

# Breathing Space Regulations: changes to our Handbook

**Consultation Paper**

CP20/21\*

October 2020

## How to respond

We are asking for comments on this Consultation Paper (CP) by **6 January 2021**.

You can send them to us using the form on our website at: [www.fca.org.uk/cp20-21-response-form](http://www.fca.org.uk/cp20-21-response-form)

**Or in writing to:**

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# 1 Summary

## Why we are consulting

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- 1.1** We are consulting on some minor changes to the Handbook as a result of the [Breathing Space Regulations](#) (the Regulations). The Regulations have been approved by Parliament and are currently laid before Senedd Cymru. They are expected to come into force in May 2021.
- 1.2** The Regulations establish a scheme in England and Wales giving someone in problem debt the right to legal protections from creditor action for up to 60 days while they receive debt advice and potentially enter an appropriate debt solution. A consumer can only access the breathing space moratorium after being advised and assessed as eligible by an FCA Authorised debt advice firm or a local authority or by accessing a mental health crisis moratorium. There is no 60-day limit to a mental health crisis moratorium period, which will usually end 30 days after the mental health crisis treatment has concluded. The breathing space moratorium and mental health crisis moratorium are referred to in this CP as 'the moratorium'.
- 1.3** The moratorium includes protection from creditor action for most personal debts, including financial services debt, household bill arrears and most public sector debt. Protections are not extended to mortgage payments on the principal and interest, but they do extend to payment of mortgage arrears not capitalised and interest, fees or any other charges on those arrears.
- 1.4** Further details can be found in the Government's ['Breathing Space Scheme: response to policy proposal'](#).
- 1.5** The Regulations impose obligations on debt advice firms to assess applications for, and initiate the moratorium, and on consumer credit lenders, mortgage lenders and other regulated firms, to comply with the restrictions and obligations imposed by the moratorium in collection and enforcement of debts and application of interest and other charges.

## Who this applies to

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- 1.6** This consultation is relevant to regulated firms who will need to comply with the Regulations and our Handbook, in particular:
- consumer credit lenders
  - debt collectors
- 1.7** It explains why we do not need to make changes to the Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB) or the debt advice rules in the Consumer Credit Sourcebook (CONC) and is of interest to regulated firms who will need to comply with the Regulations and those rules, including:

- firms such as mortgage lenders or administrators subject to MCOB
- authorised debt advice firms including not-for-profit debt advice bodies subject to CONC.

**1.8** It will also be relevant to consumer groups who have an interest in debt advice and local authorities that give debt advice to consumers in England and Wales.

## The wider context of this consultation

**1.9** Firms must comply with the Regulations when they are in scope. Firms must also comply with our rules, although some of our rules will not be relevant when the Regulations specify the actions that firms must or must not take.

**1.10** For example, debt advice firms when advising on a moratorium under the Regulations will also need to comply with CONC 8.3.2R so that, among other matters, ‘all advice given and action taken...has regard to the best interests of the customer’ and ‘is based on a sufficiently full assessment of the financial circumstances of the customer’.

**1.11** Consumer credit lenders will need to continue to apply, for example, the conduct rules for treatment of customers in arrears, default and recovery (CONC 7), where these are relevant for a customer with debts in a moratorium.

**1.12** This consultation aims to provide clarity on some specific issues where there may be duplication or uncertainty about firms’ obligations under the Regulations and compliance with our rules.

**1.13** This consultation does not give guidance for regulated firms on the interpretation or application of the Regulations. The Government intends to publish guidance on the Regulations for creditors and organisations giving debt advice.

## What we want to change

**1.14** There are a number of areas in CONC where we think it is necessary to

- clarify how our rules apply where the Regulations also apply
- avoid duplicating the effects of the Regulations in a disproportionate way

Handbook Reference	Summary of rule or guidance	Proposal
CONC 6.7.27R, 6.7.29R and 6.7.30R	Firms are not required to take certain steps under the persistent debt rules at CONC 6.7.27R, 6.7.29R and 6.7.30R where the firm is taking equivalent or more favourable steps in relation to the customer’s account.	Clarify that, where a customer’s debts are in a moratorium, the firm is considered to be taking equivalent or more favourable steps in relation to their account and so is not required to comply with the specified persistent debt rules for the duration of the moratorium

