Finalised guidance

GUIDANCE ON THE: SELLING OF GENERAL INSURANCE POLICIES THROUGH PRICE COMPARISON WEBSITES

October 2011

Selling of general insurance policies through price comparison websites

Summary
We carried out thematic work in the period June to September 2010 to better understand how firms which sell regulated insurance products and services online have developed their business models and how they are designing these models to ensure the fair treatment of consumers; this review follows our previous work on price comparison websites and the recommendations we made[1].

Through the thematic work we identified two main business models in the insurance market. The first is the use of a proprietary price comparison tool which redirects the customer to an insurer or other intermediary. The second model is the same in substance, save that the price comparison tool is not proprietary but "white labelled". Our definition of white labelling is where the host firm uses in its own business a price comparison tool provided by a third party. Our review of these firms highlighted concerns in three areas in particular:

- failures to observe the general prohibition and restrictions on financial promotion in s.19 and 21of the Financial Services and Markets Act 2000 (FSMA) respectively and firms not having appropriate permissions in breach of s.20 FSMA;
- non-compliance with the requirements in the Insurance: Conduct of Business sourcebook (ICOBS); and
- non-compliance with the Senior Management Arrangements, Systems and Controls sourcebook (SYSC).

Firms are reminded of the requirement to hold the appropriate permissions and comply with the appropriate handbook rules for any other regulated activity they are engaged in. This includes, but is not limited to, arranging and advising on mortgages and investment products.

[1] http://www.fsa.gov.uk/pages/Doing/Regulated/Promo/thematic/review_gi_comparison.shtml

We published this guidance in draft on our website and received 15 responses the majority of which agreed and welcomed our guidance. The views expressed by those who did not agree with our guidance have not led us to modify our guidance.

What we want you to do

You should consider our findings and guidance set out below, and ensure that you are complying with all relevant regulatory requirements. Specifically, your firm should:

- review your regulated activities and ensure you are appropriately authorised or otherwise exempt;
- ensure that you only enter into contracts with firms holding the appropriate authorisation and permissions to conduct that regulated activity (or who are exempt);
- withdraw your assistance from third parties if they are in breach of general prohibition;
- review your disclosure documentation, sales procedures and your terms and conditions and make sure that these are compliant with all relevant regulatory requirements including our Principles, ICOBS and the Unfair Terms in Consumer Contracts Regulations 1999. In particular, you should ensure they comply with requirements on:
    - customer eligibility,
    - status disclosure,
    - advice suitability,
    - providing a proper statement of demands and needs,
    - and that you do not seek in your terms and conditions to exclude liability for the regulated activities you are undertaking; and
- establish, implement and maintain adequate policies and procedures to ensure your firm complies with all relevant obligations under the regulatory system and for countering the risk of furthering financial crime, in particular breaches of the general prohibition and restrictions on financial promotion.

Why we are asking you to do this?

We are concerned that our Principles for Businesses are not being complied with, in particular Principle 6 and the requirement to treat customers fairly. We believe that this could lead to the following risks to consumers:

- Consumers may be being misled about the services they are receiving from price comparison sites, for example, they may believe based on the claims made by price comparison sites (or the absence of any statement to the contrary) that they are receiving a quote based on their individual demands and needs when they are actually receiving an illustrative quote based on a set of generic risk criteria;

- Consumers may be unable to claim benefits against a policy purchased through a lack of opportunity to disclose all material facts, causing an insurer to refuse to pay out in part or in full on the benefits due under a policy;

- Price comparison firms enter into "white labelling" contractual arrangements without fulfilling their obligation to counter the risk of financial crime. They could be assisting unauthorised firms in arranging or advising on contracts of insurance, against which a consumer may not be able to make a claim;

- Consumers of both white label and price comparison sites may be confused as to which firm to complain to and whether they have the right to go to the Financial Ombudsman Service.

The risks we identified where firms are falling short of our regulatory requirements are as follows:

1. The General Prohibition

The general prohibition is contained in s.19 of FSMA and broadly requires firms either to be authorised or exempt before conducting any regulated activities. Regulated activities include arranging or advising on contracts of insurance under Articles 25(1) and (2) and 53 of the Financial Services and Markets 2000 (Regulated Activities Order) 2001 ('the RAO') respectively.

