



## The Advertising Association

7<sup>th</sup> Floor North, Artillery House, 11-19 Artillery Row,  
London SW1P 1RT

Telephone: +44 (0) 20 7340 1100 Fax: +44 (0) 20 7222 1504  
e-mail: [aa@adassoc.org.uk](mailto:aa@adassoc.org.uk) web: <http://www.adassoc.org.uk>

### RESPONSE TO THE OFFICE OF FAIR TRADING CONSULTATION “IRRESPONSIBLE LENDING – OFT GUIDANCE FOR CREDITORS” (OFT1107)

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 responded last year to the consultation conducted by the Office of Fair Trading on what the scope of the guidance on irresponsible lending the OFT is required to introduce under Section 25 (“Licensee to be a fit person”) of the Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) should be. It was argued in that submission that advertising be excluded from the scope of the OFT guidance on the basis that an advertisement for credit would not actually constitute one of the elements upon which a lender would ultimately base a decision about whether or not to extend credit to a consumer<sup>1</sup>.

1.2. The current consultation by the OFT on its draft irresponsible lending guidance reflects the resolve of that body to regard advertising as in some way part of the decision-making process a lender would go through when assessing whether or not to extend credit to a particular consumer. Whilst the logic for treating advertising in this way remains unclear, the OFT appears determined to include the activity and, consequently, it will almost certainly form part of the scope of the eventual guidance on irresponsible lending that emerges.

1.3. In that context, this response:

(a) notes the degree to which the draft guidance reflects requirements already provided for in the Consumer Protection from Unfair Trading Regulations 2008 (CPRs), which are themselves reflected in the Committee of Advertising Practice (CAP) and Broadcast Committee of Advertising Practice (BCAP) Codes;

(b) proposes, in the interests of regulatory simplicity, that those elements of the draft guidance relating to the relative prominence of information in consumer credit advertisements, where legal requirements already apply, be abandoned; and,

(c) argues that OFT concern about advertising by a particular lender should never on its own determine whether or not that business is fit to hold a consumer credit licence.

1.4. If, as is anticipated, the OFT retains guidance on consumer credit advertisements within its guidance on irresponsible lending, it is recommended that the organisation work closely with the Advertising Standards Authority (ASA), which adjudicates on the CAP and BCAP Codes, given the high degree of regulatory overlap between the two bodies in this area.

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<sup>1</sup> The response of the Advertising Association to the earlier OFT consultation on the scope of the guidance can be downloaded from the following location:

<http://www.adassoc.org.uk/aa/index.cfm?LinkServID=19A6BBE7-19B9-F84A-0CDB60F3B4ECE90&showMeta=0>

1.5. The Advertising Association looks forward to publication by the OFT of a summary of responses on its website. No part of this submission should be treated as if it were confidential in nature.

## **2. Observations on “General principles of lending” section of draft OFT guidance**

2.1. Principle 2 (“There should be transparency in dealings between creditors and borrowers”) and Principle 4 (“Creditors should not treat borrowers unfairly”) within the “General principles of lending” section of the draft guidance both contain references to advertising. Whilst it is not difficult to support these two Principles in their general sense, some of the guidance appearing under them - as it pertains to advertising - appears superfluous.

2.2. The draft guidance beneath Principle 2 establishes that all advertising directed at borrowers be: clear, accurate and balanced; compliant with relevant legislative requirements; written in plain and intelligible language; and, not be misleading. The degree to which the draft guidance simply replicates what the CAP and BCAP Codes already require is striking. For example, both sets of Codes require advertisements to comply with the law and for their content to be clear to the audience being addressed. The CAP and BCAP Codes also both reflect the legal standards contained within the CPRs, covering as they do misleading claims (including those which may mislead consumers as a consequence of being inaccurate).