Handbook Reference	Summary of rule or guidance	Proposal
CONC 5D.3.3G (5)	Firms are not required to do anything under the repeat overdraft intervention rules which is inconsistent with the treatment it has already adopted for that customer	Clarify that, where a customer's debts are in a moratorium, the actions required under the repeat overdraft intervention rules are inconsistent with the treatment it has already adopted as a result of a moratorium
CONC 6.7.2R, 6.7.3G and 6.7.3R A and 6.7.3G B	Guidance on appropriate action to be taken if monitoring a customer's repayments shows signs of actual or possible repayment difficulty or financial difficulty	Clarify that compliance with a moratorium is an appropriate action under these rules
CONC 7.3.11R	A firm must suspend the active pursuit of recovery of a debt from a customer for a reasonable period where the customer informs the firm that a debt counsellor or another person acting on the customer's behalf or the customer is developing a repayment plan	Clarify that, where a customer's debts are or have been in a moratorium, firms may take that time into account in determining a reasonable period

## Mortgages and Home Finance rules and Debt Advice rules

- 1.15** We have not identified any rules or guidance in MCOB or CONC 8 (Debt Advice) which need clarifying or amending. We set out our thinking on this further in Chapter 2.

## Outcome we are seeking

- 1.16** We want to ensure there is clarity for firms about how our rules interact with the Regulations.
- 1.17** We do not have powers under the Regulations to supervise compliance or enforce against the Regulations. However, systematic non-compliance with the Regulations is likely to be of interest to us as it may call into question whether a firm is meeting the specific rules in CONC, the suitability requirements set out in our Threshold Conditions or breaching one of the principles, such as Principle 6, treating customers fairly.

## Measuring success

- 1.18** Firms are clear about how our rules and the Regulations interact and comply with both. Consumers receive appropriate communications and interventions.

## Next steps

- 1.19** We are seeking views on the proposals in this consultation. Please respond by 6 January 2021.

## 2 Proposed changes

### Consumer credit conduct rules

#### **CONC 6.7.27R, CONC 6.7.29R, 6.7.30R Persistent debt rules**

- 2.1** Our persistent debt rules require firms to help customers in persistent debt to reduce the level of debt they have on their credit cards and retail revolving credit agreements more quickly, through a series of communications and actions, escalating over time. The communications and actions are not required where the firm is already taking steps 'equivalent or more favourable in relation to the customer's account'. During a moratorium, a customer will be benefiting from protections which help to prevent their credit card and retail revolving credit debts from escalating and are also already in discussion with a debt advisor about how to reduce their debt levels with the aim of developing a sustainable repayment plan or entering a debt solution.
- 2.2** We therefore consider that where a firm is complying with the Regulations so that a customer is benefiting from the protections of a moratorium, the firm is already taking steps 'equivalent or more favourable' to the persistent debt rules, that is, stopping interest from accruing and pausing enforcement action on the moratorium debt to give the customer time to get debt advice. We propose to add guidance to the Handbook to clarify this.
- 2.3** At the end of the moratorium, the persistent debt rules would apply as normal unless the firm continued to take equivalent or more favourable steps.

#### **CONC 5D.3.3(5)G Repeat overdraft use rules**

- 2.4** We are proposing a similar approach for the application of the repeat overdraft use intervention rules. CONC 5D.3.3(5) G states that, where a customer has been identified as being in financial difficulties and is being treated with appropriate forbearance by the firm, then the firm is not required to make the interventions required by CONC 5D.3 where that would be inconsistent with that treatment. We consider that treating with 'appropriate forbearance' in this context would include firms complying with the Regulations so that the customer is benefiting from the protections of a moratorium in relation to their overdraft.
- 2.5** We also consider that taking any of the steps envisaged under CONC 5D.3.2 is inconsistent with the treatment already adopted in compliance with the moratorium. Our rules are intended to get firms to intervene in an appropriate and proportionate manner where they detect repeat use of an overdraft, with the aim of reducing that use and improving the customer's financial situation. Interventions of this type would be inconsistent with the requirements of a moratorium, which are designed to give customers time and space to seek further advice to address their debt problems after seeking initial debt advice. We propose to clarify this in guidance.
- 2.6** At the end of the moratorium, firms will need to consider the relevance of the guidance at CONC 5D.3.3(5) G in the light of their treatment of the customer.

