

Advertising Association response to the Treasury consultation on a new approach to financial regulation

September 2011

1) The Advertising Association

The Advertising Association is the only organisation that represents all sides of the advertising and promotion industry in the UK - advertisers, agencies and the media. In the UK, the advertising industry employs nearly 250,000 people. In 2009, advertising expenditure was £14.5bn.

We promote and protect advertising. We communicate its commercial and consumer benefits and we seek the optimal regulatory environment for our industry. Our goal is that advertising should enjoy responsibility from its practitioners, moderation from its regulators, and trust from its consumers.

The Advertising Association supports any moves towards less and better regulation. As such, the Government's drive towards strong consumer protection delivered by a clearer and more proportional financial regulatory system is something we would support.

We believe it is integral that the Advertising Association (AA), and the Advertising Standards Authority (ASA), are closely engaged with the process of developing the Financial Conduct Authority (FCA) and are called upon by Government to assist with the practical development and implementation of the FCA's proposed financial promotions powers. More generally, we look forward to working with the Treasury, the FSA, the OFT - and the FCA when it is created - to ensure that self-regulation of financial advertising is able to both effectively create competitive markets while also protecting consumers.

2) Overview

As is noted in the Treasury's consultation paper, the move to a new approach to financial regulation is a result of the identified failings of the previous model of financial regulation. It is pertinent to note that financial advertisements are clearly not a key contributor (or even close to being so) to the failings in the system of financial regulation in the UK, or indeed the global economy.

In this paper, we firstly explain the system of regulation for financial advertisements in the UK, and secondly set out our aspirations for how the FCA can work to continue to provide the high level of protection to consumers that the current system allows.

3) The current regulatory regime for financial advertisements

As a starting point, the Advertising Association supports the recognition by Government of the need for a body that aims to protect and enhance confidence in financial services and markets - protecting consumers and promoting competition. So, given the impending dismantling of the FSA, the creation of the FCA is warmly welcomed. A regulatory model designed to protect consumers and promote competition is one that is highly compatible with the ASA, which has the same core goals at the heart of its self-regulatory work. We set out below how the financial advertisements are currently regulated for different products and for different media, and explain how this complex system involving the FSA, OFT, Trading Standards, and the ASA works to provide consumers with a high level of protection.

a) Banking, investments and insurance sectors

All advertising relating to regulated activities in the banking, investments and insurance sectors, are tightly controlled in order to safeguard the consumer in what is a complex area. The relevant provisions are mainly contained within the Financial Services and Markets Act (FSMA) 2000 which empowers the FSA with powers and discretion to regulate this sector, to publish guidance for consumers and industry, and to undertake reviews as deemed necessary.

Non-broadcast advertising: If a complaint about a non-broadcast advertisement falls within the remit of the FSA, then the ASA forwards the complaint to the FSA immediately. The ASA's remit only covers financial advertisements that are not "technical", for example, complaints about advertisements that are deemed to create offence, be socially irresponsible, or make untruthful claims.

Broadcast advertising: If the ASA receives a complaint about a broadcast advertisement that also falls within the FSA's remit, the ASA has a statutory duty to investigate. This is borne out of the co-regulatory relationship that the ASA has via BCAP with Ofcom. The ASA will ensure that the FSA is involved, however, as this will ensure consistency between the two bodies, but ultimately the adjudication will be based upon the ASA's codes for broadcast advertising.

b) Consumer credit sector

For consumer credit advertising, any advertising by a lender must comply with the Consumer Credit (Advertisements) Regulations 2004 (CCAR). This is supported by OFT Guidance, as well as the broader requirements of the broadcast and non-broadcast advertising codes, upon which the Advertising Standards Authority (ASA) adjudicates. These advertising codes approximate the provisions of the Consumer Protection from Unfair Trading Regulations 2008. Article 4 ("Standard information to be included in advertising") of the Consumer Credit Directive contains provisions aimed at further enhancing protection in respect of the advertising to consumers of credit products.