2.3. The OFT also sets out under Principle 2 that it would expect lenders to ensure that warnings and caveats are accorded the same prominence as any benefits and incentives that may be referred to in consumer credit advertisements, such that they are equally likely to be seen by the borrower and to “have an impact”. Two sets of observations suggest themselves here. Firstly, the Consumer Credit (Advertisements) Regulations 2004 (as amended) and those draft Regulations set to implement the Consumer Credit Directive are already extremely prescriptive in respect of the prominence accorded to various pieces of information, including mandatory warnings, within advertisements. The introduction by the OFT of further requirements within its guidance on irresponsible lending will add yet another layer of complexity to a field – the regulation of consumer credit advertising – that is already complex, thereby causing confusion for businesses. Secondly, it is unclear what the OFT means by warnings ‘having an impact’ or how this could be measured, not least as this will surely depend on the reaction of individual consumers and their own personal approach to risk as well as the importance of the loan to them. For all these reasons, it is strongly recommended that the OFT omits this element of the draft guidance from the final version.

2.4. The draft guidance appearing beneath Principle 4 appears simply to reiterate the legal protections afforded consumers from unfair treatment by businesses under the CPRs and which are, in respect of advertising at least, already fully reflected within the CAP and BCAP Codes. The OFT also refers to *lawful* unfair business-to-consumer practices without elaborating on the type of behaviour that might fall into this category. The provision of examples of the type of behaviour that the OFT considers might fall into this category would actually be more valuable than simply providing an overview of the legal regime that exists under the CPRs.

## **3. Observations on “Pre-contractual issues” section of draft OFT guidance**

3.1. The “Pre-contractual issues” section of the draft OFT guidance contains references to advertising in those of its sub-sections relating to: unsatisfactory business practices and procedures; transparency; and, deceptive and / or unfair practices. As with its comments on the general principles above, the Advertising Association would clearly not support business practices that were, for example, deceptive or unfair - once again, however, it is striking the

degree to which the guidance simply replicates existing requirements within the CAP and BCAP Codes to little obvious purpose. This high degree of replication must call into question the utility of retaining the references to advertising contained in this part of the draft guidance within the final version.

#### *Unsatisfactory business practices and procedures*

3.2. The OFT cites a series of advertising practices in this part of the draft guidance that it would regard as irresponsible. It is notable in this context that the CAP Code contains a specific rule on social responsibility in non-broadcast advertising. Furthermore, it has been proposed – as part of the ongoing Code Review process being conducted by both Committees of Advertising Practice - that such a rule also apply to broadcast advertisements within a single BCAP Code. Taken together with the rest of the content of the CAP and BCAP Codes it appears unlikely that the sort of advertising practices apparently envisaged by the OFT in its draft guidance would escape an adverse ASA adjudication. Given the reference by the OFT to its view in this sub-section of the draft guidance that a trading name could potentially constitute promotional material, it is worth clarifying that the ASA has long regarded such names as capable of amounting to an advertising claim when reproduced in an advertisement.

#### *Transparency*

3.3. In referring to the relative prominence of warnings within this sub-section, the OFT repeats what it has already set out on this subject in the draft guidance that appears beneath Principle 2. As the Advertising Association argued in respect of Principle 2, given the degree of prescription in the applicable legislation on issues around the relative prominence of information in consumer credit advertisements, setting additional requirements in statutory guidance risks further complicating matters for businesses. Meanwhile, were an advertisement to understate or mask the potential risks to a borrower of taking out a loan, this would be likely to amount to a misleading omission under the CPRs – the legislative standards of which, as iterated previously, are reflected in the CAP and BCAP Codes. Finally, it is worth noting that the ASA has already adjudicated against advertisements that have trivialised the decision of consumers to take out loans.

#### *Deceptive and / or unfair practices*

3.4. In its draft guidance the OFT establishes that it would regard the use of consumer credit advertising or other related promotional material as unacceptable: if false information were presented; or key data relevant to a borrowing decision omitted, thereby rendering the advertisement misleading. Once again, the provisions contained within the CPRs on misleading actions and omissions - and which are fully reflected in the CAP and BCAP Codes - would appear to ensure that such deceptive or unfair practices would be likely to attract an adverse ASA adjudication.

### **4. Weight accorded to advertising practice in respect of Section 25 fitness test**

4.1. If advertising is to remain within the scope of the eventual guidance, the Advertising Association considers that its qualitative difference from those activities more obviously related to the decision to lend (such as assessments of affordability) should be recognised by the OFT. This recognition should take the form of a statement to the effect that any decision by the OFT on the fitness of lenders to hold licences should never turn on whether or not their advertising alone fell short of the standards contained within the guidance.