



The Advertising Association

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RESPONSE OF THE ADVERTISING ASSOCIATION TO THE FINANCIAL SERVICES AUTHORITY CONSULTATION REGULATING RETAIL BANKING CONDUCT OF BUSINESS (CP08/19)

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 *Consultation Paper 08/19: Regulating retail banking conduct of business (CP08/19)* in which the Financial Services Authority (FSA) seeks views on its proposed new framework for regulating deposit-taking and other activities in the retail banking sector. The Advertising Association also notes that the FSA has already conducted a substantive informal consultation within the financial services sector and with consumer groups and others.

2.2. The proposals put forward by the FSA will have two principal effects in respect of deposit-taking institutions and the financial promotions related to these activities that they produce: the area of regulation with which the Advertising Association is concerned. Firstly, the standards contained in the *Banking Code*¹ and the *Business Banking Code*², which are monitored and enforced by the self-regulatory Banking Code Standards Board (BCSB) would be superseded in their entirety in respect of deposit-taking and related activities by a *Banking: Conduct of Business Sourcebook (BCOBS)* enforced by the FSA. (The existing Codes both contain short and identically-worded sections on advertising and marketing – for ease of reference, the text of these can be found at the Appendix to this submission.) Secondly, the role the BCSB currently plays in monitoring and supervising certain financial promotions subject to the FSA's overarching *Conduct of Business Sourcebook (COBS)* under a Memorandum of Understanding it has with the Authority would also be taken over by the Financial Promotions Team within the Retail Policy & Themes Division of the statutory regulator. In this context, it is noteworthy that case-handling principles also exist between the FSA and the Advertising Standards Authority (ASA) whereby complaints received by the latter body about financial promotions covered by *COBS* are ordinarily referred on to the BCSB.

2.3. In summary, in this submission, the Advertising Association mounts a defence of effective self-regulatory systems and argues at the close of this response that a decision to

¹ The *Banking Code* is drafted by the British Bankers Association (BBA), the Building Societies Association and the Association for Payment Clearing Services (APACS).

² The *Business Banking Code* is drafted by the BBA and APACS.

abandon self-regulation in this field should not be taken lightly. The Advertising Association, accepting however the likelihood of the FSA replacing the self-regulatory BCSB (at least in respect of deposit-taking activities) with direct regulation by the Authority:

- (a) sets out its preference for principles-based over prescriptive regulation;
- (b) notes the benefits of regulatory transparency;
- (c) observes the complexity of the current regulatory environment in the financial services field;
- (d) supports the logic that the Principles of Business that the FSA applies in other areas of financial services should also apply in respect of deposit-taking activities by retail banks;
- (e) comments on the proposed scope and structure of any *BCOBS*;
- (f) proposes that, if feasible, the *BBA / BSA Code of Conduct for the Advertising of Interesting Bearing Accounts* should be retained in some form so as to support the interpretation of any *BCOBS*;
- (g) makes observations in respect of monitoring and enforcement around the proposed approach of the FSA towards operationalising any new *BCOBS* framework; and,
- (h) calls for transitional provisions to apply in respect of broadcast and non-broadcast advertisements (including those contained within long shelf-life publications) were any new regime to come into being.

2.4. The Advertising Association is grateful to the FSA for the short extension to the original deadline set by the Authority for receipt of submissions to CP08/19 granted to it. The Advertising Association notes that once the FSA has considered the responses it receives to this consultative exercise, the Authority will publish feedback in the form of a Policy Statement, together with final *Handbook* text for consultation in the event that it decides to make or amend any rules or guidance. The Advertising Association is not seeking for any part of this submission to be treated as confidential.

3. Response of the Advertising Association to specific questions posed by the FSA

Q1: Do you have any comments on our analysis in Chapter 3 and our reasons for proposing a new framework?

3.1. The Advertising Association does take the opportunity to comment on the analysis conducted by the FSA in Chapter 3, especially given the apparent desire of the FSA to move away from the existing self-regulatory model in the field of deposit-taking activities towards a purely statutory one. The rationale of the FSA behind this is encapsulated in its statement of “Compatibility of proposals with our objectives and the principles of good regulation” at Annex 3 of CP08/19 where it argues that self-regulation in the field of financial services is increasingly anomalous and that the current arrangements are incapable of being ameliorated. In response to Question 1 the Advertising Association challenges in the paragraphs that follow some of the conclusions drawn by the FSA in respect of self-regulation generally on the basis of its analysis of the existing BCSB framework specifically.

