

# **Memorandum of Understanding between the Financial Conduct Authority and the Advertising Standards Authority**

## **1. Purpose and scope**

1.1 This Memorandum of Understanding (MoU) concerns the arrangements for co-operation and co-ordination between the Financial Conduct Authority (FCA) and the Advertising Standards Authority (ASA) in carrying out their respective regulatory responsibilities under the Financial Services and Markets Act 2000 (FSMA), the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code), the UK Code of Broadcast Advertising (BCAP Code) and other relevant legislation.

1.2 Its purpose is to facilitate and provide a framework for co-operation and co-ordination between the FCA and ASA by setting out the respective regulatory responsibilities of the FCA and ASA and arrangements for co-operation and the exchange of relevant information.

1.3 The arrangements set out in this MoU are subject to what is permitted and required by law (including the obligation of each organisation to have regard to its objectives when considering each case to which the arrangements apply).

1.4 The FCA and ASA have separate but overlapping mandates. It is important that they understand and respect each other's roles and responsibilities, co-ordinate in areas of common interest, and co-operate in others.

## **2. Roles and responsibilities of the FCA and ASA**

### **FCA**

2.1 The FCA and Prudential Regulation Authority (PRA) regulate the financial services industry in the UK. The FCA's aim is to protect consumers, ensure the financial services industry remains stable and to promote healthy competition between financial services providers.

2.2 The FCA has rule-making, investigative and enforcement powers that it uses to protect and regulate the financial services industry.

### **ASA**

2.3 The ASA is the UK's independent regulator for ensuring that advertising in all media is legal, decent, honest and truthful, for the benefit of people, society and advertisers.

2.4 The ASA administers the UK Advertising Codes, which are written and maintained by two industry bodies, the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP). These rules are mandatory and advertisers cannot opt out of the system.

### **The ASA's remit over financial advertising**

2.5 The ASA is not the lead regulator for non-broadcast financial advertising. The ASA's work complements that of the FCA by covering the 'non-technical' elements of financial promotions, namely those aspects of a financial promotion that are not subject to the technical requirements of the Financial Services and Markets Act 2000 (FSMA), the Financial Services and Markets Act (Financial Promotions) Order 2005 (as amended), applicable FCA rules and the Consumer Credit Act 1974 (as amended); for which the FCA is the lead regulator. The FCA is also the lead regulator for firms that provide payment services and for e-money issuers. These firms must comply with the conduct of business

requirements of the Payment Services Regulations 2017 and, where relevant, the Electronic Money Regulations 2011 and such FCA rules as apply to them.

2.6 The phrase 'non-technical' in this context refers to matters of serious or widespread offence, social responsibility and the truthfulness of claims that do not relate to specific characteristics of the financial product itself.

2.7 This arrangement means that consumers are protected by a comprehensive set of rules that cover all aspects of the advertising of a financial product or service. The ASA liaises with the FCA regularly to ensure consistency of approach and to avoid duplication.

### **Non-broadcast advertisements**

2.8 The ASA responsibilities in relation to non-broadcast financial promotions can be found in Section 14 of the CAP Code, which states that:

*'Marketers must have regard to the financial promotion restriction in Section 21 of the Financial Services and Markets Act 2000 and in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (as amended), as reflected in the rules and guidance issued and enforced by the Financial Conduct Authority (FCA). The scope of that legislation, rules and guidance extends to marketing communications for: investments and investment advice; deposit taking (for example, banking); home finance transactions (regulated mortgages, home purchase plans and home finance plans); general insurance and pure protection policies (for example, term assurance). The FCA is responsible for the regulation of first-charge mortgage lending and selling, as well as certain secured loans and the activities of insurance intermediaries. The FCA does not provide pre-publication advice on proposed financial marketing communications; technical guidance is available on specific matters or rule interpretation only. For more information, contact the FCA (see <http://www.fca.org.uk>).*

*The FCA also regulates other consumer loans under FSMA, the Consumer Credit Act 1974 (as amended), the Consumer Credit Act 2006 and the FCA's Consumer Credit sourcebook (CONC). CONC Chapter 3 requires financial promotions concerning consumer credit, among other more detailed requirements, to be "clear, fair and not misleading".*

