

CONSUMER RIGHTS ACT INSTRUMENT 2015

Powers exercised

- A. The Financial Conduct 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 137A (The FCA’s general rules);
 - (2) section 137T (General supplementary powers); and
 - (3) section 139A (Power of the FCA to give guidance).
- B. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on 1 October 2015.

Amendments to the Handbook

- D. The modules of the FCA’s Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this instrument listed in column (2) below.

(1)	(2)
Glossary of definitions	Annex A
Conduct of Business sourcebook (COBS)	Annex B
Insurance: Conduct of Business sourcebook (ICOBS)	Annex C
Mortgages and Home Finance: Conduct of Business sourcebook (MCOB)	Annex D
Banking: Conduct of Business sourcebook (BCOBS)	Annex E
Supervision manual (SUP)	Annex F
Credit Unions sourcebook (CREDS)	Annex G
Consumer Credit sourcebook (CONC)	Annex H

Amendments to material outside the Handbook

- E. The Enforcement Guide (EG) is amended in accordance with Annex I to this instrument.
- F. The Unfair Contract Terms Regulatory Guide (UNFCOG) is amended in accordance with Annex J to this instrument and is renamed the Unfair Contracts and Consumer Notices Regulatory Guide.

Notes

- G. In Annex D (MCOB) to this instrument, the “notes” (indicated by “**Note:**”) are included for the convenience of readers but do not form part of the legislative text.

Citation

- H. This instrument may be cited as the Consumer Rights Act Instrument 2015.

By order of the Board
24 September 2015

Annex A**Amendments to the Glossary**

In this Annex, underlining indicates new text unless otherwise stated.

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

CRA the Consumer Rights Act 2015.

Amend the following as shown.

consumer ...

(8) (in relation to the *CRA*) an individual acting for purposes wholly or mainly outside that individual's trade, business, craft or profession.

UNFCOG the Unfair Contract Terms and Consumer Notices Regulatory Guide.

Annex B

Amendments to the Conduct of Business sourcebook (COBS)

In this Annex, underlining indicates new text.

2 Conduct of business obligations

2.1 Acting honestly, fairly and professionally

...

2.1.3 G (1) ...

- (2) The general law, including the *Unfair Terms Regulations* (for contracts entered into before 1 October 2015) and the *CRA*, also limits the scope for a *firm* to exclude or restrict any duty or liability to a *consumer*.

Annex C

Amendments to the Insurance: Conduct of Business sourcebook (ICOBS)

In this Annex, underlining indicates new text.

2 General matters

...

2.5 Exclusion of liability and reliance on others

...

- 2.5.2 G The general law, including the *Unfair Terms Regulations* (for contracts entered into before 1 October 2015) and the *CRA*, also limits the scope for a *firm* to exclude or restrict any duty or liability to a *consumer*.

...

6 Product information

...

6.4 Pre- and post-contract information: protection policies

...

- 6.4.12 G (1) ...
- (2) *Firms* will need to consider whether mid-term changes are compatible with the original *policy*, in particular whether it reserves the right to vary *premiums*, charges or other terms. *Firms* also need to ensure that any terms which reserve the right to make variations are not themselves unfair under the *Unfair Terms Regulations* (for contracts entered into before 1 October 2015) or the *CRA*.

Annex D

Amendments to the Mortgages and Home Finance: Conduct of Business sourcebook (MCOB)

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

2 **Conduct of business standards: general**

...

2.6A **Protecting customer's interests: regulated mortgage contracts, home purchase plans, home reversion plans and regulated sale and rent back agreements**

...

2.6A.10 G ...

[**Note:** The terms of a *home purchase plan*, *home reversion plan* or *regulated sale and rent back agreement* should take into account relevant legal obligations such as those under the *Unfair Terms Regulations* (for contracts entered into before 1 October 2015), the *CRA* and, where applicable, the Housing Act 1988 (or, in Scotland, the Housing (Scotland) Act 1988). A *firm* may find material on the *FCA* website concerning the *FCA's* consumer protection powers useful.]

...

11 **Responsible lending, and responsible financing of home purchase plans**

...

11.6 **Responsible lending and financing**

...

11.6.51 G (1) ...

(2) ...A *mortgage lender* should also have regard to the *Unfair Terms Regulations* *CRA* when drafting the provisions of *regulated mortgage contracts* in relation to changes to their features.

...

12 Charges

...

12.7 Home purchase plans

12.7.1 G ...

[**Note:** A *firm* should also have regard to its obligations under the *Unfair Terms Regulations* (for contracts entered into before 1 October 2015) or the *CRA* and may find material on the *FCA* website concerning the *FCA* consumer protection powers useful.]

13 Arrears, payment shortfalls and repossessions: regulated mortgage contracts and home purchase plans

...