Self-regulation and the ability to reflect changes in the legislative framework

3.2. The Advertising Association notes that the FSA considers that the two Banking Codes fail fully to reflect changes in the legislative framework such as that wrought by the Unfair Commercial Practices Directive³, which was implemented in the United Kingdom as the Consumer Protection from Unfair Trading Regulations 2008⁴. There is no reason, however, why self-regulatory systems should not be able to stay abreast of such legislative

³ Directive 2005/29/EC “on unfair business-to-consumer commercial practices”

⁴ Statutory Instrument No. 2008/1277

developments. Indeed the Advertising Codes covering non-broadcast, radio and television advertising overseen by the ASA fully reflected the provisions imposed by the 2008 Regulations within a short time of their coming into force. These three Codes can and are adjusted to take account of relevant legislative changes, as necessary.

Self-regulation and consultation

3.3. The Advertising Association notes that the FSA expresses concern that the BCSB does not consult publicly on changes to the two Codes that the Board enforces or on accompanying guidance. The Advertising Association is of the view that whilst code-owning bodies should be under no obligation to consult publicly on all changes to self-regulatory Codes, it is notable that the Committee of Advertising Practice (CAP) and Broadcast Committee of Advertising Practice (BCAP) do so when appropriate, most notably where substantive changes to the Codes may be proposed. In respect of guidance, which is presumably intended to assist firms comply with rules, the Advertising Association is less clear about why a self-regulatory body would need to consult publicly on such material. The Advertising Association considers that the view of the FSA on this subject may be influenced by the fact that, under the Financial Services & Markets Act 2000 (FSMA), the Authority is statutorily obliged to consult on Guidance⁵.

Self-regulation and deterrence

3.4. The Advertising Association notes that whilst financial services firms consider the threat of publicity and the potential resulting damage to their reputations as a significant disciplinary tool of the self-regulatory BSCB, the FSA itself regards the deterrent effect of the rulings of the Board as limited by the absence of a fining power and its relatively low media profile. The FSA, which clearly recognises how damaging adverse publicity can be to the reputation of a firm when deployed as a sanction, goes on to note in its cost-benefit analysis at Annex 2 of CP08/19 that the Authority is likely to generate seven times more publicity around a sanction than is the BCSB. As is noted in Paragraph 3.6 of this response below, the FSA is itself somewhat circumvented, however, about what it can say, at least in respect of financial promotions, about firms that infringe its rules. There is, however, no reason, why self-regulatory bodies cannot use adverse publicity as an effective sanction, particularly where they enjoy a high media profile. The self-regulatory ASA system, for example, is highly effective in deterring breaches of the advertising codes with the threat of adverse publicity and without the need to resort to fines, and although offenders can ultimately be referred to the Office of Fair Trading (OFT), it is rarely necessary for that course of action to be taken. There is certainly no obvious reason why a self-regulatory body should not enjoy a high media profile. Indeed with regard to broadcast advertising, the ASA enjoys a higher degree of recognition amongst the public than the statutory regulator to which it is ultimately accountable by law in that field - namely Ofcom - according to survey findings commissioned by the Press Complaints Commission from Ipsos-MORI and conducted in September 2006⁶. Again, the Advertising Association is not well-placed to comment on the communications and media resources that may or may not be available to the BSCB, but clearly where self-regulatory bodies, such as the ASA, do have them at their disposal a high media profile can be achieved. By way of conclusion on this point, clearly the benefits of a high media profile do not only pertain to the punitive effect of adverse publicity, but also the ability to communicate the existence of problematic claims by advertisers to consumers and other stakeholders quickly and effectively. Such action can also have the effect of improving compliance as advertisers, for example, are provided with a better idea of the standards expected of them.

⁵ Section 155 ("Consultation") and Section 157 ("Guidance")

⁶ http://www.pcc.org.uk/assets/111/PCC_public_opinion_survey_final_topline_results.pdf

Principles-based regulation versus prescription

3.5. Like the FSA, the Advertising Association considers it entirely understandable that the regulatory approach of the BCSB reflects the content of the *Banking Code* and the *Business Banking Code*: it would be somewhat surprising (and indeed concerning) were this not the case with the Board extending the scope of its remit beyond them on an arbitrary basis. That said, and again like the FSA, the Advertising Association is very much supportive of principles-based rather than prescriptive regulation, be it statutory or self-regulatory, as it provides users the greatest degree of flexibility and self-determination in respect of how rules are interpreted, whilst also safeguarding the interests of consumers and other businesses. The Advertising Association is not well-placed to comment on the entirety of the two Banking Codes, but certainly in respect of the rules contained within their respective advertising and marketing sections, it does not regard them as overly detailed. (Indeed three of the six rules appear to be purely concerned with direct marketing.) Furthermore, whilst the implementation of the Markets in Financial Instruments Directive (MiFID)⁷ has generally rendered the FSA's existing *COBS* somewhat less prescriptive, in respect of financial promotions at least they are arguably still more prescriptive than the two Banking Codes – for example, where they impose information requirements that are not actually required by European or indeed domestic legislation.

