

Consumer Credit sourcebook

Chapter 8

Debt advice

8.3 Pre contract information and advice requirements

8.3.1

R

A *firm* must (except where the contract is a *credit agreement* to which the *disclosure regulations* apply) provide sufficient information, in a *durable medium*, when the *customer* first enquires about the *firm's* services, about the following matters to enable the *customer* to make a reasonable decision:

- (1) the nature of the *firm's* service offered in the contract to the *customer*;

[Note: paragraph 3.38b of *DMG*]

- (2) the duration of the contract;

[Note: paragraph 3.38c of *DMG*]

- (3) the total cost of the *firm's* service or, where it is not possible to state the total cost, the formula the *firm* uses for calculating its fees or charges or an estimate of the anticipated likely total cost may be given;

[Note: paragraph 3.40c of *DMG*]

- (4) any fee or deposit, such as an arrangement fee, a periodic fee, a management fee, or an administrative fee;

[Note: paragraph 3.38c of *DMG*]

- (5) any fee or charge which can be imposed on the *customer* in relation to cancellation of the contract;

[Note: paragraph 3.38c of *DMG*]

- (6) any other costs likely to be incurred under the contract and the circumstances in which these would be payable;

[Note: paragraph 3.38c of *DMG*]

- (7) where the *firm* bases its fees or charges on some percentage or an hourly rate or some other formula, an explanation of how the fees or charges are calculated;

[Note: paragraph 3.9c of *DMG*]

- (8) the elements of the service that the fees cover;

[Note: paragraph 3.38c of *DMG*]

- (9) the circumstances in which a *customer* may terminate the contract and receive a refund in accordance with relevant law and any fees or charges the *customer* may be required to pay in that case;

[Note: paragraph 3.40d of *DMG*]

- (10) the consequences on the *customer's* credit rating, including how long the matter will show on the *customer's* credit file and that the *customer* may not be able to obtain *credit* or other financial services in the future;

[Note: paragraph 3.38e of *DMG*]

- (11) whether a right to cancel applies and, if so, the period and any conditions for exercising the right to cancel the contract and any amount the *customer* may be required to pay;

[Note: paragraph 3.38h of *DMG*]

- (12) how payments will be allocated to *lenders* and when payments will be made; and

[Note: paragraph 3.38k of *DMG*]

- (13) the period of time between payments being received from the *customer* and payments being made to *lenders*, including the date when the first payment will be made to *lenders*.

[Note: paragraph 3.38l of *DMG*]

- (14) an explanation that compensation might be available from the *compensation scheme* if there is a *shortfall* in *client money* held by the *firm* for that *customer*.

[Note: paragraphs 3.33, 3.35 and 3.38 of *DMG*]

8.3.2

R

A *firm* must ensure that:

- (1) all advice given and action taken by the *firm* or its agent or its *appointed representative*:
 - (a) has regard to the best interests of the *customer*;
 - (b) is appropriate to the individual circumstances of the *customer*;
 - and
 - (c) is based on a sufficiently full assessment of the financial circumstances of the *customer*;

[Note: paragraph 2.6a of *DMG*]

- (2) *customers* receive sufficient information about the available options identified as suitable for the *customers'* needs; and

[Note: paragraph 2.6b of *DMG*]

- (3) it explains the reasons why the *firm* considers the available options suitable and other options unsuitable.

[Note: paragraph 2.6b of *DMG*]

8.3.2A G *Firms* are reminded of ■ PERG 12.6G which contains *guidance* on the regulated activity of *advising on conversion or transfer of pension benefits*.

8.3.3 G The individual circumstances of the *customer* include, for example, the *customer's* financial position, the country in the *UK* to whose laws and procedures the *customer* and the *lender* in question are subject, and the level of understanding of the *customer*.