Article 25(1) of the RAO relates to making arrangements for another person to actually buy or sell particular investments. Article 25(2) concerns the making of arrangements with a view to a person who takes part in the arrangements buying or selling particular investments.

Price Comparison Websites

The main business model operated by firms is the use of a proprietary price comparison tool to provide customers with an opportunity to enter their requirements and get a series of quotes. This redirects the consumer to an insurer or insurance intermediary to purchase the policy in question. Our sample focused principally on firms providing comparison of personal lines general insurance (GI) products.

Our findings were that the services offered by these firms are likely to amount to making ongoing arrangements under Articles 25(2) of the RAO and if they subsequently bring about particular transactions that result from the Article 25(2) arrangements they will also be making Article 25(1) arrangements. We found that all firms in our sample held the Part IV permissions appropriate to the arrangement of contracts in insurance, but that only one firm in our sample considered its regulated activity might go beyond merely introducing customers to authorised firms. As such, we consider there is a risk that firms may not be aware that they are likely to be arranging contracts of insurance and may in some circumstances be advising.

Arranging Insurance
In our view a website operator that, for remuneration of some kind, provides information about the terms and prices of insurance products and then provides the means whereby the consumer can act upon the information and transact the business is likely to be arranging under Articles 25(1) and/or 25(2) RAO.

A price comparison firm may be arranging contracts of insurance where its activities involve any of the following:

- the firm provides links to product companies or intermediaries for the purpose of enabling the customer to purchase a chosen insurance product;
- the firm requires a pre-purchasing questionnaire to be completed in order to filter sales (i.e. where the intermediary asks a series of questions and then suggests several specific products which suit the answer given) particularly where the electronic questionnaire form is pre-populated;
- the firm provides a comparison of the terms of different policies as opposed to a passive display of the features of different policies;
- the firm runs a website which is funded by one or more insurance or mortgage providers (i.e. it is not 'independent'); and/or
- the firm offers a special discount on the product to its website users.

Even where no financial benefit is derived, the firm may still be making arrangements if it brands the comparison service with its own name, endorses the service or otherwise encourages users to respond to it, negotiates special rates for users, or holds out the service as something arranged for the benefit of users (see the Perimeter Guidance Manual of the FSA Handbook (PERG) 8.32.6G – 8.32.8G).

Advising on Insurance

In addition where the effect of the firm's arrangements constitutes a recommendation to purchase a specific product or products, that recommendation is likely to involve the firm giving regulated advice (see PERG 5.8 generally). Some indicators of where a price comparison website may contain advice for the purposes of the RAO include:

- where the name or logo of only one insurance product is displayed on the website in a manner that suggests that the particular product is to be preferred over other products (for example, a particular logo might appear on a webpage containing generic advice on the merits of incapacity insurance contracts);
- where a particular insurance product is recommended as the "pick of the best" product out of a number of other products in its category;
- where a particular insurance product is star-rated by a website, for example, the product is awarded five out of five stars, by contrast to a similar product which is awarded two out of five stars;
- where a scripted questionnaire gives a recommendation or opinion which influences the choice of insurance product and then goes on to identify a particular insurance or regulated mortgage product to which the advice relates;

- where the questioning process has resulted in the identification of one or more particular contracts of insurance based on a non-objective assessment of the product features;
- where the website generally makes any value judgement as to the merits of one or more insurance products or regulated mortgage contracts, by way of scripted questioning or otherwise;
- where generic best buy tables are used and are not populated from specific consumer information this might be advice depending on the consumer's experience of it. So, for example, a website containing solely generic 'best buy' tables explaining the merits of futures as opposed to options would not be advice, but if those tables guide the consumer to a particular insurance product based on the consumer's personal requirements, this is likely to be regulated advice;
- where generic statements on a website are not dependent on consumer information being populated this could be regulated advice where they are displayed in such a way that the website operator is making value judgments as to the merits of buying, selling, etc. For example, 'The products of the month are XYZ, ABC and DEF investments because they offer the best returns'.

Firms should be aware of these risks of conducting regulated activities and ensure that they have the appropriate authorisation or exemptions in accordance with s.19 FSMA, and the appropriate permissions under s.20 FSMA. More generally, the above is not exhaustive of relevant activities or factors and PERG provides guidance on the regulated activities a firm may be conducting. We also provide guidance in PERG 5.6 generally on arranging deals in and making arrangements with a view to transactions in contracts of insurance[2].

