

Chapter 2

Conduct of business

2.1 General principles

- 2.1.1** **R** A *firm* must act honestly, fairly and professionally in accordance with the best interests of its *customer* (the *client's best interests rule*).
- 2.1.2** **R** A *firm* must establish and implement clear, effective and appropriate policies and procedures to identify and protect vulnerable *customers*.
- 2.1.3** **G** *Customers* who have mental health difficulties or mental capacity limitations may fall into the category of particularly vulnerable *customers*.
- 2.1.4** **R** A *firm* must not engage in high pressure selling in relation to *regulated claims management activity*.
[Note: CAPR CSR 3]
- 2.1.5** **R** A *firm* must not carry out a *cold call* in person.
[Note: CAPR CSR 4]
- 2.1.6** **G** ■ CMCOB 2.2 sets out further *rules* and *guidance* in relation to generating, obtaining, and passing on leads.
- 2.1.7** **R** A *firm* must not make or pursue a *claim* on behalf of a *customer*, or advise a *customer* to make or pursue a *claim*, if the *firm* knows or has reasonable grounds to suspect that the *claim*:
- (1) does not have a good arguable base; or
 - (2) is fraudulent; or
 - (3) is frivolous or vexatious.
- 2.1.8** **G** (1) A *firm* should take all reasonable steps to investigate the existence and merits of each element of a potential *claim* before making or pursuing the *claim* or advising the *customer* themselves to make or pursue the *claim*.
[Note: CAPR GR 2(a)]

- (2) In accordance with *Principle 1* (Integrity) and *Principle 2* (Skill, care and diligence), the *firm's* investigations should be such that it is able, in presenting a *claim*, to make representations which:
 - (a) substantiate the basis of the *claim*;
 - (b) relate to the nature of the *claim* and are specific to the *claim*; and
 - (c) are not false or misleading, or an exaggeration-
- (3) In complying with ■ CMC0B 2.1.7R *firms* should have regard to:
 - (a) relevant guidance, including about their decisions, published by the *Financial Ombudsman Service*, any other relevant statutory ombudsman, or statutory compensation scheme; and
 - (b) decisions by the *Financial Ombudsman Service*, or any other relevant statutory ombudsman, or statutory compensation scheme concerning similar claims in respect of which the *firm* acted for the *claimant* to whom the decision was addressed.

2.1.9 **R** A *firm* must publish on its website (if it operates a website) the standard terms and conditions of the contracts it enters into with *customers*.

[Note: CAPR CSR 11]

2.1.10 **R** A *firm* must not take any payment from a *customer* until the *customer* has signed an agreement with the *firm* which provides for such a payment to be made.

[Note: CAPR CSR 11]

2.1.11 **G**

- (1) ■ CMC0B 2.1.10R prohibits a *firm* from taking a payment from a *customer* before the *customer* has signed an agreement with the *firm*. It is not sufficient for the *firm* to enter into an agreement with the *customer* orally for this purpose: the agreement should be signed.
- (2) The signature should be on a hard copy of the agreement which may be given or posted to the *firm*, else sent by fax, or scanned or photographed and sent electronically. Alternatively, the *customer* could insert a digital image of their handwritten signature into an electronic copy of the agreement before returning the agreement to the *firm* by email.
- (3) The *FCA* would not view an agreement as having been signed for the purposes of ■ CMC0B 2.1.10R where the *customer* does no more to indicate their acceptance of the *firm's* terms and conditions than to send a text message or email or to tick a box on a website or web-based form.
- (4) The *firm* will also need to have complied with the requirements of ■ CMC0B 4 (Pre-contractual requirements), including the requirement to take reasonable steps to ensure that the *customer* understands the agreement (see ■ CMC0B 4.3.1R(3)). Where an agreement is entered into electronically, those steps should include the *firm* satisfying itself that the *customer* has had the opportunity to familiarise themselves with the contract.

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- (1) This *rule* applies in respect of an agreement entered into between the *customer* and the *firm* under which the *firm* is to provide *claims management services*.
- (2) The *firm* must:
 - (a) allow the *customer* to cancel the agreement during a period of 14 *days* beginning on the day that the agreement is entered into; and
 - (b) permit the *customer* to terminate the agreement at any time after that period.
- (3) Where the *customer* cancels an agreement under (2)(a), the *firm* must provide the *customer* with a refund of any payments made to the *firm*.
- (4) Where the *customer* terminates an agreement as in (2)(b), the *firm* must not charge the *customer* an amount in excess of what is reasonable in the circumstances and reflects the work undertaken by the *firm*.
- (5) This *rule*:
 - (a) does not apply if regulation 8 (Terms and conditions of termination in an employment matter) of the Damages-Based Regulations 2013, or any equivalent provision made under the law of Scotland, applies; and
 - (b) is subject to:
 - (i) ■ CMCOB 2.1.13R and ■ CMCOB 2.1.14R; and
 - (ii) the *claims management fee cap* (see ■ CMCOB 5).

