

Chapter 5

Pre-application disclosure

5.9 Pre-sale disclosure for regulated sale and rent back agreements

Pre-sale disclosure

5.9.1

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- (1) A *firm* must, as soon as a *customer* expresses an interest in becoming a *SRB agreement seller*, ensure that the disclosures and warnings set out in (1A) are made to the *customer*, both orally and confirmed in writing, and he is given an adequate opportunity to consider them. The *firm* must not demand or accept any fees, charges or other sums from the *customer*, or undertake any action that commits the *customer* in any way to entering into a specific agreement, until:
 - (a) the written pre-offer document that is required by ■ MCOB 6.9.3 R has been provided to the *customer*; and
 - (b) the written offer document for signing (Stage Two) that is required by ■ MCOB 6.9.10R (1) has been returned to the *firm* duly signed by the *customer*.
- (1A) The disclosures and warnings referred to in (1) are the following:
 - (a) where a valuation of the property that is the subject matter of the *regulated sale and rent back agreement* has already been carried out in accordance with ■ MCOB 2.6A.12 R, a statement of its market value or, if a valuation of the property has not yet been carried out, the price or value of the property on which the proposed *regulated sale and rent back agreement* would be based (estimated if necessary);
 - (b) [deleted]
 - (c) any fees, charges or retentions that the *firm* will deduct from the purchase price for the property, net of any fees or charges otherwise payable, and whether there are any fees, charges or other sums that are payable to any *SRB intermediary* that is involved in the proposed transaction or to a third party;
 - (d) the purchase price that the *firm* is prepared to pay the *SRB agreement seller* for the property, net of any fees, charges or retentions;
 - (e) the percentage of the figure in (a) for the market value of the property that the figure in (d) for the purchase price represents;
 - (ea) that the *SRB agreement seller* should in his own best interests independently seek whatever information he can on the market value of his property, as explained in the *FCA consumer factsheet* provided to the *customer*, before proceeding with the proposed transaction and how and from where information on its value may be available;

- (f) brief details of the main terms of the tenancy under the proposed *regulated sale and rent back agreement*, including its type, the letting period including the fixed term and the security of tenure the *SRB agreement seller* (or trust beneficiary or related person) will be given under it, an explanation that the seller (or trust beneficiary or related person) cannot be evicted unless the *SRB agreement provider* obtains a possession order from the court and an explanation of the seller's (or trust beneficiary's or related person's) ability to terminate the tenancy;
 - (g) [deleted]
 - (h) [deleted]
 - (i) a prominent warning that once the fixed term under (f) expires, the *SRB agreement seller* and his family may be required to leave the property;
 - (ia) where the *SRB agreement seller* is to be given an option under the proposed agreement to buy back the property at some future date from the *SRB agreement provider*, a statement confirming that this is the case, together with details of the option, including how it may be exercised and any restrictions such as time limits that will apply to it, and a clear explanation as to how the repurchase price is to be determined;
 - (j) the initial rent due under the proposed agreement;
 - (k) the circumstances in which the rent in (j) can be increased or changed in any way under the terms of the tenancy agreement;
 - (l) the risks associated with the transaction from the *SRB agreement seller's* perspective, including in particular:
 - (i) that failure to abide by the terms of the tenancy may result in the loss of the right to occupy the property; and
 - (ii) that failure to obtain legal or professional advice may mean his interests are not fully protected;
 - (m) whether there are any other features or restrictions in the *regulated sale and rent back agreement* which the *SRB agreement seller* would reasonably need to know about for the purpose of making an informed judgment about the merits of entering into the proposed agreement;
 - (n) information on what the *SRB agreement seller* should do if he wishes to make a complaint against the *firm* arising out of or in connection with the proposed *regulated sale and rent back agreement*, including provision of an address and phone number at which the *firm* may be contacted should the customer wish to pursue a complaint and that if he cannot settle his complaint with the *firm*, that he may be entitled to refer it to the *Financial Ombudsman Service*; and
 - (o) information on the circumstances in which the *SRB agreement seller* might be entitled to compensation under the Financial Services Compensation Scheme, depending on the type of business and the circumstances of the claim, and, if so, details of the relevant coverage.
- (2) The *firm* must make the written disclosures and warnings specified in (1) to the *SRB agreement seller* in a clear, fair and not misleading way

before he enters into the proposed *regulated sale and rent back agreement* and in doing so must ensure that:

- (a) the information is set out in the same order as set out in (1);
- (b) the disclosures and warnings are made in a separate and standalone document; and
- (c) the disclosures and warnings are accompanied by a prominent written statement from the *firm* drawing the *SRB agreement seller's* attention to the importance of the information.

(3) In making the disclosures in writing to the *SRB agreement seller* that are required by (1) and (1A), the *firm* must make prominent use of the key facts logo in accordance with ■ GEN 5.1 (Application and purpose), followed by the text "about this sale and rent back agreement".

Compliance with the pre-sale disclosure requirement

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A *firm* may comply with the requirement in ■ MCOB 5.9.1 R (Pre-sale disclosure) for disclosures and warnings to be confirmed in writing by providing the potential *SRB agreement seller* with the written pre-offer document that is required by ■ MCOB 6.9.3 R (Written pre-offer document: Stage One) if this can be done as quickly as providing the pre-sale disclosures, provided that (in accordance with ■ MCOB 5.9.1 R) the *firm* does not demand or accept any fees, charges or other sums from the *customer* or undertake any action that commits the *customer* to the proposed *regulated sale and rent back agreement* until:

- (1) the written pre-offer document that is required by ■ MCOB 6.9.3 R has been provided to the *customer*; and
- (2) the written offer document for signing (Stage Two) that is required by ■ MCOB 6.9.10R (1) has been returned to the *firm* duly signed by the *customer*.

Information on valuations and rental values

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Where the potential *SRB agreement seller* has not commissioned his own valuation of the property, a *firm* must ensure that he realises that there are other possible sources of information on the property's value that are available to him, including local estate agents, local newspapers which carry advertisements for the sale of residential property in the *customer's* locality and on-line sites where details of recent property sales in the locality may be accessed.

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A *firm* must ensure that the *SRB agreement seller* realises that there are other possible sources of information on the appropriate rental value for the property available to him, including local estate agents, local newspapers and on-line sites which carry advertisements for the rental of residential property in the *customer's* locality.

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There is no requirement for the property to be valued before making the pre-sale disclosures. However, ■ MCOB 6.9.2 R requires that an independent valuation of the property be carried out before the provider supplies the

customer with the written pre-offer document at Stage One (see ■ MCOB 6.9.3 R).

Disclosure of relevant features or restrictions

5.9.1E **G** Examples of features of a *regulated sale and rent agreement* that a *SRB agreement seller* would reasonably need to know about (see ■ MCOB 5.9.1R (1A)(m)) would include an arrangement under which the seller is to receive from the *SRB agreement provider* a refund of some agreed percentage of the discount (on the market value of the property) that was reflected in the sale price under the *regulated sale and rent back agreement* after the end of the agreed letting term. Should any restrictions or the payment of any costs or fees be attached to the seller's entitlement to exercise such an option, these should be explained clearly.

Revised pre-sale disclosures

5.9.1F **R** Where a *firm* has already provided the required pre-sale disclosures and the terms for the proposed *regulated sale and rent back agreement* are subsequently materially altered, the *firm* must ensure that, at the *firm's* option, either:

- (1) the pre-sale disclosures are re-issued to the *customer*, incorporating the agreed amendment; or
- (2) the agreed amendment is incorporated in the written pre-offer document at Stage One (see ■ MCOB 6.9.3 R).

5.9.1G **G** What constitutes "materially altered" requires consideration of the facts of each individual case. For example, a change in the proposed purchase or valuation price of the property should normally be regarded as material, as would the introduction of an additional charge applying to the *regulated sale and rent back agreement* when it did not previously.