*Debt management companies must ensure they comply with the financial promotions requirements imposed by FSMA and the FCA's rules set out in Chapter 3 of CONC. The rules that follow apply to financial marketing communications that are not regulated by the FCA and to marketing communications for debt advice. All financial marketing communications are, however, subject to Code rules that cover non-technical elements of communications; for example, serious or widespread offence, social responsibility and the truthfulness of claims that do not relate to specific characteristics of financial products.*

#### **Rules**

*14.1 Offers of financial products must be set out in a way that allows them to be understood easily by the audience being addressed. Marketers must ensure that they do not take advantage of consumers' inexperience or credulity.*

*14.2 Marketing communications should state the nature of the contract being offered, any limitation, expense, penalty or charge and the terms of withdrawal. Alternatively, if a marketing communication is short or general in its content, free material explaining the offer must be made readily available to consumers before a binding contract is entered into.*

*14.3 The basis used to calculate any rate of interest, forecast or projection must be apparent immediately.*

*14.4 Marketing communications must make clear that the value of investments is variable and, unless guaranteed, can go down as well as up. If the value of the investment is guaranteed, the marketing communication must explain the guarantee.*

*14.5 Marketing communications should make clear that past performance or experience does not necessarily give a guide for the future; if they are used in marketing communications, examples of past performance or experience should not be unrepresentative.'*

2.9 ASA jurisdiction will therefore apply to non-broadcast financial promotions that are not regulated by the FCA.

### **Broadcast advertisements**

2.10 The ASA responsibilities in relation to broadcast financial promotions are contained within Section 14 of the UK Code of Broadcast Advertising (BCAP Code), which states that:

*'The rules in this section largely draw attention to statutory regulation with which all advertisements must comply. Selecting the most relevant financial products or services normally requires consumers to consider many factors; short-form television and radio advertisements are not well-suited to communicating large amounts of detail. They are not, therefore, suitable formats for advertising especially high-risk or specialist investments or any financial products or services that are not regulated or permitted in the UK under the Financial Services and Markets Act 2000 (FSMA).*

*The ASA and BCAP Executive may seek advice from other regulators when investigating possible breaches of the BCAP Code. They will apply their usual standards to prevent misleading advertising (see Section 3: Misleading Advertising) and require significant exceptions and qualifications to be made clear (see rule 3.10).'*

2.11 The BCAP code will therefore apply to all broadcast financial promotions, however, the ASA may seek advice from the FCA. The FCA jurisdiction includes broadcast financial promotions that fall under its remit. See the Annex to this document for the full details.

### **3. Co-ordination between the FCA and ASA**

3.1 The FCA will inform a complainant if it has re-directed a complaint to the ASA.

3.2 The ASA will refer to the FCA complaints regarding elements or characteristics of deposits, investment business, mortgages, general insurance, consumer credit and pure protection policies (e.g. term assurance), payment services, claims management activities where the complaint is that the promotions are unclear, unfair or misleading or where impermissible comparisons have been made.

3.3 The FCA will refer to the ASA all matters that fall outside its financial promotions remit.

#### *Multi-media campaigns*

3.4 If a complaint is received about a campaign across both non-broadcast and broadcast media, rather than referring the complaint about the non-broadcast advertisement to the FCA, the ASA will consider complaints for both media. Similarly the FCA may consider complaints for both media, subject to notifying the ASA of the broadcast element. However, the ASA will alert the FCA each time it investigates complaints (broadcast and non-broadcast) that would also fall within the FCA's remit and vice versa.

3.5 The FCA will offer generic advice and/or any other information where possible to assist

the ASA during an investigation. However, this does not constitute the FCA delegating its responsibility to the ASA. The FCA reserves its right to take its own appropriate regulatory action where the circumstances dictate.

### **Provision of advice**

3.6 The FCA will not give advice under the CAP Codes (broadcast or non-broadcast). Similarly, the ASA will not give advice under FCA rules and guidance.