[Note: paragraph 2.6c of *DMG*]

8.3.4 R A *firm* must ensure that advice provided to a *customer*, whether before the *firm* has entered into contract with the *customer* or after, is provided in a *durable medium* and:

- (1) makes clear which debts will be included in any *debt solution* and which debts will be excluded from any *debt solution*;

[Note: paragraph 3.38j of *DMG*]

- (2) makes clear the actual or potential advantages, disadvantages, costs and risks of each option available to the *customer*, with any conditions that apply for entry into each option and which debts may be covered by each option;

[Note: paragraphs 3.23a and 3.38b of *DMG*]

- (3) warns the *customer*:

- (a) of the actual or potential consequences of failing to continue to pay taxes, fines, child support payments and debts which could result in loss of access to essential *goods* or services or repossession of, or eviction from, the *customer's* home;

[Note: paragraph 3.38m of *DMG*]

- (b) of the actual or potential consequences of not continuing to make *repayments* under *credit agreements* or *consumer hire agreements*;

[Note: paragraph 3.26k of *DMG*]

- (c) of the actual or potential consequences of ignoring correspondence or other contact from *lenders* and those acting on behalf of *lenders*;

[Note: paragraph 3.38n of *DMG*]

- (d) that action to recover debts may be commenced, which may involve further cost to the *customer*; and

[Note: paragraph 3.38q of *DMG*]

- (e) that by entering into a *debt management plan* or another non-statutory repayment plan there is no guarantee that any current recovery or legal action will be suspended or withdrawn;

[Note: paragraph 3.38r of *DMG*]

- (4) where relevant to the *debt solution*, makes clear the risks, including the following risks:
 - (a) if the arrangement or deed fails, the risk of bankruptcy;
 - (b) homeowners may need to release equity from the value of their homes to pay off debts; and that a remortgage may attract higher interest rates or that if no remortgage is available, an individual voluntary arrangement may be extended for 12 months;
 - (c) there are restrictions on the expenditure of a *person* who enters into an individual voluntary arrangement or protected trust deed;
 - (d) the *customer's lenders* may not approve the individual voluntary arrangement or protected trust deed; and
 - (e) only unsecured debts included within the individual voluntary arrangement or protected trust deed may be discharged at the end of the period and unsecured debts not included remain outstanding;

[Note: paragraph 3.38s of *DMG*]

- (5) takes proper account of the individual needs of, and any requests made by, a *customer*; and

[Note: paragraph 3.23f of *DMG*]

- (6) where relevant, explains the nature of an insolvency procedure and the role of the *firm*.

[Note: paragraph 3.23o of *DMG*]

[Note: paragraphs 3.23 and 3.38 of *DMG*]

8.3.4A

R

- (1) If a *firm* has not entered into a contract with a *customer*, and is satisfied on reasonable grounds that it is unlikely to do so, ■ CONC 8.3.4R applies in relation to that *customer* as if the words "is provided in a *durable medium* and" were omitted.
- (2) The *firm* must keep a record of the grounds in (1).

8.3.5

G

The information required by ■ CONC 8.3.4 R should be provided leaving sufficient time for the *customer* (taking into account the complexity of the information and the *customer's* financial position) to consider it before having to make a decision on the appropriate course of action.

- 8.3.6** G A *firm* should not unfairly incentivise debt advisers (whether employees, agents or *appointed representatives* of the *firm*) to the extent that an incentive might lead the *firm* not to comply with ■ CONC 8.3.2 R.
- [Note: paragraph 3.22 (box) of *DMG*]
- 8.3.6A** G
- (1) *Firms* must provide advice in a *durable medium*, unless ■ CONC 8.3.4AR applies. Where questions over the application of that exemption may arise, for example, in relation to advice given to a *customer* at an initial meeting or telephone call, the following considerations may be relevant:
 - (a) if a *firm* never charges for advice and never enters into contracts with *customers* for *debt solutions*, ■ CONC 8.3.4AR may remove the requirement to provide advice to the *customer* in a *durable medium*; and
 - (b) if a *firm* enters into contracts with *customers* (in relation to advice, to a *debt solution*, or to some other matter), it will need to consider, at the early stages of contact with a *customer*, whether a contract with that *customer* may follow. A *firm* is only likely to be able to satisfy itself on that point once discussions with a *customer* have advanced to a stage where it is reasonable to conclude that it is more likely than not that the *firm* will not enter into a contract with the *customer*. The *firm* should keep a record of its reasons for being satisfied on the point.
 - (2) Where the exemption in ■ CONC 8.3.4AR applies, the *firm* should consider whether it may nevertheless be appropriate to comply with ■ CONC 8.3.4R in certain cases, for example where complex advice is given.
- 8.3.7** R A *firm* must:
- (1) provide the *customer* with a source of impartial information on the range of *debt solutions* available to the *customer* in the relevant country of the *UK*;
- [Note: paragraph 3.23b of *DMG*]
- (2) before giving any advice or any recommendation on a particular course of action in relation to the *customer's debts*, carry out a reasonable and reliable assessment of:
 - (a) the *customer's* financial position (including the *customer's* income, capital and expenditure);
 - (b) the *customer's* personal circumstances (including the reasons for the financial difficulty, whether it is temporary or longer term and whether the *customer* has entered into a *debt solution* previously and, if it failed, the reason for its failure); and
 - (c) any other relevant factors (including any known or reasonably foreseeable changes in the *customer's* circumstances such as a change in employment status);
- [Note: paragraph 3.23c of *DMG*]

