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Gough Square Chambers' consumer credit column: November 2020

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James Ross, Ruth Bala, Thomas Samuels and Lee Finch are all specialist consumer credit counsel at Gough Square Chambers. On a regular basis, they will share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

In the November 2020 column, Thomas Samuels considers the latest guidance published by the FCA relating to payment deferrals for consumer credit products in the light of the COVID-19 pandemic.

Consumer credit and COVID-19: FCA guidance

Introduction

In March of this year, at the beginning of the first nationwide period of lockdown, I wrote a column speculating on consumer credit firms' obligations to their customers in the light of the 2019 novel coronavirus disease (COVID-19) pandemic (see Article, Gough Square Chambers' consumer credit column: March 2020).

On 25 November 2020, the FCA published its final "Payment Deferral Guidance" for a range of products including loans, credit cards, motor finance, high-cost short-term credit (HCSTC) and pawn-broking. Each of these products is considered in a separate document published on the FCA's website (collectively the Deferral Guidance).

Scope and purpose of FCA guidance

Given the Chancellor's warning this week that the UK is facing the worst recession for over 300 years, it is clear that the financial impact of the pandemic is likely to be felt for months and years to come. However, the Deferral Guidance is said to last only until 31 July 2021, with the exception of that covering HCSTC, which expires on 31 March 2021.

The Deferral Guidance is intended to cover the "exceptional circumstances" arising out of the pandemic.

A "payment deferral" is defined as being a situation on or after either 9 or 24 April 2020 (depending upon the product in question) where a "firm permits... to make no payments or reduced payments... for a specified period without considering them to be in arrears". Save in relation to HCSTC, the Deferral Guidance distinguishes between a situation where the customer makes no payments, being a "full payment deferral", and one where they make reduced payments, being a "partial payment deferral".

It sets out eligibility and processes for firms dealing with (ongoing) payment deferrals. Thus, the Deferral Guidance picks up where previous iterations, issued by the FCA since April, left off.

Running alongside it is a further document called "Tailored Support Guidance" (Tailored Guidance). Its purpose is to cover firms' obligations to customers facing payment difficulties as a result of COVID-19, but who are not already receiving a payment deferral, including those who are ineligible.

Terms of deferrals

Eligibility criteria under the Deferral Guidance echoes what applied to previous iterations. In all cases, the customer must be experiencing, or have a reasonable expectation that they will experience, payment difficulties "as a result of" the pandemic. It is therefore not intended to extend firms' obligations in any other context.

For all product types other than HCSTC, a firm cannot defer more than six months' worth of payments and should not give any single deferral of longer than three months. In the case of HCSTC, the deferral should be for at least one month, but should allow repayment over such period and in such amount as is affordable.

A payment deferral, whether full or partial, should reduce payments to a level that the customer indicates they can afford. Therefore, the onus would appear to be on the customer to consider what is appropriate, rather than for the firm to have to assess affordability. In considering what is "appropriate", the Deferral Guidance gives the example of a temporary drop in household income that would have otherwise been used to make repayments on the product in question.

However, that is not to say that firms are excused of all responsibility. It makes clear that they retain an overarching obligation not to agree payment deferrals that are (on a reasonable determination) not in the customer's interests. In that respect, reference is made to the balance between "immediate temporary relief" and the "longer-term effects" of a payment deferral and, in particular, the potential impact of accrued interest over the deferred period. By way of example, it suggests that a deferral will clearly not be in a customer's interests if it gives a "greater overall debt burden" than some alternative solution such as waiving interest over the period in question.

The position is somewhat more straightforward in relation to HCSTC. The Deferral Guidance specifically provides that any payment deferral cannot put the customer in a worst position in terms of interest than if they had paid in full in accordance with an agreement.

In any event, nothing prevents firms from taking a more generous approach where appropriate.

Availability

In broad terms, all consumer credit firms must make clear to their customers that such payment deferrals are available. Further, if a customer indicates that they are experiencing, or are likely to experience, payment difficulties as a result of COVID-19, the firm must ask whether they wish to investigate a payment deferral.