13.3 Dealing fairly with customers with a payment shortfall: policy and procedures

...

13.3.7 G In relation to granting a *customer's* request for a change to the payment date, a term that purported to allow a *firm* to change the payment date unilaterally might in any event contravene the *Unfair Terms Regulations* (for contracts entered into before 1 October 2015) or the *CRA*.

Annex E

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

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

1 Application

1.1 General application

...

- 1.1.7 G The general law, including the *Unfair Terms Regulations* (for contracts entered into before 1 October 2015) and the *CRA*, also limits the scope for a *firm* to exclude or restrict any duty or liability to a *consumer*.

...

4 Information to be communicated to banking customers

4.1 Enabling banking customers to make informed decisions

...

- 4.1.2 G ...

- (7) The general law, including the *Unfair Terms Regulations* (for contracts entered into before 1 October 2015) and the *CRA*, also limits the scope for a *firm* to use or rely on a variation clause in a contract with a *consumer*.

Annex F

Amendments to the Supervision manual (SUP)

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

2 Information gathering by the FCA or PRA on its own initiative

2.1 Application and purpose

...

- 2.1.4 G ...This chapter does not deal with the information gathering powers that the FCA has under the *Unfair Terms Regulations* and the *CRA*. These are dealt with in *UNFCOG*.

...

13A Qualifying for authorisation under the Act

...

13A Annex 1G Application of the Handbook to Incoming EEA Firms

...		
(1) Module of Handbook	(2) Potential application to an incoming EEA firm with respect to activities carried on from an establishment of the firm (or its appointed representative) in the United Kingdom	(3) Potential application to an incoming EEA firm with respect to activities carried on other than from an establishment of the firm (or its appointed representative) in the United Kingdom
...		
<i>EG</i>	<i>EG</i> describes the FCA's approach to exercising the main enforcement powers given to it by FSMA and by regulation 12 of the <i>Unfair Terms Regulations</i> <u>other legislation</u> . <i>EG</i> is a Regulatory Guide and as such does not form part of the Handbook	<i>EG</i> (Enforcement Guide) As column (2).
...		

Annex G

Amendments to the Credit Unions sourcebook (CREDS)

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

10 Application of other parts of the Handbook to Credit unions

10.1 Application and purpose

...

10.1.3

G

Module	Relevance to Credit Unions
...	...
The Enforcement Guide (<i>EG</i>)	The Enforcement Guide (<i>EG</i>) describes the <i>FCA</i> 's approach to exercising the main enforcement powers given to it by the <i>Act</i> and by regulation 12 of the <i>Unfair Terms Regulations</i> <u>other legislation</u> .
...	

...

Annex H

Amendments to the Consumer Credit sourcebook (CONC)

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

2 Conduct of business standards: general

...

2.2 General principles for credit-related regulated activities

...

- 2.2.5 R Any specific rule or piece of guidance in *CONC* is without prejudice to the application of *PRIN*, any other *rules* in the *Handbooks*, the *CCA* and secondary legislation made and things done under it, the Consumer Protection from Unfair Trading Regulations 2008, the ~~Unfair Terms in Consumer Contracts Regulations 1999~~ Consumer Rights Act 2015, Part 8 of the Enterprise Act 2002 and any other applicable consumer protection legislation.

...

8 Debt advice

...

8.7 Charging for debt counselling, debt advice and related services

...

- 8.7.6 R *A firm* must not:

...

- (7) claim a fee or charge from a *customer* or take payment from a *customer's* account which is not provided for in the agreement with the *customer*, or where it is provided for but is, or is likely to be, unfair under the Unfair Terms in Consumer Contracts Regulations 1999 (for contracts entered into before 1 October 2015) or the Consumer Rights Act 2015;

[**Note:** paragraph 3.34i of *DMG*]

...

Annex I

Amendments to the Enforcement Guide (EG)

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

1. Introduction

- 1.1 This guide describes the *FCA*'s approach to exercising the main enforcement powers given to it by the Financial Services and Markets Act 2000 (the *Act*) and by ~~regulation 12 of the *Unfair Terms Regulations*~~ other legislation. It is broken down into two parts. The first part provides an overview of enforcement policy and process, with chapters about the *FCA*'s approach to enforcement (chapter 2), the use of its main information gathering and investigation powers under the *Act* and the *CRA* (chapter 3) ...

...

3. Use of information gathering and investigation powers

- 3.1 The *FCA* has various powers under sections 97, 131E, 131FA, 165 to 169 and 284 of the *Act* and Schedule 5 to the *CRA* to gather information and appoint investigators, and to require the production of a report by a *skilled person*. ...

...

