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RESPONSE TO THE FINANCIAL SERVICES AUTHORITY CONSULTATION ON REGULATING SALE AND RENT BACK – THE FULL REGIME

The Advertising Association is the only body representing all sides of the advertising and promotional marketing industries, worth £18.6 billion in 2008. Its membership represents advertisers, agencies, media and support services in the UK. Further information about the organisation is available at: <http://www.adassoc.org.uk/>

1. Introduction & Summary

1.1. The Advertising Association responds here to the proposals for regulating sale and rent back agreements (SRBs) contained in Consultation Paper 09/22 *Regulating sale and rent back – the full regime*, published by the Financial Services Authority (FSA). SRBs are essentially arrangements whereby owners of properties (usually those facing financial difficulties) sell their homes at a discount to third parties and then have the right to remain in the property as tenants of the latter. Typically, the resultant rental agreements take the form of assured shorthold tenancies consisting of a term of between six and twelve months. It is envisaged that the full SRB regime, which will include a number of new restrictions and requirements across the activities of providers, including their marketing, will replace the existing “interim” rules on 30 June 2010.

1.2. In this response, the Advertising Association:

(a) establishes its support for the continuance of the financial promotions rules for SRBs currently in force to apply under the new overarching regime being proposed, rather than for additional requirements and restrictions being brought to bear on advertisements for such products;

(b) expresses disappointment that the FSA did not seek to engage with it in respect of the financial promotions regime the Authority was considering introducing during the pre-consultation discussions that the regulator apparently conducted over the summer; and,

(c) sets out its analysis of each of the new rules being proposed, suggesting alternative approaches where appropriate – in particular, having registered the principled opposition of the advertising sector to the incorporation of mandatory information in advertisements, proposes how the introduction of the risk warning being considered might, if retained post-consultation, be rendered more proportionate.

1.3. The Advertising Association looks forward to publication by the FSA of its response to this consultative exercise in the form of a Policy Statement and a final set of rules early next year, well ahead of the full regime coming into force on 30 June 2010. It is understood that if new financial promotion rules for SRBs are introduced they would be incorporated within an expanded version of the FSA's *Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB)*. No part of this submission should be treated as if it were confidential in nature.

2. Responses to specific FSA Questions

Q3: Do you agree with our approach to regulating SRBs?

2.1. The Advertising Association supports the overall approach being proposed by the FSA towards regulating SRBs, but considers that the provisions around financial promotions contained in the current “interim” regime are already sufficient to ensure that the advertisers they cover abide by standards that afford the necessary degree of protection to consumers. Analysis by other stakeholders of the merits of the FSA’s proposals would undoubtedly have been assisted had the Authority conducted research aimed at informing it as to the degree to which SRB providers are complying with the financial promotion rules that exist under the current “interim” regime that has been in place since 1 July 2009. Data of such a nature appears to be missing from CP09/22. (See also response to Question 18 below.)

Q4: Do you have any comments on the perimeter guidance for SRB?

2.2. It is recommended that, for clarity and for ease of use by SRB providers, the FSA amend the typographical errors that can be found in its *Perimeter Guidance Manual* at *PERG 2.8.6G(1)*¹ and *PERG 14.6*².

Q18: Do you agree with our approach to financial promotions and communications?

2.3. Broadly, no: a number of the new rules are regarded as acceptable, because they are neutral in effect, whilst others are considered to be damaging from a business perspective, without being of any consumer utility. Comment is provided on each new (or amended) rule of relevance in Paragraphs 2.4 to 2.15 below. Furthermore, it is very disappointing that the FSA chose not to approach the Advertising Association during the pre-consultation discussions the Authority apparently conducted over the summer prior to drawing up its detailed proposals on financial promotions under the prospective full regime, despite the organization having responded to the earlier consultative exercise conducted by the regulator on the introduction of an “interim” regime for SRBs³. Had the FSA done so, it would have been informed that the advertising industry had been encouraged by the relatively proportionate and pragmatic approach adopted in respect of financial promotions for SRBs under the “interim” regime.

Application of rules to nationals in other European Economic Area (EEA) States

2.4. In *MCOB 3.1.11G* the FSA provides guidance as to how the new rules on financial promotions for SRBs should be applied to nationals based in other EEA States. It is considered that the introductory title to this element of *MCOB* guidance should read “Nationals of other EEA States”, as opposed to how it is presently drafted.