Records of pre-sale disclosure

5.9.2 **R** A *firm* must keep a record of the disclosures and warnings made to the *SRB agreement seller* under ■ MCOB 5.9.1 R for a period of:

- (1) one year after the end of the fixed term of the tenancy under the *regulated sale and rent back agreement*; or
- (2) five years from the date of the disclosures and warnings;

whichever is the longer.

Initial disclosure information to SRB agreement sellers: unauthorised SRB agreement providers

5.9.3 **R** (1) A *SRB intermediary* must ensure that, on first making contact with a prospective *SRB agreement seller*, whether or not he is the *firm's customer*, who is proposing to enter into a *regulated sale and rent back agreement* with an *unauthorised SRB agreement provider*, it provides him with the written warning in (2) before he enters into any such agreement.

- (2) The warning in (1) is that:
 - (a) the agreement provider is not authorised or regulated by the *FCA*, and that key protections under the *regulatory system* will not apply; and
 - (b) the provider is not subject to the jurisdiction of the *Financial Ombudsman Service*, and that the *SRB agreement seller* will not be entitled to refer complaints against the provider to the *Financial Ombudsman Service*.

Initial disclosure information to unauthorised SRB agreement providers

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- (1) A *SRB intermediary* must ensure that, on first making contact with a *customer* who is both an individual and an *unauthorised SRB agreement provider*, when it anticipates giving personalised information or advice on a *regulated sale and rent back agreement*, it must provide him with the written warning in (2).
- (2) The warning in (1) is that a *regulated sale and rent back agreement* is a complex legal arrangement and that expert independent legal advice should be obtained before entering into any such agreement.

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A *person* may enter into a *regulated sale and rent back agreement* as agreement provider without being regulated by the *FCA* (or an *exempt person*) if the *person* does not do so by way of business. However, a *SRB intermediary* should at all times be conscious of its obligations under *Principle 6* (Customers' interests). Should the *firm* have any reason to believe or entertain any suspicions that the *SRB agreement seller* may be proposing to enter into a *regulated sale and rent back agreement* with an *unauthorised SRB agreement provider* notwithstanding that the provider appears to be doing so by way of business and therefore appears to require authorisation under the *Act*, the *firm* should warn the seller that he should not be proceeding with the transaction.

Uncertainty whether the arrangements constitute a sale and rent back agreement

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- (1) If, at the point that the required pre-sale disclosures must be provided to a potential *SRB agreement seller*, a *firm* is uncertain whether the arrangement will qualify as a *regulated sale and rent back agreement*, the *firm* must:
 - (a) provide the required pre-sale disclosures on the basis that the arrangement might constitute a *regulated sale and rent back agreement*; or
 - (b) seek to obtain from the potential seller information that will enable the *firm* to ascertain whether the contract will qualify as a *regulated sale and rent back agreement*.
- (2) Where (1)(b) applies, pre-sale disclosures must be provided, unless, on the basis of information the potential seller provides, the *firm* has reasonable evidence that the contract would not qualify as a *regulated sale and rent agreement*.

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If the *firm* has reasonable evidence that the contract is not a *regulated sale and rent back agreement*, for example where at least 40% of the property is not going to be occupied as a dwelling by the seller or his family, and has not provided the required pre-sale disclosures and the *firm* subsequently concludes that the contract does qualify as a *regulated sale and rent back agreement*, there is no requirement to provide separate pre-sale disclosures at the time the *firm* reaches that conclusion. However, the requirement to integrate the pre-sale disclosures into the written pre-offer document at Stage One that is required by **■ MCOB 6.9.3 R** will apply.

Record of sale and rent back providers

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- (1) A *SRB intermediary* must for each *regulated sale and rent back agreement* in relation to which it carries on *regulated sale and rent back mediation activity* keep a record of the contact details of the provider that enters into or is proposed to enter into the agreement, making it clear whether the provider is a *SRB agreement provider* or an *unauthorised SRB agreement provider*.
- (2) The record in (1) must be retained for a period of one year, or one year from the end of the fixed term of the tenancy under the *regulated sale and rent back agreement*, whichever is the longer.