***CONC 6.7.2R and 6.7.3 G, 6.7.3R A and B Monitoring a customer's repayments for signs of actual or possible repayment difficulty***

- 2.7** Customers in a moratorium will have actual or possible repayment difficulty, given that one of the eligibility criteria is that 'the debtor is unable, or is unlikely to be able, to repay some or all of their debt as it falls due' (Regulation 24 (4)(a) and Regulation 30(4) (a)). CONC 6.7.2R therefore applies and requires firms to take 'appropriate action'.
- 2.8** CONC 6.7.3 G gives guidance that appropriate action should generally include sending the customer information about the risks of escalating debts and providing contact details for not-for-profit debt advice bodies. We do not think this guidance is relevant where a customer is in a moratorium since they are already taking steps to deal with their debts and are in contact with a debt advice firm. We propose adding additional guidance to make clear that compliance with a moratorium is an appropriate action under this rule.
- 2.9** There are similar provisions in CONC 6.7.3R A and B relating to retail revolving credit (store cards and catalogue credit) and credit card agreements and signs of actual or possible financial difficulties. The guidance on examples of appropriate action is more broadly drafted to be explicit that firms should consider what may be appropriate in the circumstances. However, to give certainty to firms, we propose making the same clarification, that compliance with a moratorium is an appropriate action under this rule.

***CONC 7.3.11R Suspending recovery of a debt for a reasonable period***

- 2.10** This rule requires firms to suspend active recovery of a debt for a reasonable period where the customer (or someone acting on their behalf) is developing a repayment plan. Guidance in 7.3.12 G states that a 'reasonable period' should generally be for 30 days and then a further 30 days where there is evidence of progress towards developing a plan.
- 2.11** This rule has a similar purpose and effect to the protections of a moratorium. Both are intended to allow the customer time to get advice and develop a repayment plan or enter into a debt solution. When assessing what is a reasonable period under CONC 7.3.11R, we consider that it is reasonable for firms to take into account time the debt has already been in a moratorium. We propose clarifying this in guidance.
- 2.12** Firms will still need to make an assessment of what is a 'reasonable period' and may determine that additional time is reasonable depending on the borrower's circumstances.

## **Debt advice rules**

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- 2.13** We are not consulting on any amendments to the debt advice rules (CONC 8). We have considered the rules below in particular, but concluded that no changes are necessary. We welcome views on this.

## Definition of debt solution

**2.14** Certain rules use the term 'debt solution' and requirements in some cases depend on whether a debt advice firm is promoting or advising on debt solutions. Debt solution is defined in our Handbook Glossary as 'an arrangement, scheme or procedure, whether statutory or not, the aim of which is to discharge or liquidate a customer's debts.' A moratorium does not have the aim of discharging or liquidating a customer's debts and so is not a debt solution. We think this is sufficiently clear without amending the Handbook.

### ***CONC 8.3.4R Advice to be provided in a durable medium***

**2.15** Firms must ensure that debt advice is provided in a durable medium. This would include any debt advice given under the Regulations. The rule requiring this also specifies certain information that must be included. We considered whether we need to make changes to this list to take into account advice given on a moratorium. We think that this is not necessary as the information currently required will still be relevant during a moratorium, although the actual or potential consequences will differ.

### ***CONC 8.6 Changes to contractual payments***

**2.16** These provisions require firms to inform the customer of the potential consequences of making changes to contractual payments before a debt solution is agreed or entered into. We considered making changes to these rules, given that the consequences of changes to contractual repayments will be particular to a moratorium. Again, we think that this is not necessary as firms can adapt the information they give under CONC 8.6 to account for the consequences of a moratorium.

## Mortgages and Home Finance rules (MCOB)

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**2.17** We are not consulting on any amendments to MCOB as we have not identified any rules or guidance in MCOB which need clarifying or amending.

**2.18** In coming to this conclusion, we have discussed the Regulations with stakeholders.

**2.19** We note that the definition of 'arrears' used in the Regulations and our Handbook differs, however we consider that firms will understand the intended meaning clearly in any given context.

**Q1:** Do you have any comments on our proposals for the consumer credit guidance?

**Q2:** Are there any other consumer credit rules or guidance that we should consider amending?

**Q3:** Do you agree that no changes are required to the debt advice rules or guidance in CONC 8?

**Q4:** Do you agree that no changes are required to the rules or guidance in MCOB?



## Annex 1

### Questions in this paper

- Q1:** Do you have any comments on our proposals for the consumer credit guidance?
- Q2:** Are there any other consumer credit rules or guidance that we should consider amending?
- Q3:** Do you agree that no changes are required to the debt advice rules or guidance in CONC 8?
- Q4:** Do you agree that no changes are required to the rules or guidance in MCOB?

## Annex 2

# Cost benefit analysis

1. There is no statutory requirement in the Financial Services and Markets Act 2000 for a cost benefit analysis (CBA) on guidance. In accordance with our approach to analysing costs and benefits, we only produce a CBA for guidance where we identify an element of novelty which may contain certain prescriptive expectations. Given that our proposed guidance is not prescriptive or prohibitive, we have not produced a CBA. Any costs are imposed by the Regulations and not by our proposed amendments, which clarify the application of our rules during a moratorium.
2. For example, the proposed guidance sets out our view that the communications required by the persistent debt and repeat overdraft rules are not required for a customer whose debts are in a moratorium. The Regulations prohibit communications relating to enforcement of a debt unless they are required by the Consumer Credit Act or by our rules. Therefore, if firms incur costs identifying debts in a moratorium and 'turning off' communications not required by our rules, those costs are incurred as a result of the Regulations.