Tightening of existing exemption from MCOB requirements for brand advertising

2.5. In *MCOB 3.2.5R* the FSA currently provides an exemption from the full application of the SRB rules in those circumstances where only the name of the firm, its logo, contact point, telephone number and a brief factual statement as to the nature of its business is given in the financial promotion. The FSA proposes introducing a new rule – *MCOB 3.2.4AR* – that would only allow SRB providers to describe their businesses as offering an opportunity to “sell your house and rent it back” or offering a “sale and rent back” service rather than

¹ Amend the Guidance to read: “those relating to”

² Amend the Answer to Question 39 to read: “the time that”

³ The response of the Advertising Association to the FSA Consultation Paper 09/6 *Regulating sale and rent back: an interim regime* can be downloaded from the following location:

<http://www.adassoc.org.uk/aa/index.cfm?LinkServID=CCF6844E-EE2F-A487-7FB4FE01EDFA87AB&showMeta=0>

permitting them to incorporate any more detail about their businesses via brief factual statements. The FSA does not offer up any evidence, anecdotal or otherwise, that SRB providers are currently abusing the present opportunity to provide a brief factual statement about their businesses under the existing “interim” regime. It is therefore impossible to arrive at an informed judgment as to whether or not the more restrictive regime being proposed by the FSA is justified or not.

Proposed ban on cold calling

2.6. In *MCOB 3.7.3R* the FSA proposes prohibiting unsolicited approaches to potential customers be these in person or via telephone. It is notable that were such cold-calling in any way aggressive, action could surely be taken against the SRB provider concerned under Regulation 7 (“Aggressive commercial practices”) of The Consumer Protection from Unfair Trading Regulations 2008 (CPRs)⁴. It is unclear what mischief would be caught by *MCOB 3.7.3R* that would not also be caught by Regulation 7 of the CPRs, thereby calling into question the need for this new FSA rule.

Reiteration of “clear, fair and not misleading” standard

2.7. Although a number of the merits of passing responsibility for regulating non-broadcast SRB advertisements from the Advertising Standards Authority (ASA) to the FSA were questioned at the time of the consultation on the “interim” regime, then as now, the Advertising Association would endorse the principle established by the statutory regulator in *MCOB 3.8B.1R* that financial promotions should meet the standard of being “clear, fair and not misleading”. (These were standards already effectively required by the ASA, reflecting as the broadcast and non-broadcast advertising codes upon which that body adjudicates do, the provisions of the CPRs as they pertain to misleading advertising.)

Guidance in respect of comparative advertising

2.8. In *MCOB 3.8B.2R* and *MCOB 3.8B.2G* the FSA sets out in a rule and guidance the “clear, fair and not misleading” standard it expects with regards to the form and content of financial promotions for SRB agreements. In a Note that appears beneath the rule and its supporting guidance, the FSA states that a comparative financial promotion will need to comply with The Control of Misleading Advertisements Regulations 1988⁵. That Statutory Instrument was in fact repealed last year via the CPRs and the legal provisions the measure contained on comparative advertising are now set out in The Business Protection from Misleading Marketing Regulations 2008⁶. It is therefore recommended that, to avoid confusion, the FSA correct the reference in this Note accordingly.

Proposed ban on door-dropping of leaflets by SRB providers

2.9. In *MCOB 3.8B.3R* the FSA effectively bans the door-dropping of leaflets relating to SRB products. Ordinarily door-drops would not be considered a problematic channel to market. It appears that what the FSA regards as problematic in the SRB context is the degree to which providers target certain neighbourhoods with door-drops. Given that the FSA proposes introducing a series of stricter rules governing the form and content of financial promotions for SRBs more generally, the Authority should give further consideration to whether it is absolutely necessary to prohibit the door-dropping of leaflets by providers before finally committing itself to the introduction of a ban in this area.

Restriction on the use of the phrase “equity release” to describe SRB products

2.10. In *MCOB 3.8B.4R(1)* the FSA requires that SRB products should not be described by providers as “equity release” in their financial promotions, given the qualitative difference between the two. It is difficult to disagree with such a requirement. It is, however, unclear

⁴ Statutory Instrument No. 2008/1277

⁵ Statutory Instrument No. 1988/915 (as amended)

⁶ Statutory Instrument No. 2008/1276

why a specific rule in *MCOB* is required, given that were an SRB provider to adopt such an approach it would be likely to breach, at the very least, the FSA's "not misleading" standard (see Paragraph 2.7 above).

Restriction on the use of certain other words and phrases in SRB financial promotions

2.11. In *MCOB 3.8B.7R* the FSA requires that SRB firms avoid using the terms "fast sales", "rescue", "cash quickly" or equivalent turns of phrase in their financial promotions. The basis for the FSA introducing this rule appears to be that such terms may appeal to certain vulnerable consumers. It is difficult to support limitations being placed on creative treatments and the use of certain words, but if the FSA does possess persuasive evidence of serious detriment being caused to vulnerable consumers by the use of such terms in financial promotions, it may be that – exceptionally - such an intervention is appropriate.

