Guidance

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Who should read this guidance?

This guidance is relevant to SRA-authorised firms involved in credit-related regulated activities carried out under Part 20 of the Financial Services and Markets Act 2000 (FSMA).

Part 20 allows SRA-authorised firms to carry on credit-related regulated activities without need for separate authorisation by the Financial Conduct Authority (FCA). An SRA-authorised firm that is also authorised by the FCA in relation to any activity cannot benefit from Part 20 and must obtain the appropriate FCA permissions to undertake credit-related regulated activities.

Scope of regulation

The scope of the credit-related regulated activities that SRA-authorised firms are permitted to carry on under Part 20 is set out in the SRA Financial Services (Scope) Rules (Scope Rules [https://qltt.sra.org.uk/solicitors/standards-regulations/financial-services-scope-rules/]) and the activities that are credit-related regulated activities are defined in the SRA Glossary. You need to be aware that a breach of any of the Scope Rules, including undertaking regulated activities that are only allowed to be carried on by FCA-authorised firms, may be a criminal offence under FSMA.

You are also reminded that you may make financial promotions only if the financial promotion has been approved by an FCA-authorised person. You are still able to make exempt financial promotions without requiring the approval of an FCA-authorised person; these are financial promotions which are exempt under the Financial Promotions Order [1][#n1] .

What regulatory arrangements apply?

You must, at all times, ensure compliance with the SRA Principles [https://qltt.sra.org.uk/solicitors/standards-regulations/principles/] , the SRA Code of

Conduct for Solicitors, RELs and RFLs (Code for Solicitors) [https://qltt.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/] and the SRA Code of Conduct for Firms (Code for Firms) [https://qltt.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/] .

In addition, when carrying on credit-related regulated activities, you must comply with the SRA Financial Services (Conduct of Business) [https://qltt.sra.org.uk/solicitors/standards-regulations/financial-services-conduct-business-rules/] Rules (COB Rules), and in particular Part 4 of the COB Rules.

This formal guidance forms part of our regulatory arrangements relating to credit-related regulated activities and explains how the SRA Standards and Regulations apply specifically to these activities. It also sets out examples of behaviours that will be expected of you when carrying on such activities.

The guidance reflects many of the FCA's rules which apply to FCA authorised firms engaged in credit-related regulated activities.

You must have regard to this guidance when carrying on credit-related regulated activities. Failing to have regard to this guidance is a breach of the COB Rules and may indicate an issue of concern for investigation. We will take it into account when considering whether there has been a breach of our rules and whether any such breach requires us to take regulatory action.

This guidance does not set out an exhaustive list of all regulatory issues which might arise in this context, nor is it a substitute for the provisions of the SRA Standards and Regulations. It is your responsibility to ensure full compliance with the SRA Standards and Regulations at all times.

How is this guidance structured?

The guidance is organised into three sections and poses questions along the way that you will need to consider if you are involved in, or considering becoming involved in, the carrying on of credit-related regulated activities under Part 20.

Section 1 covers general behaviours that you must demonstrate (or avoid) when you undertake credit-related regulated activities—particularly focusing on the need to ensure that your client's expectations are managed and that you act in their best interests.

Section 2 relates to behaviours that will be expected of you if you offer debt advice services which could include debt counselling or debt adjusting or providing credit information services.

Section 3 reflects key behaviours and the need for you to have clear and effective policies and procedures when engaged in debt recovery work or dealing with debtors who may lack mental capacity.

Section 1 – Consumer credit and our expectations of you

Do I have the required competency to act?

Paragraph 3 of the Code for solicitors sets out the standards we expect in relation to service and competence. Paragraph 3.3 requires you to ensure that the services you provide to clients are competent and delivered in a timely manner and paragraph 3.4 sets out that you take account of your client's attributes, needs and circumstances.

When acting on behalf of a client in respect of a credit-related regulated activity you should take steps to establish:

- the client's needs and circumstances; and,
- where appropriate their financial situation;

so that the potential impacts of a recommended course of action can be properly considered.

If you are dealing with a client or a third party in a different jurisdiction, you should take into account any differences in law and court procedure that may have an impact on their rights.

Are my client's expectations being managed?

Paragraphs 1.1 and 1.2 of the Code for Solicitors requires you to ensure that clients are treated fairly and Principle 7 requires you to act in the best interests of your clients.