End of deferral period

The position at the end of a customer's deferral period is less well-defined. The Deferral Guidance requires that customers are treated fairly and notes that what that will entail will differ according to each customer's financial circumstances. As a general rule, however, a distinction is to be drawn between those customers who can resume full payments immediately and those who cannot.

Firms must take reasonable steps to contact customers in "good time" before the end of the deferral period to ascertain their situation and provide relevant information about resuming payments or seeking further support.

If a customer is likely to require further support, either a further payment deferral can be arranged or, if the customer is not eligible, assistance in accordance with the Tailored Guidance may be appropriate. Where a customer is transferred to the Tailored Guidance, any interest that "would have accrued over the deferral period(s) but for the deferral(s) granted under this guidance should be waived as a soon as reasonably practicable at the end of the period".

Particular considerations

As noted above, the Deferral Guidance comprises of five individual documents, each covering a different type of credit. Accordingly, particular considerations arise in relation to each. These include the following:

- Credit cards. This includes a specific section concerning the interaction with the "persistent debt" rules in the Consumer Credit sourcebook (CONC). In particular, the remedies in CONC 6.7.27R to 6.7.40R are suspended in relation to periods during which the customer has been granted a payment deferral. Therefore, if the customer has non-consecutive payment deferrals, there will be periods where the persistent debt rules apply and periods where they do not. In any event, however, once a deferral period has come to an end it will be counted towards the assessments firms must make under those rules. The precise calculations and timings are considered further at para 4.4 of the credit card Deferral Guidance.
- Motor finance. Where the agreement in question is a personal contract purchase (PCP) agreement or similar, the firm must not use the deferral period to modify or seek to unilaterally alter any aspect of the original agreement to the customer's disadvantage. For example, by recalculating the guaranteed minimum future value of the vehicle. Equally, specific solutions should be sought for customers who are unable to make a balloon payment at the end of a PCP agreement because of COVID-19-related difficulties.
- HCSTC. As indicated above, the Deferral Guidance for this sector takes a substantially different form because of the unique nature of product and the rules which already apply to it.

Given the different guidance, resort should be made to each of the individual Deferral Guidance documents as applicable to the product in question.

Tailored Support Guidance

As noted above, the Tailored Guidance supplements firms' obligations in circumstances where the Deferral Guidance does not apply.

As the name suggests, it aims to give firms "flexibility and scope to tailor their approach to meet the challenge of many customers needing help...". In doing so, it does not impose any prescriptive requirements so as to give firms room to use automated or digital tools to assist in the forbearance process.

The Tailored Guidance is a much longer document than any of the Deferred Guidance publications and covers a range of issues. These include the treatment of arrears and credit reference agency reporting after a payment deferral period.

Section 5 specifically considers "Tailored support in the current environment". It notes the medium and long-term challenges likely to be faced by borrowers and requires firms to employ a full range of short and long-term forbearance options and to "minimise avoidable financial distress, stress and anxiety...". Equally, however, it acknowledges the challenges faced by firms in terms of staff shortages and remote working.

The Tailored Guidance identifies nine outcomes that should be achieved by firms in providing tailored support in relation to COVID-19-related difficulties:

- Having due regard to customers' interests and treating them fairly.
- Treating customers with forbearance and due consideration.
- Giving customers sustainable arrangements, taking account of other debts and essential living costs.
- Not pressuring customers to pay in an unreasonable short period.
- Protecting customers from escalating debt.
- Recognising and responding to vulnerability.
- Having clear, effective and appropriate procedures for customers who may be in financial difficulty or vulnerable (or both), including having proper staff training.
- Allowing customers time to consider their options and, if necessary, seek advice.
- Referring customers to debt advice when appropriate.

Conclusion

Over the coming months it is likely that the Deferral and Tailored Guidance will become increasingly important to firms and customers alike. It is therefore important that all concerned understand their rights and obligations thereunder.

For more information on the Deferral and Tailored Guidance, see Practice note, COVID-19: FCA temporary guidance for retail lenders.

Gough Square Chambers' consumer credit columns

For previous consumer credit columns written by barristers at Gough Square Chambers, see Practice note, Gough Square Chambers' consumer credit column.