Power to require information relating to potentially unfair etc terms and notices

3.15E Schedule 5 to the *CRA* gives:

- (1) (a) the *FCA*; and
- (b) any other *person*, who may be an *FCA* employee, specifically authorised or appointed by the *FCA* for this purpose;

the power to require, by notice in writing, which must contain the particulars specified by paragraph 15 of Schedule 5, the production of information to enable the *FCA* to ascertain whether a *person* has complied with or is complying with an *injunction* granted or an undertaking given under Schedule 3 to the *CRA*, as described in paragraphs 10.12 to 10.19 below; and

- (2) such an appointed or authorised *person* the same power to enable the *FCA* to:
- (a) seek an *injunction* or undertaking under Schedule 3; or
- (b) consider whether to do so;

but only if that *person* reasonably suspects that an unfair term or notice within the scope of Schedule 3 is being used or proposed or recommended to be used.

...

10. Injunctions

...

Applications for injunctions under regulation 12 of the Unfair Terms Regulations or Schedule 3 to the CRA: the FCA's policy

- 10.11A The *Unfair Terms Regulations* still apply to contracts entered into before 1 October 2015. Please read the pre-1 October 2015 version of this guide for the FCA's approach and policy relating to its powers under the *Unfair Terms Regulations*.
- 10.12 ~~If For a consumer contract term, if the FCA decides, after notifying the Competition and Markets Authority (the CMA), to the extent required by Schedule 3 to the CRA, to address issues using its powers under the *Unfair Terms Regulations*, and Schedule 3, if the contract term is within its the CRA's scope, as described in the FCA's Regulatory Guide on these powers, it will, unless the case is urgent, generally first write to the a person using or proposing or recommending the use of that term.~~
- 10.12A When writing, the FCA will express expressing its concerns about the potential unfairness about whether the term is or would be unfair within the meaning of sections 62 to 64 of the CRA, or non-transparent within the meaning of the *Unfair Terms Regulations* of a term or terms in the person's contract section 68 of the CRA, or purports or would purport to exclude or restrict any liability described in the sections of the CRA specified in paragraph 3(2) of Schedule 3 and inviting will invite the person's comments on those concerns.
- 10.12B If the FCA, having considered those comments, remains of the view that the term is or would be unfair within the meaning of the *Unfair Terms Regulations*, or non-transparent or purports, or would purport, to be exclusionary or restrictive, as described above, it will normally ask the person to undertake to stop including the term in new contracts and stop relying on it in contracts which have been concluded using, relying on or recommending it or proposing its use. It should be noted that, under paragraphs 2(3), 6(3) and 7(1) of Schedule 3 to the CRA, such an undertaking must be notified by the FCA to the CMA and any relevant complainant and then the CMA is under a duty to publish it.
- 10.12C In relation to a notice to consumers within the CRA's scope, the FCA will generally, after notifying the CMA, request such an undertaking from the relevant person, if the notice causes the FCA relevant concerns, without first seeking comments. Although the FCA will, unless the case is an urgent one and time does not permit, then have regard to any representations responsive to that request.
- 10.13 ~~If, whether in relation to such a notice or such a term, the person either declines to give such an undertaking, or gives such an undertaking and fails to follow it, the FCA will consider the need to apply to court for an injunction under regulation 12 of the *Unfair Terms Regulations* Schedule 3 to the CRA. The FCA will, again, notify the CMA appropriately at this stage, as required by Schedule 3.~~