## Annex 3 Compatibility Statement

### Compliance with legal requirements

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1. Section 1B of FSMA requires the FCA to carry out its general functions such as giving general guidance, as far as is reasonably possible, in a way that is compatible with its strategic objective and advances one or more of its operational objectives. The FCA also needs to, so as far as is compatible with acting in a way that advances the consumer protection objective or the integrity objective, carry out its general functions in a way that promotes effective competition in the interests of consumers.
2. We are satisfied that these proposals are compatible with our general duties under section 1B of FSMA, in particular having regard to the matters set out in 1C(2) FSMA (our consumer protection objective) and the regulatory principles in section 3B. We think that:
  - it will help us use our resources in an efficient and economical way
  - the expectations contained within it are proportionate to the benefits
  - it supports the principle that the regulators should exercise their functions as transparently as possible.

### Equality and Diversity

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3. Having considered the equality and diversity issues that may arise from the proposed amendments in this chapter, we do not think they will adversely impact any of the groups with protected characteristics under the Equality Act 2010, i.e. age, disability, sex, marriage or civil partnership, pregnancy and maternity, race, religion and belief, sexual orientation and gender reassignment. However, we welcome comments on any equality and diversity issues respondents believe may arise. We will review our assessment prior to publishing final rules.

### Legislative and Regulatory Reform Act 2006 (LRR)

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4. We have had regard to the principles in the LRR and consider that the proposals will be effective in helping firms understand and meet regulatory requirements more easily. We also believe the proposals are proportionate and will result in an appropriate level of consumer protection when balanced with impacts on firms and competition.
5. We have had regard to the Regulators' Code and this consultation is a way for firms to let us know their views of our proposals.

## Annex 4

# Abbreviations used in this paper

<b>CONC</b>	Consumer Credit Sourcebook
<b>CP</b>	Consultation Paper
<b>FSMA</b>	The Financial Services and Markets Act 2000
<b>MCOB</b>	Mortgages and Home Finance: Conduct of Business Sourcebook
<b>moratorium</b>	A Breathing Space Moratorium or Mental Health Crisis Moratorium
<b>the Regulations</b>	The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020



We make all responses to formal consultation available for public inspection unless the respondent requests otherwise. We will not regard a standard confidentiality statement in an email message as a request for non-disclosure.

Despite this, we may be asked to disclose a confidential response under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Rights Tribunal.

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# Appendix 1

## Draft Handbook text

**CONSUMER CREDIT (DEBT RESPITE MORATORIUM) INSTRUMENT 2021**

**Powers exercised**

- A. The Financial Conduct Authority (“the FCA”) makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 139A (Power of the FCA to give guidance).

**Commencement**

- B. This instrument comes into force on [*date*].

**Amendments to the Handbook**

- C. The Glossary of definitions is amended in accordance with Annex A to this instrument.
- D. The Consumer Credit sourcebook (CONC) is amended in accordance with Annex B to this instrument.

**Citation**

- E. This instrument may be cited as the Consumer Credit (Debt Respite Moratorium) Instrument 2021.

By order of the Board  
[*date*]

**Annex A****Amendment to the Glossary of definitions**

Insert the following new definition in the appropriate alphabetical position. The text is not underlined.

<i>Debt Respite moratorium</i>	means a breathing space moratorium or mental health moratorium under The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations [2020].
<i>moratorium debt</i>	means a moratorium debt for the purposes of The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations [2020].

## Annex B

### Amendments to the Consumer Credit sourcebook (CONC)

In this Annex, underlining indicates new text and striking through indicates deleted text.

#### 5D      **Overdraft repeat use**

...

#### 5D.3      **Interventions to be taken in the case of repeat users**

...

#### 5D.3.3      G      (1)      ...

...

(5)      (a)      If an overdraft *customer* has already been identified by a *firm* as being in financial difficulties, and is already being treated with appropriate forbearance by the *firm*, the *rules* in this section do not require the *firm* to do anything inconsistent with the treatment that it has already adopted in respect of that *customer*.

