



The Advertising Association

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RESPONSE OF THE ADVERTISING ASSOCIATION TO THE FINANCIAL SERVICES AUTHORITY CONSULTATION “REGULATING SALE AND RENT BACK: AN INTERIM REGIME”

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) Consultation Paper “Regulating sale and rent back: an interim regime” (CP09/6). Sale and rent back agreements 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 with a term of between six and twelve months. This response is limited to the specific proposals being made by the FSA rather than the broader basis on which the HM Treasury (HMT) proposes that the Authority become responsible for the sector-specific regulation of the sale and rent back sector, including in respect of advertising¹.

2.2. The Advertising Association notes that the development by the FSA of an interim regime represents a significant departure from the usual approach of the Authority when introducing new regulatory measures, whereby a full regime is ordinarily developed and consulted upon before it is brought into being. The conclusion arrived at by the FSA that this interim regime should be established in the interests of protecting consumers as soon as practicable is also noted. The commencement date for the interim regime will be set out in any secondary legislation HMT lays before Parliament. The Advertising Association notes that the FSA currently expects the commencement date contained within that secondary legislation to be 1 July 2009. Firms within the sale and rent back sector would then need to apply for permission to operate from the FSA for the duration of the interim regime and be subject to relevant provisions within the Authority’s *Handbook*, prior to any full regime coming into being - expected to be in the second quarter of 2010.

2.3. In its response, the Advertising Association:

(a) supports the creation of a bespoke regulatory regime for the sale and rent back sector;

¹ The Advertising Association has responded separately to the HMT consultative exercise “Regulating the sale and rent back market: a consultation”.

- (b) agrees that the FSA should apply its Principles for Businesses to the sale and rent back sector, including the two covering customers' interests and communicating with clients;
- (c) regards the rules that the FSA intends applying to advertising by firms in the sale and rent back sector as proportionate;
- (d) notes, in commenting on the cost-benefit analysis produced by the FSA, that there may be some detrimental impact on advertising media under the rules proposed for the interim regime (but that it is not expected to be significant – based on the nature of the three rules relating to advertisements for sale and rent back agreements that are being proposed);
- (e) requests the incorporation of transitional provisions covering the proposed rules on financial promotions (or even the postponement of the introduction of provisions in this area until the full regulatory regime comes into being);
- (f) recommends a correction to an existing Guidance provision contained within the FSA's *Senior Management and Arrangements Systems and Controls Sourcebook (SYSC)*; and,
- (g) sets out the views of the organisation on the scope and nature of the rules that the FSA may seek to apply as part of its full regulatory regime, ahead of the Authority consulting publicly on those proposals.

2.4. The Advertising Association is grateful to the FSA for granting the organisation a short extension to the deadline originally set by the Authority. The Advertising Association looks forward to publication by the FSA of a Policy Statement setting out its response to this consultative exercise in due course. No part of this submission should be treated as if it were confidential in nature.

3. Response of the Advertising Association to specific FSA Questions

Question 3: Do you agree with our proposal to create a bespoke regulatory regime for 'sale and rent back'?

3.1. The Advertising Association supports the decision of the FSA to create a bespoke regulatory regime for sale and rent back agreements, on the basis that such arrangements deserve to be regulated under the Financial Services and Markets Act 2000 ('the 2000 Act'). The Advertising Association takes the view that it is only due to the novelty of the product being offered that this particular business activity is not already specified as being within the scope of the 2000 Act.

Question 10: Do you agree with our proposal to apply the Principles for Businesses to 'sale and rent back'?

3.2. The Advertising Association notes the intention of the FSA to apply its Principles for Businesses in full to firms operating in the sale and rent back sector. The Advertising Association comments on the application of two of those Principles to firms operating within the sale and rent back sector in Paragraphs 3.3 and 3.4 below.

3.3. Application of Principle 6 (Customers' interests) would require that firms offering sale and rent back agreements have due regard to the interests of their customers and treat them fairly. Certainly with respect to the second part of Principle 6, any firm regardless of business sector, should already be complying with the legal standards set out in the Consumer Protection from Unfair Trading Regulations 2008² (CPRs). It is notable given the circumstances under which sale and rent back agreements are frequently offered that the CPRs contain specific provisions relating to the protection of vulnerable consumers.