- 10.14. In determining whether to seek an *injunction* under Schedule 3 to the *CRA* against a *person*, after or, in an urgent case, instead of requesting such an undertaking, the *FCA* will consider the full circumstances of each case. A number of factors may be relevant for this purpose. The following list is not exhaustive; not all of the factors may be relevant in a particular case, and there may be other factors that are relevant such as:
- (1) whether the *FCA* is satisfied that the contract term ~~which is the subject of the complaint~~ or notice in question may properly be regarded, if it is used, as unfair, non-transparent and/or purportedly exclusionary and/or restrictive within the meaning of the *Unfair Terms Regulations*. *CRA*;
 - (2) the extent and nature of the detriment to *consumers* resulting from the term or notice, or the potential detriment which could result from the term or notice;
 - (3) whether the *person* has, if asked to do so, fully cooperated with the *FCA* in resolving the *FCA*'s concerns about the ~~fairness of the~~ particular contract term or notice;
 - (4) the likelihood of success of an application for an *injunction*;
 - (5) the costs the *FCA* would incur in applying for and enforcing an *injunction* and the benefits that would result from that action; the *FCA* is more likely to be satisfied that an application is appropriate where an *injunction* would not only prevent the ~~continued~~ use of the particular contract term or notice, but would also be likely, as paragraph 5(3)(b) of Schedule 3 to the CRA envisages, to prevent the use ~~or continued use~~ of similar terms or notices, or terms or notices having ~~the same a similar~~ effect, ~~used or recommended by other firms concluding contracts with consumers~~.
- 10.15 In an urgent case, the *FCA* may seek a temporary *injunction*, to prevent the continued or potential use of the term or notice until ~~the fairness of the term could~~ it can be fully considered by the court. ... In such an urgent case, the *FCA* may seek a temporary *injunction* without first consulting with the *person* or persons using or proposing to use, or recommending the use of, the relevant term or notice.
- 10.16 In deciding whether to grant ~~an~~ a final *injunction* under Schedule 3 to the *CRA*, the court will decide whether the term or notice in question is unfair, purportedly restrictive or exclusionary or non-transparent within the meaning of the *Unfair Terms Regulations* (see *UNFCOG 1.3.2G*) *CRA*. The court may grant an *injunction* on such terms as it sees fit. For example, it may require the *person* to stop including ~~the unfair~~ a term in contracts with *consumers* or issuing, publishing, communicating or announcing a notice to consumers from the date of the *injunction* and to stop relying on the ~~unfair~~ term in such contracts which have been concluded or on the notice to the extent that it has already been issued, published, communicated or announced. If the *person* fails to comply with the *injunction*, ~~it~~ the person will be in contempt of court.
- 10.17 ~~Regulation 8 of the Unfair Terms Regulations~~ *The CRA* provides that ~~an unfair~~ a term or notice that is unfair or a term that excludes or restricts liability in any of the ways specified in the *CRA* is not binding on the *consumer*. ~~This means that if the court finds that the term in question is unfair, the person would be unable to rely on the unfair~~

~~term in existing contracts governed by the *Unfair Terms Regulations* is the case~~ irrespective of whether there has been a decision of a court to that effect. ~~To~~ The CRA also provides that, to the extent that it is possible practicable, the existing rest of the contract would continue continues in effect without the unfair term.

10.18 When the FCA considers that a case requires enforcement action under the *Unfair Terms Regulations* CRA, it will take the enforcement action itself, after appropriately notifying the CMA, if the person against whom such action will be taken is a firm or an appointed representative.

10.19 Where ~~the~~ that person is not a *firm* or an *appointed representative*, the FCA will liaise with the ~~Competition and Markets Authority~~ CMA or (as appropriate) a qualifying body under the *Unfair Terms Regulations* another CRA regulator.

...

19. Non-FSMA powers

...

Enterprise Act 2002

...

19.40 The Enterprise Act identifies two ~~main~~ types of breach which trigger the Part 8 enforcement powers. These are referred to as:

(1) “domestic infringements”, which are breaches of particular UK law, enactments or of contractual or tortious duties, in each case if they occur in the course of a business and in relation to goods or services supplied or sought to be supplied:

(a) to or for a person in the UK; or

(b) by a person with a place of business in the UK; and

(2) “Community infringements”, which are breaches of the EU legislation listed in Schedule 13 ~~of~~ to the Enterprise Act, if directly effective, or of national laws, whether of the UK or not, giving effect to that EU legislation, even where it is directly effective, including provisions of those national laws that provide additional protections, beyond but permitted by that EU legislation.

In both cases the breach must ~~be regarded as harming~~, to trigger those powers, harm the collective interests of consumers.

...

The FCA’s powers as a designated enforcer

19.43 As a designated enforcer, the *FCA* has the power to apply to the courts for an enforcement order ~~or an interim enforcement order~~ which requires a ~~person~~ *person* who has committed a ~~breach of applicable legislation~~ domestic or Community infringement or, as to the latter, is likely to commit such an infringement:

- (1) not to engage, including through a company and, as to a domestic infringement, whether or not in the course of business, in the conduct which constituted, or is likely to constitute, the ~~breach~~ infringement;
- (2) to publish the order and/or a corrective statement;
- (3) to offer compensation or other redress, including the right to terminate relevant contracts, to affected *consumers*;
- (4) where such *consumers* cannot be practically identified, to take measures in the collective interests of *consumers*;
- (5) to take measures intended to prevent or reduce the risk of the relevant conduct occurring or being repeated; and/or
- (6) to take measures intended to enable *consumers* to choose more effectively between *persons* supplying or seeking to supply goods or services;

although it should be noted that the remedies listed under (3) to (6) inclusive are only applicable to conduct taking place or likely to occur after the relevant provisions of the *CRA* came into force.

19.43A The *FCA* may also apply for orders where it thinks that a *person* is likely to commit a Community infringement, if necessary without notice, for interim enforcement orders where immediate temporary prohibition of the relevant conduct is expedient pending full consideration by the court. Such interim orders can also be sought pre-emptively in relation to Community infringements, but again only preventing conduct in the course of business.

