



The Advertising Association

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RESPONSE OF THE ADVERTISING ASSOCIATION TO “REGULATING THE SALE AND RENT BACK MARKET: A CONSULTATION” PUBLISHED BY HM TREASURY

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 “Regulating the sale and rent back market: a consultation”, which was published by HM Treasury in February 2009. 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. It is understood that the Government undertook in its Pre-Budget Report of November 2008 to bring forward a consultation on the regulatory framework covering the sale and rent back market with a view to extending the scope of regulation by the Financial Services Authority (FSA) into that field so as to strengthen the protections accorded to potentially vulnerable consumers. This decision by Government was itself informed by the study of the sale and rent back market conducted by the Office of Fair Trading (OFT), which was published in October 2008.

2.2. In its study the OFT identified market failure, concluding that the potential for severe detriment to occur in connection with sale and rent back agreements was unlikely to be sufficiently addressed through either the existing body of consumer protection law or the development of self-regulatory measures by the industry. The OFT therefore considered that sector-specific statutory regulation of the sale and rent back market was warranted and that firms operating within it should be regulated by the FSA, with the objective of enhancing transparency and ensuring consumers were provided with suitable protections and appropriate means of redress, thereby reducing their exposure to risk. The OFT also anticipated that another benefit that might be expected to accrue was the adoption of more responsible behaviour on the part of those firms offering sale and rent back agreements.

2.3. In its response, the Advertising Association:

- (a) sets out why the organisation considers that the regulatory intervention being proposed by HM Treasury for the sale and rent back market is justified;

- (b) establishes how consumers are better placed currently to seek redress about an advertisement for a sale and rent back arrangement than they are for the product itself;
- (c) considers that (despite the organisation having identified certain disadvantages) treating advertisements for sale and rent back arrangements as financial promotions under the regime applied by the FSA is the most logical endpoint in the current legislative framework; and,
- (d) agrees with the conclusion arrived at by HM Treasury that treating advertisements for sale and rent back arrangements as financial promotions is likely to increase costs for firms operating in that market.

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

3. Comments on the implications of HM Treasury proposals for advertising

3.1. The Advertising Association notes that at present there is no specific regulation of products in the sale and rent back market and agrees that it is somewhat anomalous that this business activity currently falls outside the scope of the Financial Services & Markets Act 2000 ('the 2000 Act'). The current absence from that regime of sale and rent arrangements is perhaps best explained by the relative novelty of that product offer as part of a viable business model.

3.2. The sale and rent back sector is, however, as HM Treasury correctly identifies, subject to more general legislative measures - most notably perhaps from an advertising perspective, the Consumer Protection from Unfair Trading Regulations 2008¹ (CPRs).

3.3. The legal standards set by the CPRs are reflected 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 are also protected from inaccurate comparative advertising by the Business Protection from Misleading Marketing Regulations 2008². 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.

3.4. The OFT set out in its study of the sale and rent back market the concerns the Office had that consumers might be misled as to the nature of the arrangements offered. In respect of being misled as a result of an advertisement for such an agreement, a consumer (or indeed a competitor business), would currently be able to seek redress through the ASA, which would consider any complaint lodged with it against either the CAP or BCAP advertising codes (or potentially both), as appropriate.

3.5. Complaining about the sale and rent back product itself and getting redress, however, is considerably less straightforward for consumers. Given these circumstances; the nature of the product itself; and, the need to ensure the conduct of businesses involved in the sector is

¹ Statutory Instrument No. 2008/1277

² Statutory Instrument No. 2008/1276

appropriate, the Advertising Association considers that the regulatory intervention being proposed is justified.

3.6. By placing sale and rent back arrangements squarely within the regulatory remit of the FSA, the ability for consumers to seek redress about the product will be considerably enhanced. By contrast, the Advertising Association is less sure that treating advertisements for rent and sale back agreements as financial promotions under the 2000 Act will increase the protection accorded to consumers from any misleading marketing, intentional or otherwise, conducted by firms operating in this field of activity. Indeed, the proposals will lead to a more complicated landscape, at least in respect of complaining about advertising, from a consumer perspective. Recognition of the ASA as the organisation to which consumers should currently complain about advertisements that breach the standards set out in the advertising codes is strong. Going forwards, the FSA will deal with technical complaints about promotions for sale and rent back agreements, while the ASA will deal with those of a non-technical nature, whereas previously the latter body would have dealt with grievances about all advertisements for such arrangements, whatever the nature of them. The Advertising Association anticipates that this will prove confusing for consumers.

