

Bulletin

Banking Code Standards Board

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TO BANKING CODE AND BUSINESS BANKING CODE
COMPLIANCE OFFICERS

No.16

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We are issuing this Bulletin primarily to advise you of changes to how the Distance Marketing Directive (DMD) is expected to be handled for Code subscribers. Also in connection with the DMD, we include notice of a Rule change and a waiver of a Code provision.

Bold type in the Contents indicates items on which you may need to take specific action.

1. CODE DEVELOPMENTS

(i) 2004 Independent Review of the Codes

We gather that Elaine Kempson's discussion of her recommendations with the Code sponsors is likely to continue for a while, so that publication of her report and the industry response will not be before mid-October.

We are still banking on there being sufficient detail to hand in time for us to have some productive discussions with Compliance Officers on implementation of the 2005 Codes at our series of roadshow seminars starting on 21 October.

(ii) Distance Marketing Directive

We set out what was the latest position in BCSB Bulletin No.15 on 26 July. Since then, HM Treasury has published its Summary of Consultation Feedback & Government Response, which is on the Treasury website at:

http://www.hm-treasury.gov.uk/media/B37/A8/Implementation_dmd.pdf

HM Treasury has announced that the commencement date for the overarching *Financial Services (Distance Marketing) Regulations 2004* (Statutory Instrument 2004 No.2095) will be 31 October 2004. This is subject to transitional arrangements for prior information on distance contracts relating to consumer credit made before 31 May 2005, the date on which the *Consumer Credit (Disclosure of Information) Regulations 2004* (SI 2004 No.1481) come into effect. Guidance on the DMD is on the DTI website at:

<http://www.dti.gov.uk/ccp/topics1/guide/dmdguide.pdf>

CONTENTS

Page

1. BANKING CODE DEVELOPMENTS	1
(i) 2004 Independent Review of the Codes	1
(ii) Distance Marketing Directive	1
2. COMPLIANCE MONITORING & ENFORCEMENT TOPICS	
(i) Notice of Banking Code Rule change	2
(ii) Limited waiver of Banking Code paragraph 6.5	2
3. BCSB NEWS	2
New Subscriber	2

APPENDIX: Amendment to the Banking Code Rules

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In this Bulletin we focus on the impact of the DMD on deposit taking – savings and current accounts other than overdrafts, ie the areas for which the FSA is the relevant regulator, rather than DTI/OFT.

Since the publication of Bulletin No.15, there have been further discussions with the FSA and we now expect that the approach will change somewhat.

Instead of transposing the FSA Rules into the Code/Guidance, with accompanying exemptions from the FSA Rules for Code subscribers, the latest thinking is that the FSA Rules should after all stay 'switched on' with direct application to subscribers. This was always going to be the case for those few deposit takers that are not covered by the Codes. Amongst various arguments in favour of this course, it deals with a mismatch in territorial jurisdiction between the Code, which is restricted to the UK in its specific provisions, and the

DMD, which covers business with customers in any European Economic Area state.

It is still planned that the key tenets of the DMD will be reflected in the Banking Code: an analogy is the current inclusion in the Code of information on the complaint handling obligations of subscribers, which are derived from the FSA Rules.

In determining precise DMD obligations, we along with Code subscribers will have to work direct from the FSA handbook, rather than from an extract, filtered to cover just Code-related products and services, in the Code or Guidance for Subscribers.

Discussions on the arrangements between us and the FSA, under which we will monitor compliance with DMD requirements alongside Code compliance, are continuing largely unaffected by the changed approach. The Banking Code Rule change announced at item 2.(i) below is to open a gateway for providing information to the FSA to facilitate this co-regulatory approach.

The FSA has confirmed the revised approach in paragraph 3.14 of Handbook Notice 36, on its website at:

http://www.fsa.gov.uk/pubs/handbook/hb_notice36.pdf

We would draw attention to paragraphs 3.9 and 3.10 of Handbook Notice 36, commenting on the guidance the FSA has just published. These note that, where a customer picks up a leaflet in a branch and completes and returns it without there being a substantive discussion with a member of staff, or where, in response to a customer query a member of branch staff directs the customer to a means of distance communication such as a call centre, in neither case will there be a 'distance contract' under the FSA rules, although this will depend on the specific characteristics of the subscriber's business process. We understand this conclusion to reflect the fact that in these two scenarios there has not been exclusive use of distance communication.