[Note: CAPR CSR 17 and 18]

2.1.13

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- (1) A *firm* must not charge a fee to a *customer* in relation to a financial services or financial product *claim* before the provision of a *claims management service* to the *customer* other than *seeking out, referrals and identification of claims or potential claims*.

[Note: CAPR CSR 15]

This *rule* is subject to ■ CMCOB 2.1.14R.

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- (1) A *firm* must not charge a fee to a *customer* in relation to a *claim* in respect of a *payment protection contract* prior to the later of:
 - (a) the *customer* withdrawing or deciding not to pursue the *claim*; and
 - (b) the settlement of the *claim*.
- (2) A *firm* must not charge a fee to a *customer* in relation to a *claim* in respect of a *payment protection contract* if there was no such contract between the *customer* and the *person* whom it was alleged was the counterparty to the contract.

[Note: CAPR CSR 15 and 16]

2.2 Generating, obtaining and passing on leads

2.2.1

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- (1) The *Principles* (in particular *Principle 6* and *Principle 7*) apply to actions of a *firm* dealing with a *claim* or a *customer* whose details the *firm* has obtained from a *lead generator*. For example, where there is a possibility that the *lead generator* is using misleading information, advice or actions to obtain a *customer's* personal data, acting on those sales leads could amount to a breach by the *firm* of *Principle 6* and *Principle 7*.
- (2) The definition of "*customer*" in the *Glossary* includes a *person* who may have a *claim* and either (i) may use the services of a *person* who carries on a *regulated claims management activity* or an activity which would be a *regulated claims management activity* but for the exclusion in the *Regulated Activities Order*; or (ii) in respect of whom a *person* carries on the *regulated activity of seeking out, referrals and identification of claims or potential claims* or an activity which would be the *regulated activity of seeking out, referrals and identification of claims or potential claims* but for an exclusion in the *Regulated Activities Order*. An individual who is contacted by a *lead generator*, or whose details are obtained by a *lead generator* and passed on to another *firm*, is, therefore, a *customer* of both the *lead generator* and, where relevant, that other *firm*.

Requirements relating to use of a lead generator

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- (1) A *firm* that accepts or proposes to accept sales referrals, leads or data (including details of *claims* or of *customers*) from a *lead generator* must:
 - (a) ascertain whether the *lead generator* is an *authorised person* with a *permission* to carry on *seeking out, referrals and identification of claims or potential claims*; and
 - (b) satisfy itself as to whether the *lead generator* has appropriate systems and processes in place to ensure compliance with (i) and (ii) (including that the referrals, leads or data have been obtained in compliance with (i) and (ii)):
 - (i) *data protection legislation*; and
 - (ii) the Privacy and Electronic Communications (EC Directive) Regulations 2003 (or, if the *lead generator* is established in an *EEA State* but has no establishment in the *United Kingdom*, the equivalent legislation in that *EEA State*).
- (2) The *firm* must take the steps required by (1):

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- (a) before accepting sales referrals, leads or data from a particular *lead generator* for the first time; and
 - (b) if the *firm* continues to accept sales referrals, leads or data from that *lead generator*, at appropriate intervals.
- (3) If the *lead generator* is not an *authorised person* with a *permission* to carry on seeking out, referrals and identification of claims or potential claims, the *firm* must take reasonable steps to satisfy itself that the *lead generator* may carry on that regulated activity without breaching the general prohibition.
- (4) The *firm* must keep a record of the steps it has taken under (1), and its conclusions in relation to (1)(a) and (1)(b).
- (1) A *firm* may ascertain whether a *person* is an *authorised person* by checking the *Financial Services Register* on the *FCA* website.
- (2) In order to comply with ■ CMCOB 2.2.2R(1)(b) the *FCA* expects *firms* and *lead generators* to ensure that they are aware of any requirements to obtain consent under:
- (a) regulation 21A of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the cold calling ban);
 - (b) *data protection legislation*; and
 - (c) any guidance published by the Information Commissioner's Office in relation to *data protection legislation* and the cold calling ban.
- (3) In satisfying itself as to whether a *lead generator* has appropriate systems and processes in place to ensure compliance with *data protection legislation*, a *firm* should consider, in particular, the procedures by which the *lead generator* obtains *customers'* personal data and *customers'* consent to the use (including the acquisition, storage and sharing) of that data and whether there is consent to use it in the *firm's* intended marketing.
- (4) *Firms* are reminded that, under *data protection legislation*, they must have consent from the *customer* to process the *customer's* personal data, for example to contact the *customer* or to pass their details on to a third party, unless one of the other conditions which renders the processing of that data lawful is satisfied. In this context, the *FCA* would normally expect *firms* to obtain consent and would only expect *firms* to be able to rely on the legitimate interests condition (under article 6(1)(f) of the *General data protection regulation* very occasionally. Where the *firm* relies on consent which has been obtained by a *lead generator*, the *firm* should satisfy itself that the consent was properly obtained, and clearly covers both the *firm* and the use that the *firm* intends to make of the *customer's* personal data. In relation to consent, *firms* are also reminded of the requirements in article 7(2) of the *General data protection regulation*.
- (5) In satisfying itself as to whether a *lead generator* has appropriate systems and processes in place to ensure compliance with the Privacy and Electronic Communications (EC Directive) Regulations 2003, a *firm* should consider, in particular, the systems and processes the *lead generator* has in place to ensure compliance with the prohibition of cold-calling in relation to *claims management services* (regulation