When carrying on credit-related regulated activities you should ensure that you are in full agreement with your client as to the nature, scope and terms of the credit-related regulated activities which are or may be carried on and that you maintain a record of this agreement.

Paragraph 8.7 of the Code for Solicitors requires you to ensure that clients receive the best possible information, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of their matter.

Behaviours that are likely to demonstrate that your client's interests have been protected and that they have been treated fairly include (but are not limited to):

- not putting the client under pressure to accept terms of engagement that may not be in accordance with the client's wishes;
- setting out clearly and at an early stage the nature and cost of the services you provide and, where applicable, the identity of, and your relationship with, any relevant third party;

- where you charge different rates for professional services or any exempt credit-related regulated activities, this should be made clear to the client;
- not taking advantage of a client's lack of knowledge;
- bringing to the attention of the client how you will use his/her personal data and who that information might be shared with (in accordance with the General Data Protection Regulation); and
- setting out details of any relevant cancellation rights that may apply.

Am I acting in the best interests of my client?

Principle 7 [https://qltt.sra.org.uk/solicitors/standards-regulations/principles/] requires you to act in the best interests of your client. When advising a client you should always treat your clients fairly (paragraphs 1.1 and 1.2 of the Code for Solicitors). We would expect you to act in good faith and do your best for each of your clients.

When assessing your compliance with Principle 7 and t the Code for Solicitors you may need to consider a range of factors, including whether you

- identified whether the client was vulnerable and dealt with vulnerable clients appropriately (see also SRA Risk Outlook [https://qltt.sra.org.uk/archive/risk/risk-outlook/]);
- considered whether the client had the mental capacity to understand, remember and consider relevant information to make relevant decisions;
- considered whether the particular course of action was suitable for the client's needs and circumstances, including, where applicable, the client's financial position and ability to pay;
- provided sufficient information and explanations about all options available to the client, and how they operate and the reasons why a particular option is the most suitable for the client;
- made the client aware of the possible consequences and risks associated with an option;
- kept under review the operation and effectiveness of the chosen option and kept the client appropriately informed (when instructed on an on-going basis);
- ensured that you did not unfairly encourage, incentivise, induce or pressurise a client to make a decision without giving the client the time to consider the options (see also SRA guidance [https://qltt.sra.org.uk/solicitors/guidance/offering-inducements-potential-clients-clients/] on inducements);
- ensured that you did not promote an option where you knew or had reason to believe that this would be unsuitable for the client in the light of their needs and circumstances;
- provided the client, upon request, with the name and address of any credit reference agency consulted;

- maintained client confidentiality (paragraph 6.3 of the Code for Solicitors) and only shared financial or other information with the client's consent and in a transparent manner;
- did not mislead the client about the legal effect of a regulated credit agreement or debt solution.

When dealing with a credit broker or other permitted third party on behalf of a client you should have regard to Principles 3 and 7 and take steps to ensure that the broker/third party is appropriately authorised by the FCA or exempt.

You should also ensure that when you engage with creditors or third parties, you do so in a transparent manner so that your client's interests are not adversely affected.

What do I need to consider when providing explanations and assessing creditworthiness?

The COB Rules require that, where you act as lender in relation to a proposed regulated credit agreement, you must provide an adequate explanation to enable the client to assess whether the proposed agreement is suitable to the client's needs and circumstances. This should cover in particular:

- any features of the agreement which may make the credit unsuitable for particular types of use;
- how much the client will have to pay periodically, and in total, under the agreement;
- any features of the agreement which may have a significant adverse effect on the client in a way which the client is unlikely to foresee;
- the principal consequences for the client arising from a failure to make payments under the agreement at the times required; and
- the effect of the exercise of any right to withdraw from the agreement and how and when this right may be exercised.

You should provide the client with an opportunity to ask questions about the agreement, and advise the client how to ask for further information and explanation.

The COB Rules also require a firm acting as a lender to assess the client's creditworthiness on the basis of sufficient information both before entering into a regulated credit agreement and before any significant increase in the amount of credit. In doing so, you should consider:

- the potential for the commitments to adversely affect the client's financial situation, taking into account information of which you are aware at the relevant time; and
- the client's ability to make repayments as they fall due over the life of the agreement and in a sustainable manner.