This will help avoid branch-based business being drawn unintentionally into compliance with DMD requirements. However, we have to add that, where a subscriber markets products by means which can be used to conclude contracts without any 'simultaneous physical presence', then the arrangements must be designed to comply fully with DMD requirements when such distance sales are made.

2. COMPLIANCE MONITORING AND ENFORCEMENT TOPICS

(i) Notice of Banking Code Rule change

As mentioned above in item 1.(ii), we give notice of an amendment to the Banking Code Rules made by our Board of Directors. The Associations, as sponsors of the Banking Code, have agreed to the change, following consultation with their members.

The amendment, with changes 'tracked', is set out in the Appendix to this Bulletin and comes into effect on 31 October 2004. The prime reason for the change is to allow provision of information to the FSA in respect of DMD obligations. The opportunity is also being taken to include cash ISA requirements, which are already in place but have not previously been the subject of formal arrangements between us and the FSA, and also to clarify what we can do by way of notifying another regulator in the event of serious concerns about a subscriber.

Please place a copy of the Appendix with all paper copies of the Banking Code Rules that you hold. We will amend the text of the Rules on our website when the amendment takes effect.

(ii) Limited waiver of Banking Code paragraph 6.5

Many subscribers are expected to have to revise their terms and conditions (Ts & Cs) purely to achieve technical compliance with the FSA's DMD rules and to introduce the correct terminology.

The BCSB Board has agreed that there should be a dispensation, limited to changes in Ts & Cs needed purely to achieve DMD compliance, from the requirement in Code paragraph 6.5 to tell customers about a change within 30 days of it being made.

It remains the requirement, under Code paragraph 6.6, that if a lot of other minor changes, or a major change, in Ts & Cs is made within a year, then customers will anyway receive a new set of Ts & Cs, or a summary of changes.

3. BCSB NEWS

New subscriber

The Board has approved the application of Capital One Bank Europe plc, whom we are pleased to welcome as a subscriber to the Banking Code.

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APPENDIX TO BCSB BULLETIN NO.16, 23 SEPTEMBER 2004

Banking Code Standards Board

AMENDMENT TO THE BANKING CODE RULES (May 2003 edition)

Existing Banking Code Rules 5.3 and 5.4

- 5.3 The BCSB agrees that it shall not, save as required by law, at any time after the execution of these Rules divulge any information in relation to the affairs or business or method of carrying on business of the Subscriber which it knows at the time to be confidential and which it has learnt as a result of its dealings with that Subscriber; save that the BCSB may notify any governmental organisation or body whose principal purpose is regulation (including self-regulation) of concerns that it has about a Subscriber and, with the consent of the relevant Subscriber, divulge to any of these bodies information in the possession of the BCSB regarding that Subscriber.
- 5.4 The provisions of this clause shall be subject to any overriding duty of confidentiality of the Subscriber to its customers.

Revised Banking Code Rule 5.3 and new Rule 5.4

To come into effect on 31 October 2004

- 5.3 The BCSB agrees that it shall not, save as required by law or as permitted in accordance with paragraph 5.4 below, at any time after the execution of these Rules divulge any information in relation to the affairs or business or method of carrying on business of the Subscriber which it knows at the time to be confidential and which it has learnt as a result of its dealings with that Subscriber; save that the BCSB may notify-identify to any governmental organisation or body whose principal purpose is regulation (including self-regulation) of concerns that it has about a Subscriber about which it has serious concerns. and The BCSB may, with the consent of the-relevant that Subscriber, divulge to any of these bodies information in the possession of the BCSB regarding that Subscriber.
- 5.4 The BCSB may divulge to the Financial Services Authority information about any Subscriber, without consent but subject to notification to the Subscriber concerned, in relation to obligations in the FSA Handbook or under HM Treasury regulations reflecting the requirements of the EU Distance Marketing Directive and in respect of cash deposit ISAs.
- 5.5 [Re-numbered paragraph 5.4 – text unchanged]
The provisions of this clause shall be subject to any overriding duty of confidentiality of the Subscriber to its customers.