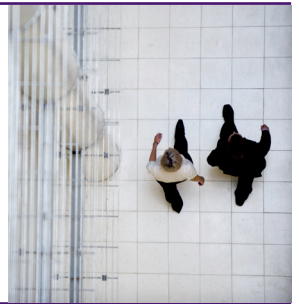


Review

Financial Services Group



FSA restates warning that firms may need to review their standard terms and conditions

Introduction

The FSA has recently re-emphasised (in a Regulation round-up dated 18 June 2010) the need for firms to review their standard contract terms and conditions to ensure their customers are not being requested to confirm that they had read and understood the terms of a contract which they may not have any real awareness of. If the FSA finds that a term is unfair it will not be enforceable against the customer.

What do the FSA consider to be unfair?

In January 2009 the FSA took action against The Online Partnership for the use of the statement I confirm that I have received, read and understood this agreement and agree to the terms set out within. The outcome was that the Online Partnership gave an undertaking changing its terms of business.

Why do the FSA consider this term to be unfair?

The FSA stresses that firms should draft contracts in plain and intelligible language, and give customers an opportunity to read all the terms of a contract.

Though customers should check the terms of a contract they enter into, standard contract terms that include the statement that a customer has read and understood the terms of the contract are likely to be considered unfair because in practice it binds customers to terms that they have no real awareness of.

The FSA can challenge firms that are using terms they consider to be unfair. A term is deemed to be unfair under the Unfair Terms in Consumer Contracts Regulations 1999 (the "Regulations") if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the customer.

The Regulations apply a test of fairness to all standard terms (terms that have not been individually negotiated) in contracts used by firms with customers, subject to certain exceptions.

Hammonds' Comment

We recommend that firms pay particular attention to reviewing standard product and/or service specific documentation which may not be negotiated with customers. If these contracts include the statement that a customer has read and understood this agreement (or a similar statement) and agree to the terms set out within, it is likely that such term will be unenforceable against the customer.

This reminder by the FSA of the importance of the Regulations is a clear warning to firms that the FSA will take a strict approach to standard terms of a contract that do not give customers appropriate opportunity to read and consider the terms of a contract.

We recommend that firms revisit the terms of their standard contracts and consider taking appropriate measures to ensure that customers are bound by them. This may involve a redrafting of the confirmation clause itself, bringing customers attention to the clause (such as capitalising the clause and highlighting the clause in bold) and changing practices at signing so that customers are actually asked whether they have any questions that they would like to raise regarding the contract.

If the FSA finds that a term is unfair it will not be enforceable against the customer.

FURTHER INFORMATION

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