You should monitor the client's repayment record subsequently and take appropriate action where there are signs of actual or possible repayment difficulties. This should generally include providing contact details for not-for-profit debt advice bodies. You should not encourage a client to refinance a regulated credit agreement if the result would be that the client's commitments are not sustainable.

Contact with a client (or third party debtor) – what steps should I take?

Paragraph 8.9 of the Code for Solicitors requires you to ensure that you do not make unsolicited approaches to members of the public. You should not victimise or harass anyone in the course of your professional dealings.

When engaging with a client or third party debtor you should take steps to ensure that:

- all communications are balanced, comprehensive and easily understood;
- you do not send, or cause to be sent, any communication, for the purposes of marketing, after you have received a request from the person to stop doing so;
- you do not charge excessive or unreasonable costs; and
- you have regard to the person's wishes regarding the duration, timing and location of any meeting.

Do I need to signpost clients to alternative sources of help?

You should inform a client with debt difficulties that free and impartial information and assistance may be available from not-for-profit debt advice bodies and that the client can find out more by contacting the Money Advice Service [https://www.moneyadviceservice.org.uk/en] .

Where you consider that your skills and resources do not meet the client's needs, you should also consider, where it is in the client's best interests, making a referral to or providing contact details for an appropriate debt advice provider or a not-for-profit organisation. Any referral to a third party should be made in compliance with the SRA Principles and paragraph 5.1 of the Code for Solicitors.

You should also, where applicable, ensure that your client is aware that they may be eligible for help and assistance via the Financial Ombudsman Service.

Section 2 – Debt counselling, debt adjusting and credit information services

This section of the guidance note relates to debt advice work (debt counselling/adjusting) and the provision of credit information services.

The aim of paragraphs 8.6, 8.7 and 8.8 of the Code for Solicitors is to ensure that your publicity is not misleading and is sufficiently informative to ensure that clients and others can make informed choices.

The effect of paragraphs 3.2 and 3.3 of the Code for Solicitors is to make sure that the service you provide is competent and that you maintain your competence and keep your professional knowledge up to date. This helps make sure that your clients' interests are protected. You should, therefore, set out clearly in any communication to a client the extent of the services you are able to offer.

What are credit information services and what should I take into account?

Providing credit information services includes circumstances where you are seeking information on behalf of a client about his/her financial standing (e.g. credit rating information), including asking a credit reference agency if it holds the information. You may also be asked to provide advice to the client on how to seek to alter, or secure the omission of, the information or how to seek to restrict the availability of the information.

The following behaviours may indicate that you have acted in breach of Principle 7 [https://qltt.sra.org.uk/solicitors/handbook/handbookprinciples/] or paragraph 1.2 of the Code for Solicitors in failing to act in your clients' best interests or taking unfair advantage of them by:

- claiming that you will be able to remove negative but accurate information from a client's credit file, including entries concerning adverse credit information and court judgments;
- misleading a client about the length of time that negative information is held on the client's credit file or any official register;
- claiming that a new credit file can be created, such as by the client changing address;
- implying that you will be able to guarantee a favourable outcome; or
- using an offer of credit information services in order to promote other services to the client.

Advice and agreeing solutions - what is expected of me?

You should take steps to ensure clients are aware of the scope of your advice and the potential risks of a proposed debt solution so that an informed decision can be made (paragraph 8.6 of the Code for Solicitors).

Any recommended options should be in the best interests of the client. You should make clear the actual or potential advantages, disadvantages, costs and risks of each option available to the client with any conditions that apply for entry into each option and which debts may be covered by each option. You should also seek to ensure that the client understands the information and explanations provided.

To ensure that your client is treated fairly (paragraphs 1.1 and 1.2 of the Code for Solicitors) you should where appropriate, before giving advice or a recommendation on a particular course of action in relation to your client's debts, carry out a reasonable and reliable assessment of

- the client's financial position (including the client's income, capital and expenditure);
- the client's personal circumstances (including the reasons for the financial difficulty, whether it is temporary or longer term and whether the client has entered into a debt solution previously and, if it failed, the reason for its failure); and
- any other relevant factors (including any known or reasonably foreseeable changes in the client's circumstances such as a change in employment status or family circumstances).

