

Chapter 2

Conduct of business standards: general

2.6A Protecting customer's interests: regulated mortgage contracts, home purchase plans, home reversion plans and regulated sale and rent back agreements

Protecting customer's interests: regulated mortgage contracts

- 2.6A.1 **R** A mortgage lender may only include, or rely on, a term in a *regulated mortgage contract* which permits it to change the rate of interest from a fixed, discounted or other concessionary rate to the *firm's* standard variable rate in the event of a breach of contract if each of the following conditions is met:
- (1) the breach of contract is material;
 - (2) the breach of contract is unrelated to a *payment shortfall*; and
 - (3) that standard variable rate is not an interest rate created especially for *customers* who are (either at all, or in particular ways) in breach of contract.

Protecting customer's interests: home purchase plans, home reversion plans and regulated sale and rent back agreements

- 2.6A.1 **R** A *firm* must ensure that the interests of its *customer* under a *home purchase plan, home reversion plan or regulated sale and rent back agreement* are protected to a reasonable standard.
- 2.6A.2 **G** Circumstances that a *firm* should consider include how the *customer* will be protected in the event of:
- (1) the *failure* of a *reversion provider, home purchase provider or SRB agreement provider*;
 - (2) the transfer of a *reversion provider's, home purchase provider's or SRB agreement provider's* interest (or the interest the provider would have had, had it not nominated a third party to hold it) in the property to a third party;
 - (3) other dealings by a *reversion provider, home purchase provider or SRB agreement provider* (or its nominee) with a third party; and

(4) a reversion provider's, home purchase provider's or SRB agreement provider's (or its nominee's) failure to perform obligations owed to third parties, or imposed by statute.

2.6A.3

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The steps that a *firm* might take in order to protect its *customer's* interests will depend on a number of factors, including the nature and structure of the *home purchase plan*, *home reversion plan* or *regulated sale and rent back agreement* and the jurisdiction in which the property is situated. If it is not possible to achieve reasonable protection (for example, due to impediments under a particular legal system) then a *firm* should not enter into, arrange or administer the plan.

2.6A.4

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- (1) In the *FCA's* view, a *customer's* interests will include:
 - (a) protection of the *customer's* rights under the plan, in particular the right to occupy the property throughout its term;
 - (b) protection of any interest (legal or beneficial) that the *customer* retains, acquires or is intended to acquire in the property, including the expectation that such interests will be unencumbered by third party interests;
 - (c) that, where a *customer* pays sums under a *home purchase plan* towards the purchase price of the property, those sums will be applied towards the purchase price. Or, in circumstances where that is not practicable (for example, on *repossession*), that an appropriate amount will be returned to the *customer*; and
 - (d) a *customer's* contractual entitlement to receive certain sums back after a qualifying period, such as where it has been agreed that a certain percentage of discount will be refunded to the *customer* after a set period of tenancy.

- (2) The protections that a *firm* should consider include:
 - (a) the extent to which different forms of tenure protect the tenant's right to occupy the property and afford protection against removal. In particular, granting the *customer* a licence to occupy the property is unlikely to provide an adequate level of security;
 - (b) (except in Scotland) the need for any agreement under which a *customer* has a right to acquire an interest in the property to be specifically enforceable;
 - (c) the extent to which appropriate registrations, restrictions, notices or other entries should be made in the relevant land register;
 - (d) the timing of entries in the relevant land register and who should be responsible for making them; and
 - (e) the *customer's* need for a full and clear understanding of all the steps that the *firm* expects him or his advisers to take to protect his interests both at the time the plan is entered into, and throughout its duration.

Protecting customers' interests: additional material for home reversion plans

2.6A.5

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Unless it is satisfied on reasonable grounds based on the *customer's* knowledge, expertise and experience that it is unnecessary, a *firm* must

obtain from its *customer's* legal adviser, before its *customer* enters into a *home reversion plan*, confirmation that:

- (1) he has been instructed to ensure that the *customer's* legal rights under the plan are protected to a reasonable standard; and
- (2) he has explained to the *customer* those aspects of the *customer's* legal rights and obligations under the *home reversion plan* that he needs to understand.

Protecting customer's interests: regulated sale and rent back agreements

2.6A.5A

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A *firm* must ensure that before a *SRB agreement seller* enters into a *regulated sale and rent back agreement*, the *SRB agreement seller* is made aware of the availability and importance of independent legal or professional advice.