19.44 The ~~*FCA* has the power under the *FCA*'s~~ investigative powers in support of its Enterprise Act enforcement powers are set out in Schedule 5 to the *CRA*. The *FCA* can, under Schedule 5, ~~to~~ require any ~~person~~ *person* to provide it with information which will enable it to (i) exercise or consider exercising its functions as an enforcer; or (ii) determine whether a ~~person~~ *person* is complying with an enforcement order, ~~or an interim enforcement order~~ or an undertaking given as described below. If the *FCA* requires a ~~person~~ *person* to provide it with information, it must give him a notice setting out the information that it requires and ~~confirming for which of purposes (i) and (ii) above the information is required~~ specifying the relevant enforcement function and/or any such purpose.

19.45 Before the *FCA* may apply for an enforcement order, including an interim enforcement order, it must:

- (1) give notice to the CMA of its intention to apply for an enforcement order; and

- (2) unless the application relates to breach of an undertaking given to the court (other than one to provide information), consult the ~~person~~ *person* against whom the enforcement order would be made.

19.45A The ~~period~~ *periods* for notification and consultation is (both of which can be waived by the CMA) are:

- (1) 14 days before an application for an enforcement order is made unless, just as to consultation, the *person* to be consulted is a member of or represented by a body operating an approved consumer code, in which case the period is 28 days; or
- (2) 7 days in the case of an application for an interim enforcement ~~award~~ order, unless the application relates to breach of an undertaking given to the court, in which case the CMA must be notified but not necessarily in advance.

19.45B The aim of consultation is to ensure that any action taken is necessary and proportionate, and to ensure that businesses are given a reasonable opportunity to put things right before the courts become involved. The consultation period starts when the *person* receives the FCA's request for consultation and runs whether or not that *person* agrees to be consulted and/or is available for consultation.

19.46 The Enterprise Act also makes provision for enforcers and courts to accept undertakings from a ~~person~~ *persons* who ~~has~~ *have* committed a ~~breach~~ *breaches* or, in respect of Community infringements, are considered likely to do so. The undertaking confirms that the ~~person~~ *person* will not, amongst other things, commence, continue or repeat the conduct which constituted or, as to a Community infringement, would constitute the breach, although, as above, such a pre-emptive prohibition will only apply to conduct in the course of business. The undertaking may also confirm that the *person* will compensate consumers and/or take the other measures described in paragraph 19.43, above. There is a general expectation that, if a breach of applicable legislation or of a relevant duty is committed, or if a Community infringement is likely to be committed, enforcers will seek an undertaking from the ~~person~~ *person* in question before applying to court for an enforcement order ~~against him~~.

...

The FCA's powers as a CPC enforcer

19.48 In addition to its powers as a designated enforcer under the Enterprise Act, the FCA also has powers, in its capacity as a "CPC enforcer" and, therefore, only in respect of Community infringements, to enter commercial premises with or without a warrant. The FCA must give at least two working days' notice of its intention to enter such premises without a warrant unless ~~it has not been possible to serve such notice despite all that is not~~ reasonably practicable ~~steps having been taken~~. If the FCA cannot give a notice in advance, it must produce the notice on the day the premises are entered.

Annex J

Amendments to the Unfair Contract Terms Regulatory Guide (UNFCOG)

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

1 The Unfair Contract Terms and Consumer Notices Regulatory Guide

1.1 Application and purpose

1.1.1 G This Guide explains the *FCA's* policy on how it will use its powers under the ~~*Unfair Terms Regulations*~~ (the Regulations) *CRA* in relation to unfair terms and consumer notices.

1.1.1A G The *Unfair Terms Regulations* will continue to apply to contracts entered into before 1 October 2015. Firms (see 1.1.5G) should refer to the previous version of this Guide for an explanation of the *FCA's* policy regarding the *Unfair Terms Regulations*.

1.1.1B G The unfair terms provisions in Part 2 of the *CRA* apply to consumer contracts entered into on or after 1 October 2015 and consumer notices issued on or after 1 October 2015.

1.1.1C G In this Guide, 'consumer notice' has the same meaning as in section 61 of the *CRA*.

1.1.2 G We have agreed with the Competition and Markets Authority ("CMA") that the *FCA* will consider the fairness (within the meaning of the ~~Regulations~~ *CRA*) of those financial services contracts ~~for carrying on any regulated activity~~ and consumer notices specified in the Memorandum of Understanding between the CMA and the *FCA* on the use of concurrent powers under consumer protection legislation (<http://www.fca.org.uk/fca-cma-consumer-protection-mou>).

1.1.3 G Where the firm concerned is not a *firm* or an *appointed representative*, the ~~CMA may take enforcement action under the Regulations in respect of financial services contracts involving the carrying on of regulated activities~~ *FCA* will liaise with the CMA or (as appropriate) another *CRA* regulator (see ~~EG 10.16 and 10.17~~ 10.19).

