Questions and answers to support consumer credit consultation

Scope and overview

Q - What are regulated consumer credit activities?

A - Regulated consumer credit activities are set out in Part 2 or 3A of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO) and are also listed in the definition of “credit related activities” in the SRA Glossary. These include activities such as entering into a regulated credit agreement as lender, credit broking, debt adjusting, debt counselling, debt collecting, debt administration, providing credit information services and providing credit references.

Q - In what circumstances can an SRA-authorised firm carry out regulated consumer credit activities?

A - An SRA-authorised firm will only be able to carry out regulated consumer credit activities if:

1. the firm is authorised by the FCA to carry out these activities by either full FCA authorisation or having been granted interim permission; or

2. the consumer credit activity is an exempt regulated activity under Part 20 of FSMA - which allows regulated activities to be carried on by firms authorised by a Designated Professional Body (DPB) (such as the SRA) without separate FCA authorisation.

Q - What conditions have to be satisfied in order to rely on Part 20?

A - Part 20 of FSMA sets out a number of conditions that must be met for a regulated activity to be exempt (see sections 327 and 332(4) of FSMA). These include the following:

1. the activity arises out of, or is complementary to, the provision of a particular professional service to a particular client;
2. the manner of the provision by the firm of any service in the course of carrying on the activities is incidental to the provision by the firm of professional services;
3. the firm accounts to the client for any pecuniary reward or other advantage which the firm receives from a 3rd party; and
4. the firm does not carry on any FSMA regulated activities other than those permitted under Part 20 or where the firm is an exempt person.

Q - Are the services being provided in an "incidental manner"

A – The "incidental manner" condition (see above) is one of the conditions that must be satisfied for a firm to be able to benefit from the exemption in Part 20 which allows regulated activities to be carried on by firms authorised by a DPB (such as the SRA).

The FCA has stated in its Professional Firms Sourcebook at PROF 2.1.15 that in order to satisfy this condition in section 327(4) of FSMA regulated activities cannot be a major part of the practice of the firm. The FCA also considers the following further factors to be among those that are relevant:

1. the scale of regulated activity in proportion to other professional services provided;
2. whether and to what extent activities that are regulated activities are held out as separate services; and;
3. the impression given of how the firm provides regulated activities, for example through its advertising or other promotions of its services.

Therefore, it is unlikely that a firm which undertakes a regulated consumer credit activity, such as debt collecting, as a major part of their practice, would be able to satisfy the "incidental manner" condition in which case it would need to be authorised by the FCA.

Prohibitions and restrictions in paragraphs 10 and 11 of this consultation

Q - What is a regulated credit agreement?

A - A regulated credit agreement is an agreement between a "relevant recipient of credit" or an individual (the borrower) and any other person (the lender) by which the lender provides the borrower with credit of any amount. A regulated credit agreement means any credit agreement which is not within the categories of exempt agreements. An example of an exempt agreement includes where the number of repayments to be made by a borrower is twelve or less, made over a period of 12 months or less and without interest or other charges.

See article 60B and 60C to 60H of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 for further detail.

Q - Will the restriction relating to 'pawn broking' impact on circumstances when a lien is exercised over client files/assets?

A - The proposed restrictions would not prevent a firm from exercising a lien over a client's files or assets. The proposed restriction refers to "taking any article from the client in pledge or pawn as security for the transaction", this therefore deals with taking something as security *for the transaction* rather than keeping possession of a client's files/assets until a debt owed by the client is paid.

Q - Are conditional fee agreements, and the use of, impacted in any way?

A - No, the use of conditional fee agreements are governed by legislation and rules which are unrelated to regulated credit agreements.

Q - Is the holding of a continuous payment authority prohibited absolutely or only when used in relation to a regulated credit agreement?

A - The prohibition will apply only in relation to regulated credit agreements. Where, for example, the firm has authority to make payments out of a client account under a Power of Attorney these arrangements will not be affected as they do not relate to a regulated credit agreement.

Q - When acting as lender under a regulated credit agreement which relates to the payment of disbursements or professional fees can the firm charge the client a variable rate of interest?

A - No, under the proposed restrictions a firm must not act as lender under a regulated credit agreement which includes a variable rate of interest. This includes fixing your interest rate by reference to a rate, such as the Bank of England base rate, which will itself vary over time.

Q - Will the use of a Sears Tooth agreements, which in effect provides for security for a credit arrangement concerning fees, be allowed under the proposed regulatory arrangements?

A - The proposals allow a firm to enter into a regulated credit agreement as lender where the regulated credit agreement relates to the payment of disbursements or professional fees. Therefore, firms should be able to use Sears Tooth agreements provided that they comply with any relevant restrictions including, for example, the restriction that the credit must not be secured on land by a legal or equitable mortgage.

Q - Is a loan to a business partner to buy into a partnership included in the scope of the proposed prohibitions?

A - An activity is not a regulated consumer credit activity unless it is “carried on by way of business” (section 22(1A) of FSMA), therefore, activities such as brokering partnership loans are unlikely to fall within this definition as this activity is not pursued as a business in its own right.

You can also access questions and answers published previously in relation to consumer credit activities.