Non-broadcast advertising:

If the ASA receives a complaint which is assessed to fall within the Consumer Credit Act remit, then the ASA will tell the complainant to contact their local Trading Standards. The OFT is only consulted if the complaint needs to be escalated. The ASA will investigate non-technical complaints.

Broadcast advertising: As with advertisements for banking, investments and insurance sectors, the co-regulatory system of broadcast advertising regulation means that the ASA has a statutory duty to deal with these cases. The ASA will consult with the OFT during an investigation.

c) Overview of the system

As detailed above, the ASA works closely with both the FSA and the OFT (depending on the product) when dealing with complaints about financial advertisements. Complimentary to the OFT and FSA systems, specific rules for financial advertisements are contained within the regulatory codes of the Committee of Advertising Practice, the Broadcast Committee of Advertising Practice and, given the co-regulatory system for broadcast advertising, within the Ofcom Broadcasting codes. These rules largely mirror the rules set out in FSMA 2000 and the Consumer Credit (Advertising) Regulations 2004. While the technical elements of financial advertisements are

generally covered by either the OFT or the FSA, all financial advertising is subject to the non-technical elements of such communications.

Additionally, it is worth noting, that for broadcast advertising the system benefits from having advance central clearance for credit advertising, provided by Clearcast and the RACC, pre-vet advertisements prior to them being broadcast.

4) Financial advertising: the consumer perspective

The current system, as outlined above, is – broadly speaking - effective and we urge the Government to acknowledge the benefits of this regulatory structure for advertising when reforming the broad financial regulatory regime. While it is clear that the structure of the system is complex, from the consumer perspective these complexities are not evident due to the effective processes between the various regulatory bodies. However, we recognise that these processes could be improved, and as a such see the creation of the FCA as an opportunity to further streamline the processes between regulators.

While the regulatory structure is to all intents and purposes hidden from the consumer, the level of consumer information or “legals” in financial advertising is very evident. We believe that much of this small print is counterproductive. Evidence from Credos, the independently governed advertising think-tank, shows that the more ‘proof’ offered in advertisements, the less consumers trust the message. Indeed, there is clear evidence that information requirements are perceived to be included in advertising to protect the advertiser, rather than the consumer.

There is also evidence that information requirements in financial advertisements – such as wealth warnings - actually confuse consumers and detract from the products’ branding.¹ Such evidence is also backed up in the 2007 report by the Better Regulation Executive and National Consumer Council, “Too Much Information Can Harm”² that assess that there is “growing evidence that information is not a panacea, and can cause harm”. Rather than increasing information requirements, we believe that there is a case for reducing the amount of information that must be incorporated into financial advertisements. This would address the “information overload” experience faced by consumers, and we believe that mandatory information requirements in advertising are rarely of value to consumers. While we recognise that this issue is not the focus of the Treasury paper, we are keen to ensure that this point is acknowledged as the new structure for the FCA is developed.

The AA firmly believes that financial advertising, as with advertising in any other sector, should not mislead or put prospective customers under undue pressure, and that it should also be fair. We also recognise that financial advertising requires specific attention given that this is a highly regulated environment and the products involved are typically more significant purchases than the average product. The AA considers that the regulatory provisions outlined above are more than adequate to ensure that advertising is carried out in a responsible manner. Furthermore, the AA believes that necessary remit and sanctions are currently in place to punish malpractice.

5) Our vision for the FCA

¹ The Navigator for the UK Radio Advertising Bureau “Radio commercials and wealth warnings” research, February 2004