3.7 Pre-publication advice on proposed non-broadcast financial marketing communications that are subject to the CAP Code is available from the CAP Copy Advice team (see [www.asa.org.uk/advice-and-resources.html](http://www.asa.org.uk/advice-and-resources.html)). The CAP Copy Advice team will not give advice relating to FSMA 2000.

3.8 Pre-clearance for broadcast advertisements is carried out by Clearcast (see: <http://www.clearcast.co.uk/>), Radiocentre (see: [www.radiocentre.org](http://www.radiocentre.org)) or by individual licensees themselves.

3.9 The FCA does not pre-approve proposed marketing communications for authorised firms. Technical guidance is only available on specific matters or FCA rule interpretations.

3.10 Guidance on these criteria can be obtained from either the Manager of the Financial Promotions Team at the FCA or the Operations Manager, Complaints at the ASA.

### **4. Information sharing: general**

4.1 The FCA and ASA will exchange information on relevant issues of interest to the extent permitted by law, and as appropriate and relevant to their respective objectives. This may include, but is not limited to:

- information about investigations and notifying the other about any relevant action taken against a person or firm by one regulator which may be relevant to the functions of the other.
- information held by either regulator about fraud / criminal or any other activity that might cast doubt on the fitness and propriety of an FCA-authorized firm or an approved person.
- information or intelligence held by the ASA which indicates that there may be a failure of an FCA-authorized firm's governance or culture (including the implementation or effectiveness of its systems and controls).

4.2 The FCA and ASA may request information from each other and will include the details of the information sought and why it would assist them to carry out their functions. Each may suggest a reasonable deadline for response, including an explanation of any urgency.

4.3 The FCA and ASA may consult and co-ordinate in respect of reviews, calls for evidence and recommendations directed towards both parties, where appropriate.

### **5. Policy and rule-making**

5.1 Each regulator will make rules and/or policies in pursuit of its separate objective(s). The FCA and ASA will seek to co-ordinate work on their respective policies that have a material effect on the other's objectives. This may include, as appropriate, work on:

- regulatory policy
- industry standards and recommendations
- regulatory materials, such as codes of practice, rules and guidance
- assessments of the landscape and risk analysis to inform policy-making

- FCA consumer alerts concerning advertising
- competition in the financial advertising sector; and
- any other projects that may be identified on an ad hoc basis, particularly to aid market understanding of how the two regulators work together.

5.2 The FCA and ASA will liaise closely to ensure that their separate awareness activities are complementary. Both regulators will share communication and publication plans to facilitate joined up messages and effective resource planning, where appropriate.

## **6. Investigation and enforcement**

6.1 The FCA and ASA recognise that there are areas in which they have complementary functions and powers. They will therefore endeavour to ensure that in these cases, the most appropriate body or bodies will commence and lead investigations. To the extent permitted by law and having regard to their respective powers, expertise and resources, they will seek to ensure that: in cases of investigations, the FCA and ASA will notify each other of significant developments where the other is likely to have an interest and discuss where appropriate the steps they propose to take and co-ordination takes place in a timely manner, where possible, allowing for a proper exchange of views.

6.2 The FCA and ASA may refer a matter for action if the other body is considered more appropriate to deal with the matter. Any such referral will include the action sought and the legal powers it considers are available to the other. Where the other recipient determines not to proceed, an explanation will be provided, where possible.

6.3 Relevant FCA and ASA staff will, where appropriate, seek to maintain general awareness and understanding of each other's functions and needs and will liaise with each other to ensure that issues are appropriately identified.

## **7. Confidentiality**

7.1 In accordance with relevant legislation, the FCA and ASA will protect the confidentiality and sensitivity of all unpublished regulatory and other confidential information received from the other regulator.

7.2 Where one regulator has received information from the other, it will consult with, and where required, obtain the consent of the other before passing the information to a third party or using the information in an enforcement proceeding or court case.

7.3 The FCA and ASA will liaise where relevant, to the extent permitted by law and having regard to their respective objectives, on responding to enquiries from the public, including Freedom of Information requests, and will consult each other before releasing information originally belonging to the other.