² Statutory Instrument No. 2008/1277

3.4. Application of Principle 7 (Communications with clients) would require that firms offering sale and rent back agreements pay due regard to the information needs of their clients and, furthermore, that any information communicated to them is conducted in such a way as to ensure it is clear, fair and not misleading. The first part of Principle 7 is at least partially (if not fully) covered by the provisions relating to misleading omissions contained within the CPRs. Meanwhile, in respect of marketing communications, the standards of 'clear, fair and not misleading' are equivalent to those set out in the self-regulatory non-broadcast and broadcast advertising codes - with which compliance is compulsory - drawn up by the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) respectively. The CAP and BCAP codes are administered by the Advertising Standards Authority (ASA). (Consumers would also be protected from inaccurate comparative advertising by firms operating in the sale and rent back sector as a consequence of the Business Protection from Misleading Marketing Regulations 2008³. The legal standards set by the BPRs are also reflected in the CAP and BCAP codes.) Compliance with the CAP and BCAP codes is encouraged through a system of escalating sanctions operated by the ASA, which may ultimately involve referral of the transgressor concerned to a statutory regulator.

Question 18: Do you agree with our proposal to apply rules relating to financial promotions and communications?

3.5. The Advertising Association only provides comments here in respect of marketing communications, as it is not suitably placed to give a view on the nature and content of non-promotional communications between firms and consumers.

3.6. As the Advertising Association set out in its response to the consultation by HMT, the organisation considers that the case for sale and rent agreements being subject to regulation by the FSA is well made, particularly given the absence presently of means for consumers readily to seek redress. By contrast, it is notable that redress about misleading advertising by firms offering sale and rent back agreements is currently available to consumers through the ASA.

3.7. The Advertising Association notes, however, that the study of the sale and rent back market conducted by the Office of Fair Trading (OFT) and published in 2008 found evidence of schemes being advertised as offering long-term accommodation with very little detail as to the actual nature of the security of tenure available (or lack thereof). The FSA suggests that the advertising produced by sale and rent back firms can be misleading, particularly around the price that would be offered to the homeowner for the real estate and the rights accorded to the client to remain in the property as a tenant subsequently. If advertisements were misleading and a complaint was lodged with the ASA, it seems likely that they would be found in breach of the CAP or BCAP Codes, given that these reflect the statutory provisions contained within the CPRs. It is the view of the Advertising Association, as it expressed to HMT in the response by the organisation to the consultation conducted by that Government Department: if the product is to be regulated under the 2000 Act – as is being proposed – then it would be anomalous for advertising to remain outside the scope of FSA regulation. This certainly appears to the Advertising Association to be far and away the most compelling rationale for changing the regulatory framework for advertising in the sale and rent back sector, given the significant protections already available to consumers in respect of misleading marketing communications.

3.8. The Advertising Association notes that the FSA intends addressing consumer detriment arising from insufficient information provision of the type identified by the OFT (see

³ Statutory Instrument No. 2008/1276

Paragraph 3.7 above) in marketing communications as part of its interim regime by applying certain elements of the Authority's existing *Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB)*. The provisions that the FSA will draw on from *MCOB* will be supported by the Authority's Principles of Businesses, about which the Advertising Association has already commented in Paragraphs 3.2, 3.3 and 3.4 of this submission above.

3.9. The FSA proposes applying three rules from *MCOB* to marketing communications produced by firms operating in the sale and rent back sector. These three rules are:

(a) *MCOB 2.2.6R*: "When a firm communicates information to a customer, it must take reasonable steps to communicate in a way that is clear, fair and not misleading."

(b) *MCOB 3.6.1R*: "A non-real time financial promotion must contain the name of the firm or its appointed representative and either an address or a contact point from which an address is available."

(c) *MCOB 3.6.3(1)R*: "A firm must be able to show that it has taken reasonable steps to ensure that a non-real time financial promotion is clear, fair and not misleading."