21A) and the requirements in relation to the use of electronic mail, including text messages, for direct marketing purposes (regulation 22). The Regulations also contain restrictions on marketing by fax, email and text message and apply to both the caller/sender of the marketing (e.g. the *lead generator*) and the instigator (e.g. the *firm*, where the *lead generator* is acting on behalf of the *firm*). Both the instigator of the marketing and the business carrying out the marketing may be subject to enforcement action if any breaches occur. *Firms* should therefore ensure that any marketing carried out on their behalf by a *lead generator* is compliant.

- (6) A *firm* should have regard to the frequency with which it accepts leads from a *lead generator* when determining what an appropriate interval is at which it should take the steps required by
- CMC0B 2.2.2R: the more frequently it accepts leads from that *lead generator*, the shorter should be the interval; and where the *firm* accepts leads from the *lead generator* on an ongoing basis, it should take those steps regularly.

Recording the source of sales referrals, leads or data

2.2.4 **R** Where a *firm* accepts a sales referral, lead or data, or details of a *claim* or of a *customer*, from a *lead generator*, the *firm* must keep a record of the *lead generator* from whom it accepted that lead or those details for at least three years.

2.2.5 **I** [Not used]

2.2.6 **R** If the *firm* is not satisfied as to the matters in ■ CMC0B 2.2.2R(1)(b), it must neither accept sales referrals, leads or data from that *lead generator* nor use sales referrals, leads or data obtained from that *lead generator*.

Notifying the FCA if a lead generator is not authorised

- 2.2.7 **R**
- (1) If the *lead generator* is not an *authorised person* with a *permission* to carry on *seeking out, referrals and identification of claims or potential claims* and the *firm* is not satisfied that the *lead generator* may carry on that *regulated activity* without breaching the *general prohibition*, the *firm* must:
 - (a) promptly notify the *FCA* in writing, using the form at ■ SUP 15 Annex 4R; and
 - (b) neither accept sales referrals, leads or data from that *lead generator* nor use sales referrals, leads or data obtained from that *lead generator*.
 - (2) A notification under (1)(a) must include:
 - (a) the identity of the *lead generator* and, if known, contact details for the *lead generator*; and
 - (b) the *firm's* reasons for not being satisfied that the *lead generator* may carry on *seeking out, referrals and identification of claims or potential claims* without breaching the *general prohibition*.

Provision of information by lead generators

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- (1) This *rule* applies to a *firm* from the time at which it could reasonably be expected to know or suspect that it is going to:
 - (a) pass the *customer*, or details of a *customer* or of a *claim*, to a third party, or give details about the third party to a *customer*; and
 - (b) receive a payment from the third party in relation to the *firm* doing so.
- (2) The *firm* must, in its *financial promotions* and in any communication with the *customer*, include a prominent statement to the effect that the *firm* receives payments from third parties to whom it passes *customers*, or the details of *customers* or of *claims*, or whose details it passes to *customers*, in respect of doing so.
- (3) If a communication relates to a *claim* which may be made by a *customer*, without using the services of the *firm* and without incurring a fee, to a statutory ombudsman or statutory compensation scheme the *firm* must ensure that the communication contains a prominent statement to the effect that:
 - (a) the *customer* is not required to use the services of a *firm* which carries on *regulated claims management activity* to pursue their *claim*; and
 - (b) it is possible for the *customer* to present the *claim* themselves for free, either to the *person* against whom they wish to complain or to the relevant statutory ombudsman or statutory compensation scheme.
- (4) Where the communication is made by voice telephony, the *firm* must comply:
 - (a) with (2) at the start of the call; and
 - (b) with (3) as soon as the *firm* knows the sort of *claim* to which the communication relates.
- (5) The *firm* need not comply with (2) or, as relevant, (3) if it has previously complied with those *rules* in respect of that *customer* within the previous *month*.