3.7. There are a number of models of sector-specific statutory regulation that bite on advertising but that still maintain the ASA as the principal consumer-facing body for enforcing the standards that should apply to marketing communications - even if the overarching regulator for the sector may impose one or more statutory information requirements, for example, where it retains responsibility for enforcement. The claims management sector is one such area of activity (see case study overleaf), where regulatory duplication and overlap is less than might otherwise have been the case if the initial policy proposals for how claims management companies should be regulated, including any advertising conducted by them, had been adopted. The Advertising Association considers, however, that sale and rent back arrangements should be treated as a financial product, given that if this business model had existed ten years ago, it would undoubtedly have been identified as an activity that should be subject to the 2000 Act (and thus to the financial promotions regime applied by the FSA). The most straightforward way of dealing with what amounts to an anomaly is to adopt the policy that HM Treasury is proposing³.

4. Comments on the draft Order and timetable for implementation of FSA regulation

4.1. The Advertising Association has no comments as such on the draft Order annexed to the consultation document published by HM Treasury – the final version of which will be made under powers conferred by the 2000 Act. It is noted that Article 31 of that draft Statutory Instrument contains those provisions by which the necessary consequential amendments to the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005⁴ will be made.

4.2. The Advertising Association notes that HM Treasury proposes laying a final version of the Order before Parliament in the very near future such that the FSA will be in a position to commence its interim regime (upon which the Authority is currently consulting⁵) for the regulation of the sale and rent back sector as early as July 2009. This interim regime will provide for advertisements for sale and rent back agreements to be treated as if they were

³ Home reversion plans (whereby consumers sell some or all of the equity in their home and retain a lifetime lease) were outside the scope of FSA regulation until 2007. Lifetime mortgages – the other major type of equity release product - were brought under the regulatory scope of the FSA in 2004.

⁴ Statutory Instrument No. 2005/1529 (as amended by Statutory Instrument No. 2006/2383)

⁵ The Advertising Association will also be responding to FSA Consultation Paper “Regulating sale and rent back: an interim regime” (CP09/6)

financial promotions and set new requirements for them. From July 2009 firms operating in the sale and rent back field will have to seek interim permission from the FSA if they are to continue operating legally. Once the interim regime has been established the FSA will consult on a full regulatory one covering activity in the sale and rent back sector, which the Advertising Association understands is likely to come into being during the second quarter of 2010.

5. Comments of the Advertising Association on the Impact Assessment

5.1. The Advertising Association notes that HM Treasury identifies in its Impact Assessment that the regulation of the sale and rent back market will generate a number of new costs for firms, including those resulting from advertisements for sale and rent back agreements being treated as financial promotions in future. The Advertising Association would endorse that conclusion, although the organisation is not in a position to quantify the scale of that impact.

5.2. The Advertising Association notes, however, that the FSA estimates (in the cost-benefit analysis annexed to its own consultation paper) that the additional ongoing cost to individual firms operating in the sale and rent back sector as being likely to amount to £3,000 per annum under the advertising requirements being proposed by the Authority for its interim regime. If further advertising requirements were added in due course under any full FSA regulatory regime then costs might reasonably be expected to rise. The FSA does not attempt to quantify the impact that any increase in the amount of information that must be carried in advertisements for sale and rent back products, resulting from new mandatory requirements, may have on the relative competitiveness of different 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 cost they incur.

6 May 2009

Case study: Statutory regulation of claims management companies - treatment of advertising

Claims management companies developed rapidly from about 2000 in response to various legal and regulatory developments. The method of operation of some companies in the sector, however, soon began to become a cause of public concern. In light of these concerns continuing, despite some industry-led initiatives by the claims management companies themselves to improve matters, the Government introduced the Compensation Bill in 2005 the better to regulate the sector. The Compensation Act, which included a number of powers to make secondary legislation, received Royal Assent on 25 July 2006.

The *Conduct of Authorised Persons Rules (CAPR)* is a form of sub-delegated legislation, governing the claims management sector, made by the Ministry of Justice pursuant to Regulation 22 of the Compensation (Claims Management Services) Regulations 2006⁶ under powers conferred by the Compensation Act 2006. *CAPR* contains a number of general rules and client-specific rules. Compliance with the *CAPR* is a condition of authorisation for claims management companies. Sections 2 to 9 of the client-specific rules contained within *CAPR* cover advertising, marketing and the solicitation of business more generally. Section 2 of *CAPR* requires that claims management companies engaging in those activities must conform to the advertising codes enforced by the ASA.

⁶ Statutory Instrument No. 2006/3322 (as amended by Statutory Instrument No. 2008/1441)