## **8. Maintaining the MoU**

8.1 The FCA and ASA will review each year the operation of the MoU and the effectiveness of co-operation and co-ordination between the FCA and ASA.

## **9. Contact**

9.1 In the first instance, the following should be used as points of contact:

- Manager, SRA Conduct Supervision, Financial Promotions Team, FCA. Tel 0207 066 1000
- Operations Manager, Complaints, ASA. Tel 0207 492 2222

9.2 Early contact between the FCA and ASA is essential to avoid duplication of effort. It is recommended that contact be maintained during the life of a referred case and an update given (subject to confidentiality provisions) once it has been concluded.

**FCA & ASA**

Dated: .....

Signed by:



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Karina McTeague

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Louise Maroney

For and on behalf of the FCA

For and on behalf of the ASA

## **ANNEX**

### **BCAP Code**

#### **14 Financial products, services and investments**

##### **Background**

The rules in this section largely draw attention to statutory regulation with which all advertisements must comply. Selecting the most relevant financial products or services normally requires consumers to consider many factors; short-form television and radio advertisements are not well-suited to communicating large amounts of detail. They are not, therefore, suitable formats for advertising especially high-risk or specialist investments or any financial products or services that are not regulated or permitted in the UK under the Financial Services and Markets Act 2000 (FSMA).

The ASA and BCAP Executive may seek advice from other regulators when investigating possible breaches of the BCAP Code. They will apply their usual standards to prevent misleading advertising (see Section 3: Misleading Advertising) and require significant exceptions and qualifications to be made clear (see rule 3.10).

On 1st April 2013, the Financial Services Authority was split into two new regulators: the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA).

The FCA is the conduct regulator for the financial services industry and is also responsible for the prudential regulation of those financial services firms not supervised by the PRA (e.g. asset managers). It regulates conduct of business, including advertising, for investment products, including structured deposits where capital is subject to market risk. It also regulates the advertising of insurance, including the activities of insurance intermediaries (for example motor, home and travel insurers). It is responsible for the regulation of most first-charge mortgage lending and selling. Mortgages that are not regulated are those secured on non-UK land and business premises with less than 40% residential occupation. The FCA's financial promotion rules set out in Mortgages and Home Finance: Conduct of Business sourcebook (MCOB) Chapter 3 in the FCA Handbook apply to Home Reversion Plans, sale and rent back business and qualifying credit promotions as defined under the Financial Services and Markets Act (Financial Promotion) Order 2005 (as amended) (FPO) and the FCA Handbook glossary. The rules in MCOB 3 do not apply to Home Purchase Plans, with the exception of the "clear, fair and not misleading" standard and some relevant guidance detailed in MCOB Chapter 2.

Unsecured consumer credit or consumer hire, other forms of secured consumer credit and some other credit-related activities are also regulated by the FCA under FSMA, the Consumer Credit Act 1974 (as amended), the Consumer Credit Act 2006 and the FCA's Consumer Credit sourcebook (CONC). CONC Chapter 3 requires financial promotions concerning consumer credit, among other more detailed requirements, to be "clear, fair and not misleading".

The FCA regulates the activity of accepting deposits from banking customers in the UK under the Banking Conduct Regime, which applies the FCA's Principles for Businesses, the conduct of business requirements of the Payment Services Regulations (PSRs) and the

Banking Conduct of Business sourcebook (BCOBS). BCOBS Chapter 2 states that, when designing a financial promotion, a firm may find it helpful to take account of the British Bankers' Association/Building Societies' Association Code of Conduct for the Advertising of Interest Bearing Accounts. The FCA Handbook requires financial promotions to be "fair, clear and not misleading".

The PRA, a subsidiary company of the Bank of England, is responsible for the prudential regulation of banks, building societies and credit unions (collectively 'deposit-takers'), insurers and major investment firms. It will promote the safety and soundness of these firms, seeking to minimise the adverse effects that they can have on the stability of the UK financial system; and contribute to ensuring that insurance policyholders are appropriately protected.

## **Definitions**

In this section, unless otherwise stated, the terms "financial promotion", "authorised person", "qualifying credit" and "regulated activity" have the same meanings as in FSMA and FPO. The FSMA definition of a financial promotion is broad and includes, for example, advertisements for deposits and insurance products.