Regulatory transparency

3.6. The Advertising Association notes that the FSA considers that whilst the approach of the BCSB has been successful in delivering change and redress for consumers, the Board has historically been less transparent than the Authority both in terms of process and the publicity accorded to individual actions taken. Whilst the Advertising Association is not well-placed to know whether this is a fair criticism, it like the FSA (which recently conducted a consultation in this area) absolutely recognises the value of transparency as a regulatory tool⁸. As the Advertising Association argued in its response to that FSA consultation, self-regulation should certainly be no bar to greater transparency. Indeed, the self-regulatory ASA system compares favourably with that of the statutory FSA system in transparency terms, given the strictures, at least in respect of financial promotions, imposed on the Authority by the Financial Services and Markets Act 2000⁹.

Regulatory overlap

3.7. The Advertising Association is sympathetic to the views already expressed by firms within the retail banking sector to the FSA that if the current arrangements are to continue, greater clarity on the respective responsibilities of the Authority, the BCSB, the OFT and the Financial Ombudsman Service would be welcome. Meanwhile, it is notable that firms and the above bodies will shortly have to adapt to changes to the existing legislative framework brought about by national implementation of the Payment Services Directive¹⁰ and the Consumer Credit Directive¹¹. Even under the present arrangements, there is an understandable concern on the part of the aforementioned firms at the degree of regulatory duplication or overlap between the above bodies and concern that retail banks may be exposed to double jeopardy when conducting their daily business. Whilst these risks may be mitigated by the existence of such tools as Joint Communications¹² and Memoranda of

⁷ Directive 2004/39/EC “on markets in financial instruments”

⁸ FSA Discussion Paper 08/3 “Transparency as a Regulatory Tool” (DP 08/3)

⁹ These strictures are contained within Section 207 (“Proposal to take disciplinary measures”) and Section 208 (“Decision notice”).

¹⁰ Directive 2007/64/EC “on payment services in the internal market”

¹¹ Directive 2008/48/EC “on credit agreements for consumers”

¹² The FSA and BCSB issued a joint communication on the advertising of savings accounts in October 2008.

Understanding¹³, of which the objective is either to avoid either gaps in or unnecessary duplication of regulation, the regulatory landscape is rendered no less complicated by them. It is noteworthy in this context that the FSA, in its description of the current self-regulatory arrangements, refers to the existence of a mechanism under which complaints received by the ASA about advertisements covered by the Banking Code(s)¹⁴ are passed on to the BCSB for investigation and potential enforcement action. (This appears to be over and above the arrangement between the FSA and ASA in respect of COBS referred to in Paragraph 2.2 of this submission above.) The standards set by the FSA that financial promotions be clear, fair and not misleading (and in the case of the BCSB, reasonable as well) are reflected in the three Advertising Codes overseen by the ASA. These broad principles-based standards apply to whichever product category is being advertised, including financial promotions. Furthermore (and as already described in Paragraph 3.2 of this submission above), the standards contained within the Unfair Commercial Practices Directive as they relate to advertising, and by extension financial promotions, are already fully and comprehensively reflected within the three Advertising Codes overseen by the ASA.

Q2: Do you agree with our proposal to apply all the Principles fully for all firms that accept deposits or issue e-money?

3.8. The Advertising Association considers that, if the FSA proceeds with its preferred course of action, which will result in more direct regulation of firms that accept deposits or issue e-money, it would be somewhat illogical for its Principles for Business not to apply to those activities, when it applied to all other financial services falling within its regulatory remit. That said, the Advertising Association has also already highlighted in this response how the standards contained within the three Advertising Codes overseen by the ASA reflect the UCPD requirements around treating consumers fairly and the MiFID standard on client communications (including financial promotions) about them being clear, fair and not misleading. (The requirements of these two Directives are reflected in Principle of Business 6 and Principle of Business 7 of the FSA.) By way of conclusion, and to re-iterate the comments made by the Advertising Association in Paragraph 3.2 above, the ability of self-regulatory bodies to reflect relevant legislative changes should not be ignored by the FSA.

