

Financial Services Authority

Freedom of Information Request – (FOI2707)

Extract from FSA letter dated 5 May 2004 from Chief Counsel, Retail Markets Department, General Counsel's Division to Messrs Barlow Lyde & Gilbert:

NHBC and the Insurance Mediation Directive

The Authority has now reconsidered the application of the Directive to the circumstances of the NHBC Buildmark scheme....

...the Authority has reached the view that members of the NHBC who provide insurance to buyers of properties in accordance with the Buildmark scheme ("scheme members") do not carry out a regulated activity in respect of insurance mediation which will require authorisation under Part IV of FSMA 2000, and thus has decided that it will not contend that scheme members who fail to register will be contravening section 19 of FSMA after 14 January 2005.

The reasons for that decision are as follows:

1. The Authority is satisfied that scheme members will be carrying on the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, within the meaning of article 2 of the Directive, and will be carrying on the activity of arranging deals in insurance within article 25 of the Regulated Activities Order.
2. Article 2 of the Directive, construed consistently with recital (11), requires that an insurance intermediary be a person who takes up or pursues insurance mediation for remuneration, so that the intermediary is remunerated for, and in respect of, an insurance mediation service either by pecuniary remuneration or by remuneration consisting of an agreed economic benefit tied to the performance of the mediation activity. Thus the Directive requires that remuneration be found in the relevant contract or contracts in respect of the mediation service performed by the intermediary in that capacity.
3. In order to take proper account of both limbs of recital (11) it is necessary to find either that there is some pecuniary remuneration, or remuneration, which is non-pecuniary, but constitutes an agreed economic benefit tied to the performance of the mediation activity. The Authority takes the view that remuneration may exist if the arrangements enable an intermediary, by virtue of the arrangements with an insurer, to enjoy the economic benefit of enhancing the attraction for a customer of a product packaged with the insurance cover, or if the intermediary acquires some other economic benefit under the contract, such as limiting liability to the customer.

4. The Authority is satisfied that insurance cover will be provided to the customer under arrangements made by the scheme member in consideration for the payment of a price by the customer. The cost of Buildmark cover is included in the purchase price....
5. However the Authority considers that in the normal course of transactions under the NHBC scheme, there is no evidence that such remuneration as is secured by the scheme member, by way of economic benefit, is remuneration provided for his mediation services as such. In respect of the economic benefit derived from the enhancement of the value of the house on the market, the evidence leads to the conclusion that this is a benefit derived wholly or mainly from the provision of the insurance, under arrangements procured by the builder in the enrolment, inspection and certification of the property, rather than in the activity of insurance mediation acting on behalf of either the insurer or the customer. In respect of the benefit the builder obtains by way of limitation of liability, derived from the absence of a right of subrogation to the house buyer's rights under the Buildmark insurance, that benefit is obtained in consideration for the benefits conferred on the customer under the contract, and not in return for any insurance mediation activity.
6. For these reasons the insurance mediation activity performed by a scheme member does not fall within the scope of article 2 of the Directive, and falls outside the scope of the "by way of business" test under the By Way of Business Order by virtue of paragraph 3 (4)¹.

If there were to be any material change in the scheme in the future in respect of the provision of Buildmark insurance cover the Authority would need to reconsider the matter.

¹ Financial Services and Markets Act 2000 (Carrying on Regulated Activities By Way of Business) Order 2001 SI 2001/1177 (as amended by The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No2) Order 2003) SI 2003/1476.