

# Prevention and cure in a market downturn

## Managing risks from customer documentation and relationships

### Requirement of fairness

One of the areas that our financial services clients tell us is of current concern to them is how to manage potential weaknesses in their customer documentation and the problems that stem from those weaknesses. There are two main aspects to this:

- identifying those terms in agreements which may not stand up to challenge, either from the FSA, or from customers when the business seeks to rely on them; and
- how to prevent or, if unavoidable, handle, the fallout from these issues.

On 22 January 2009, the FSA obtained an undertaking from The On-Line Partnership Limited to amend one of its key clauses in its 2007 terms of business for customers – *"I confirm that I have received, read and understood this agreement and agree to the terms set out within"* – which was held to be unfair. This is just the latest in a series of undertakings sought and demonstrates that unfair documentation will not be tolerated.

### Increasing risks

These issues are particularly topical now, given:

- the FSA's renewed vigour to bring enforcement action against firms whose documentation fails to comply with the TCF standard (especially now that the December 2008 'implementation' deadline has passed);
- the FSA's decision to bring forward its incorporation of TCF into its core supervisory work from September to January 2009;
- with 'consumers', the equally (if not more) serious possibility that terms of business could be rendered unenforceable under the Unfair Terms in Consumer Contract Regulations 1999, which the FSA is also treating as a priority;
- in falling markets, customers are looking for imaginative ways of complaining (about bad advice, products or service) or avoiding their obligations; and
- complaint handling itself is also embedded now within TCF and a business' entire approach to dispute handling and compensation must be informed by those principles. When the volume of complaints or threatened claims against a firm reaches a certain critical mass, this may also be evidence of a systemic problem within that firm, which brings with it the added considerations of proactive reviews and redress, disclosure and explanation to the FSA.

### What firms should be considering

These risks are most relevant to firms with individual (or small business) customers such as private banks, wealth managers and advisers, packaged product providers/distributors, insurers and insurance intermediaries.

Key areas are likely to include:

- How fair is your documentation and disclaimers? Are there important terms or disclaimers in your agreements that might be considered "unreasonable", and therefore not binding on your customer?
- How effective are you at avoiding disputes with clients in the first place? Is there more you could do?
- Once you do have customer issues or disputes, could you handle them more effectively and reduce the risks of challenge on your documentation?
- What does TCF actually mean in the context of a particular set of facts? How does TCF impact upon the effectiveness of your disclaimers?
- What status does a rule breach have and does it automatically mean redress must be offered?
- When can you distinguish between different types of customer complaints, as opposed to treating them all the same?
- What is the safest way to prepare internal investigation reports and take advantage of legal privilege, avoid admissions of liability and obtain a customer's full waiver of rights if they accept redress?

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**How we can help**

Our team at Taylor Wessing which specialises in this area can add true value for clients because of the industry experience of its key practitioners. We have between us almost 10 years of in-house experience, across a range of financial services business (particularly the private wealth management industry) and the Bank of England. We know the types of challenges that legal and compliance teams face, how to assist you to work with your internal clients and the need for rapid, practical advice. We do not underestimate the impact of business culture on conduct and risk.

We also have substantial experience of defending financial services businesses against complaints and claims by their customers and guiding clients along the tightrope between complying with regulatory obligations and protecting and defending the business' interests.

We would welcome the opportunity to meet with you to discuss these areas and should it be of interest, we could then make a training presentation to your legal and/or compliance teams. We would not charge for this initial meeting or subsequent training session. We propose following up this document to establish whether our services would be of benefit to you. In the meantime, if you would like to discuss any of these issues with us, or arrange for a presentation, please feel free to contact any of the partners listed here.

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