You should inform your client, where applicable, that certain options (for example, entering into an individual voluntary arrangement or a debt relief order) will or may result in details being entered on a public register and may have an adverse effect on the client's credit rating.

I have been asked to provide a financial statement on behalf of a client - what do I need to keep in mind?

If you are asked to prepare a financial statement on behalf of a client to be sent to a creditor or a permitted third party, you should ensure that

- the financial statement is accurate, clear and realistic and the client has confirmed its accuracy;
- you have taken reasonable steps to verify information contained in the statement or have sought explanations from the client where appropriate;
- the statement sets out any fees or charges being made by you in relation to the activity (and a revised statement is sent if these change subsequently affecting payments by the client);
- the client consents to the statement being shared with the creditor or third party and has confirmed that the statement is accurate; and
- the statement is shared with the creditor or third party, and the client, as soon as possible after the accuracy of the statement has been confirmed.

You should also ensure that you take reasonable steps to verify the client's identity, income and outgoings and seek explanations where

necessary.

Can I advise a client to make changes to contractual payments?

If you advise a client not to make a contractual repayment or to cancel any means of making such a repayment before any debt solution is agreed or entered into, you should be able to demonstrate the advice is in the client's best interests (Principle 7 [https://qltt.sra.org.uk/solicitors/handbook/handbookprinciples/]). This includes where you advise a client to switch debt solutions and adopt an alternative. Any change to a debt solution should only be made where the client has consented and understands the impact of the change (paragraph 8.6 of the Code for Solicitors).

If you advise a client to make changes to contractual payments, you should advise the client to notify any creditors without delay and to explain that the client is following your advice to this effect.

If you have advised a client not to make contractual repayments (in full or in part) or to cancel the means of making such payments or not to make repayments necessary to meet interest and charges accruing, you should take steps to inform the client accordingly if it becomes clear that this course of action is not producing effects in the client's best interests (Principle 7 [https://qltt.sra.org.uk/solicitors/handbook/handbookprinciples/]).

Can I charge for debt advice and related services?

Yes. When agreeing fees/charges for your services, you should ensure that the client does not pay all or part of your fees in priority to making any repayments that are due to a creditor and that the fees/charges do not undermine your client's ability to make significant repayments to a creditor.

You should take steps to ensure that, if you hold money on behalf of the client, you distribute that money promptly, following negotiating a settlement with the client's creditors or a third party.

If you identify that advice provided by you to the client was incorrect or was not appropriate to the client, you should not charge an additional fee for further or revised advice. Where appropriate you should offer a refund to the client for any losses incurred.

Section 3 – Debt collection

This section of the guidance note relates to debt recovery work including arrangements between firms and debt recovery businesses.

What are the key risks and issues?

The SRA in its review of firms involved in debt recovery and the arrangements they have in place with debt recovery businesses has identified some key risks and issues.

These include

- misleading or aggressive correspondence sent by or on behalf of the firm;
- letters before action being sent without adequate supervision;
- firms putting their independence at risk by the nature of the arrangements with and/or their reliance upon a debt recovery business;
- unfair treatment of clients or third party debtors in arrears or financial difficulties;
- ignoring or disregarding a third party's claim that a debt has been settled or is disputed and then continuing to make demands for payment without providing clear justification and/or evidence as to why the third party's claim is not valid;
- commencing proceedings in the wrong jurisdiction;
- failing to establish the true identity of the debtor or the amount of the debt owed;
- failing to make clear the purpose of any contact with the debtor;
- taking or threatening disproportionate action against a client or third party in arrears or default or action which it may not be permissible to take;
- failing to provide clients or third party debtors (or their representatives) with information about the amount of any arrears and the balance owing;
- failing to inform clients or third parties of the potential implications of making payments less than the total amount owing;
- failing to pass on payments by a third party debtor to the client in a timely manner or to refer to the client any reasonable offer by the debtor to pay by instalments;
- pursuing debts which are statute barred.

We will look closely at your conduct if you make unjustified claims against a third party. An assertion that you were acting in the "best interests" of your client is not an answer to the making of an improper demand. You must not engage in business practices which are deceitful, oppressive or otherwise unfair or improper.

You should accurately and openly represent your authority/status in all communications, and convey in those communications the correct legal position with regard to debts and the debt recovery process.

