Chapter 5

Distance communications
5.1 The distance marketing disclosure rules

Application

5.1.1 A firm must provide a consumer with the distance marketing information (COBS 5 Annex 1R) in good time before the consumer is bound by a distance contract or offer.

[Note: article 3(1) of the Distance Marketing Directive]

5.1.2 A firm must ensure that the distance marketing information, the commercial purpose of which must be made clear, is provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the legal principles governing the protection of those who are unable to give their consent, such as minors.

[Note: article 3(2) of the Distance Marketing Directive]

5.1.3 When a firm makes a voice telephony communication to a consumer, it must make its identity and the purpose of its call explicitly clear at the beginning of the conversation.

[Note: article 3(3)(a) of the Distance Marketing Directive]

Exception: contracts for payment services

5.1.4 A firm must ensure that information on contractual obligations to be communicated to a consumer during the pre-contractual phase is in conformity with the contractual obligations which would result from the law presumed to be applicable to the distance contract if that contract is concluded.

[Note: article 3(4) of the Distance Marketing Directive]
5.1.5 A firm must communicate to the consumer all the contractual terms and conditions and the information referred to in the distance marketing disclosure rules ( § COBS 5.1.1 R to § COBS 5.1.4 R) on a durable medium available and accessible to the consumer in good time before the consumer is bound by any distance contract or offer.

[Note: article 5(1) of the Distance Marketing Directive]

5.1.6 A firm will provide information, or communicate contractual terms and conditions, to a consumer if another person provides the information, or communicates the terms and conditions, to the consumer on its behalf.

Exception: distance contract as a stage in the provision of another service

5.1.7 This section does not apply to a distance contract to deal as agent, advise or arrange, if the distance contract is concluded merely as a stage in the provision of another service by the firm or another person.

[Note: recital 19 to the Distance Marketing Directive]

Exception: successive operations

5.1.8 In the case of a distance contract comprising an initial service agreement, followed by successive operations or a series of separate operations of the same nature performed over time, the rules in this section only apply to the initial agreement.

[Note: article 1(2) of the Distance Marketing Directive]

5.1.9 If there is no initial service agreement but the successive operations or separate operations of the same nature performed over time are performed between the same contractual parties, the distance marketing disclosure rules ( § COBS 5.1.1 R to § COBS 5.1.4 R) will only apply:

(1) when the first operation is performed; and

(2) if no operation of the same nature is performed for more than a year, when the next operation is performed (the next operation being deemed the first in a new series of operations).

[Note: recital 16 and article 1(2) of the Distance Marketing Directive]

5.1.10 In this section:

(1) 'initial service agreement' includes the opening of a bank account and the concluding of a portfolio management contract;

(2) 'operations' includes transactions made within the framework of a portfolio management contract; and

(3) adding new elements to an initial service agreement, such as the ability to use an electronic payment instrument together with one's existing bank account, does not constitute an 'operation' but an
additional contract to which the rules in this section apply. The subscription to new units of the same fund is considered to be one of 'successive operations of the same nature'.

[Note: recital 17 of the Distance Marketing Directive]

5.1.11 In the FCA's view, other examples of:

(1) 'initial service agreement' include:
   (a) subscribing to an investment trust savings scheme; or
   (b) concluding a life policy, personal pension scheme or stakeholder pension scheme that includes a pre-selected option providing for future increases or decreases in regular premiums or payments; and

(2) 'operations' include:
   (a) successive purchases or sales of shares under an investment trust savings scheme; and
   (b) subsequent index-linked changes to premiums or increases or decreases to pension contributions following fluctuations in salary.

Exception: voice telephony communications

5.1.12 In the case of a voice telephony communication, and subject to the explicit consent of the consumer, only the abbreviated distance marketing information (COBS 5 Annex 2R) needs to be provided during that communication. However, a firm must still provide the distance marketing information (COBS 5 Annex 1R) on a durable medium available and accessible to the consumer in good time before the consumer is bound by any distance contract or offer, unless another exception applies.

[Note: articles 3(3)(b) and 5(1) of the Distance Marketing Directive]

Exception: means of distance communication not enabling disclosure

5.1.13 A firm may provide the distance marketing information (COBS 5 Annex 1R) and the contractual terms and conditions in a durable medium immediately after the conclusion of a distance contract, if the contract has been concluded at a consumer's request using a means of distance communication that does not enable the provision of that information in that form in good time before the consumer is bound by any distance contract or offer.

[Note: article 5(2) of the Distance Marketing Directive]

Exception: contracts for payment services

5.1.13A Where a distance contract is also a contract for payment services to which the Payment Services Regulations apply, a firm is required to provide to the consumer only the information specified in rows 7 to 12, 15, 16 and 20 of COBS 5 Annex 1R.

[Note: article 4(5) of the Distance Marketing Directive]
Where a distance contract covers both payment services and non-payment services, this exception applies only to the payment services aspects of the contract. A firm taking advantage of this exception will need to comply with the information requirements in Part 6 of the Payment Services Regulations.

**Distance marketing: other provisions**

If, at any time during the contractual relationship, a consumer that is a party to a distance contract asks a firm:

1. for a paper copy of the terms and conditions of that contract; or
2. to change the means of distance communication used;

the firm must provide that paper copy or change the means of distance communication used, unless (in the latter case) that would be incompatible with the contract or the nature of the service provided.

[Note: article 5(3) of the Distance Marketing Directive]

**Unsolicited services**

(1) A firm must not enforce, or seek to enforce, any obligations under a distance contract against a consumer, in the event of an unsolicited supply of services, the absence of reply not constituting consent.

(2) This rule does not apply to the tacit renewal of a distance contract.

[Note: article 9 of the Distance Marketing Directive]

**Mandatory nature of consumer's rights**

If a consumer purports to waive any of the consumer's rights created or implied by the rules in this section, a firm must not accept that waiver, nor seek to rely on or enforce it against the consumer.

[Note: article 12 of the Distance Marketing Directive]

If a firm proposes to enter into a distance contract with a consumer that will be governed by the law of a country outside the EEA, the firm must ensure that the consumer will not lose the protection created by the rules in this section if the distance contract has a close link with the territory of one or more EEA States.

[Note: articles 12 and 16 of the Distance Marketing Directive]