Under FSMA, a financial promotion is "an invitation or inducement to engage in investment activity" that is made "in the course of business" and is "capable of having an effect in the UK." That broad definition captures all promotional activity, including traditional advertising, telephone sales and face-to-face conversations, in relation to all products and services regulated by the FCA. Under FSMA, "investment activity" does not cover only conventional investments; it includes deposits, home finance transactions (regulated mortgages, home purchase plans and home reversion plans), unsecured consumer credit or consumer hire agreements, other forms of secured consumer credit or hire and credit-related activities, such as credit broking, debt counselling, debt adjusting and most insurance, including some advertisements by insurance intermediaries (see the Insurance Conduct of Business sourcebook - ICOBS).

A "specialised financial channel or station" is an Ofcom-licensed channel or station whose programmes, with few exceptions, are likely to be of particular interest only to business people or finance professionals.

In this Code, "spread betting" and "contract for differences" have the same meanings as in the glossary to the FCA Handbook.

## **Rules**

14.1 Radio Central Copy Clearance – Radio broadcasters must ensure advertisements for consumer credit, investment and complex financial products and services are centrally cleared.

14.2 Broadcasters are responsible for ensuring that advertisements carried by them comply with all the relevant legal and regulatory requirements. Broadcasters might need to seek legal advice if an advertiser claims an advertisement should be considered:

14.2.1 not to be a financial promotion or

14.2.2 to be a financial promotion that is not required to be communicated or approved by an authorised person (because it is subject to an exemption under the FPO). Advice, or



general advice from the FCA, might be required on compliance with the FCA Handbook. The FCA does not pre-vet or advise on the compliance of proposed financial promotions with FSMA. For more information, visit the financial promotions pages of the FCA website ([www.fca.org.uk](http://www.fca.org.uk)) and see the FCA Handbook, especially: the Consumer Credit sourcebook (CONC) Chapter 3; the Conduct of Business sourcebook (COBS) Chapter 4; the Mortgages and Home Finance: Conduct of Business sourcebook (MCOB) Chapter 3; the Insurance: Conduct of Business sourcebook (ICOBS) Chapter 2.2; and the Perimeter Guidance Manual (PERG) Chapter 8.

14.3 Advertisements for financial services that are broadcast exclusively to audiences in EU Member States other than the UK or are not subject to the FCA's financial promotion rules need not comply with this section. Instead, they must comply with the laws and regulations of the relevant Member States.

14.4 Financial promotions or other advertisements for regulated activities may be broadcast if:

14.4.1 communicated by an authorised person

14.4.2 approved or issued by an authorised person or an appointed representative of an authorised person who, to the broadcaster's satisfaction, has confirmed that the final recorded version of the advertisement complies with the FCA's financial promotion rules or

14.4.3 exempt under the FPO. An advertisement by a general insurance intermediary need not be approved by an authorised person if it is a generic promotion and exempted by the FPO. (That is usually if the advertisement does not identify an insurer, insurance intermediary or product; so it will usually apply if the financial promotion refers generally to product types.)

14.5 These categories of advertisement may be broadcast on specialised financial channels, stations or programming only:

14.5.1 advertisements for the acquisition or disposal of derivatives, warrants or other transferable securities (such as shares) that are not on the Official List of the FCA or admitted to trading on a Regulated Market in the UK or other EEA State (as defined by the Markets in Financial Instruments Directive)

14.5.2 advertisements for spread betting, as an investment only. Spread betting advertisements may be advertised on interactive or additional TV services (including text services). They must comply with the gambling rules (see Section 17: Gambling). The advertised products or services should be available only to clients who have demonstrated through a pre-vetting procedure compliant with the FCA's appropriateness test that they have relevant financial trading experience

14.5.3 advertisements for contracts for differences (except spread betting), provided the products are available only to clients who have demonstrated through an appropriate pre-vetting procedure that they have relevant financial trading experience.

14.5.4 advertisements for investments not regulated or permitted under FSMA. An advertisement that implies, for example, that a collectors' item or other unregulated

product or service could have investment potential (in the colloquial sense) would normally be unacceptable.