1.1.4 G This Guide applies to:

- (1) *firms*;
- (2) *appointed representatives*; ~~and~~
- (3) other *persons*, whether or not a *person* with *permission*, who use, or recommend the use of, contracts to carry on *regulated activities*; ~~;~~
- (4) *electronic money issuers*; ~~and~~

(5) payment service providers.

...

1.2 Introduction

1.2.1 G This Guide explains the *FCA's* formal powers under the ~~Regulations~~ CRA in relation to unfair terms and consumer notices. It does not contain comprehensive *guidance* on the ~~Regulations themselves~~ CRA itself, and you should refer to ~~those Regulations~~ the CRA for further details.

1.2.2 G This Guide also provides *guidance* on the approach we take before considering whether to exercise our formal powers under the ~~Regulations~~ CRA in relation to unfair terms and notices.

1.2.3 G The *FCA* has powers as a ~~qualifying body~~ regulator and an unfair contract terms enforcer under the ~~Regulations~~ CRA. ~~The Regulations are not made under the Act, but, under the Regulations~~ Under the CRA our functions are treated as functions under the *Act*. This:

(1) makes the *statutory objectives* relevant to forming policy that governs the discharge of our functions under the ~~Regulations~~ CRA;

(2) means that any complaints about the *FCA's* activities under the ~~Regulations~~ CRA can be referred to the *Complaints Commissioner*;

...

(5) protects the *FCA* against liability in damages in respect of its activities under the ~~Regulations~~ CRA; and

(6) allows the *FCA* to raise fees to fund its activities under the ~~Regulations~~ CRA.

1.2.4 G (1) As such, we may publish on our website details of cases that result in a change in the ~~contract~~ terms and notices used by the firm. This may happen through either an undertaking by a firm or injunction obtained from the courts.

(2) Under ~~regulation 14 of paragraphs 4(1) and 6(3) of Schedule 3 to the~~ Regulations CRA, the *FCA* has a duty to pass details of these cases to the CMA.

(3) The CMA also publishes details of cases that it, and other ~~qualifying bodies~~ regulators, have dealt with in accordance with the CMA's duties under ~~regulation 15 of paragraph 7 of Schedule 3 to the~~ Regulations CRA.

1.3 ~~The Unfair Terms Regulations~~ CRA

Terms and notices to which the ~~Regulations apply~~ CRA applies

- 1.3.1 G (1) ~~The Regulations apply~~ Part 2 of the CRA applies, with certain exceptions, to ~~terms in contracts concluded~~ a contract between a ~~seller or supplier trader~~ and a consumer, ~~which have not been individually negotiated~~ Part 2 of the CRA also applies to consumer notices.
- (2) Terms or notices cannot be reviewed for fairness within the meaning of the ~~Regulations~~ CRA if they are ~~terms which~~ reflect:
- ...
- (b) the provisions or principles of an international conventions convention to which the ~~EEA States~~ United Kingdom or the ~~EU as a whole are~~ is a party.
- (3) Terms ~~written in plain and intelligible language~~ which are transparent and prominent (as defined in section 64 of the CRA) cannot be reviewed for fairness within the meaning of the ~~Regulations~~ CRA if the terms relate to the extent that:
- ~~the definition of~~ they specify the main subject matter of the contract; or
 - the ~~adequacy~~ assessment is of the appropriateness of the price ~~or remuneration, as against~~ payable under the contract by comparison with the goods, digital content or services supplied in exchange under it.
- However, we can fully review terms concerning these matters for fairness within the meaning of the ~~Regulations~~ CRA if they are not ~~written in plain, intelligible language~~ transparent and prominent. ~~We do not consider that it is enough that a lawyer could understand the term for it to be excluded from such a review. The term must be plain and intelligible to the consumer.~~
- (4) But, the subject matter and price exemption in (3) only applies to terms. It does not apply to a term of a contract listed in Part 1 of Schedule 2 to the CRA.
- (5) It is a requirement under section 68 of the CRA that a written term of a consumer contract, or a consumer notice in writing, is transparent.

When a term or notice is 'unfair' within the meaning of the ~~Regulations~~ CRA

- 1.3.2 G Terms or notices are ~~regarded as~~ unfair if, contrary to the requirement of good faith, they cause a significant imbalance in the parties' rights and obligations to the detriment of the *consumer*.

The main powers of the courts, ~~and qualifying bodies~~ regulators and unfair contract terms enforcers under the Regulations CRA

- 1.3.3 G (1) ~~Under regulation 13 we have the power to request, for certain purposes:~~
- ~~'(a) a copy of any document which that person has used or recommended for use, [...] as a pre-formulated standard contract in dealings with consumers;~~
- ~~(b) information about the use, or recommendation for use, by that person of that document or any other such document in dealings with consumers.'~~

As an unfair contract terms enforcer under Schedule 5, we have powers in relation to the production of information. Under paragraph 14 of Schedule 5, an enforcer or an officer of an enforcer may give notice to a person requiring the person to provide the enforcer with the information specified in the notice.