Protecting customers' interests under regulated sale and rent back agreements: security of tenure

2.6A.5B

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- (1) When *entering into a regulated sale and rent back agreement*, a *firm* must ensure that, under the terms of the *regulated sale and rent back agreement*:
 - (a) the entitlement of the *SRB agreement seller* (or trust beneficiary or related person) to occupy the property is governed by a tenancy, which is structured:
 - (i) if the property is in England and Wales, as an assured tenancy (including an assured shorthold tenancy) under the Housing Act 1988 (as amended);
 - (ii) if the property is in Scotland, as an assured tenancy (including a short assured tenancy) under the Housing (Scotland) Act 1988, (as amended); and
 - (iii) if the property is in Northern Ireland, as a private tenancy under the Private Tenancies (Northern Ireland) Order 2006;
 - (b) the tenancy is for a fixed term of no less than five years;
 - (c) the terms of the tenancy provide for the tenant to terminate the tenancy during the fixed term on no more than three months' notice (and with no other conditions attached); and
 - (d) each of the terms of the tenancy is fair.
- (2) When *entering into a regulated sale and rent back agreement*, a *firm* must ensure that, under the terms of the *regulated sale and rent back agreement*, if the property is in England and Wales, the terms of the tenancy do not:
 - (a) give the landlord power to determine the tenancy in certain circumstances as referred to in section 5(1) of the Housing Act 1988, as amended; or
 - (b) otherwise make provision for the tenancy to be brought to an end by the landlord save on a ground or grounds for possession applicable for an assured tenancy under the Housing Act 1988, as amended; or

- (c) make provision for the tenancy to be brought to an end on any of Grounds 2, 6, 8 or 9 under the Housing Act 1988, as amended.

A *firm* may not rely during the fixed term of the tenancy on any ground for possession of the property other than a ground for possession on which the terms of the tenancy may under this paragraph (2) make provision for the tenancy to be brought to an end by the landlord, and a *firm* may only rely on any ground for possession if it is fair for the *firm* to do so.

- (3) When *entering into a regulated sale and rent back agreement*, a *firm* must ensure that, under the terms of the *regulated sale and rent back agreement*, if the property is in Scotland, the terms of the tenancy do not include:

- (a) any provision for it to be brought to an end by the landlord during the fixed term other than a ground for possession applicable for an assured tenancy under the Housing (Scotland) Act 1988, as amended; or
- (b) Grounds 2, 6, 8 or 9 under the Housing (Scotland) Act 1988, (as amended).

A *firm* may not rely during the fixed term of the tenancy on any ground for possession of the property other than the grounds permitted under this paragraph (3) to be included in the terms of the tenancy, and a *firm* may only rely on any ground for possession if it is fair for the *firm* to do so.

- (4) When *entering into a regulated sale and rent back agreement*, a *firm* must ensure that, under the terms of the *regulated sale and rent back agreement*, if the property is in Northern Ireland, the terms of the tenancy do not include:

- (a) any provision which would permit the landlord to forfeit the lease and obtain possession of the property during the fixed term unless the provision is equivalent to a ground for possession applicable for an assured tenancy under Schedule 2 to the Housing Act 1988, as amended, in England; or
- (b) any provision which would permit the landlord to forfeit the lease and obtain possession of the property on the basis that:
 - (i) a mortgagee (or chargee) under a mortgage (or charge) entered into by the landlord requires vacant possession for the purposes of exercising a power of sale of the property; or
 - (ii) the landlord intends to demolish or reconstruct, or carry out substantial works on, the property or any part of the property; or
 - (iii) there are arrears of rent, unless the conditions applicable to either Ground 9 or Ground 10 under the Housing Act 1988, as amended, in England, are satisfied; or
 - (iv) alternative accommodation is available for the tenant.

A *firm* may not rely during the fixed term of the tenancy on any circumstance to forfeit the lease and obtain possession of the property other than the circumstances permitted under this paragraph (4) to be included in the tenancy agreement, and a *firm* may only rely on any circumstance if it is fair for the *firm* to do so.

- (5) A *firm* must not take, or propose or threaten to take, any steps to evict the *SRB agreement seller* (or trust beneficiary or related person) other than by applying to the court for a possession order based on the grounds or circumstances, reliance on which is not prohibited by this *rule*, and enforcing that order in a lawful manner.
- (6) Where a *SRB agreement provider* enters into or proposes to enter into (whether before or after the commencement of the tenancy) a mortgage (or charge or standard security) over the interest it obtains under a *regulated sale and rent back agreement*, the *firm* must ensure that the mortgagee (or chargee or security holder) has agreed in writing to the proposed letting under the agreement, and to the terms of the agreement. The *firm* must provide to the *SRB agreement seller* a copy of the agreement in writing of the mortgagee (or chargee or security holder).