14.6 Unless they are obviously addressed to a specialist audience and shown either on specialised financial channels or stations or in breaks in relevant financial programmes, advertisements subject to this section must be considered to be addressed to non-specialist audiences. No specialist knowledge should normally be required for a clear understanding of claims or references. For example, exceptions, conditions or expressions that would be understood by finance specialists must be avoided or explained if they would be unfamiliar to the audience.

14.7 References to interest payable on savings are acceptable, subject to these conditions:

14.7.1 they must be factually accurate at the time of broadcast and the advertisement must be modified immediately if the rate changes

14.7.2 advertisements quoting a rate must use the Annual Equivalent Rate (AER) and the contractual rate as set out in the British Bankers' Association and Building Societies Association Code of Conduct for the Advertising of Interest Bearing Accounts and advertisements should comply with all the provisions of that code

14.7.3 if conditions apply to calculations of interest and might affect the sum received, the advertisement must refer to the conditions and how they can be accessed

14.7.4 advertisements quoting a rate must make clear whether it is gross or net of tax, or tax-free, but do not need to explain those expressions

14.7.5 where the interest rate is variable, this must be stated

14.7.6 if the investment returns of different types of savings products are compared (for example, a unit trust and a bank deposit), significant differences between the products must be explained.

14.8 Subject to legal requirements, reference to specific sums assured in life insurance advertisements must be accompanied by all relevant qualifying conditions; for example, age and gender of the assured at the outset of the policy, period of policy and amount and number of premiums payable.

14.9 References to income tax and other tax benefits must be properly qualified, clarifying their meaning and making clear, if relevant, that the tax treatment depends on the individual circumstances of each person and could be subject to change in future.

### **Lending and credit**

14.10 Advertisements for paper or electronic publications (for example, periodicals, books and text services) must not recommend a specific investment offer.

14.11 The advertising of unsecured consumer credit or hire services by consumer credit businesses or consumer hire businesses and / or credit brokering businesses or related credit services, such as debt counselling or debt adjusting is acceptable only if the advertiser complies with the financial promotions requirements imposed by FSMA and the FCA's rules set out in Chapter 3 of CONC.. The requirements for financial promotions set out in Chapter 3 of CONC do not apply: (a) where the credit is available only to a company

or other body corporate (such as a limited liability partnership); (b) where a financial promotion is solely promoting credit agreements or consumer hire agreements or P2P lending agreements for the purposes of a customer's business; (c) to a financial promotion to the extent that it relates to qualifying credit or (d) it falls within the definition of an excluded communication as set out in the FCA's handbook. If the applicability or interpretation of these rules or provisions is in doubt, advertisers may contact the FCA. The FCA does not check financial promotions for compliance with the CONC rules before they are published. Such advertisements that involve distance marketing must also comply with the Financial Services (Distance Marketing) Regulations 2004 (as amended). Other distance-marketing financial advertisements are covered by the FCA Handbook.

14.12 Advertisements for mortgages and re-mortgages are normally financial promotions under FSMA and must comply with the requirements imposed by FSMA and MCOB.

14.12.1 Advertisements for most loans secured by a second charge are financial promotions and the requirements of CONC therefore apply. Special note should be taken of the requirements in CONC 3.6 for secured loans

14.12.2 Advertisements for some mortgages might also have to comply with the provisions of COBS (for example if an investment product is being sold alongside a mortgage).

14.13 Advertising for debt management services is acceptable only from bodies that:

14.13.1 are licensed under the Consumer Credit Act 1974 (as amended) and

14.13.2 undertake to comply with the Debt Management Guidance published by the Office of Fair Trading.

### **Direct remittance**

14.14 Advertisements on television or radio are unacceptable if they directly or indirectly invite the remittance of money direct to the advertiser or any other person without offering an opportunity to receive more information; an intermediate stage at which more information is supplied is mandatory.

14.15 Advertisements on Ofcom-regulated text services that invite the direct remittance of money are acceptable for the categories listed in rule 14.4, but not those in rule 14.5.