- 1.3.4 G (1) Unless the case is urgent, we will generally first write to a firm to express our concern about the potential unfairness of a term or terms (within the meaning of the Regulations CRA) and will invite the firm to comment on those concerns. If we still believe that the term is unfair, we will normally ask the firm to stop ~~including the term in new contracts and to stop relying on it in concluded contracts~~ using or proposing or recommending the use of that term in a consumer contract. If the firm ~~either continues to rely on that term or declines to give an undertaking, or gives an undertaking but fails to follow it~~, the *FCA* will consider the need to apply to the courts for an injunction under ~~regulation 12~~ paragraph 3 of Schedule 3.

- (2) In deciding whether to ask a firm to undertake to stop ~~including a term in new contracts and to stop relying on it in concluded contracts~~ using or proposing or recommending the use of a term in a consumer contract, we will consider the full circumstances of each case. Several factors may be relevant for this purpose and the following list is not exhaustive, but will give some indication of the sorts of things we consider:

- (a) whether we are satisfied that the contract term may properly be regarded as unfair within the meaning of the Regulations CRA;

...

- 1.3.4A G (1) In relation to a consumer notice, where we are concerned about the potential unfairness of the notice, we will generally contact a firm to ask the firm to amend or withdraw the notice.

- (2) The *FCA* can also ask a firm to undertake to amend or withdraw a consumer notice. Under paragraph 6 of Schedule 3, a regulator may accept an undertaking from a *person* against whom it has applied, or

thinks it is entitled to apply for an injunction or interdict. The undertaking may provide that the *person* will comply with the conditions that are agreed between the person and the regulator about the use of terms or notices, or terms or notices of a kind, specified in the undertaking.

1.3.5 G ~~Regulation 12 states that:~~

~~'(1) The [OFT] or [...] any qualifying body may apply for an injunction (including an interim injunction) against any person appearing to them to be using, or recommending the use of, an unfair term drawn up for general use in contracts concluded with consumers'.~~

~~'(3) The court, on an application under this regulation, may grant an *injunction* on such terms as it thinks fit.'~~

(1) Under paragraph 3 of Schedule 3, a regulator may apply for an injunction or (in Scotland) an interdict against a *person* if the regulator thinks that:

(a) the *person* is using, or proposing or recommending the use of, a term or notice to which Schedule 3 applies; and

(b) the term or notice:

(i) purports to exclude or restrict liability of the kind mentioned in paragraph 3(2) of Schedule 3; or

(ii) is unfair to any extent; or

(iii) breaches the transparency requirement.

(2) A regulator may apply for an injunction or interdict in relation to a term, whether or not it has received a relevant complaint about the term.

(3) The *FCA* is a ~~qualifying body~~ regulator for the purposes of ~~regulation 12~~ Schedule 3. Our approach to seeking an injunction under the ~~Regulations~~ *CRA* is set out in *EG* 10.

1.3.6 G ~~Regulation 8 states that~~ Under sections 62 and 67 of the *CRA*, an unfair term is not binding on the *consumer* but ~~that~~ the contract will continue to bind the parties if it is capable of continuing in existence without the unfair term. ~~Therefore, if~~ If the court finds that the term in question is unfair, the firm would have to stop relying on the unfair term in existing and future contracts governed by the ~~Regulations~~ *CRA*.

1.3.6A G Under section 62 of the *CRA*, an unfair consumer notice is not binding on the *consumer*.

1.4 ~~The Unfair Terms Regulations~~ CRA: the FCA's role and policy

- 1.4.1 G The *FCA* may consider the fairness of a ~~contract term or notice~~ within the meaning of the ~~Regulations~~ CRA following a complaint from a *consumer* or other person or on its own initiative if the ~~contract term or notice~~ is within its scope.
- 1.4.2 G There are three main ways in which we might receive a complaint from a *consumer* or other person. These are:
- ...
- (2) from another ~~qualifying body~~ regulator which considers that the *FCA* should deal with the complaint; or
- ...
- 1.4.3 G (1) The main way in which we would act on our own initiative is to undertake a review of ~~contracts or consumer notices~~ in a particular area of business. This might involve looking at the ~~contract terms or notices~~ used by several firms in a particular sector.
- (2) We will, for example, consider launching such a review if multiple *consumer contract* complaints or other intelligence lead us to believe that under the ~~Regulations~~ CRA there may be a ~~contractual~~ an issue relating to contracts or notices of wider significance to firms and *consumers*.
- 1.4.4 G If, following either a complaint or an own-initiative review, we consider that a term ~~in a contract or notice~~ is unfair, we may challenge firms about their use of that term or notice.