[**Note:** In England, Wales and Scotland a landlord, such as a *SRB agreement provider*, can only seek possession of a property during the fixed term of an assured tenancy if one or more of a limited number of grounds for possession set out in (in England and Wales) the Housing Act 1988, as amended, or (in Scotland) the Housing (Scotland) Act 1988, as amended, applies and the terms of the tenancy make provision for it to be ended on any of these grounds. Once the fixed term of the assured tenancy has ended, the landlord has the right to seek possession on broader grounds. Where the tenancy is (in England) an assured shorthold tenancy or (in Scotland) a short assured tenancy, the landlord has an additional right to seek possession from the end of the fixed term.

In Northern Ireland, the position is governed by the Private Tenancies (Northern Ireland) Order 2006 and the parties are free to agree the terms of a tenancy including its duration and the grounds on which the landlord may seek possession, including during any fixed term.

In any event it is for the court to decide whether one or more of the grounds for possession actually applies in the particular circumstances of any case.

In Northern Ireland, a tenant must give at least four weeks' notice to quit. Northern Ireland law implies a fixed term of six months in a private tenancy unless the parties agree an alternative fixed term, so a notice to quit expiring before the first six months of the tenancy may not be effective.]

2.6A.5C

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In the light of ■ MCOB 2.6A.5BR (1)(c), and in accordance with *Principle 6*, a *firm* should not seek to prevent a tenant in Northern Ireland from ending the tenancy on less than the agreed notice period (not exceeding three months in accordance with ■ MCOB 2.6A.5BR (1)(c)), where the notice is given in the first six months of the tenancy.

2.6A.6

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Firms remain responsible for ensuring that their *customers'* interests are protected to a reasonable standard.

Protecting customers' interests: additional material for home purchase plans

2.6A.7 **G** A *home purchase provider* should consider obtaining confirmation from the *customer's* legal adviser that he has carried out, or will carry out, the steps that the *firm* expects the *customer* or his legal advisers to take to protect his interests at the time the plan is taken out.

Treating customers fairly: home purchase plans, home reversion plans and regulated sale and rent back agreements

2.6A.8 **R** A *firm* must pay due regard to the interests of its *customer* and treat him fairly when drafting, amending the terms of, or imposing obligations or exercising rights or discretions under, a *home purchase plan, home reversion plan or regulated sale and rent back agreement*.

2.6A.9 **G** A *firm* is unlikely, for example, to be treating its *customer* fairly in relation to termination of a *home purchase plan, home reversion plan or regulated sale and rent back agreement* if:

- (1) the grounds on which it may terminate all or part of a plan or agreement are unduly wide, or on which a *customer* may terminate are unduly narrow; or
- (2) the *customer* is not given appropriate notice of termination.

2.6A.10 **G** A *firm* is also unlikely to be treating its *customer* fairly if, upon termination of an agreement under a *home purchase plan, home reversion plan or regulated sale and rent back agreement*, the *customer* does not receive (net of any reasonable sums payable by the *customer*):

- (1) in the case of a *home reversion plan or regulated sale and rent back agreement* where the *customer* retains a beneficial interest in the property, the value of that beneficial interest; or
- (2) in the case of a *home purchase plan*, the value of purchase payments made.

[**Note:** The terms of a *home purchase plan, home reversion plan or regulated sale and rent back agreement* should take into account relevant legal obligations such as those under the *Unfair Terms Regulations* (for contracts entered into before 1 October 2015), the *CRA* and, where applicable, the *Housing Act 1988* (or, in Scotland, the *Housing (Scotland) Act 1988*). A *firm* may find material on the *FCA* website concerning the *FCA's* consumer protection powers useful.]

Treating customers fairly: home reversion plans and regulated sale and rent back agreements

2.6A.11 **G** A *firm* is unlikely, for example, to be treating a *reversion occupier or SRB agreement seller* fairly if:

- (1) the *reversion occupier or SRB agreement seller* is obliged to maintain the property to a standard which exceeds the standard that the

property is in when the *home reversion plan* or *regulated sale and rent back agreement* commences;

- (2) the *reversion occupier* or *SRB agreement seller* is not entitled to, or is not given, reasonable notice of an inspection, or the inspection is conducted in a way that is biased against him;
- (3) unreasonable restrictions are imposed on who may occupy the property, taking into account the potential needs of the *reversion occupier* or *SRB agreement seller* throughout the duration of the *home reversion plan* or *regulated sale and rent back agreement*;
- (4) unreasonable restrictions are imposed on the uses to which the property may be put;
- (5) the *reversion occupier* or *SRB agreement seller* is unreasonably treated as having abandoned the property. For example, it is likely to be unreasonable to treat a property as abandoned based only on a period of non-occupation;
- (5A) the rent payable under a *regulated sale and rent back agreement* is increased by an unreasonable amount or any charges payable under a *regulated sale and rent back agreement* are unreasonably imposed after the agreement is concluded; and
- (6) where the *reversion occupier* has a reasonable expectation that the *home reversion plan* can be transferred to another property, agreement to such a transfer is, or can be, refused unreasonably.

