

**BANKING: CONDUCT OF BUSINESS SOURCEBOOK (AMENDMENT NO 2)
INSTRUMENT 2011**

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 138 (General rule-making power); and
 - (2) section 157(1) (Guidance).
- B. The rule-making power listed above is specified for the purpose of section 153(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on 6 March 2011.

Amendments to the Handbook

- D. The Glossary of definitions is amended in accordance with Annex A to this instrument.
- E. The Banking: Conduct of Business sourcebook (BCOBS) is amended in accordance with Annex B to this instrument.

Citation

- F. This instrument may be cited as the Banking: Conduct of Business Sourcebook (Amendment No 2) Instrument 2011.

By order of the Board
24 February 2011

Annex A

Amendments to the Glossary of definitions

Insert the following new definitions in the appropriate alphabetical position. The text is not underlined.

- priority debt* (in *BCOBS*) an obligation on the part of a *consumer* to make a payment:
- (a) where the remedies for a breach of that obligation potentially include seeking possession of, or seeking to exercise a power of sale in respect of:
 - (i) the sole or main residence of the *consumer* (for example, an obligation to pay secured by a mortgage or charge in respect of land, an obligation to pay rent under a tenancy, or an obligation to make payment under a licence to occupy land); or
 - (ii) the *consumer's* essential goods or services (for example, an obligation to pay under a hire purchase, conditional sale or hire agreement that relates to, or an obligation to pay secured by a charge on, the *consumer's* cooker, refrigerator, or the means to travel to work); or
 - (b) where that obligation arises out of an order of the court, an Act or secondary legislation (for example, an obligation to pay council tax, child support maintenance, income tax or court fines); or
 - (c) where that obligation arises under a contract for the provision of utility supplies (for example, water, gas or electricity).
- right of set-off* (in *BCOBS*) any right of a *firm*, whether under a contract for a *retail banking service* or the general law, to set off or combine:
- (a) any debt due from a *consumer*; or
 - (b) any debit balance on an account held by a *consumer*;
- against or with:
- (c) any sum payable by the *firm* to the *consumer*; or
 - (d) any credit balance on an account held by the *consumer*;
- that has the effect of reducing, discharging or extinguishing the *firm's*

liability to the *consumer* or the credit balance on the account held by the *consumer*.

subsistence balance (in *BCOBS*) any sum of money payable by a *firm* to a *consumer* or standing to the credit of the *consumer* in an account with the *firm* where that sum is needed by the *consumer* to meet essential living expenses or *priority debts* (whether owed to the *firm* or a third party).

Annex B

Amendments to the Banking: Conduct of Business sourcebook (BCOBS)

In this Annex, underlining indicates new text and striking through indicates deleted text.

- 1.1.5 R BCOBS 4.1.4AG(2)(a), BCOBS 5.1.3AG, BCOBS 5.1.3BG and BCOBS 5.1.13R ~~does~~ do not apply to a *credit union*.
- ...
- 4.1.4 G The appropriate information *rule* applies before a *banking customer* is bound by the terms of the contract. It also applies after a *banking customer* has become bound by them. In order to meet the requirements of the appropriate information *rule*, information provided or made available by a *firm* to a *banking customer* should include information relating to:
- ...
- (8) ~~information about compensation arrangements in accordance with COMP 16~~ the terms of any compensation scheme if the *firm* cannot meet its obligations in respect of the *retail banking service*;
- ...
- 4.1.4A G (1) This guidance applies to a *firm* only with respect to its *communications* and dealings with *consumers* where a *firm* has a *right of set-off*.
- (2) To ensure compliance with the appropriate information *rule*, the *firm* should:
- (a) (i) provide an explanation of the nature and extent of the *firm's right of set-off*, and
- (ii) if the *firm* considers that it is entitled to exercise a right to set off or combine a debt due solely from a *consumer*, or a debit balance on an account held in the sole name of a *consumer*, against or with a credit balance on an account held in the joint names of that *consumer* and another *consumer*, also provide an explanation of that right to the *consumers* in whose names the joint account is held;
- in good time before the *consumer* is bound by the contract for the *retail banking service*. This information may be incorporated in the terms and conditions that apply to the contract for the *retail banking service*;
- (b) (i) on the first occasion that the *firm* proposes to exercise a