Interaction with the FCA's powers under the Act

- 1.4.5 G (1) The *FCA* will consider using its powers under the ~~Regulations~~ CRA in the context of its wider regulatory powers under the *Act*.
- (2) In some cases, it might be appropriate for us to use other powers to deal with issues identified under the ~~Regulations~~ CRA. The powers available to the *FCA* under the *Act* may vary depending on the *regulated activities* which the firm carries out. For example, the use of ~~the~~ an unfair term might involve a breach of a *Principle* or a *rule* in *BCOBS*, *COBS*, *CONC*, *MCOB* or *ICOBS* and the use of an unfair notice might involve a breach of the *financial promotions rules*. If so, the *FCA* might also address the issue as a *rule* breach.
- (3) We may, in some circumstances, consider treating the matter under our powers in the *Act* itself and also under the ~~Regulations~~ CRA.
- ...

1.5 Risk Management

1.5.1 G ...

- (2) The firm should also, as part of its risk management, consider the effect on its own business, including whether there are relevant risks which need mitigation. For example, firms should consider the effect of ~~regulation 8 of the Regulations~~ section 62 of the CRA which provides that an unfair term or consumer notice is not binding on the *consumer*, ~~but that the contract will continue to bind the parties if it is capable of continuing in existence without the unfair term. The mitigation may involve the firm contacting existing customers to ask that they agree to an amended contract, although any such amendment will itself need to avoid unfairness within the meaning of the Regulations and to comply with the law of contract generally.~~
- (3) ~~As part of their risk management, firms that have not themselves given an undertaking or been subject to a court decision should remain alert to undertakings or court decisions about other firms, since these will be of potential value in indicating the likely attitude of the courts, the FCA, the CMA or other qualifying bodies to similar terms or to terms with similar effects.~~

Section 67 of the CRA provides that where a term of a consumer contract is not binding on the consumer, the contract continues, so far as practicable, to have effect in every other respect. Mitigation may involve the firm contacting existing customers to ask that they agree to an amended contract, although any such amendment will itself need to avoid unfairness within the meaning of the CRA and to comply with the law of contract generally.

- (4) As part of their risk management, firms that have not given an undertaking or been subject to a court decision should remain alert to undertakings or court decisions about other firms, since these will be of potential value in indicating the likely attitude of the courts, the FCA, the CMA or other qualifying bodies to similar terms or notices or those intended to have similar effects.

1.6 Redress

- 1.6.1 G (1) ~~The FCA~~ Under the CRA, the FCA (as a regulator and an unfair contract terms enforcer) does not have the power ~~under the Regulations~~ to grant redress to *consumers* who have suffered loss because of an unfair term or notice. *Consumers* may choose to complain to the firm and to seek redress from it. If the firm does not satisfy the *consumer's* complaint, the *consumer* may choose to refer

the complaint to the *Financial Ombudsman Service*, if appropriate.

...

- (3) The FCA can use its powers under section 404 of the Act to make rules requiring authorised persons, electronic money issuers and payment service providers to establish and operate consumer redress schemes. The FCA can also impose a requirement on an authorised person, electronic money issuer and payment service provider under section 404F(7) of the Act to establish and operate a scheme that corresponds to, or is similar to, a consumer redress scheme under section 404 of the Act.

2 Unfair Contract Terms material published by the FCA

2.1 Statements of Good Practice on fairness of terms in consumer contracts

- 2.1.1 G In the Unfair Contract Terms Library <http://www.fca.org.uk/your-fca/list?types=&year=&search> (<https://small-firms.fca.org.uk/unfair-contract-terms/unfair-contract-terms-library>) you will find Notices of Undertakings, Statements, Speeches and other publications where we have set out our views on the likely application of the ~~Regulations~~ Unfair Terms Regulations and the CRA in relation to certain types of clause in standard form *consumer* contracts. We will add further publications to the Unfair Contract Terms Library as and when they are published.

After UNFCOG 2 insert the following new section. The text is not underlined.

TP1 Transitional Provisions

Transitional provisions applying to the Unfair Contract Terms and Consumer Notices
Regulatory Guide

(1)	(2) Material to which the transitional provision applies	(3)	(4) Transitional provision	(5) Transitional provision: dates in force	(6) Regulatory Guide provision: coming into force
	<i>UNFCOG</i>		<p><i>UNFCOG</i> takes effect on 1 October 2015, save to the extent described below.</p> <p>In relation to a contract entered into before 1 October 2015, <i>UNFCOG</i> should apply in the form it was in at 30 September 2015.</p>	1 October 2015	1 October 2015