i></p> <p><i>(ii) fall within subsection (2),</i></p> <p><i>in their capacity as such persons,</i></p> <p><i>(2) A person falls within this subsection if—</i></p> <p><i>(a) he is responsible for making decisions on behalf of the business referred to in subsection (1)(a)(i) about the purchase of tobacco products which are to be sold in the course of that business,</i></p>

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	<p><i>(b) he occupies a position in the management structure of the business in question which is equivalent in seniority to, or of greater seniority than, that of any such person, or</i></p> <p><i>(c) he is the person who, or is a member of the board of directors or other body of persons (however described) which, is responsible for the conduct of the business in question.</i></p> <p>Conclusion</p> <ul style="list-style-type: none"> • An image used by a wholesaler in material directed solely at trade buyers will be considered a tobacco advertisement which is permitted by virtue of the exception in Section 4(1). • A wholesaler intending to publish an image permitted under Section 4(1) must be able to demonstrate that the advertisement is directed solely at trade buyers. This should include restricting access to the advertisement, to persons who can demonstrate they meet the requirements specified in Section 4(1) & (2). • The legislation does not specify any mandatory requirements for inclusions nor exclusions in an image used in an advertisement permitted under Section 4(1). • Brand images and other marketing information shown on outer packaging can be captured for online use in circumstances permitted under S.4(1).
Document references:	None.
Communication with businesses	This Assured Advice will be posted on the dedicated pages of the Co-ordinator's commercial website. An electronic communication will be sent to all members of the Regulated Group with a clear indication of the relevance of the subject matter.
Communication with enforcing authorities:	<p>An enforcing authority, proposing to take enforcement action against a business, is only required to notify the primary authority, where they are aware that the business is a member of a regulated group. While guidance states that the enforcing authority should ask you whether you are relying on Primary Authority advice, we recommend that you ensure you communicate this as soon as possible, and do not wait to be asked. (para 21.5 of the Statutory Guidance refers). The scheme does not allow for a business to make a notification to the primary authority where an enforcing authority has already taken action in respect of which it [the enforcing authority] failed to make the required notification to the primary authority (para 21.20 of the Statutory Guidance refers).</p> <p>Additionally, the rules allow for you (or the Co-ordinator) to notify the primary authority (para 21.19 of the Statutory Guidance refers).</p> <p>Once a primary authority receives notification, statutory time limits apply (usually 5 days) in which time they must respond to the notification. (Paras 21.9 & 21.10 of the Statutory Guidance refer).</p>
Issued by:	<p>Stewart Aitken, Senior Trading Standards Officer</p> 

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Notes:

1. Once complete, this template should be saved in a format that ensures it cannot be altered, for example a password protected PDF.
2. This document includes best practice advice and a brief summary of the requirements of the [Primary Authority Statutory Guidance](#). It should be read alongside the Primary Authority Statutory Guidance.
3. Primary Authority Advice is assured. This means that when a business is following the advice the primary authority can direct against any proposed enforcement action which is inconsistent with the advice

Annex - Relevant excerpts from legislation

[The Standardised Packaging of Tobacco Products Regulations 2015](#)

Interpretation

2.—(1) In these Regulations—

...

“container packet”, in relation to a tobacco product, means any packaging—

- (a) in which that product is, or is intended to be, presented for retail sale, and
- (b) which encloses (whether wholly or partially)—
 - (i) a unit packet of that product, or
 - (ii) an aggregation of such unit packets;

and where there is more than one separate layer of such packaging each such layer is to be regarded as a separate container packet for the purposes of these Regulations; but any reference in this definition to packaging does not include a wrapper;

“external packaging”—

- (a) in relation to a unit packet of a tobacco product (other than a unit packet mentioned in paragraph (b)), means every surface of the packet that is visible before the packet is opened,
- (b) in relation to a unit packet of hand rolling tobacco in the form of a pouch, means every surface of the pouch that is visible before the pouch is opened, together with the hidden surface of the pouch in a case where the pouch takes the form of a rectangular pocket with a flap that covers the opening, and
- (c) in relation to a container packet of a tobacco product, means every surface of the packet that is visible before the packet is opened;

and for the purposes of this definition “visible” includes visible through any wrapper permitted by paragraph 4 of Schedule 2 or 4 or any tab which complies with paragraph 3(1) of Schedule 4;

“internal packaging”, in relation to a unit packet or container packet of a tobacco product, means so much of that packet as does not comprise the external packaging of that packet;

“unit packet”, in relation to a tobacco product, means the smallest individual packaging (whether enclosed by a container packet or not) in which that product is, or is intended to be, presented for retail sale, but does not include any wrapper;

“wrapper”, in relation to a tobacco product, means a cellophane or plastic wrapper—

- (a) in which that product is, or is intended to be, presented for retail sale, and
- (b) which encloses (whether wholly or partially)—
 - (i) a unit packet of that product,
 - (ii) an aggregation of such unit packets which is not contained in a container packet, or
 - (iii) a container packet of that product.