(3) refer a *customer* to an appropriate *not-for-profit debt advice body* in circumstances where the *customer*:

(a) has problems related to debt requiring immediate attention with which the *firm* is unable or unwilling to assist the *customer*; or

[Note: paragraph 3.23gi of DMG]

(b) does not have enough disposable income to pay the *firm's* fees;

[Note: paragraph 3.23gii of DMG]

(4) refer a *customer* to, or provide contact details for, another debt advice provider in circumstances where the *firm* is unable to provide appropriate advice or provide an appropriate *debt solution* for the *customer*; and

[Note: paragraph 3.23h of DMG]

(5) seek to ensure that a *customer* understands the options available and the implications and consequences for the *customer* of the *firm's* recommended course of action.

[Note: paragraph 3.23i of DMG]

8.3.8

G

(1) The information and advice referred to in ■ CONC 8.3 should be provided in a manner which is clear fair and not misleading to comply with *Principle 7* and ■ CONC 3.3.1 R, and should be in plain and intelligible language in accordance with ■ CONC 3.3.2 R. A *firm* should encourage a *customer* to read the information and allow sufficient time between providing the information and entering into the contract to enable the *customer* to seek independent advice if so desired.

[Note: paragraphs 3.21, 3.35 and 3.36 of DMG]

(2) The *firm's* services referred to in ■ CONC 8.3 include any *debt solution* the *firm* offers to a *customer*. Therefore, in setting out fees or charges for a *firm's* services, the fees and charges the *firm* charges in relation to a *debt solution* should be included.

(3) The serious problems related to debt in ■ CONC 8.3.7 R are likely to include, where non-payment of a debt may result in the loss of a *customer's* home or loss of access to essential *goods* or services and, in particular, where legal action is threatened or legal action is taken in relation to debts which may have that effect.

[Note: paragraph 3.23gi of DMG]

(4) A *not-for-profit debt advice body* should refer a *customer* to another *not-for-profit debt advice body* under ■ CONC 8.3.7R (3) where, for example, it is unable to assist a *customer*.

(5) An appropriate *not-for-profit debt advice body* would be one that provides the most appropriate *debt solution* given the *customer's* financial circumstances.

Prohibition on debt packager remuneration from debt solution providers Scope

8.3.9

R

- (1) ■ CONC 8.3.11R to ■ CONC 8.3.15R:
- (a) apply to a *firm* with respect to *debt counselling* where the *firm* does not itself provide *debt solutions*; and
 - (b) do not apply to a *firm* that is a *not-for-profit debt advice body*.
- (2) A *firm* is treated as not itself providing *debt solutions* for the purposes of ■ CONC 8.3.9R(1)(a) where the *firm*:
- (a) provides *debt solutions* on a single or occasional basis; and/or
 - (b) receives only an insignificant amount of its total annual revenue from providing *debt solutions*.