What policies and procedures do I need to have in place?

Paragraphs 2.1 to 2.5 of the Code for Firms sets out the SRA's expectations of firms and individuals to ensure efficient running of a

business.

When carrying on debt collection work (and other credit-related regulated activities) you must establish and implement clear, effective and appropriate policies and procedures to deal with for example:

- the fair treatment of clients or third parties whose accounts fall into arrears, and treating them with forbearance and due consideration;
- accurate and adequate data collection and recording;
- giving due consideration to any reasonable offer of repayment;
- not pressurising a client or third party debtor to pay more than they can reasonably afford or within an unreasonably short period of time;
- suspending the active pursuit of a debt for a reasonable period where the client or third party is developing a repayment plan;
- not refusing to negotiate with a client or third party who is developing a repayment plan;
- not refusing unreasonably to deal with a person acting on behalf of a third party debtor;
- not imposing unreasonable charges on clients or third parties for arrears or default; and
- the fair and appropriate treatment of clients and third parties, who you understand or reasonably suspect to be particularly vulnerable.

Can I outsource work to a debt recovery business?

If you outsource work to a debt recovery business, you must ensure that you comply with paragraphs 2.1 to 2.5 of the Code for Firms Paragraph 2.3 provides that you remain accountable for compliance with our regulatory arrangements where your work is carried out through others. This includes those you contract with.

You must ensure that any activities conducted in your name or on your behalf by a debt recovery business are not undertaken in a way which takes unfair advantage of others. For example, by making demands for payment from a debtor for sums (such as the costs of a letter of claim) which are not legally recoverable from the debtor or making aggressive or misleading demands for repayment.

You should also take steps to ensure that any debt recovery business you engage with is appropriately authorised where it is engaged in credit-related regulated activities.

Is my independence at risk?

When entering into an agreement with a debt recovery business, you must ensure that the terms and substance of the arrangement do not compromise your independence. A relationship with a debt recovery business which enables it to have control over the supervision of cases

and/or the direction and management of a firm is likely to compromise the firm's independence.

Examples of situations where your independence may be at risk under an arrangement with a debt recovery business include

- Financial dependency;
- Contractual conditions which cede control;
- Giving access to confidential information;
- A non-arm's length relationship which suggests that the firm is more akin to a subsidiary rather than an independent law firm; and
- Fee sharing arrangements beyond that allowed in paragraph 5.1 of the Code for Solicitors.
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Can I share my fees and make referrals to a third party?

If you enter into an arrangement for a debt recovery business to refer clients to your firm, you must achieve comply with the SRA Principles and paragraph 5.1 of the Code for Solicitors. The arrangement must not compromise your independence and professional judgment, for example, by relinquishing control of the work to the debt recovery business.

You should not enter into an arrangement which is clearly not in the best interests of your clients or which compromises your ability to act in their best interests. An example of this would be an arrangement which requires you to pay monies recovered from the debtor to the debt recovery business rather than to your client.

The creditor will be your client and you must ensure that you comply with paragraphs 3.1 and 8.6 of the Code for Solicitors. For example, failing to confirm the client's instructions at the outset of the retainer, or relying on the instructions of the debt recovery business where the client has not directly authorised this, may put you at risk of not meeting the standards expected of you.

You should also ensure that you comply with paragraph 4.1 of the Code for Solicitors which requires you to account to your client for any financial benefit which you receive from a third party.

What should I do if a debtor lacks mental capacity?

You should consider whether it is appropriate to pursue the recovery of a debt from a debtor when you are aware, or have been notified, that the debtor does not or may not have the mental capacity to make relevant financial decisions about the management of their debt and/or to engage in the debt recovery process at the time.

In these circumstances, and having regard to the expectations of you set out in paragraphs 1.1 and 1.2 of the Code for Solicitors, you should consider whether it is appropriate to allow the debtor or a person acting on their behalf a reasonable period of time to provide evidence as to the likely impact of any mental capacity limitation on the debtor's ability to engage with you.

Further help and guidance

If you require any further assistance, please contact the Professional Ethics helpline [https://qltt.sra.org.uk/home/contact-us/] .

[1] http://www.legislation.gov.uk/uksi/2005/1529/contents/made [http://www.legislation.gov.uk/uksi/2005/1529/contents/made]