(6) For the purposes of these Regulations a person supplies a tobacco product if, in the course of a business, the person—

- (a) supplies the product—
 - (i) for consumption in the United Kingdom or through the travel retail sector, or
 - (ii) with a view to the product being supplied for consumption in the United Kingdom or through the travel retail sector,
- (b) offers or agrees to supply it in those circumstances, or
- (c) exposes or possesses it for supply in those circumstances.

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Tobacco Advertising and Promotion Act 2002

- 1** Meaning of “tobacco advertisement” and “tobacco product”
In this Act—
“tobacco advertisement” means an advertisement—
 (a) whose purpose is to promote a tobacco product, or
 (b) whose effect is to do so, and
“tobacco product” means a product consisting wholly or partly of tobacco and intended to be smoked, sniffed, sucked or chewed.
- 2** **Prohibition of tobacco advertising**
(1) A person who in the course of a business publishes a tobacco advertisement, or causes one to be published, in the United Kingdom is guilty of an offence.
(2) A person who in the course of a business prints, devises or distributes in the United Kingdom a tobacco advertisement which is published in the United Kingdom, or causes such a tobacco advertisement to be so printed, devised or distributed, is guilty of an offence.
(3) Distributing a tobacco advertisement includes transmitting it in electronic form, participating in doing so, and providing the means of transmission.
...
- 3A. Advertising: information society services**
(1) This subsection applies where by means of an information society service, provided in the course of a business, a tobacco advertisement is published—
 (a) in the United Kingdom, or
 (b) in an EEA State other than the United Kingdom, by a service provider established in the United Kingdom.
(2) Where subsection (1) applies—
 (a) any proprietor of the information society service or any editor of the information contained in the information society service is guilty of an offence, ...
- 4 Advertising: exclusions**
(1) No offence is committed under section 2, 3 or 3A in relation to a tobacco advertisement—
 (a) if it is, or is contained in, a communication made in the course of a business which is part of the tobacco trade, and for the purposes of that trade, and directed solely at persons who—
 (i) are engaged in, or employed by, a business which is also part of that trade, and
 (ii) fall within subsection (2),
 in their capacity as such persons,
 ...
 ...
(2) A person falls within this subsection if—
 (a) he is responsible for making decisions on behalf of the business referred to in subsection (1)(a)(i) about the purchase of tobacco products which are to be sold in the course of that business,
 (b) he occupies a position in the management structure of the business in question which is equivalent in seniority to, or of greater seniority than, that of any such person, or
 (c) he is the person who, or is a member of the board of directors or other body of persons (however described) which, is responsible for the conduct of the business in question.
 ...
 ...
- 7D Displays on a website**
(1) The Secretary of State may by regulations make provision imposing requirements in relation to the display in England and Wales or Northern Ireland in the course of a business of tobacco products or their prices on a website where tobacco products are offered for sale.
(2) A person who displays or causes to be displayed tobacco products or their prices in breach of a requirement contained in the regulations is guilty of an offence.

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(3) A service provider established in England and Wales or Northern Ireland is guilty of an offence if, in the course of providing information society services, the provider does anything in an EEA State other than the United Kingdom which, if done in England and Wales or Northern Ireland, would constitute an offence under subsection (2).

(4) Nothing in subsection (2) makes it an offence for a service provider established outside the United Kingdom to do anything in the course of providing information society services.

(5) The regulations may make provision for a relevant display of tobacco products or their prices which also amounts to an advertisement to be treated for the purposes of offences in England and Wales or Northern Ireland under this Act—

(a) as an advertisement and not as a display, or

(b) as a display and not as an advertisement.

(6) In subsection (5) a “relevant display” means a display on a website where tobacco products are offered for sale.

[The Tobacco and Related Products Regulations 2016](#)

Images of tobacco products targeted at consumers

12.—(1) No person may publish or cause to be published in the course of a business an image of a unit pack or container pack of a tobacco product in connection with an offer for sale to a consumer (in circumstances which are not otherwise made unlawful by the provisions of the Tobacco Advertising and Promotion Act 2002) unless the image complies with paragraph (2).

(2) An image of a unit pack or container pack of a tobacco product complies with this paragraph if the pack depicted in the image complies with the labelling and packaging requirements for the lawful supply of the product concerned which are imposed by—

(a) this Part; and

(b) regulations 4, 8 and 10 of the Standardised Packaging of Tobacco Products Regulations 2015.