Context, purpose and anti-avoidance

8.3.10

G

- (1) *Firms* are reminded that when referring *customers* to *debt solution providers*, or carrying on related services, a *firm* must comply with its obligations under:
- (a) *Principle 12* (Consumer Duty) to act to deliver good outcomes for *retail customers* and/or *Principle 6* (Customers' interests) to pay due regard to the interests of its *customers* and treat them fairly; and
 - (b) ■ CONC 8.3.2R(1) to ensure that all advice given and action taken by the *firm*, its agent or its *appointed representative*:
 - (i) has regard to the best interests of the *customer*;
 - (ii) is appropriate to the individual circumstances of the *customer*; and
 - (iii) is based on a sufficiently full assessment of the financial circumstances of the *customer*.
- (2) The purpose of the prohibition in ■ CONC 8.3.11R is to remove the conflict of interest between a debt packager's obligations under *CONC*, including those referred to in ■ CONC 8.3.10G(1), and the financial incentive to act in a way which generates revenue in the form of referral fees from *debt solution providers*.
- (3) The effect of ■ CONC 8.3.9R(2) is that *firms* will not be able to avoid the prohibition in ■ CONC 8.3.11R by starting to provide a small number of *debt solutions* for that purpose.
- (4) For the purposes of ■ CONC 8.3.9R(2)(b), the amount of total annual revenue received from providing *debt solutions* is unlikely to be considered significant if an undue risk of non-compliant debt advice arising out of a conflict of interest of the kind described in ■ CONC 8.3.10G(2) continues to exist.
- (5) For the purposes of ■ CONC 8.3.10G(1)(a), during the period to which ■ CONC TP 8(6) to (7) applies, the *FCA* considers it unlikely that an increase in either the referral of *customers* to *debt solution providers* or carrying on related services, would be in accordance with *Principle 6* or *Principle 12*.

Prohibition

- 8.3.11** **R** (1) A *firm* must not (and must take all reasonable steps to ensure that none of its *associates* or its *appointed representatives*):
- (a) enter into an agreement to receive;
 - (b) solicit or accept; or
 - (c) seek to exercise, enforce or rely on rights or obligations under an agreement to receive,
- any commission, fee or any other financial consideration, directly or indirectly, from a *debt solution* provider in connection with the *firm* referring *customers* to a *debt solution* provider, or any other related services, except as provided in **■ CONC 8.3.14R**.
- (2) **■ CONC 8.3.11(1)(b)** and **■ (c)** do not apply where the *firm* has an accrued contractual right to payment for the referral, or related services, in relation to a *customer* prior to the coming into force of **■ CONC 8.3.11R(1)**.
- 8.3.12** **R** 'Related service(s)' for the purposes of **■ CONC 8.3.9R** to **■ CONC 8.3.11R** includes:
- (1) recommending a *debt solution* provider;
 - (2) providing *debt counselling* services to *customers* prior to those *customers* being referred to a *debt solution* provider or entering into a *debt solution*; and
 - (3) providing *debt counselling* services to *customers* who have been referred to the *firm* by a *debt solution* provider.
- 8.3.13** **R** '*Debt solution* provider(s)' for the purposes of **■ CONC 8.3.10G** to **■ CONC 8.3.12R** includes such providers' *associates* and *appointed representatives*.
- 8.3.14** **R** **■ CONC 8.3.11R** does not apply to payments made:
- (1) pursuant to an enactment;
 - (2) in relation to the administration by a 'money adviser' approved under The Debt Arrangement Scheme (Scotland) Regulations 2011 of a *customer's* application for a Debt Arrangement Scheme under those Regulations; or
 - (3) by a person employed as an officer of:
 - (a) (in relation to England and Wales) the Insolvency Service;
 - (b) (in relation to Scotland) the Accountant in Bankruptcy; or
 - (c) (in relation to Northern Ireland) the Insolvency Service.

Record keeping

- 8.3.15 **G** *Firms are reminded of their obligations in ■ SYSC 9.1.1R to keep orderly records, which must be sufficient to enable the FCA to monitor the firm's compliance with the requirements of the regulatory system.*

Application of the prohibition to appointed representatives

- 8.3.16 **R** *Principals which have an appointed representative to whom ■ CONC 8.3.9R(1) would apply if the appointed representative were an authorised person must take all reasonable steps to ensure that such an appointed representative complies with ■ CONC 8.3.11R as if the references in that rule to 'firm' applied to such an appointed representative.*

- 8.3.17 **G** *The purpose of ■ CONC 8.3.16R is to prevent a debt packager firm from becoming an appointed representative in order to avoid ■ CONC 8.3.11R applying to it and continuing to be conflicted by the financial incentive to act in a way which generates revenue from debt solution providers.*