Incorporation of mandatory risk warnings in financial promotions for SRB products

2.12. In *MCOB 3.8B.4R(2)* the FSA proposes requiring advertisers to incorporate a lengthy risk warning into their financial promotions, including a statement advising prospective customers to request that the SRB provider send them a statement setting out the key terms of the arrangement. In this context, it is notable that the FSA refers in CP09/22 to the fact that one of its regulatory objectives in intervening in the SRB market is the provision of concise information to prospective customers, but then proposes the incorporation of a lengthy risk warning within financial promotions. As the FSA will be well aware from previous evidence provided to it by the Advertising Association in the course of other consultative exercises, incorporating mandatory information, such as risk warnings, into advertisements is of no consumer utility, whilst imposing a significant burden on media owners - most obviously in commercial radio where advertisers must purchase additional airtime, thereby undermining the relative competitiveness of an otherwise highly effective advertising medium. The FSA is therefore urged to consider a carve-out for broadcast media in respect of the risk warning. It is accepted, however, that the FSA is likely to want to maintain some form of risk warning for incorporation in financial promotions within its proposals. Two proposals aimed at rendering the warning more concise and proportionate are made in this context. Firstly, the need to refer to the availability of a key terms statement in financial promotions appears superfluous given that elsewhere within the full SRB regime being proposed by the FSA, an obligation is placed on providers to supply prospective customers with such a document: it therefore appears anomalous for the prospective customer also to have to ask for one – indeed it effectively imposes a burden on them. In this context it is therefore strongly recommended that the phrase "For further information, please ask for a key terms statement" be removed from the risk warning ahead of the proposed new rules being incorporated into the final version of *MCOB*. Secondly, it is recommended that rather than the FSA prescribing the wording⁷, advertisers should be given the opportunity to make a statement to the effect that: 'customers are unlikely to get the full market value of their home if they enter into such an arrangement; may only be able to live there if they comply with the tenancy agreement; and, that other options may be available'. The obligation remains on SRB providers to communicate that information, but they are likely to be able to get it across in a more concise manner to the benefit of consumers and media owners, whilst firms offering such arrangements could benefit from the greater flexibility that such an approach would permit.

⁷ The prescribed risk warning being proposed by the FSA within *MCOB 3.8B.4R(2)* would, if taken forward in the form presented in CP09/22, read: "You are unlikely to get the full market value of your home should you enter into a sale and rent back arrangement and may only be able to live there while you comply with the tenancy agreement. There may be other options available. For further information, please ask for a key terms statement."

Incorporation of risk warning in advertising for SRB providers offering quick property sales

2.13. In *MCOB 3.8B.4R* the FSA proposes that the risk warning considered in Paragraph 2.12 above should be incorporated within financial promotions where SRB firms advertise quick property sales, but stay silent about the possibility of the prospective seller renting the property back - only doing so once the consumer has initiated contact. As commented elsewhere in this response, it is unclear (from CP09/22) the extent to which SRB providers have actually attempted to circumvent the existing "interim" regime in the way suggested by the FSA.

Evidential requirements placed on SRB providers in respect of their financial promotions

2.14. In *MCOB 3.8B.5E(1)* the FSA places a set of evidential requirements on SRB providers in respect of the financial promotions they produce. FSA evidential requirements do not amount to rules *per se*. It does appear pertinent to note here, however, the extent to which many of the evidential requirements set out by the FSA simply reflect what is already required by law under the CPRs. The provisions of the CPRs are also reflected in the broadcast and non-broadcast advertising codes upon which the ASA adjudicates and, consequently, prior to 1 July 2009, advertisers of SRBs would have been expected to meet the legal standards set by that Statutory Instrument.

Record-keeping requirements

2.15. The Advertising Association considers it reasonable that under *MCOB 3.10.1R* firms should be able to confirm that their advertising complies with applicable FSA rules and for those SRB providers to keep a record of the approved promotion for the specific period being proposed (twelve months).

Q29: Do you agree with our proposals regarding a key terms statement?

2.16. In *MCOB 5.9.1R(1A)* the FSA sets out its requirements on pre-sale disclosures and warnings in respect of SRBs. Comment has already been provided in this response on the proposal, which appears superfluous to the Advertising Association, that SRB providers should be obliged to refer to the key terms statement in financial promotions for their products. It is considered, however, that, for clarity, *MCOB 5.9.1R(1A)(d)* should be amended to read: "the purchase price that the firm is prepared to pay the SRB *agreement seller* for the property, net of any fees, charges or retentions;".

Q36: Do you have any comments about our transitional arrangements?

2.17. The inclusion of an explicit three month transitional provision for SRB-related promotional material produced before 30 June 2010 is welcome - as is the grace period of up to twelve months granted to those providers' advertisements contained in long shelf-life publications, such as directories, that are published before the introduction of the full regime next year.

Q43: Do you have any comments on our CBA?

2.18. The observation is made here that, according to the FSA's own calculations in its cost-benefit analysis, the initial non-recurring costs imposed on SRB providers (at up to £10,000 per firm) and the recurring costs (at up to £6,000 per annum) that will need to be absorbed by them in order to comply with the financial promotions rules being proposed are significant. It is anticipated that these costs could be off-set, at least to a degree, were the recommendations and observations outlined above taken into account by the FSA ahead of the regulator publishing its final set of rules in early 2010.