3.10. With respect to *MCOB 2.2.6R*, the Advertising Association notes that this provision will apply to all information communicated by a firm in the sale and rent back sector, irrespective of whether it is a financial promotion or not. The organisation considers this to be a proportionate rule, and in respect of marketing communications at least, simply reflects the standards already contained within the CAP and BCAP codes.

3.11. With respect to *MCOB 3.6.1R*, the FSA will be well aware of the principled opposition of the Advertising Association to the insertion of mandatory information requirements into advertisements, and the reasons behind that stance, from previous responses to consultations conducted by the Authority. However, the Advertising Association does not consider the requirements in this instance as too onerous in practice because, whilst *MCOB 3.6.1R* requires the firm to provide its name, the provision of such information is in any case ordinarily likely to feature in advertisements produced by brand owners. Whilst a brand owner might not always provide an address or contact point in an advertisement, it appears likely that with the product offered by a firm involved in providing sale and rent back agreements they would do so of their own volition. The Advertising Association welcomes the flexible approach set out in the Guidance⁴ that accompanies *MCOB 3.6.1R* as to how trading names and contact points may be conveyed in financial promotions. If at the conclusion of this consultation process the FSA decides to proceed with its proposal that marketing communications for sale and rent back agreements comply with *MCOB 3.6.1R*, the Advertising Association considers that it will be necessary to incorporate a reference to that rule (and any relevant guidance) into any Instrument made by the Authority. In this context, it is notable that a reference to *MCOB 3.6.1R* is currently absent from the Schedule to Annex A of the draft Interim Permitted Regulated Sale and Rent Back Activities Instrument 2009 ('the draft FSA Instrument') as well as from Annex E of the same measure.

3.12. With respect to *MCOB 3.6.3(1)R*, the Advertising Association considers it proportionate for the FSA to require that a financial promotion complies with *MCOB 2.2.6R* and that any claims made therein can be substantiated. As already stated, *MCOB 2.2.6R* essentially reflects the standards regarding the accuracy of advertising already contained within the CAP and BCAP codes. The ASA similarly requires advertisers to substantiate claims in the event of a complaint being made to that body about an advertisement.

⁴ The Advertising Association assumes that *MCOB 3.6.1G(1)* and *MCOB 3.6.1G(2)* will apply, even if *MCOB 3.6.1G(3)* will not (at least for the duration of the interim regime in the case of the latter).

3.13. The Advertising Association considers that these three rules, together with the existing legal safeguards contained within the CPRs and BPRs, will be sufficient to address the consumer detriment identified by the OFT and that no further provisions should be incorporated into the interim regime established by the FSA.

Q29: Will the proposed interim regulatory regime generate any further costs that have not been identified here?

3.14. The Advertising Association notes that the FSA estimates that the additional ongoing cost to individual firms operating in the sale and rent back sector as a result of the new high-level rules governing communications (including financial promotions) under the interim regime set out in Paragraph 3.9 above will be £3,000 per annum⁵. (It is noteworthy to observe in this context that any interim regime is likely to be in place for less than twelve months.)

3.15. The 2000 Act requires the FSA to have regard to the principles of good regulation, including the desirability of minimising adverse effects on competition. In light of this it is worth stating that any increase in the amount of data that must be carried in advertisements as a result of mandatory information requirements impacts detrimentally on the relative competitiveness of advertising media. The most obvious example of this is radio, whereby additional airtime has to be purchased by advertisers potentially making what is otherwise a very effective medium potentially less attractive to them as a result of the additional costs they incur. In view of the comments the Advertising Association has already made in respect of the rules set out in Paragraph 3.9 above, it is doubtful that this effect would be considerable under the interim regime proposals. This observation does, however, underline the need to avoid, if possible, the imposition of further information requirements once the FSA comes to consider the content of any full regulatory regime (see also Paragraph 6.3 of this submission below).

4. Request for the incorporation of transitional provisions

4.1. The Advertising Association appreciates the desire of the FSA to bring its regulation to bear on firms operating in the sale and rent back sector as soon as possible. Nevertheless, the Advertising Association would request that transitional provisions apply in respect of advertising for sale and rent back agreements. This request is based on the fact that the organisation considers advertisements already on display or at a very late stage of production should not be judged non-compliant for a specified period in the aftermath of any interim regime coming into force. Ideally a three-month and six-month transitional period would apply to non-broadcast and broadcast advertising respectively. (The longer transitional period for broadcast advertising is considered necessary, in light of the lengthier production lead-times involved.)

