

A large, stylized, semi-transparent globe is centered on the page. It has a glowing, ethereal appearance with internal circuit-like patterns and a blue-white color scheme. The globe is partially obscured by the text and a horizontal line.

Notes on FSA PS04/11 Implementation of the Distance Marketing Directive

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**Notes to summarise: FSA PS04/11
Implementation of the Distance Marketing Directive**

- This Policy Statement covers feedback on the Distance Marketing Directive (DMD) proposals following consultation on CP196
- The basic aims of the DMD are to ensure that retail customers:
 - Are given minimum specified information about a financial product or service BEFORE contracting for it; and
 - Have the right to cancel a range (although not all types) of contracts once entered into
- The scope of the DMD is limited to:
 - Financial services (i.e. “any service of a banking, credit, insurance, personal pension, investment or payment nature”);
 - Retail Customers (i.e. “any natural person who...is acting for purposes which are outside his trade, business or profession”); and
 - Where the contract is offered, negotiated or concluded EXCLUSIVELY by one or more means of distance communication under an organised distance sale or service-provision scheme (i.e. a set up designed to deliver the service or products without face to face contact with the customer)
- The DMD must be implemented by **9 October 2004**
- In order to implement articles of the DMD for the firms and activities FSA regulate changes have been made to a number of sourcebooks within the FSA handbook including: ICOB, MCOB, COB and AUTH
- As the MCOB and ICOB rules were drafted in the knowledge of the DMD requirements, these rulebooks already incorporated measures needed to implement the DMD.
- The further changes introduced are minimal – restricted to changes to the provisions in respect of ‘tacit renewals’ in ICOB (Chapter 4) and MCOB (chapter 5)
- The definition of Distance Contract which FSA have adopted in implementing their rules is derived directly from the DMD
- **DISTANCE CONTRACT DEFINITION:** *“Any contract concerning financial services, the making or performance of which constitutes or is part of a regulated activity, concluded under an organised distances sales or service provision scheme run by the contractual provider of the service who, for the purpose of that contract, makes exclusive use (directly or through an intermediary) of one or more means of distance communication up to and including the time at which the contract is concluded.”*
- In some cases the distinctions between a distance and non-distance contract are clear, for example:
 - Retail customer receives information through the post/street distribution/Press/TV/Radio/Internet advertising and then deals with the firm SOLELY by means such as post, internet, fax or ‘phone
- However, the application of the DMD in some other situations is less clear and still not settled, for example:
 - Customer picks up a leaflet in a branch and completes it (either on or away from the premises) and returns it to the branch without there being any substantive discussion about the contract with any member of the firm’s staff; or

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- Where in response to a customer's query a member of the branch's staff directs the customer to a means of distance communication such as a call centre
- **Initial service agreements and successive operations**
- There are two limitations on the need to comply with the DMD's full requirements
- Where a transaction is within the scope of an 'initial service agreement'; and
- Where there is no initial service agreement, but there is a successive operation or separate operation of the same nature as a preceding one
- Firms will not necessarily have to make the disclosures and apply new cancellation rights each time they provide a service to an existing retail customer. E.g. a firm offering a current account would not be entering into a new distance contract each time the customer signed a cheque nor would it each time it moved a customer's units from one fund to another
- This is because the DMD states that where services are provided under an initial service agreement, its provisions only apply to that initial service agreement, and not to services subsequently provided under that agreement
- **Retail Customer**
- Some respondents to CP196 raised concerns at the definition of retail customer saying that this would exclude from DMD protection persons acting on behalf of small organisations, such as small clubs; or those acting as trustees
- FSA have not altered their position but have clarified that:-
 - Someone acting as a trustee of a family trust would be considered a retail customer
 - Someone acting as trustee for a housing trust or a member of a governing body of a small club would not be a retail customer
- **Workplace Contracts**
- Where, for example, an IFA provides a seminar to a group of employees and gives them packs to fill in, any resulting contract would likely not be a distance contract – as it has not been entered into using exclusively distance means of communication
- Conversely, if an employer were to make the same information packs available to employees, any resulting contract would be a distance contract and would have to meet DMD requirements regarding disclosure and cancellation rights
- **Joint Contracts**
- Some asked whether if in the face to face contact only one of a joint pair of account or policyholders were present would lead to the contract being a distance one (as one party has not had the face to face contact.) FSA view is that as in such instances there is a single contract and that contract has not been entered into exclusively by distance means, it would not be a distance contract
- **Introducers/Intermediaries**
- Where an IFA (for example) introduces a customer to a broker, and there has been face to face contact with the IFA but not with the broker: there are two distinct services, one of introducing and the other of broking. If