Q3: Do you have any comments on our proposals for a Banking Conduct of Business sourcebook and the draft Handbook text in Appendix 1?

3.9. The response of the Advertising Association to Question 3 is premised on the assumption that the FSA pursues its declared preference of abandoning the current self-regulatory BCSB system (in so much as it covers deposit-taking activities). Moreover, the comments of the Advertising Association relate to the treatment of financial promotions alone.

Scope

3.10. The Advertising Association notes that the FSA proposes that for the purposes of the regulation of financial promotions any BCOBS would apply to both deposit-taking¹⁵ and payment accounts. The Advertising Association considers that treating financial promotions for such products in the same way as each other will have the benefit of simplicity.

¹³ A Memorandum of Understanding exists between the FSA and BCSB in respect of the monitoring and supervision of certain financial promotions regulated under COBS.

¹⁴ It is unclear from CP08/19 whether this relationship applies only in respect of the *Banking Code* or both it and the *Business Banking Code*.

¹⁵ Deposit-taking accounts would be taken to include structured deposits, cash deposit Individual Savings Accounts, cash deposit Child Trust Funds as well as all accounts not denominated in euros or sterling.

Structure

3.11. The Advertising Association agrees with the FSA that any *BCOBS* should be structured in the same way as the conduct of business requirements for investment business and general insurance, which reflects the way most firms organise their business (i.e. moving from financial promotion and information disclosure through to post-sale services).

Future locus of regulatory responsibility for financial promotions for deposit-taking activities

3.12. The Advertising Association notes that financial promotions for deposit-taking activities are already subject to certain elements of Chapter 4 (“Communicating with clients, including financial promotions”) of *COBS*. Moreover, the Advertising Association notes that given the FSA intends to reflect these existing *COBS* requirements in *BCOBS*, the principal change firms would be likely to detect would be of a structural nature rather than one of content, as the Authority rather than the BCSB would take on responsibility for monitoring compliance with the rules contained in any *BCOBS*¹⁶. The Advertising Association assumes that this new responsibility of the FSA would be handed to the Financial Promotions Team within the Retail Policy & Themes Division of the Authority to carry out.

Need for consequential changes

3.13. The Advertising Association notes that if the FSA concludes that there is a need to introduce a *BCOBS* as a result of this consultative exercise, consequential changes are also likely to be required to *COBS* and some other of the modules that make up the overarching *Handbook* of the Authority, and that this would require public consultation.

Comments on draft BCOBS text

3.14. In light of the invitation by the FSA to comment on the draft *BCOBS* text, the Advertising Association would draw attention to section 2.3.9.G. The Advertising Association considers that, for the sake of consistency, this should read “Bankers Association /”, rather than as presently drafted.

Question 7: Do you think there are elements of the current Banking Codes and other relevant codes/guidelines that would not appear in the PSD Regulations or BCOBS (as proposed in this CP) but which ought not to be lost?

3.15. The Advertising Association considers that it would be unfortunate if, as a result of the changes being proposed by the FSA that are currently being consulted on, were the BBA / BSA *Code of Conduct for the Advertising of Interesting Bearing Accounts* “lost”, assuming they remained relevant (reflecting firms’ views) and assisted interpretation of the relevant chapter of any *BCOBS*¹⁷. The Advertising Association considers it likely that considerable time and effort went into the creation of this document based on its experience of the work that CAP and BCAP put into their Help Notes and Guidance respectively to support the interpretation of various parts of the three Advertising Codes.

Question 8: Do you have any comments on our proposed approach to operationalising the new framework?

Monitoring

3.16. As described previously in this submission, the FSA intends taking over responsibility for the monitoring of financial promotions relating to deposit-taking activities, rather than referring (lower risk) promotions that raise possible concerns to the BCSB as happens at present. In light of this change of regulatory responsibility, the Advertising Association is

¹⁶ See Footnote 12 for a brief description of the existing mechanism.

¹⁷ The FSA has indicated it envisages Chapter 2 of any *BCOBS* being entitled “Rules on communications and financial promotions”.

somewhat reassured by the commitment of the FSA to adopt a risk- and principles-based approach in this area. (See also Paragraph 3.12 of this response above.)

