

Chapter 2

Conduct of business standards: general



2.10 Mental capacity guidance

Application

2.10.1

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This section applies:

- (1) to a *firm*;
- (2) in relation to the following decisions:
 - (a) granting *credit* under a *regulated credit agreement*;
 - (b) significantly increasing the amount of *credit* under a *regulated credit agreement*; and
 - (c) setting a *credit limit* for running account credit.

2.10.2

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- (1) The Mental Capacity Act 2005 sets out the legal framework concerning mental capacity for England and Wales. The Ministry of Justice has issued the Mental Capacity Act Code of Practice which, among other things, includes information on indications of mental capacity limitations and on how to assist people with making decisions.
- (2) The Adults with Incapacity (Scotland) Act 2000 provides the framework in Scotland for safeguarding the welfare and managing the finances of adults who lack capacity due to mental disorder or inability to communicate.
- (3) References in this section to a *firm's* knowledge, understanding, observation, suspicion, assumption or belief include that of the *firm's* employees, *appointed representatives*, agents and any others who act on behalf of the *firm*.

[Note: footnote 2 of MCG]
- (4) In making a decision within ■ CONC 2.10.1 G, a *firm* should consider the *customer's* individual circumstances.

[Note: paragraph 2.4 of MCG]

Mental capacity

2.10.3

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Mental capacity is a person's ability to make a decision. Whether or not a *customer* has the ability to understand, remember, and weigh up relevant

		<p>information will determine whether the <i>customer</i> is able to make a responsible borrowing decision based on that information.</p> <p>[Note: paragraph 2.1 of MCG]</p>
2.10.4	G	<p>A <i>firm</i> should assume a <i>customer</i> has mental capacity at the time the decision has to be made, unless the <i>firm</i> knows, or is told by a <i>person</i> it reasonably believes should know, or reasonably suspects, that the <i>customer</i> lacks capacity.</p> <p>[Note: paragraph 3.1 of MCG]</p>
2.10.5	G	<p>Where a <i>firm</i> reasonably suspects a <i>customer</i> has, or may have, some form of mental capacity limitation which would constrain the <i>customer's</i> ability to make a decision to borrow, the <i>firm</i> should not regard the <i>customer</i> as lacking capacity to make the decision unless the <i>firm</i> has taken reasonable steps without success to assist the <i>customer</i> to make a decision.</p> <p>[Note: paragraph 3.2 of MCG]</p>
2.10.6	G	<p>Amongst the most common potential causes of mental capacity limitations are the following examples, a mental health condition, dementia, a learning disability, a developmental disorder, a neurological disability or brain injury and alcohol or drug (including prescribed drugs) induced intoxication.</p> <p>[Note: paragraph 2.9 of MCG]</p>
2.10.7	G	<p>Where a <i>firm</i> understands or reasonably suspects a <i>customer</i> has a condition of a type in ■ CONC 2.10.6 G, this does not necessarily mean that the <i>customer</i> does not have the mental capacity to make an informed borrowing decision. See also ■ CONC 2.10.15 G.</p> <p>[Note: paragraph 2.10 of MCG]</p>
2.10.8	G	<p>Indications that a person may have some form of mental capacity limitation</p> <p>A <i>firm</i> is likely to have reasonable grounds to suspect a <i>customer</i> may have some form of mental capacity limitation if the <i>firm</i> observes a specific indication (behavioural or otherwise) that could be indicative of some form of limitation of the <i>customer's</i> mental capacity. Examples (amongst others) of indications might include:</p> <ol style="list-style-type: none">(1) where a <i>firm</i> has an existing relationship with a <i>customer</i>, the <i>customer</i> making a decision that appears to the <i>firm</i> to be unexpected or out of character;(2) a <i>person</i> who is likely to have an informed view of the matter, such as a relative, close friend, carer or clinician raising a concern with the <i>firm</i> as to the capacity of the <i>customer</i> to make a decision about borrowing;(3) the <i>firm</i> understands or has reason to believe the <i>customer</i> has been diagnosed as having an impairment which led to the <i>customer</i> not having had mental capacity for similar decisions in the past;

- (4) the *firm* understands or has reason to believe the customer does not understand what the customer is applying for;
- (5) the *firm* understands or has reason to believe the *customer* is unable to understand the information and explanations provided by the *firm*, in particular concerning the key risks of entering into the agreement;
- (6) the *firm* understands or has reason to believe the *customer* is unable to retain information and explanations provided by the *firm* to enable the *customer* to make the decision to borrow;
- (7) the *firm* understands or has reason to believe the *customer* is unable to weigh up the information and explanations provided by the *firm* to enable the *customer* to make the decision to borrow;
- (8) the *customer* is unable to communicate a decision to borrow by any reasonable means;
- (9) the *customer* being confused about the personal information that the *firm* requires, such as date of birth or address.