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there is no simultaneous physical presence between the consumer and the broker there will be a distance contract between them

- *Presumably there is an implication here that if in a larger organisation a branch “introduces” a customer to, for example, a call centre elsewhere within the organisation (or acting as an administrator on behalf of the organisation) – although there may be face to face contact with the branch staff member doing the introducing and only distance contact with the call centre staff doing the advising/arranging – the contract would not be a distance contract – This appears consistent with the way that both the ICOB rules and the DMD are drafted. Neither refers to the contract merely being “concluded” at a distance – if at any point in the sale process there is face to face contact the sale is not a distance one.*
- **Direct Offer Promotions**
- Basically, the DMD aims to ensure the retail customer is given access to suitably comprehensive information about a financial product or service ‘in good time before’ they are bound by the contract
- To this end where a firm makes any direct offer to a customer on or after 9 October 2004 that offer should include, in durable medium, all of the information required by the DMD
- This is because a direct offer financial promotion allows the customer to contract with the firm solely on the basis of the information contained within that offer (it must, therefore, also include full terms and conditions, etc.)
- In response to concerns raised at consultation, FSA has agreed that it will be for the firm to decide whether to include all of this information within the direct offer pack, or to meet the DMD requirements to provide this information in full and in durable medium before conclusion of the contract by some other means
- **Cancellation**
- The DMD requires rights of withdrawal (cancellation rights) to be provided for distance contracts for certain services.
- These cancellation rights have been incorporated into the ICOB rules already and these rules will take effect from 14 January 2005
- Cancellation periods are basically 14 days for general insurances and 30 days for pure protection contracts
- Where the contract is a distance contract the DMD requires firms to incorporate these cancellation rights, and appropriate communication of them both before and after conclusion of the contract, to all contracts concluding on or after 9 October 2004
- **Tacit Renewals**
- ICOB 4.7 provided rulings on how certain ‘unsolicited services’ were to be handled, including the annual ‘tacit renewal’ of general insurance contracts – which would not be allowed to continue without express consent of the customer, or a contractual right.
- Following industry feedback to the effect that, as this practice has been happening for a number of years without explicit consent, this change could be seen leading to consumer detriment as they could find their cover lapsing unintentionally – leaving them unprotected in the event of a claim

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- In the light of this, and as tacit renewals are actually referenced as exempt from the unsolicited services requirements within the DMD itself – ICOB 4.7 has now been amended to delete all references to tacit renewals.
- This means that firms will not now be prevented by ICOB from tacitly renewing insurance contracts on the same basis that they do now
- **Application of DMD requirements from 9 October 2004**
- **WHEN**
- DMD applies when a financial services contract is offered, negotiated and concluded with a retail customer using exclusively distance means of communication
- **WHAT**
- The DMD applies to all financial services 'of a banking, credit, insurance, personal pension, investment or payment nature' provided to retail customers
- Where the DMD regulations impact on FSA regulated activities, FSA are implementing them through changes to the handbook.
- It should be noted that some DMD requirements may impact on non-FSA regulated areas – e.g. there are changes to some consumer credit provisions. These will be implemented by the DTI/OFT through changes to the consumer credit provisions.
- Additionally there are some financial services which are not regulated by either the FSA or the DTI/OFT – these are subject to HMT's regulations implementing the DMD and will be enforced either by the FSA or the OFT.
- **WHOM**
- Only distance contracts with RETAIL CUSTOMERS are impacted by the DMD
- **WHERE**
- The DMD has been implemented by FSA on a country of origin basis. In simple terms this means it applies to firms that enter into distance contracts from a branch or head office based in the UK

- **COB**
- Much of PS04/11 concentrates on implementing the DMD through COB – the Conduct of Business rules already in place to enable the FSA to regulate investment business
- Within PS04/11 Appendix 1, Annex A (pages 3-76) deals exclusively with amendments to COB to implement the DMD for investment business
- This summary paper is aimed more at identifying the impacts of the DMD on the mortgage, general insurance and pure protection business
- The DMD is implemented for these sectors primarily by the ICOB and MCOB rules, through which FSA will regulate the general insurance/pure protection and mortgage sectors respectively
- PS04/11 does include references to changes to ICOB and MCOB but, as these sourcebooks were drafted much more recently than COB, much of the DMD was already taken into account in their initial drafting and only more recent clarifications/amendments have resulted in changes to these sourcebooks as already drafted