Enforcement

3.17. The Advertising Association notes that, unlike the BCSB in respect of the two Banking Codes, the FSA will have the power to impose fines on firms for breaches of *BCOBS*. As described previously in this submission, the Advertising Association considers that the effective deployment by self-regulatory bodies of adverse publicity should not be underestimated as a powerful sanction capable of deterring aberrant behaviour by firms. The FSA goes on to observe in CP08/19 that the BCSB has no power to take a case against individuals, as its disciplinary procedures are aimed at firms. By contrast, the FSA underlines that it is able to take action against individuals who fail to comply with its Statements of Principles and Code of Practice for Approved Persons or who have been wittingly involved in the contravention by an authorised firm of the rules of the Authority. Whilst the Advertising Association can well see that such a focus on individuals is highly appropriate for many aspects of deposit-taking activities, from an external perspective it would appear likely that a sanction for infringement of a financial promotion rule would be more appropriate against a firm than an individual. (By way of comparison, the ASA, for example, acts against firms on whose behalf an advertisement appears rather than against specific individuals, which appears to be an effective approach.)

Q10: In which areas do you think transitional provisions would be desirable and for how long?

3.18. The Advertising Association notes the intention of the FSA to implement all the components of any *BCOBS* in the course of November 2009 in order to fit in with the deadline the Authority is working to for implementing the Payment Service Directive. The FSA considers that achieving this deadline will be challenging. The Advertising Association would not disagree with that analysis.

3.19. The Advertising Association would request that with respect to any changes that might impact on the content of financial promotions a transitional period should apply such that advertisements already on display or in the very late stage of production should be deemed as remaining compliant for a specified period in the aftermath of any new regime coming into force. In this regard, the Advertising Association would recommend a three-month and six-month transitional period apply for non-broadcast and broadcast advertisements respectively. (The longer transitional period proposed for broadcast advertising is considered necessary, given the longer production lead-times involved.)

3.20. There is one medium within which non-broadcast advertisements appear for which the Advertising Association would request a longer transitional period. With regard to long shelf-life publications, such as directories and catalogues, the Advertising Association would request that the transitional period be twelve months. The FSA has seen fit to adopt such an approach in the past, most notably in recent times following the coming into force in the United Kingdom of MiFID. The Advertising Association appreciates that the FSA would need to consult on any such transitional provisions at a later date.

Question 14: Do you agree with the compatibility statement?

3.21. The Advertising Association accepts that self-regulation in the area of deposit-taking activities is something of a unique situation in the financial services field primarily brought about by the existence of the *Banking Code* prior to the establishment of the FSA. The Advertising Association notes, moreover, the intention of the FSA, as set out in its

compatibility statement, to abandon the self-regulatory arrangements of the BCSB that currently apply in respect of deposit-taking activities.

3.22. The intention behind much of this Advertising Association submission is to demonstrate that self-regulation can be robust and uses the ASA example as evidence of this. The FSA appears to hold the view that the self-regulatory BCSB will not be able to meet the expectations of the Authority, although the Advertising Association is not party to the extent to which the Board has been given the opportunity to address the concerns expressed.

3.23. Whilst the Advertising Association is not in a position to demur from whatever policy the FSA ultimately pursues, it would observe that any departure from self-regulation should not be taken lightly, not least given the commitment of the Government to the principles of better regulation and the directive to seek out alternatives to statutory regulation. Most importantly of all, this decision should not foreclose the possibility of the FSA considering self-regulatory solutions in the financial services field, or elements thereof, in the future.

24 February 2009

APPENDIX**Extracts from *The Banking Code* and *The Business Banking Code***

In respect of advertising and marketing, the two Codes are identically worded. Those sections of the two Codes relating to advertising and marketing are set out below:

Section 2 (“Fairness Commitment”)

First Bulletpoint

“We will make sure that our advertising and promotional literature is clear and not misleading and that you are given clear information about our products and services.”

Section 8 (“Advertising and marketing”)

8.1 We will make sure that all advertising and promotional material is clear, fair, reasonable and not misleading.

8.2 We will take care when we send you marketing material, particularly if it relates to loans or overdrafts, or if you are under 18.

8.3 Unless you specifically give your permission or ask us to, we will not pass your name and address to any company, including other companies in our group, for marketing purposes. We will not ask you to give your permission in return for standard account services.

8.4 We may tell you about another company’s services or products. If you agree, that company may contact you directly.

8.5 When you become a customer, we will give you the opportunity to say that you do not want us to contact you for marketing purposes. At least once every three years, we will remind you that you can do this.

8.6 We will not insist that you buy an insurance product from us when we agree to provide a lending product.