



The Advertising Association

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RESPONSE TO HM TREASURY'S *MORTGAGE REGULATION: A CONSULTATION*

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 consultative exercise - *Mortgage regulation: a consultation* – being conducted by Her Majesty's Treasury (HMT). This submission is principally concerned with the policy proposals of HMT in respect of the future regulation of second-charge and buy-to-let mortgages.

1.2. In this submission, the Advertising Association:

- (a) sets out its preference for second-charge mortgages to come under a single regulatory regime, thereby avoiding the duplication that presently exists in the form of the overlapping remits of the Financial Services Authority (FSA) and those of local trading standards services, under the leadership of the Office of Fair Trading (OFT);
- (b) argues that, if buy-to-let mortgages are to be subject to product regulation by the FSA, the continuation of Advertising Standards Authority (ASA) responsibility for the advertising of such financial instruments should receive due consideration;
- (c) proposes (if the above course of action is not deemed possible by HMT) that any Conduct of Business rules the FSA draws up should take full account of the fact that buy-to-let borrowers are essentially acting as businesses and consequently any associated rules should be less prescriptive, for example in respect of information requirements in financial promotions for them, than for purchasers of ordinary buy-to-dwell mortgages; and,
- (d) calls for a balanced analysis, in the medium-term, to be conducted by HMT of the case for a single regulatory regime to apply across all credit products.

1.3. The Advertising Association is grateful to HMT for granting the organisation a short extension to its original deadline for submission of responses. The organisation looks forward to publication by HMT of a summary of responses in due course that incorporates feedback regarding the submissions received, as well as establishing how the consultation process influenced the policy, and which sets out how the Government intends to proceed. No part of this submission should be treated as if it were confidential in nature.

2. Responses to specific HM Treasury consultation questions

2.1. The Advertising Association responds below to Questions 2, 3 and 16 of HMT's consultation document.

Question 2: Do you agree that extending the scope of FSA mortgage regulation to include the second-charge mortgage market would support the Government's objective of ensuring a fair, stable and efficient market for second-charge mortgages?

2.2. The Advertising Association considers it preferable for the scope of the FSA's remit to be extended to include responsibility for regulating second-charge mortgages, than for the present regime to be maintained, under which such products are subject to regulation both by the financial services regulator and local trading standards services, of which there are 389 in England alone. Whilst local trading services operate under the leadership of the OFT, there is clearly considerable scope for differences in interpretation of the relevant legislation between them, including in respect of the requirements set out in the Consumer Credit (Advertisements) Regulations 2004¹ ('the CCARs'), even with the introduction several years ago of the Primary Authority Principle.

2.3. As HMT will be aware, the impact on advertising in terms of compliance costs is significant and can result in such bizarre outcomes as, for example, two virtually identical risk warnings - one required by the FSA under its *Mortgages: Conduct of Business Sourcebook (MCOBS)* and the other by the CCARs - appearing in the same advertisement for a single product. Although the FSA and OFT attempted to assist stakeholders by publishing joint guidance in September 2008 in the form of *Credit advertising: A guide to dually-regulated advertising*², that document principally serves to underline the degree of regulatory complexity in the field of second-charge mortgages and the detrimental outcomes visited on the advertising sector as a consequence of this regulatory overlap.

2.4. Whilst the advertising sector has made recommendations on numerous occasions in responses to consultations by Government and regulatory authorities as to how the regulation of financial promotions might be improved, the FSA model does at least have the advantage over the consumer credit regime of greater flexibility in terms of its ability to amend rules in light of experience. Any proposed rule changes are, of course, rightly subject to public consultation by the FSA. (This greater degree of flexibility derives from the rule-making function awarded to the FSA under the Financial Services & Markets Act 2000³, which obviates the need for time-consuming changes to primary or secondary legislation to be made before provisions can be amended.)

Question 3: Do you consider that any further action would be necessary in order to ensure that any transfer of responsibility for regulating second-charge mortgages from the OFT to the FSA would not result in a loss of consumer protection?

2.5. No, the Advertising Association considers that transferring full responsibility for regulating second-charge mortgages from local trading standards services (under OFT leadership) to the FSA will not result in any loss in consumer protection and thus no further action beyond that proposed by HMT in its consultation document is necessary. Indeed, consumers should benefit from the adoption of a more consistent approach on a national basis to regulation in this area.

Question 16: Do you agree that the regulated activities in relation to mortgage contracts should apply to buy-to-let mortgages?