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- **ICOB**
- Annex B to Appendix 1 (pages 77-79) looks at amendments to ICOB in respect of general insurance and pure protection
- The only ICOB rules amended here are ICOB 4.7.1R to ICOB 4.7.3G and ICOB 8.4.1R to 8.4.3G relating to the removal of 'tacit renewals' from the unsolicited services regulations as described above

- **MCOB**
- Annex C to Appendix 1 (page 80) looks at amendments to MCOB in respect of mortgage business
- The only MCOB rules amended here are MCOB 4.5.4R and 4.5.5R
- Again these amendments remove 'tacit renewals' from the mortgage rules on unsolicited services

- **DMD Requirements before ICOB takes effect**
- In drafting the ICOB rules, FSA sought to regulate the general insurance and pure protection markets and to implement certain European Directives, principally the Insurance Mediation Directive (IMD) and the Distance Marketing Directive (DMD)
- The deadline for the UK to implement the IMD is 14 January 2005 and this is the date when the ICOB rules take effect
- However, the deadline for the UK to implement the DMD regulations is 9 October 2004 – a little over 3 months before the ICOB rules take full effect
- This leaves a gap from 9 October to 13 January during which general insurance intermediaries need to be complying with the DMD requirements but before they need to (and in some respects are permitted to) comply fully with ICOB
- Appendix 1 to PS04/11 also includes the Distance Marketing Directive Instrument 2004
- This explains that the amendments to MCOB take effect 31/10/04; the amendments to ICOB take effect 14/1/05 and the other amendments (i.e. to COB; MAR; AUTH; CRED; ECO; PROF and ELM) take effect 9/10/04
- Clearly firms which are regulated by the FSA are required to comply with all relevant handbook sourcebooks from their effective dates
- But firms exclusively involved in mortgage, general insurance and pure protection intermediation business would, at present, not consider themselves to be regulated by the FSA and therefore run the risk of failing to comply with COB, AUTH, etc. until such time as they do become fully regulated (October or January)
- If a firm were to comply with ICOB and/or MCOB from 9 October 2004 – it could be reasonably confident that it was also complying with the DMD requirements
- However, some elements of ICOB and MCOB have a time bound start date – e.g. surrounding the use of keyfacts logos, confirming that they are regulated by the FSA, etc. which mean the rules cannot be complied with in full from 9 October
- This leaves a potential issue for such firms – in understanding what they must do to comply with DMD requirements during that gap period from 9 October to when the FSA rules kick in

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- In PS04/11 FSA advises that this gap regulation is to be handled by HMT regulations – but although these were consulted on by HMT during 2003 – the regulations have not yet been made public
- As there are a number of requirements of DMD which may fall within this gap, there is a risk that, with the HMT regulations still not available, firms may struggle to implement them in time for 9 October 2004

- **How can firms bridge the “gap”**
- Whilst it is not possible to predict exactly what the HMT regulations will say, or how prescriptive they might be, there are some issues firms could consider now which may help
- Identify which products/services/processes will lead to “Distance Contracts” with Retail Customers
- Remember only “Distance Contracts” with Retail Customers are subject to the DMD requirements, so broadly speaking, if the offering, negotiation or conclusion of the financial services contract includes some face to face presence – that contract will not be required to meet the DMD regulations by 9 October 2004
- Having identified those cases which will need to meet the DMD regulations on 9 October, firms will then need to look at what they will need to do to ensure their compliance
 - **Status disclosure/initial disclosure** (using something akin to the FSA IDD in durable medium on all distance contracts from 9/10/04 would fulfil these requirements) – *DMD Article 3*
 - **Statement of Price** (providing the information that the FSA statement of price will require, in durable medium, before conclusion of all distance contracts on or after 9/10/04 would satisfy these requirements) – *DMD Article 3*
 - **Terms and conditions** (to satisfy the DMD, where the contract is a distance contract the terms and conditions must be provided in full to the customer BEFORE conclusion of the contract on or after 9/10/04) – *DMD Article 5*
 - **Cancellation rights** (this could be more problematic as it will be reliant on co-operation from the insurer/provider to give the necessary cancellation rights on all distance contracts concluded on or after 9/10/04) – *DMD Article 6*
 - **Law applicable** (This should already be provided to the customer before conclusion of the contract in order to satisfy other directive requirements, so is unlikely to present a problem to most firms) – *DMD Article 3*
 - **Complaints procedures** (again, existing directives already require this information to be provided to the customer prior to conclusion – so this requirement should already be being satisfied) – *DMD Article 3*
 - **Unsolicited Communications** – this regulation within the DMD will mean a supplier/firm cannot contact a consumer by fax or by using an automatic calling machine without the consumer’s prior consent – *DMD Article 7*