

## Model Code Update Number 0902

Date: 8 January 2009

### 8. Customer relationship, advice and liability (1)

*Treasury product offerings by financial institutions to customers have become much more complex, sophisticated and advanced in their applications. The objectives of customers for entering into such products can be diverse. Financial institutions and more in particular sales and advisory personnel should be mindful of the level of knowledge, sophistication and understanding of their customers when giving advice on the use, application or outcome of these products.*

In general, all financial market transactions are presumed to be on an arm's length basis unless parties explicitly acknowledge otherwise. All such transactions are entered into solely at each party's risk. When dealing with customers, the financial market professionals are advised to clarify the foregoing nature by explicitly agreeing in writing that:

- (a) the customer understands the terms, conditions and risks of that transaction;
- (b) the customer made its own assessment and independent decision to enter into such transaction and is entering into the transaction at its own risk and account;
- (c) the customer understands that any information, explanation or other communication by the other party shall not be construed as an investment advice or recommendation to enter into that transaction except in a jurisdiction where laws, rules and regulations (such as the Mifid directive by the EC) would qualify the given information as an investment advice.
- (d) no advisory or fiduciary relationship exists between the parties except where laws, rules and regulations would qualify the service provided by the financial market professional to the customer as an advisory or fiduciary relationship.

These should be clearly set out at the onset of the trading relationship in writing such as in a master agreement. However, depending upon the jurisdiction concerned, the validity of these representations or agreements may not be robust due to, inter alia, overriding mandatory statutes. In addition, depending on the size, tenor and/or sophistication of the relevant transaction, the financial institution may wish to consider reiterating these in the relevant document relating to that transaction such as a confirmation.

For its own protection, prior to the transaction, the financial institution should endeavour to provide all necessary information reasonably requested by the customer so that the customer fully understands the effects and risks of the transaction. Both before and after entering into the transaction, it may, if it deems appropriate under the circumstances, also provide any additional information or material it may think fit as a precautionary measure against future adverse allegations or assertions of claims by the customer.

Unless required by applicable laws and/or regulations, financial institutions are under no general legal obligation to explain the effects, risks or projected outcome of the transaction or to advise on possible solutions. However, if the financial institution thinks it is appropriate to do so, it should set out clearly any assumption and/or forecast on which such advice or explanation is based and that such advice or explanation should be understood and judged by the customer before it makes any decision as to the possible action/inaction. If the financial institution does provide advisory services, it should do so in good faith and in commercially reasonable manner.

The financial institution should be familiar with applicable laws, rules and regulations in the jurisdictions in which it conducts business. It should seek advice of its legal counsel in each jurisdiction wherever appropriate or prudent to do so. It may wish to consider incorporating such legal advice into its own internal policies and/or procedures.

Deleted: under the circumstances

It is important to note that the relevant laws in these areas differ substantially from jurisdiction to jurisdiction. For example, the distinction between a professional investor and an amateur (and the terminologies used to refer to these concepts) may or may not be codified in a statute and the legal consequence of such distinction, such as the protection afforded to "non-professionals", i.e. the duty of care imposed on the professionals, is also diverse.

Deleted: 'amateurs'

(1) "Wordings in this chapter do not have the same meaning as set out in the European Community directive known as 'Markets In Financial Instruments Directive' (Mifid), in particular regarding the definition of a professional customer and the provision of advice."