

Undertaking

Introduction

As a qualifying body under the Unfair Terms in Consumer Contracts Regulations 1999 (the Regulations) we, the Financial Services Authority (FSA), can challenge firms that are using terms which we view as unfair. We review contract terms referred to us by, among others, consumers, enforcement bodies and consumer organisations. This has led to A.P. Financial Services UK Limited undertaking not to use certain terms that we consider are unfair.

Under the Regulations we must notify the Office of Fair Trading (OFT) of the undertakings we receive. The OFT has a duty to publish details of these undertakings and they appear on its Consumer Regulation website. We also publish details on our website. Both publications will name the firm, identify the specific terms and explain why we think they are unfair under the Regulations.

Even if firms have not given an undertaking or been subject to a court decision under the Regulations, they should remain alert to undertakings or court decisions concerning other firms as part of their risk management. These could give an indication of the view that the courts, the FSA, the OFT or other qualifying bodies may take of similar terms or terms with a similar effect. However, ultimately only a court can determine the fairness of a term and therefore we do not recommend as being definitively fair terms that have been revised by a firm to address our concerns. The FSA cannot approve terms for the purposes of the Regulations; it is for firms to make an assessment of the fairness of their terms and conditions under the Regulations and in the context of the product or service in question. It is important to bear in mind that wording that is fair in one particular agreement is not necessarily fair in another. Where we accept an undertaking from a firm to revise a term this means that, on the evidence available at the time, we consider the term to be sufficiently improved to require no further regulatory action by the FSA.

A.P. Financial Services UK Ltd undertaking in relation to its Terms of Business Letter for Mortgage and Insurance

Name of business	A.P. Financial Services UK Limited	Lead organisation	FSA
Trading sector	Retail Intermediaries	Contract identifier	Terms of Business Letter for Mortgage and Insurance
Original term			
<u>'Remuneration'</u>			
We derive income from commission paid to us in respect of transactions in Life Assurance, PEP/ISA, Unit Trusts and other Regulated Collective Investment Schemes and in Investment Trust Companies' shares held in a PEP/ISA or regular savings scheme. We shall tell you the amount and the frequency of commission payable to us on any such investment.			
If we receive commission or other form of benefit from the issuer of a security or from another			

intermediary, we will inform you but we will not tell you its amount unless you ask us to do so. We reserve the right to share any commission or fees received by us with other introducing agents.

Alternatively, if you or we propose to operate on a fee basis, we will agree its basis, frequency and method with you in writing before we carry out any chargeable work. Should we receive commission from any third party in relation to transactions arranged for you, we will offset the amount received against any fees due.

If we arrange for you to effect a life policy from which we receive commission and **subsequently you cease to pay premiums** which results in us refunding the commission which has been paid to us **we reserve the right to charge you a fee** to recompense us for the time spent in advising you and arranging the policy.

We shall not charge any fee if you exercise your right to cancel the policy in accordance with the cancellation notice sent to you by the product provider.'

Application of the Regulations (Schedule 2 paragraph or as indicated)

Generally, a term is deemed to be unfair under Regulation 5 of the Regulations if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer.

We were concerned that the term could be unfair under the Regulations as it does not clearly state the amount that the consumer can expect to be charged as a fee if they stop paying premiums and the firm has to refund its commission. Furthermore, the period of time within which this fee can be reclaimed from the consumer is not made clear. In our view the term, 'contrary to the requirement of good faith', caused a 'significant imbalance in the parties' rights and obligations under the contract' because it did not make clear the amount the firm could reclaim from the consumer or the timeframe in which the firm could reclaim this amount. Therefore we were concerned the term gave too much discretion to the firm in deciding what amount could be reclaimed and when to reclaim it. This meant that, in our view, the term was capable of operating 'to the detriment of the consumer' because the firm could use it to impose a charge in respect of which the consumer could not reasonably have known either the amount or the relevant timeframe.

How the term has changed

The firm recognised the term could be unfair and agreed to clarify the circumstances in which it would seek to reclaim commission from a consumer. The firm therefore amended its Terms of Business Letter to include a new term relating to remuneration and opted to provide more detailed information to each individual at the time of sale in a separate suitability letter.

We are satisfied that the new term makes it clear to consumers that they will be charged a fee if they stop paying premiums and, as a result, the firm has to refund its commission to the provider. We think it is acceptable for the term to provide that the exact amount and timeframe of the potential fee will be detailed in the consumer's suitability letter.

New term

Remuneration

When we derive income from commission or procurement fees paid to us in respect of transactions in mortgages, life assurance or other general insurance products we will inform you of the amount and the frequency of any amounts payable to us.

Alternatively if you wish or we propose to operate on a fee basis we will agree its basis,

frequency and method with you in writing before we carry out any chargeable work. Should we receive commission from any third party in relation to a transaction arranged for you we will offset the amount received against any fees due.

If we arrange for you a life policy from which we receive initial commission and subsequently you cease to pay premiums which results in us refunding the commission which has been paid to us, we reserve the right to recover from you an amount equal to the amount we have had to refund. The amount recoverable and the timeframe over which it is recoverable are dependent on the product chosen. Further details of the amount and timeframe will be notified to you prior to the conclusion of the contract in the suitability letter we will send you.'

Other information

The firm has agreed not to rely on the original term in contracts with existing customers.

Under the proposed changes in the Retail Distribution Review (RDR), from the end of 2012 product providers will be banned from offering commission to Independent Financial Advisors and other retail intermediaries. Therefore the practice of commission clawback will no longer be permitted for new business after this date. However we note firms may continue to operate on a commission basis until the implementation of the RDR and therefore some consumers may remain subject to similar commission clawback terms. We encourage all such firms to consider the fairness of their terms in line with this undertaking.

The firm was fully co-operative in agreeing to provide this undertaking.

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