



The Advertising Association

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RESPONSE OF THE ADVERTISING ASSOCIATION TO THE FINANCIAL SERVICES AUTHORITY DISCUSSION PAPER 08/3 ON “TRANSPARENCY AS A REGULATORY TOOL”

1. Preamble

1.1. The Advertising Association is a federation of trade bodies and organizations representing the advertising and promotional marketing industries, including advertisers, agencies, the media and support services in the UK. It is the only body that speaks for all sides of an industry that was worth over £19 billion in 2007. Further information about the Advertising Association, its membership and remit, can be found at the following location:
<http://www.adassoc.org.uk/>

2. Introduction & Summary

2.1. The Advertising Association welcomes the opportunity to respond to the Financial Services Authority (FSA) Discussion Paper 08/3 “Transparency as a Regulatory Tool” (DP 08/3).

2.2. In summary, in this response, the Advertising Association sets out:

- (a) its recommendation that the FSA compare its own procedures with those of fellow regulators with responsibilities for advertising, such as the Advertising Standards Authority (ASA) and the Medicines & Healthcare products Regulatory Agency (MHRA);
- (b) that it considers the package of measures both in progress and in prospect the FSA pursues in the areas of education, deterrence, prevention and confidence as likely to go a significant way towards reducing the risk of consumer detriment being incurred;
- (c) its recommendation that the FSA offer a free non-binding “without prejudice” pre-publication advice service covering financial promotions to those firms that wanted to draw upon it; and,
- (d) its views on the need for the minimum level of prescription when it comes to the inclusion of those information requirements in financial promotions that are mandated by law.

2.3. The Advertising Association looks forward to publication by the FSA of a statement by the end of 2008 in response to DP 08/3 that will set out the proposals of the Authority and the timescales for progressing its policy in this area.

2.4. The Advertising Association is not seeking for any part of this submission to be treated as confidential. The Advertising Association is grateful to the FSA for the extension granted it by the Authority to the original deadline of 29 August 2008 for receipt of this response.

3. General comments in relation to financial promotions and regulatory disclosure

3.1. The Advertising Association appreciates that the FSA considers itself constrained by what it can and cannot disclose under the Freedom of Information Act 2000 (FOIA) and those provisions contained within the Financial Services and Markets Act 2000 (FSMA)¹ relating to due process when publishing statements amounting to public censure of those the Authority regulates. The FSA states that Sections 207 and 208 of FSMA have the effect of circumscribing what the Authority may say about a financial promotion so as to avoid the implication that a firm was necessarily in breach of any of its requirements. The way the FSA expresses matters in DP 08/3 suggests that the rules on promotions contained within its respective *Sourcebooks* are not binding on firms, which is contrary to how the Advertising Association understands matters.

3.2. The Advertising Association is encouraged by the commitment of the FSA to disclose information about financial promotions that the Authority considers, on balance, serves, rather than harms the public interest. The Advertising Association also accepts that any information so disclosed should meet the standards set by the FSA itself in terms of economy, efficiency and effectiveness.

3.3. Separately, the Advertising Association considers that the Financial Promotions Team (FPT) within the Retail Policy & Themes Division of the FSA might benefit from comparing its own procedures with those of fellow regulators with responsibilities for advertising – both self-regulatory, like the ASA – and statutory, like the MHRA, whose Vigilance & Risk Management of Medicines Division contains an Advertising Standards Unit.

4. Specific comments in relation to financial promotions and regulatory disclosure

Q16: Do you agree that we should take further action, over and above our existing actions, to reduce the risk of consumers making poor buying decisions because of financial promotions that are unfair, unclear or misleading?

4.1. Yes. The Advertising Association agrees that the FSA should take actions over and above those it takes presently to reduce the risk of consumers making poor buying decisions resulting from financial promotions that do not meet the standard required by the Markets in Financial Instruments Directive (MiFID)² that information provided to clients be ‘fair, clear and not misleading’. The Advertising Association therefore supports the actions the FSA states it is “minded to do”³ in DP 08/3.

Q17: Do you think that the package of measures described in paragraphs 6.56 to 6.68 will be effective in reducing the risk of consumer detriment?