White Label Websites

The White Labelling Firm

Our findings, with regard to the alternative business model where a firm (the 'host firm') "white labels" (that is, uses in its own business) a price comparison tool provided by a third party website (the 'provider firm'), were that the regulatory status of the host firms vary. Some host firms appeared to have no authorisation or exemption, whereas others were appointed representatives of an authorised firm or were authorised in their own right.

We found that in most cases the host firm seemed likely to be deriving a financial benefit from hosting the comparison tool and in many cases the service is co-branded as "powered by" or "in partnership" with the provider firm making it likely that the host firm is arranging contracts of insurance. PERG 8.32.6G provides guidance on the FSA's view of when an introduction such as that made to the provider firm by the host firm is likely to fall within Article 25(2) of the RAO.

Arrangements of this sort are likely to fall within Article 25(2) of the RAO as there will be ongoing arrangements that envisage transactions taking place from time to time and in consequence of the host's participation in the arrangements. In our view there is an ongoing arrangement as the host firm

[2] http://fsahandbook.info/FSA/html/handbook/PERG/5/6

is using the technical facilities of the provider's software, or is in any event providing introduction services to the same product providers over time. It is unlikely that the exclusions under Article 29 (arranging deals with or through authorised persons) or Article 33 (Introducing) of the RAO would be available to these firms given that these are contracts of insurance.

The potential exclusion under Article 27 of the RAO is also unlikely to be available if, for example, the host firm brands the service with its own name, endorses the service, otherwise encourages users to respond to it, negotiates special rates for users, or holds out the service as something arranged for the benefit of users (see PERG 8.32.6G – 8.32.8G).

The host firm should also consider whether their activities may amount to the provision of regulated advice. Advising might include suggesting the purchase of specific contracts of insurance because they meet investors' requirements. Guidance in PERG 5.8.15 says that pre-purchase questioning – where a sequence of questions are asked in order to extract information from investors to enable them to select an investment product that meets their needs may amount to regulated advice. However there are a number of exclusions that may be relevant, see in particular PERG 5.8.24 on exclusions relating to periodicals, publications, broadcasters and websites.

Firms not authorised under FSMA may also, when promoting certain financial products, be in breach of s.21 of FSMA. Section 21 prohibits the communication of an invitation or inducement to engage in investment activity unless the person making the communication is an authorised firm or the content of the communication is approved by such a firm. Breaching s.21 is a criminal offence. Further guidance on the financial promotions regime is set out in PERG 8, including guidance on certain common exemptions.

In summary, white labelling firms should be aware of the risks that they are conducting regulated activities and ensure that they have the appropriate authorisation or exemptions. Those that are authorised will need to ensure they have the relevant permissions in place in accordance with s.20 of FSMA.

The Price Comparison Tool Provider Firm

Further, the provider firms providing comparison tools should ensure that such firms with which they are partnering in white labelling arrangements have the appropriate regulatory status for carrying out the regulated activity they are engaged in.

In most cases, these firms will need to be authorised in their own right and hold the relevant permissions, or be an appointed representative of a firm with the relevant permissions. In the event that a firm conducts regulated activities without authorisation or exemption, they will be doing so in breach of the general prohibition at s.19 FSMA and may also be in breach of s.21 FSMA if they are also issuing financial promotions. In doing so they may be committing offences under s.23(1) and 25(1) FSMA respectively. Whilst this is primarily a matter for the host firm, we also note that firms under SYSC 6.1.1R are required to:

> *"…establish, implement and maintain adequate policies and procedures sufficient to ensure compliance of the firm…with its obligations under the regulatory system and for countering the risk that the firm might be used to further financial crime*."

'Financial crime' includes "*...any kind of criminal conduct relating to money or to financial services or markets, including any offence involving...misconduct in...a financial market...*". It is our view that this includes the s.23(1) FSMA offence which amounts to misconduct in a financial market and is generally criminal conduct relating to financial services.

As such, provider firms are required to establish, implement and maintain adequate policies and procedures sufficient to counter the risk that they might be used to further the activities of another firm that give rise to an offence under s.23(1): namely a breach of the general prohibition.