2.6. Yes, it would be sensible to bring buy-to-let mortgages within the regulatory scope of the FSA, given that on the supply side it appears that such products are not currently subject to

¹ Statutory Instrument No. 2004/1484, as subsequently amended

² http://www.fsa.gov.uk/pubs/other/dual_reg.pdf

³ 2008, Chapter 8

any regulation. One area of provider activity that has been regulated to date (and continues to be) is the advertising for such products, which have had to comply with the provisions contained within the Codes drawn up by the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP). These Advertising Codes are adjudicated upon by the ASA. It is notable that HMT has not identified advertising for buy-to-let mortgages as having been a problematic area of provider activity.

2.7. In the circumstances, HMT should give serious consideration to allowing ASA regulation of this area of activity to continue. Such an outcome could be achieved either by not referring to financial promotions for buy-to-let mortgages in any revised edition of *MCOBS* or to make it a requirement in that *Sourcebook* for those authorised to offer such products to comply with the CAP and BCAP Codes, including the specific provisions they contain on financial services advertising. Whilst the Advertising Association has a strong preference for the former approach, there are examples of the latter approach operating successfully in other sectors, including in the area of claims management, for example.

2.8. If the sub-optimal decision is taken to draw up specific *MCOBS* rules in this area then any information requirements introduced should take account of the fact that purchasers of buy-to-let mortgages are essentially acting as businesses. It is reasonable to assume a considerably greater degree of investment sophistication and awareness around the average buy-to-let purchaser than an individual interested solely in purchasing a standard buy-to-dwell mortgage. In light of this, it would be neither appropriate nor proportionate to require the same level of information requirements in financial promotions that presently exist around buy-to-dwell mortgages for buy-to-let products. The concern of the Advertising Association here is that whilst that there is little evidence that loading consumers with mandatory information requirements serves any useful purpose in transient communications, such as advertisements, they do have a detrimental media impact. The most obvious example of this detrimental impact is on the radio advertising sector, given that advertisers are required to purchase additional airtime in order to deliver the mandatory information requirements, thereby rendering an otherwise highly effective and competitive medium relatively less so. (The evidence suggests that the provision of such information becomes more relevant and thus effective, the closer the consumer approaches to the point-of-purchase.)

3. Comments on HM Treasury's proposed draft Statutory Instrument

3.1. The Advertising Association has two comments (see Paragraphs 3.2 and 3.3 of this submission below) in respect of the draft Statutory Instrument that HMT proposes bringing forward in order to extend the scope of FSA mortgage regulation to all second-charge and buy-to-let mortgages. This outcome would be achieved by:

(a) the Statutory Instrument carving out second-charge mortgages entirely from the consumer credit legislation in the same way that first-charge mortgages presently are; and,
 (b) in order to do this, amending the definitions of "regulated mortgage contract" and "mortgage" respectively within the Financial Services & Markets Act 2000 (Regulated Activities) Order 2001⁴ so as to include second-charge mortgages and buy-to-let products within the scope of that secondary legislation.

3.2. It is recommended that Article 2 of the draft Statutory Instrument be amended so as to read: "Articles 3 to 8 amend the principal Order as follows."⁵

⁴ Statutory Instrument No. 2001/544

⁵ Article 2 of the draft Statutory Instrument presently reads: "Articles 3 to 8 amend the principal Order is amended as follows."

3.3. It is recommended that, in the interests of consistency, the notation used for referring to other Statutory Instruments of relevance be standardised within the draft Order and the Explanatory Note that accompanies it.

4. Case for a medium-term review of overall regulatory regime for credit

4.1. The Advertising Association notes that HMT does not intend to make fundamental changes to the wider institutional framework in this field whilst the Consumer Credit Directive⁶ (CCD) is being transposed into domestic law. This appears sensible. Once the CCD has had an opportunity to bed down, however, there is a strong case for HMT to conduct a thorough analysis of both the advantages and disadvantages of maintaining the current division of labour in respect of credit regulation across the piece. As identified in Paragraph 2.2 of this submission above, the problem is not just one of dual regulation by the FSA and local trading standards services, but the fact that the CCARs are themselves open to a variety of interpretations amongst hundreds of different enforcement authorities. A unitary credit regime might also serve to reduce regulatory complexity for those second-charge mortgage lenders that remain engaged in other credit or related ancillary activities and thus will remain, despite the policy proposals contained in *Mortgage regulation: a consultation*, subject to the rump consumer credit regime.

4.2. Greater consistency is likely to benefit all those parties with an interest in issues around credit, including consumers, lenders, those responsible for enforcement and ultimately, of course, the courts.

24 February 2010

⁶ Directive 2008/48/EC “on credit agreements for consumers and repealing Council Directive 87/102/EEC”