4.2. There is one medium within which non-broadcast advertisements appear for which the Advertising Association would request a longer transitional period. The medium in question is long shelf-life publications, such as directories and catalogues, where the Advertising Association would request that the transitional period that should apply be twelve months.

⁵ The FSA has based this calculation on the precedent provided by communications (including financial promotions) produced on the part of firms offering home reversion plans, where an additional recurring cost of £6,000 a year per firm was estimated. That figure has been halved for firms offering sale and rent back agreements, on the basis that they will be subject to fewer and less detailed rules for the duration of the interim regime than are companies offering home reversion plans, to which MCOB applies in full.

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 the Markets in Financial Instruments Directive⁶ in November 2007.

4.3. It is notable that the existing ASA regime should be able to continue providing sufficient protection in the aftermath of the interim regime coming into force, given the comments already made in this submission – particularly if the FSA itself makes use of the complaints mechanism of the former, where it identifies potentially misleading advertisements by providers.

4.4. The Advertising Association has already stated its preference for the FSA not to expand upon the three rules in its interim regime as part of any full regulatory regime. If the FSA already intends to expand upon what it requires of financial promotions as part of any full regulatory regime, it may make sense, rather than introducing a series of changes (and given the protections offered by the ASA already in place), to introduce such rules only when the full regulatory regime is brought into being. Such an approach would serve to minimise the scope for consumer confusion emerging about which organisation they should direct complaints about misleading advertisements for sale and rent back agreements.

5. Comments of the Advertising Association on the draft FSA Instrument

5.1. The Advertising Association also recommends an amendment to the wording of an existing Guidance provision within SYSC, namely SYSC 4.1.2A G. The amendment proposed is that the phrase “as if it ‘should’ appeared in” be replaced with “as if ‘should’ appeared in”.

5.2. The Advertising Association understands that if HMT deviates from a 1 July 2009 commencement date for the secondary legislation expanding the regulatory remit of the FSA to the sale and rent back sector, the Authority would amend the draft rules it is currently proposing to reflect such a change.

6. Development of full FSA regulatory regime

6.1. The Advertising Association appreciates that the interim regime that the FSA is proposing is purely a stop-gap measure ahead of a full regulatory one being developed, which will be subject to public consultation. The objective of any full regulatory regime will be to enhance further the protections accorded to consumers.

6.2. The Advertising Association notes the statement made by the FSA in CP09/6 that the protections upon which it is currently consulting will be expanded under any full regulatory regime, including additional conduct of business rules. The FSA is silent on whether an expansion of the conduct of business rules will mean, within that, additional provisions around financial promotions.

6.3. The Advertising Association welcomes the high-level nature of the rules the FSA has proposed in respect of the interim regime, providing as it does firms will flexibility to determine how best to comply with the requirements laid down by the Authority. As the Advertising Association has already established in this submission, it regards the three rules being proposed for financial promotions under the interim regime as sufficient - and thus not requiring the incorporation of further rules within any full regulatory regime. If the FSA does

⁶ Directive 2004/39/EC of the European Parliament and the Council “on markets in financial instruments”

propose any additional rules around financial promotions, the Advertising Association would request that the same high-level nature of the rules that the FSA has adopted in respect of the interim regime be pursued thereby providing firms with the maximum degree of flexibility by which they may achieve compliance. The Advertising Association would also request that the FSA continues to have regard to the impact that making rules resulting in a heavier data load in advertisements (such as that resulting from mandatory information requirements) has. As established in Paragraph 3.15 above, such requirements have a detrimental impact on media, whilst, the evidence would suggest⁷, they add little value from a consumer perspective.

7 May 2008

⁷ For example, the joint Better Regulation Executive / National Consumer Council report *Warning: Too much information can harm* (November 2007), cited in FSA Discussion Paper *Transparency as a regulatory tool* (DP08/3)