In particular, where the provider firm provides software to a host firm, the provider firm must have adequate policies and procedures in place to reduce the risk that the host firm will use that proprietary software to conduct regulated activity in breach of the general prohibition.

Adequate steps may include having appropriate contractual terms requiring the host firm to have appropriate authorisation or exemption as a requirement of their use of the software: and we would also note that compliance with such a term is then easily verified by reasonably regular confirmation of authorisation or appointed representative status on the FSA register online[3].

Lastly, we also note that any provider firm that then knowingly or with sufficient foresight provides or continues to provide software to a host firm which then conducts regulated activity using that software in breach of the general prohibition risks facing secondary liability for aiding or abetting the s.23(1) FSMA offence and being charged as a principal offender.

2. ICOBS

We found that because the firms in our sample took the view that they are "introducing" customers to an authorised firm they fell short of our requirements in a number of key areas.

Exclusion of Duty to Check Eligibility or Disclosure

Our view is the limitations and exclusion clauses contained in the terms and conditions of firms are often too far reaching and place an unfair burden on consumers to ensure they purchase a policy under which they are eligible to claim, or that they make their own disclosure of material facts to the insurer. [4]

[3] http://www.fsa.gov.uk/register/home.do

[4] Firms are reminded of the Unfair Terms in Consumer Contracts Regulations 1999 (the 'Regulations'). The Regulations require terms in standard form contracts with consumers to be clear and fair. Regulation 5 states that a term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Schedule 2 to the Regulations contains a non-exhaustive, indicative list of terms that may be regarded as unfair. For example, paragraph 1(b) says that terms which have the object or effect of "inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations..." may be regarded as unfair. Therefore, for example and in our view, if a firm is arranging insurance or advising on insurance then a term that seeks to exclude or limit liability for those activities is likely to be unfair."

All firms in our sample stated they rely on the insurer or intermediary selling the policy to check the customer's personal risks are disclosed and it is often not clear what if any checks take place on customer eligibility. It was our view that too much onus is being put on the customer to do this. Firms (including all arrangers and advisers) are reminded of their obligations:

- under Principle 6 and ICOBS 5.1.1G to:

  "*(1)…take reasonable steps to ensure that a customer only buys a policy under which he is eligible to claim benefits*.

  (2) If, at any time while arranging a policy, a firm finds that parts of the cover apply, but others do not, it should inform the customer so he can take an informed decision on whether to buy the policy"; and,

- under Principle 6 and ICOBS 5.1.4G of ensuring a customer knows what he must disclose which may be achieved by:

  "*(1) explaining the duty to disclose all circumstances material to a policy, what needs to be disclosed, and the consequences of any failure to make such a disclosure; or*

  (2) ensuring that the customer is asked clear questions about any matter material to the insurance undertaking."

Requiring customers to take entire responsibility for checking eligibility or disclosure themselves instead of the firm potentially excludes or restricts the duties owed to the customer identified above which arise as a matter of treating the customer fairly. An exclusion of a regulatory duty is a breach of ICOBS 2.5.1R which provides that firms must not seek to exclude or restrict a duty under the regulatory system.

Status Disclosure

We reviewed a number of firms and concluded that particularly in the case of white labelling firms (but sometimes also in firms operating their own price comparison tools), it is unclear to consumers which firm is responsible for the comparison being provided. We found it is also often unclear which firm is acting as an introducer and which firm is arranging the sale of the policy. Customers could be easily confused about who to complain to if they wish to do so and the address to which their complaints should be sent, or whether they have a right to refer complaints to the FOS.
In particular, firms arranging or advising on contracts of insurance going beyond pure introductions are required under ICOBS 4.1.2R (broadly) to provide details about the firm, whether it is financially interested or linked to a given insurer, and procedures for making complaints (including the availability of the FOS) to customers. All firms involved in providing a comparison service that amounts to arranging beyond pure introduction should ensure that they comply with these requirements.

Scope of Service: Advised or Non-Advised Sales

All firms said that they were offering a comparison service to customers but not whether they were providing advice or only information. We found most of the firms offering a comparison service to be arranging contracts of insurance on a non-advised basis but some firms could be providing advice (see above on "*Advising on Insurance*").