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- (1) ■ CMCOB 2.2.8R applies to *lead generators*, and to other *firms* which generate leads, as soon as there is a possibility of *customers*, or the details of *customers* or of *claims* being passed to another *person*.
- (2) Examples of a *firm* receiving a payment from a third party in relation to doing any of the things mentioned in ■ CMCOB 2.2.8R(1)(a) include (but are not limited to):
 - (a) the third party paying the *firm* a fee for each sales referral or lead it passes on; and
 - (b) the third party making a monthly, occasional or a one-off payment to the *firm* irrespective of how many sales referrals, or leads or data the *firm* actually passes on and irrespective of how this might be described (for example as a 'marketing budget').

- (3) Where that *rule* applies to telephone calls, it applies in respect of both incoming and outgoing calls, including voice telephony over the internet.
- (4) The *guidance* at ■ CMCOB 3.2.8G also applies in relation to ■ CMCOB 2.2.8R(3).
- (5) *Firms* are reminded that section 56 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 prohibits the payment and receipt of fees for the referral of legal services in cases involving personal injury or death.

2.3 Recording and retention of telephone calls and electronic communications

Recording and retention of telephone calls and electronic communications

- 2.3.1** **R** This section applies to telephone calls and *electronic communications* between the *firm* and a *customer* made for the purposes of, or in connection with, a *regulated claims management activity* carried on by the *firm* ("relevant communications").
- 2.3.2** **R** *Firms* must record all telephone calls and retain all other relevant communications.
- 2.3.3** **G** The requirement to record and retain all relevant communications applies to incoming and outgoing calls, text messages, emails, and other *electronic communications* between the *firm* (or a *person* acting for the *firm*) and a *customer*, including calls and communications relating to complaints about the *firm*.
- 2.3.4** **R** A *firm* must take all reasonable steps to prevent an *employee* or contractor from making, sending, or receiving relevant communications:
- (1) on equipment owned by a *person* other than the *firm*; and
 - (2) which the *firm* is unable to record or retain.
- 2.3.5** **R** A *firm* must notify a *customer* at the start of each telephone call (including a call made by voice telephony via the internet) that the call will be recorded.
- Retention period**
- 2.3.6** **R** The *firm* must retain telephone call recordings (including recordings of calls made by voice telephony via the internet) for a minimum of 12 *months*, from the latest of:
- the *customer* withdrawing or deciding not to pursue the *claim*;
 - the settlement of the *claim*;

the conclusion of any legal proceedings commenced in connection with the *claim*;

- (4) the conclusion of the handling of any complaint made by the *customer* to or about the *firm*, including the handling of the complaint by an alternative dispute resolution scheme (such as the *Financial Ombudsman Service*);
- (5) the termination of the agreement between the *firm* and the *customer*; and
- (6) the date of the *firm's* last contact (by whatever method) with the *customer*.

2.3.7

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- (1) For the purposes of ■ CMCOB 2.3.6R(2), a *claim* is settled when the *customer* receives compensation, damages or redress in respect of the *claim*.
- (2) The effect of ■ CMCOB 2.3.6R is that where, for example, the only contact with the *customer* is a telephone call made with a view to selling the *firm's* services, but the *customer* does not engage the *firm*, the *firm* is required to keep a record of that call for at least 12 *months*. (*Firms* are reminded that, in relation to cold calling by telephone, the Privacy and Electronic Communications (EC Directive) Regulations 2003 prohibit unsolicited calls for the purposes of direct marketing in relation to *claims management services* without the consent of the subscriber of the line being called (regulation 21A).)
- (3) The effect of ■ CMCOB 2.3.6R(4) is as follows. Where the *firm* would otherwise become entitled to cease to keep the record absent that provision but at that time there is a complaint that has been made and not concluded, the *firm* must retain that record for a minimum of twelve *months* from the point at which the complaint has been concluded.

2.4 Record keeping

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- (1) *Firms* are reminded that ■ SYSC 9.1.1R requires a *firm* to arrange for orderly records to be kept of its business and internal organisation, including all services and transactions undertaken by it, which must be sufficient to enable the *FCA* to monitor the *firm's* compliance with the requirements under the *regulatory system*, and in particular to ascertain that the *firm* has complied with all obligations with respect to *clients*.
- (2) *Firms* are also reminded that ■ SYSC 9.1.5G states that in relation to the retention of records, a *firm* should have appropriate systems and controls in place with respect to the adequacy of, access to, and the security of its records so that the *firm* may fulfil its regulatory and statutory obligations. With respect to retention periods, the general principle is that records should be retained for as long as is relevant for the purposes for which they are made. For these purposes retaining records would include keeping all text messages, emails, and other *electronic communications* between the *firm* (or a *person* acting for the *firm*) and a *customer*.
- (3) As a minimum, *firms* should retain records in their files of any advice given to, and correspondence with, their *customers*, and of any correspondence with third parties in the course of their providing services to their *customers*.
- (4) *CMCOB* also imposes a number of specific record-keeping requirements: see Schedule 1.