right of set-off in its dealings with the consumer; and

- (ii) where appropriate, on any subsequent occasion that the firm proposes to exercise a right of set-off in its dealings with the consumer;

provide general information in relation to the nature of the firm's right of set-off and the generic circumstances in which the firm may rely on that right within a reasonable period before the firm seeks to exercise its right of set-off. The FSA considers that this information should be provided at least 14 days before the firm seeks to exercise its right of set-off. It may be communicated in a standard form of words and may be incorporated in another communication sent by the firm to the consumer; and

- (c) where it has exercised a right of set-off, provide prompt notification of this to the consumer. This notification should clearly identify the date that the firm exercised its right of set-off and the amount debited from the consumer's account in reliance on that right.

- (3) The information referred to in (2) should be provided in plain and intelligible language on paper or in another durable medium.
- (4) In determining whether it is appropriate to provide general information under (2)(b)(ii), the firm should consider the period of time that has elapsed since the firm last provided that information under (2)(b)(i) or (ii).
- (5) Nothing in (2)(a)(ii) should be considered as expressing a view on the validity, enforceability or fairness of any right of set-off in relation to a joint account that a firm considers it is entitled to exercise.

...

Set-off

5.1.3A G To ensure compliance with its obligations under BCOBS 5.1.1R and Principle 6, on any occasion where it proposes to exercise a right of set-off, a firm (other than a credit union) should, with respect to its dealings with consumers:

- (1) review the information available and accessible to the firm relating to the consumer's account, on an individual basis, and estimate the amount of any subsistence balance;
- (2) refrain from seeking to set off or combine:
- (a) any debt due from, or a debit balance on an account held by, a consumer against or with that subsistence balance;

- (b) any debt due from, or a debit balance on an account held by, a consumer in a personal capacity against or with any sum of money payable by the firm to the consumer or standing to the credit of the consumer in an account held with the firm, where the firm knows or reasonably ought to know that:
- (i) a third party is beneficially entitled to that money or that the consumer is a fiduciary in respect of that money; or
 - (ii) the consumer has received that money from a government department, local authority or NHS direct payment body for a specific purpose or is under a legal obligation to a third party to retain and deal with that money in a particular way.

5.1.3B G (1) If it becomes apparent to a firm after it has exercised a right of set-off that it has set off or combined a debt due from, or a debit balance on an account held by, a consumer against or with:

- (a) the consumer's subsistence balance; or
- (b) money payable by the firm to the consumer, or standing to the credit of the consumer in an account held with the firm, that falls within BCOBS 5.1.3AG(2)(b)(i) or (ii);

the firm should refund to the consumer the sum debited from the account of the consumer in exercise of the right of set-off unless it is fair not to do so.

- (2) If, in the circumstances referred to in (1), the firm does not provide a refund of the sum debited from the account in exercise of the right of set-off, the firm should be able to justify that it is fair not to do so and should consider taking other remedial action having regard to its obligations under BCOBS 5.1.1R and Principle 6.

TP 1 Transitional Provision

| (1) | (2) | (3) | (4) | (5) | (6) |
|----------|---|----------|---|---|--|
| | Materials to which the transitional provision applies | | Transitional provision | Transitional provisions: dates in force | Handbook provisions: coming into force |
| ... | | | | | |
| <u>6</u> | <u>BCOBS 4.1.1R</u> | <u>R</u> | <u>A firm need not have regard to BCOBS 4.1.4AG in interpreting and applying BCOBS 4.1.1R until 6 September 2011.</u> | <u>6 March 2011 to 6 September 2011</u> | <u>6 March 2011</u> |