Where firms are providing advice on a contract of insurance, a number of obligations arise including, in particular (but not limited to):

- prior to the conclusion of the insurance contract such firms must disclose whether they are giving advice or whether they are conducting an information only sale (ICOBS 4.1.7R) and scope of their advice (ICOBS 4.1.6R);

- under ICOBS 5.3.1.R "…*the firm must take reasonable care to ensure the suitability of its advice for any customer who is entitled to rely on its judgement*"; and

- firms must also produce a statement of demands and needs under ICOBS 5.2.2R(1) specifying the "*underlying reasons for any advice given to the customer on that policy*."

Firms that are not aware that they are advising risk not complying with these significant requirements and we would request that firms consider carefully first whether they provide advice (see above on perimeter guidance) and then whether they are discharging the above obligations (and any other obligations attending the provision of advice) properly .

Statement of Demands and Needs

We found that all of the firms in our sample relied on the insurer or another intermediary selling the policy to produce the statement of demands and needs which is usually issued prior to or just after the policy goes on risk. As the comparison site is acting as the insurance intermediary when it is arranging or advising on the contract of insurance it is responsible for providing the demands and needs document (see ICOBS 5.2.1R, 5.2.2R and 5.2.4R) and cannot delegate this responsibility to the insurer or another intermediary (see ICOBS 2.5.3G(2)).

However, under the current business models it appears firms take no responsibility for producing the demands and needs statement. In non-advised sales, it may be that the questions used by some firms collect what may be considered a customer's demands and needs. However, the questions do not contain a suitable statement which would lead the customer to appreciate that they are being offered policies based wholly or largely on a generic set of demands and needs rather than their own personal demands and needs (e.g. ICOBS 5.2.4G(1) or 5.2.4G(2)).

Ability to Claim against the Policy Purchased

We found that the firms in our sample did not take sufficient responsibility for checking that the eligibility and material risk data collected through their online questionnaire maps accurately to the eligibility and risk criteria of the policies sold. All the firms in our sample stated that they considered this to be the responsibility of the party selling the policy. Any controls the aggregator did have in place were limited to their own staff running "quotes".

We did not consider that these were reasonable steps for an insurance intermediary to take to ensure a customer only buys a policy under which he is eligible to claim benefits (Principle 6 and ICOBS 5.1.1G) or of ensuring a customer knows what he must disclose (Principle 6 and ICOBS 5.1.4G). We are concerned customers may find they are not covered by the policy purchased because a standardised or short set of questions used on the firm's website may not be sufficient to accurately capture all relevant eligibility or risk information for that individual. We are also concerned that in many cases questions are pre-populated with default answers e.g. a presumption of an absence of relevant convictions as a material risk, or a presumption that a certain age group indicates particular employment or education status.

We consider that reasonable steps in this context requires that any preset questionnaire on a website that forms a part or the whole of a firm's eligibility data checking practices accurately gathers all the relevant eligibility data (such relevance being determined by the eligibility criteria of all potentially relevant insurance policies). Further the eligibility criteria of particular policies sold should then be checked against the eligibility data, and policies for which the customer is not eligible should not be displayed to the consumer.
Firms should also take steps in accordance with ICOBS 5.1.4G to ensure customers know what material facts they should disclose and why, and what the consequences of non-disclosure might be. This includes where required as a matter of fairness, to seek typical material facts proactively in accordance with ICOBS 5.1.4G(2) in tandem with eligibility criteria and to forward these facts to the insurer before the insurance is purchased. Firms may also then need to consider implementing sample file checks that these systems are then working properly and adapt them as necessary (SYSC 6.1.1R: see further below).

3. SYSC

We found that the above problems arising with the firms in our sample have generally resulted from the fact that they have designed their systems and controls to maximise revenue and have not paid sufficient regard to regulatory compliance.

As set out above, SYSC 6.1.1R requires firms to establish, implement and maintain adequate policies and procedures sufficient to ensure compliance of the firm with its obligations under the regulatory system and for countering the risk that the firm might be used to further financial crime.

As such, we request firms to also consider whether they are establishing, implementing and maintaining adequate policies and procedures to ensure compliance with those specific requirements and standards under the regulatory system identified above for ICOBS and the Principles; and likewise whether they have adequate systems and controls to avoid the risk that they may be used to further breaches of the general prohibition.