4.2. The Advertising Association considers that the package of measures the FSA describes in paragraphs 6.56 to 6.68 covering initiatives of the Authority relating to education, deterrence, prevention and confidence will undoubtedly go a significant way towards reducing the risk of consumer detriment.

¹ The relevant provisions are contained within Section 207 (“Proposal to take disciplinary measures”) and Section 208 (“Decision notice”), both of which are to be found within Part XIV (“Disciplinary measures”) of FSMA.

² Directive 2004/39/EC of the European Parliament and the Council “on markets in financial instruments” (as implemented by Commission Directive 2006/73/EC “as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive”)

³ Source: *Discussion Paper 08/3: Transparency as a Regulatory Tool* [FSA, May 2008: 46]

4.3. The Advertising Association assesses in turn the four strands of measures the FSA proposes taking in respect of education, deterrence, prevention and confidence to reduce the risk of consumer detriment in Paragraphs 4.5 to 4.13 below. Clearly the FSA should itself monitor the extent to which its proposals are succeeding in achieving their objectives and adjusting them to improve their efficacy as necessary over time or consider alternative approaches. (See also Paragraph 4.14 below.)

4.4. Before doing so, however, the Advertising Association should state that it shares the analysis by the FSA in DP 08/3 as to why firms may on occasion issue promotions that fail to satisfy the requirements set out by the Authority in its *Sourcebooks*. The FSA identifies a poor understanding by firms of the rules contained within its *Sourcebooks* as the root cause of non-compliance with them, rather than any intent on the part of financial services companies actively to deceive consumers.

Education

4.5. In order to assist firms in understanding the expectations of the FSA, the Authority currently communicates "...clear, timely and explicit warnings when necessary."⁴ The reference to issuing warnings, however, belies the fact that any promotion necessitating such action, as a result of falling foul of FSA rules, has already been produced. The Advertising Association, however, considers that it would be far preferable for all concerned – the regulator, consumers and firms - had the financial promotion not got to that stage before being identified as problematic in the first place: a case of prevention being better than cure. (The Advertising Association considers the current and prospective activities of the FSA in the field of prevention in Paragraphs 4.11 and 4.12 below.)

4.6. It is notable, in this context, that the FSA does not offer financial services firms or the advertising agencies that may be acting on their behalf any advice about the content of their advertisements prior to their release. Such an approach is in stark contrast to other advertising sectors where the Committee of Advertising Practice (CAP), for example, offers advertisers a free copy advice service against the provisions contained within its *The British Code of Advertising, Sales Promotion & Direct Marketing (BCASPDM)*⁵. Advice sought and received in this way gives advertisers the opportunity to adjust material if they so choose, but it is without prejudice to any negative adjudication about an advertisement that may subsequently be arrived at by the ASA – the body responsible for administering the *BCASPDM*. (See also Paragraph 4.12 of this submission below.) CAP also provides advertisers with a series of Help Notes on its website covering a range of advertising categories and issues, which effectively act as guidance for advertisers, informed as their content is by previous ASA adjudications.

4.7. From an industry perspective, the Advertising Association certainly welcomes the efforts made in recent years by the FSA to communicate better, through a variety of means, with financial services firms and the advertising agencies that may be acting on their behalf. The Advertising Association also recognises that the FSA does not ordinarily have recourse as a first resort to the enforcement mechanisms at its disposal. The Advertising Association is, however, not surprised to learn that the principal conclusion drawn by the FSA as a consequence of the informal consultation it conducted over the summer of 2007 with representatives from consumer groups and industry was that the tools presently used by the Authority were of limited relevance. This serves to underline again, if it were necessary, the

⁴ Source: *Discussion Paper 08/3: Transparency as a Regulatory Tool* [FSA, May 2008: 45 (First Bulletpoint, Paragraph 6.55)]

⁵ It is the *BCASPDM* against which the ASA would adjudicate in respect of a non-broadcast marketing communication in the event of receiving a complaint requiring further investigation.

need for the FSA to clarify its expectations in respect of promotions that will be deemed to comply with its *Sourcebooks* (and for it to be more ambitious still in its programme of educating firms).