Independent valuation: home reversion plans and regulated sale and rent back agreements

2.6A.12 R A *firm* must ensure that any valuation is carried out by a competent valuer who is independent of the *reversion provider* or *SRB agreement provider*.

2.6A.12A R A *firm* must ensure that any valuation for the purposes of a *regulated sale and rent back agreement* is carried out by a valuer who owes a duty of care to the *customer* in valuing the property.

2.6A.13 E

- (1) A valuer may be considered competent if he is a suitably qualified member of a professional body.
- (2) A valuer may be considered independent if:
 - (a) the *customer* can choose the valuer subject to the *firm* objecting on reasonable grounds and to the valuer being competent;
 - (b) he owes a duty of care to the *customer* in valuing the property; and
 - (c) the *customer* has an appropriate remedy against him under a complaints procedure which allows the complaint to be referred to an independent person whose decision is binding on the valuer.

(3) Compliance with (1) and (2) (except, in the case of a *regulated sale and rent back agreement*, (2)(b)) may be relied on as tending to establish compliance with ■ MCOB 2.6A.12 R.

(4) [deleted]

(5) For a *regulated sale and rent back agreement*, contravention of (1) or (2) (except (2)(b)) may be relied on as tending to show contravention of ■ MCOB 2.6A.12 R.

2.6A.13A G A *firm* may wish to use the form of joint instruction letter set out in ■ MCOB 2 Annex 1G with a view to establishing that a valuer owes a duty of care to the *customer* (see ■ MCOB 2.6A.12A R). That form incorporates the definition of "market value" required by ■ MCOB 6.9.2R (1)(b).

2.6A.14 G Members of the Royal Institution of Chartered Surveyors, for example, are required to operate a complaints procedure that allows the complaint to be referred to an independent person whose decision binds the valuer and which, in the *FCA's* view, provides a *customer* with an appropriate remedy.

Obtaining best price: partial home reversion plans or regulated sale and rent back agreements

2.6A.15 R A *firm* must take reasonable steps to ensure that, when a *home reversion plan* or *regulated sale and rent back agreement* ends and the *customer* retains a beneficial interest in the property:

- (1) the property is sold within a reasonable period of time; and
- (2) the best price that might reasonably be obtained is paid.

2.6A.16 G It is recognised that a balance has to be struck between the need to sell the property as soon as possible, and other factors, such as market conditions, which may prompt the delay of the sale. Legitimate reasons for deferring action might include the expiry of a period when a grant is repayable on re-sale, or the discovery of a title defect that needs to be remedied if the optimal selling price is to be achieved.

Arranging or administering for unauthorised providers: home reversion plans

2.6A.17 R For the purpose of this section (except this *rule*), a *reversion arranger* or *reversion administrator's customer*:

- (1) includes a *reversion occupier* or potential *reversion occupier* who enters, or proposes to enter, into a *home reversion plan* with an *unauthorised reversion provider* who is the *firm's customer*; and
- (2) excludes an *unauthorised reversion provider*.

Arranging or administering for unauthorised providers: regulated sale and rent back agreements

2.6A.17A **R**

For the purpose of this section (except this *rule*), a *SRB arranger's* or *SRB administrator's* customer:

- (1) includes a *SRB agreement seller* or potential *SRB agreement seller* who enters, or proposes to enter, into a *regulated sale and rent back agreement* with an *unauthorised SRB agreement provider* who is the *firm's customer*; and
- (2) excludes an *unauthorised SRB agreement provider*.

Arranging or administering for unauthorised providers: home reversion plans and regulated sale and rent back agreements

2.6A.18 **G**

A *person* may enter into a *home reversion plan* or *regulated sale and rent back agreement* as provider or agreement provider without being regulated by the *FCA* (or an *exempt person*) if the *person* does not do so by way of business (see *PERG 14.5*). If a *firm* arranges or makes arrangements for such a *person* to enter into a *home reversion plan* or *regulated sale and rent back agreement* as provider or agreement provider, the *firm* will be responsible for ensuring that the *reversion occupier's* or *SRB agreement seller's* interests are protected to a reasonable standard, even if the *reversion arranger* or *SRB arranger* is not acting for the *reversion occupier* or *SRB agreement seller*. A *reversion administrator* or *SRB administrator* is under the same obligation in relation to a *reversion occupier* or *SRB agreement seller* under a *home reversion plan* or *regulated sale and rent back agreement* which it administers on behalf of an *unauthorised reversion provider* or *unauthorised SRB agreement provider*.