(b)      Where a *Debt Respite moratorium* is in effect for a *customer's* overdraft and a *firm* is complying with its obligations pursuant to that moratorium, the *firm* is treating the *customer* with appropriate forbearance with respect to the portion of the overdraft that is subject to the moratorium. The *firm* is not required to take the steps in relation to that *moratorium debt* under this section during the moratorium, as these steps would be inconsistent with the treatment currently being adopted in respect of that *customer*.

...

...

#### 6      **Post contractual requirements**

...

#### 6.7      **Post contract: business practices**

Application

6.7.1      R      (1)      This section applies to a *firm* with respect to *consumer credit lending*.



(2) ...

Business practices

- 6.7.2 R (1) A *firm* must monitor a *customer's* repayment record and take appropriate action where there are signs of actual or possible repayment difficulties.
- (2) This *rule* does not apply in relation to a credit card unless the card is a business credit card (see *CONC* 6.7.1R(3)).

[**Note:** paragraph 6.2 of *ILG*]

- 6.7.3 G The action referred to in *CONC* 6.7.2R should generally include:
- (1) notifying the *customer* of the risk of escalating debt, additional interest or charges and of potential financial difficulties; and
- [**Note:** paragraph 6.16 of *ILG*]
- (2) providing contact details for *not-for-profit-debt advice bodies*.
- [**Note:** paragraph 6.2 of *ILG*]; or
- (3) where a *Debt Respite moratorium* is in effect for the *customer's* debt for the purposes of *CONC* 6.7.2R, complying with its obligations pursuant to the moratorium, with respect to that *moratorium debt*.

Business practices: credit cards and retail revolving credit

- 6.7.3A R A *firm* must monitor a *retail revolving credit customer's* or a credit card *customer's* repayment record and any other relevant information held by the *firm* and take appropriate action where there are signs of actual or possible financial difficulties.

6.7.3B G ...

(2A) Where a *Debt Respite moratorium* is in effect for the *customer's* *retail revolving credit* or credit card debt and a *firm* is complying with its obligations pursuant to the moratorium, this is likely to constitute appropriate action in relation to that *moratorium debt* for the purposes of *CONC* 6.7.3AR.

...

...

Credit cards and retail revolving credit: persistent debt

- 6.7.27 R (1) This *rule* applies to a *firm* with respect to communicating with a *customer* about, and receiving payments or exercising rights under, a *regulated credit agreement* for a credit card or *retail revolving credit*, if the *firm* assesses that the amount the *customer* has paid to

the *firm* towards the credit card balance or *retail revolving credit* balance over the immediately preceding 18-month period comprises a lower amount in principal than in interest, fees and charges.

...

(3) The *rule* in paragraph (1) does not apply:

...

(c) where the *firm* is taking steps to treat the *customer* with forbearance under *CONC* 6.7.37R, is otherwise taking equivalent or more favourable steps in relation to the *customer's* account, or *CONC* 6.7.39R applies.

...

6.7.28 G (1) For the purposes of:

(a) *CONC* 6.7.27R, *CONC* 6.7.30R, *CONC* 6.7.34G, *CONC* 6.7.39R and *CONC* TP 8, “principal” comprises only the amount of *credit* drawn down by the *customer* under the credit card agreement or *retail revolving credit* agreement, and does not include any interest, fees or charges added to the account; and

(b) *CONC* 6.7.27R(3)(c), *CONC* 6.7.29R(5) and *CONC* 6.7.30R(4), where a *Debt Respite moratorium* is in effect for the *customer's* *retail revolving credit* or credit card debt, and a *firm* is complying with its obligations pursuant to the moratorium, the *firm* will be taking steps equivalent to, or more favourable than, those required under *CONC* 6.7.37R with respect to that *moratorium debt*, for as long as the moratorium is in effect.

...

...

**7 Arrears, default and recovery (including repossessions)**

...

**7.3 Treatment of customers in default or arrears (including repossessions): lenders, owners and debt collectors**

...

7.3.11 R A *firm* must suspend the active pursuit of recovery of a debt from a *customer* for a reasonable period where the *customer* informs the *firm* that a *debt counsellor* or another *person* acting on the *customer's* behalf or the *customer* is developing a repayment plan.

[**Note:** paragraphs 7.12 of *ILG* and 3.7m of *DCG*]

- 7.3.12 G A “reasonable period” in *CONC* 7.3.11R should generally be for thirty *days* where there is evidence of a genuine intention to develop a plan and the *firm* should consider extending the period for a further thirty *days* where there is reasonable evidence demonstrating progress to agreeing a plan. Where appropriate, a *firm* can take into account the period of time that the debt was subject to a *Debt Respite moratorium* when determining what is a reasonable period.

[**Note:** paragraphs 7.12 (box) *ILG* and 3.7m of *DCG*]