4.8. In attempting to address this, the Advertising Association considers that the proposal of the FSA to use 'real life' examples rendered anonymous in order to maximise their relevance is a step in the right direction.

Deterrence

4.9. The Advertising Association notes the apparent frustration of the FSA at the paucity within its enforcement armoury of "tools that create a penalty for firms that either repeatedly commit minor breaches of the spirit or the letter of the financial promotions requirements, or commit a fundamental breach of the requirements."⁶ Nevertheless, in the period from December 2004 until May 2008, the FSA states that it undertook twelve acts of enforcement, which resulted in public censure and fines of £1.5m.

4.10. The Advertising Association notes both the time and expense involved in the enforcement processes currently undertaken by the FSA for both itself and firms in the Authority's discussion of its overall deterrence strategy. The Advertising Association therefore welcomes the fact that the FSA is considering developing a fast-track enforcement procedure whereby the outcome is more likely to be adverse publicity resulting from public censure, than a fine – this would appear to approximate the highly effective approach adopted by the ASA, which is very successful in deterring non-compliance. Indeed one of the principal sanctions available to the ASA is precisely the generation of adverse publicity about an advertisement that falls foul of the spirit or the letter of the various codes that govern standards in advertising, which it is responsible for administering, given its impact on the reputation of the advertiser. This tried and tested approach is effective, not least because it makes clear the regulatory expectations the ASA has of the advertising community. The system is also geared to assist consumers, with the ASA having processes in place to alert them rapidly via media outlets about any adverse adjudications against advertisements at which it arrives.

Prevention

4.11. In discussing the educational initiatives undertaken by the FSA in Paragraphs 4.5 to 4.8 above, the Advertising Association has already noted the advantages of the Authority pursuing a preventative approach aimed at minimising the likelihood of firms failing to comply with the provisions governing promotions contained within its *Sourcebooks*. Education and prevention are closely linked, as the FSA itself identifies. Preventative approaches are advantageous to all concerned as consumers are protected from exposure to non-compliant advertising in the first place, whilst advertisers benefit from a reduction in the likelihood that a commercial communication might subsequently be subject to an adverse adjudication. (Where firms are found to be in breach of advertising rules, the costs they incur can be both indirect: such as to brand reputation; or direct: such as those associated with the need to correct or even withdraw a campaign. In the context of financial services, firms may also be subject to additional sanctions imposed by the FSA, such as financial penalties.) Helping firms to achieve compliance, rather than having to handle the fall-out from non-compliant behaviour is not only logical from the perspective of the regulator, as it considers how best to allocate its finite resources, but also fits with the overall direction in recent years of best regulatory practice across enforcement authorities more generally.

⁶ Source: *Discussion Paper 08/3: Transparency as a Regulatory Tool* [FSA, May 2008: 45 (Second Bulletpoint, Paragraph 6.55)]

4.12. The Advertising Association does not possess the technical expertise to comment on the extent to which so-called non-fundamental Own Initiative Variation of Permissions (OIVoPs) might in themselves constitute useful tools in preventing the publication of non-compliant financial promotions, as the FSA suggests they may be. The Advertising Association notes, however, that one of the actions the FSA envisages could be taken under a non-fundamental OIVoP would be to require a financial services company to use an external person or third party company to confirm the compliance of financial promotions for a period. It is clear that the FSA recognises the value of offering pre-publication advice, even if the counsel of such third parties cannot presumably guarantee compliance as this would put into doubt the sovereignty of the Authority as the ultimate arbiter in respect of interpreting its *Sourcebooks*. The Advertising Association considers that it would be preferable if the FSA itself were able as a matter of course to offer some form of free non-binding pre-publication advice to financial services advertisers and the agencies acting on their behalf that was offered “without prejudice” to the ability of enforcement action being taken against them subsequently, if necessary. (This would reflect the systems in place around the broadcast and non-broadcast advertising codes upon which the ASA adjudicates, including for products in what can be technical sectors, such as gambling. See also Paragraph 4.6 above.) Whilst advertisers would not be required to seek pre-publication in the ordinary course of events, the Advertising Association considers that the FSA should be able to require recalcitrant advertisers to engage in mandatory pre-clearance of financial promotions for a specified period. (A similar sanction exists within the armoury of the ASA.)