[Note: paragraphs 3.14 and 3.15 of MCG]

Practices and procedures

- 2.10.9

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(1)

A *firm* should not unfairly discriminate against a *customer* who it understands, or reasonably suspects, has a mental capacity limitation, in particular, by inappropriately denying the *customer* access to *credit*.
[Note: paragraph 4.8 of MCG]

(2)

It would not be inappropriate not to grant *credit* nor significantly increase the amount of *credit* under an agreement nor set a *credit* limit for running account credit where the *firm* reasonably believes the agreement or decision would be voidable at the instance of the *customer* or the agreement is void.
- 2.10.10

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(1)

In accordance with *Principle 6*, *firms* should take reasonable steps to ensure they have suitable business practices and procedures in place for the fair treatment of *customers* who they understand, or reasonably suspect, have or may have a mental capacity limitation.
[Note: paragraph 4.1 of MCG]

(2)

■ CONC 7.2.1 R requires *firms* to establish and implement arrears policies and procedures, which include policies and procedures for the fair and appropriate treatment of *customers* the *firm* understands or reasonably suspects of having mental capacity limitations.
- 2.10.11

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A *firm* should document practices and procedures to set out the steps that it takes when it receives applications for *credit* from such *customers*.
[Note: paragraph 4.2 of MCG]
- 2.10.12

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Where a *firm* understands, or reasonably suspects, a *customer* has or may have a mental capacity limitation the *firm* should use its business practices and procedures to:

- (1) assist the *customer*, where possible, to make an informed borrowing decision; and
- (2) ensure its lending decision is informed and responsible in the circumstances and mitigates the potential risks to the *customer*.

[Note: paragraphs 4.3 and 4.5 of MCG]

2.10.13 G As stated in the Mental Capacity Act Code of Practice, it is important to balance a person's right to make a decision with that person's right to safety and protection when they are unable to make decisions to protect themselves.

[Note: paragraph 4.5 (box) of MCG]

2.10.14 G *Firms* should present clear, jargon-free information in explaining *credit agreements* in a way that makes it as easy as possible for the *customer* to understand. *Firms* should consider ways to present information in alternative, more 'user-friendly' formats where it appears appropriate to do so, subject to compliance with the relevant statutory requirements.

[Note: paragraph 4.20 of MCG]

2.10.15 G Where a *firm* knows, or reasonably suspects, that a *customer* has or may have one of the conditions in ■ CONC 2.10.6 G this could justifiably act as a trigger for the *firm* to consider the potential specific steps in giving effect to the *firm's* practices and procedures for assessing:

- (1) whether or not the *customer* appears able to understand, remember, and weigh up the information and explanations provided and, when having done so, make an informed borrowing decision;
- (2) whether the *customer* appears able to afford to make *repayments* under the *credit agreement* in a *sustainable* manner without adverse consequences to the *customer's* financial circumstances; and
- (3) whether the *credit* the *customer* is seeking is clearly unsuitable (given the *customer's* individual circumstances and, to the extent that the *firm* is aware, the *customer's* intended use of the *credit*).

[Note: paragraphs 2.5 and 2.11 of MCG]

2.10.16 G *Firms'* practices and procedures should be designed to assist *customers* that *firms* understand have, or reasonably suspect of having, mental capacity limitations to overcome, to the extent possible, the effect of the limitations and place them, to the extent possible, on an equivalent basis to *customers* who do not have such limitations, to increase the likelihood of *customers* being able to make informed borrowing decisions.

[Note: paragraph 4.4 of MCG]

Allowing sufficient time for decisions

2.10.17 G Where a *firm* understands, or reasonably suspects, a *customer* has or may have a mental capacity limitation it should consider allowing the *customer*:

- (1) sufficient time in the circumstances to weigh up the information and explanations the *firm* has given;
- (2) sufficient time in the circumstances to make an informed borrowing decision;
- (3) to defer a decision to borrow to a later date.

[Note: paragraphs 4.26, 4.27 and 4.28 of *MCG*]

Sustainability of borrowing

2.10.18

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Where a *firm* understands, or reasonably suspects, a *customer* has or may have a mental capacity limitation it should apply a high level of scrutiny to the *customer's* application for *credit*, in order to mitigate the risk of the *customer* entering into *unsustainable* borrowing.

[Note: paragraphs 4.32 and 4.33 of *MCG*]

2.10.19

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- (1) A *firm* should balance the risk of a *customer* taking on *unsustainable* borrowing against inappropriately or unnecessarily denying *credit* to a *customer*.
- (2) Where a *firm* understands or reasonably suspects a *customer* has or may have a mental capacity limitation, it should undertake an appropriate and effective *creditworthiness assessment* (see ■ CONC 5.2A) and it would be appropriate not to place over-reliance on information provided by the *customer* for the assessment.

[Note: paragraph 4.34 of *MCG*]

2.10.20

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Where a *firm* understands, or reasonably suspects, a *customer* has or may have a mental capacity limitation the *firm* should take particular care that the *customer* is not provided with *credit* which the *firm* knows, or reasonably believes, to be unsuitable to the *customer's* needs, even where the *credit* would be affordable.

[Note: paragraph 4.43 of *MCG*]