² <http://www.bis.gov.uk/files/file44367.pdf>

Taking into account the overview set out above, the current regulatory regime for financial advertisements, and the content of the Treasury consultation paper which focuses on the financial promotions powers, our vision for the FCA is as follows:

a) Overview

- The FCA must not only be a strong regulator with a committed focus on protecting consumers but it also must have transparency and cooperation (with other regulatory bodies) at its heart.
- The FCA's strengthened ability to tackle misleading financial advertisements must be compatible with the powers currently administered by the ASA. Clear processes and remits need to be set out between the ASA and FCA to ensure that consumer complaints are dealt with quickly, effectively, and in a consistent manner.
- The FCA must cement its recognition that transparency is a key regulatory tool by setting out clearly how this transparency will be achieved in context with its work in the field of financial advertisements. The ASA model is one that should be considered in this context, the ASA being open and transparent in its operations; publishing all of its adjudications; and responding to enquiries from the public and various organisations.
- For the FCA to be truly effective, it must engage the entire industry in its work and ensure that there is a structured meeting programme leading to an ongoing, positive relationship between regulator and industry. By way of an example, the ASA's system of sanctions goes beyond just "name and shame", including measures such as the refusal by media owners to feature advertisements from companies in breach of the rules. This is only achievable due to the level of engagement in the system between the entire industry – advertisers, agencies and media owners – and the ASA.

b) Sanctions

- The "name and shame" sanction administered by the ASA is well renowned as being an effective driver of compliance by advertisers, and the FCA's proposals in this area should complement the effective sanctions already being administered by the ASA. The processes that the ASA have in place to administer this sanction are generally perceived to be fair, and thus we urge the FCA's model to be as similar to the ASA's as much as possible. The publication of adjudications generates a great amount of media attention in the UK, and frequently internationally, which can significantly damage an advertiser's reputation.
- A rigid sanctions mechanism may undermine the regime it is trying to protect. The FCA should be able to take a flexible approach to enforcement and thus be given the ability, rather than a duty, to publish where a firm falls foul of the rules. An overly exuberant sanctions regime may unnecessarily undermine the market place, while also weakening the negative impact the "name and shame" function could have against serial offenders and other more serious cases.

c) Powers

- The FCA's powers should be clearly set out from the start. We have concerns over the lack of detail on the proposed FCA's powers outlined in the Treasury paper. For example, much greater detail is required to understand how the following powers would be administered in practice: "to direct the firm to refrain from making a promotion, to withdraw a promotion, to publish details of it, or to do anything else the FCA directs it to do in relation to the promotion." Currently, this lack of clarity and detail is a significant concern.
- The FCA should not have the power to contact consumers who have acted upon a promotion which is, for example, misleading. This would be a significant development and may set a dangerous precedent in the way in which advertising is regulated more generally. There is

sufficient legal protection already in place for consumers in this area and we strongly oppose this proposal.

- Without knowing more about how the product intervention power would work in practice, we cannot hold a clear position on this issue. The Government will have to consult and publish a statement of policy on when it will make temporary product intervention rules. We do, however, welcome the suggestion that any temporary product intervention rules will only last for 12 months and that if the FCA wants to make them permanent it will have to follow their own rule making powers.
- As stated in the Government paper, it is essential that if the FCA is able to ban or demand changes to advertising and marketing communications, the firm must be alerted about the FCA's proposed course of action and allow representations by the firm before publishing any details.

d) Relationship with OFT and TSI

- Given that the OFT and Trading Standards have an important role in the regulation of financial advertising, the impending dismantling of the OFT and increased role of Trading Standards with regards to taking on the OFT's consumer protection powers must be recognised. We welcome the Government's plans to transfer responsibility for consumer credit regulation from the Office of Fair Trading to the FCA. The AA is keen to ensure that the new structure for enforcing consumer credit law retains within it a strong, national body that is able to serve effectively as a backstop to the ASA.

6) Conclusion

The creation of the FCA is one that presents a number of opportunities for the advertising industry but, as ever with any regulatory shake-up, there are number of risks involved with this change. We are keen to meet with Treasury and FSA officials to ensure that when discussion focuses on the FCA's advertising powers, industry is closely involved with this process.

Furthermore, we look forward to discussing the FSA's forthcoming paper on FCA strategy, the further details of the FCA's operational approach, and the Government's plans to transfer responsibility for consumer credit regulation from the Office of Fair Trading to the FCA.

In reforming the regulatory regime for financial services, it is essential that the role of the ASA in this space is fully understood, and that unnecessary new layers of statutory legislation are not introduced.

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