Confidence

4.13. The Advertising Association notes the attempts by the FSA to increase confidence in the work of its FPT by making more information available (and in greater detail) about its work. The Advertising Association welcomes such initiatives, which should be of reassurance to consumers - not least as it makes them aware of the fact that the FSA is actively monitoring promotions and addressing non-compliance on their behalf.

Q18: Do you think that the benefit of creating a financial promotions Register, as described, would outweigh the drawbacks? If so, why?

4.14. The FSA sets out in DP 08/3 what it regards as the advantages and disadvantages of pursuing the option of creating a financial promotions Register, before taking an “on balance” decision against doing so at the present time, whilst establishing that it remains open to persuasion. The Advertising Association respects this “on balance” decision, but recommends that it be revisited if the other initiatives the FSA proposes to pursue fail to achieve their objectives – indeed the Authority itself advocates this approach.

5. Additional observations in relation to regulated information in advertising

5.1. The Advertising Association is encouraged by the reference the FSA makes in DP 08/3 to the joint report published by the Better Regulation Executive (BRE) and the National Consumer Council (NCC) in November 2007 entitled *Warning: Too much information can harm*⁷. A key conclusion of the BRE/NCC report was that many pieces of information that the law mandated be provided were simply not having the impact on consumer behaviour they set out to achieve, whilst placing an undue administrative burden on businesses to ensure compliance. Although the findings of the report were not specific to commercial communications, the Advertising Association considers them to be of enormous relevance

⁷ Source: *Discussion Paper 08/3: Transparency as a Regulatory Tool* [FSA, May 2008: 14 (Paragraph 3.12)]

with regards to when information requirements are mandated in advertising. In respect of financial promotions specifically, the Advertising Association would argue that such commercial communications are unlikely to be the best vehicle for transmitting detailed information about products, but that they are highly effective at raising brand awareness about providers and their offering in the first place. In support of this contention, the Advertising Association would cite the findings of the *Consumer Purchasing Outcomes Survey (CPOS)*⁸ commissioned by the FSA, conducted by The Henley Centre and BMRB and published in September 2006 - which the Authority makes reference to in DP 08/3⁹. The CPOS findings suggest that advertisements are not a useful source of detailed information for house-buyers in their decision-making processes for purchasing mortgage products, despite the data that they are required to incorporate. (Not surprisingly, information provided by financial advisers was considered by respondents to be the most useful source of data upon which decisions were made, followed by leaflets and brochures supplied by those financial services companies offering the products.) To reiterate, the CPOS findings appear to underline the fact that advertising by its very nature is aimed at raising awareness of products, rather than acting as a source of detailed information that consumers use when making purchasing decisions, something borne out by other research into the utility (or otherwise) of mandating information requirements in advertising.

5.2. In making the observations it has in Paragraph 5.1 above, the Advertising Association accepts that the FSA in many ways is simply the conduit for expressing the intent of European and domestic legislation. Indeed, the Advertising Association welcomed the principles-based approach contained within MiFID and considers that the FSA in implementing that Directive did so in the most flexible manner possible, thereby furnishing firms with the broadest latitude available to deliver the information requirements mandated. Furthermore, the effective ownership by the FSA of the rules it enforces (and the flexibility to amend them that comes with owning them) that FSMA allows compares well with other prescriptive legislation that is directly applicable to firms - most notably in the field of consumer credit advertising. This difference of approach came to the fore in respect of the advertising of those products subject both to regulation by the FSA and local trading standards services several years ago. The FSA was able to amend its rules in order to address a particular problem relating to information requirements arising from this dual regulation, whereas the prescriptive nature of the consumer credit legislation meant nothing could be done on the trading standards side to ameliorate the situation.

12 September 2008

⁸ http://www.fsa.gov.uk/pubs/other/mortgage_review_outcomes.pdf

⁹ Source: *Discussion Paper 08/3: Transparency as a Regulatory Tool* [FSA, May 2008: Annex 1 (Page 4, Table 2)]