Office of Fair Trading Guidance on Property Sales and the Consumer Protection Regulations Seminars 2012/13

Is your business compliant and why does it matter?

November 2012 – February 2013

Various locations, UK
Welcome and Introduction

Peter Bolton King
RICS Global Residential Director

Paul McCormack
RICS Regulation Policy Manager
What is the OFT Guidance all about?

- Guidance on property sales
- Compliance with the Consumer Protection from Unfair Trading Regulations 2008 and
- The Business Protection from Misleading Marketing Regulations 2008
- These Regulations are how the UK has implemented the EU Unfair Commercial Practices Directive 2005
Workshop Objectives

By the end of the Workshop you will be able to:

• Undertake a high level risk assessment of your processes
• Brief your team on their main duties and the risks
• Explain and advise on the Key points of the Guidance
• Understand which marketing and sales tactics present more risks
How did the OFT guidance come about?

- Autumn 2011 - OFT public consultation exercise on draft version of the guidance
- December 2011 - RICS response to the OFT consultation
- Spring 2012 – further RICS engagement with OFT
- June 2012 – RICS comments on a pre-publication draft of the OFT guidance
- September 2012 – publication of final version of the OFT guidance
Structure of Today’s Seminar

- An update from the OFT
- Overview of the Regulations
- The key concepts
- Q&A
- Implications for your business
- What action you need to take now
- Q&A
DISCLAIMER

- It is a Guidance note
- Court makes the final ruling
- Seek Independent legal advice
OFT Guidance: Where Are We?

• An update from the OFT
  (Cavendish Elithorn, Senior Director)
• Origins of the guidance
• Overall policy objectives
• Compliance and enforcement strategy
What do the CPRs cover and where do they apply?

- Unfair Commercial Practices
- Location
- Relationship
- PMA 1991
- Mitigating the risk
Important concepts under the CPRs (1)

The five rules of unfair practice

1. Giving misleading information to consumers
2. Failing to give necessary information to consumers
3. Acting aggressively
4. Failing to act in accordance with reasonable expectations of acceptable trading practice
5. Engaging in any of the 31 practices banned under the CPRs
Important concepts under the CPRs (2)
Failing to give necessary information to consumers

Goes further than the duty not to make false or misleading statements that agents are familiar with under the PMA 1991.

‘Misleading omission’ focuses on what an agent has NOT said.

This duty is limited to the provision of ‘necessary information’, described in the CPRs as ‘material information’.
What is ‘Material Information’? (1)

• Information a consumer needs to know at each stage of the property transaction process in order to make a sufficiently informed transactional decision
• Each stage in the property transaction process, each consumer, and each property, might well be different.
• Missing information?
What is ‘Material Information’? (2)

• What are reasonable steps?
  – Record the material information that is readily available to you
  – Ask clients or 3rd parties for information to fill any gaps
  – Verify the accuracy of information via other available sources
  – Provide all material information you obtain to the consumer before they make a transactional decision
The Signposting Principle

What does this mean and how can it help?
Questions and Answers
What does compliance look like? What does this mean for your business?

Some worked examples…
Case Study 1 – Adverse Survey Results

• **Issue** - Information on property’s condition arising from a prospective buyer’s survey results in sale falling through

• **Dilemma** – What does the Agent need to say to subsequent prospective buyers?

• **Current practice** – likely to be ‘do nothing’. ‘Caveat emptor’ applies

• **Impact of OFT guidance** – Agent takes ‘reasonable steps’ to verify the property’s condition through a range of sources, and then judge what additional information on the property’s condition needs to be disclosed to future potential buyers
Case Study 2 - Communicating offers

**Issue** – 1st Buyer’s offer is accepted, but Seller insists property remains on market. Seller and Agent agree to notify 1st Buyer if other offers are made. A 2nd Buyer makes a ‘take it or leave it offer’. Seller agrees and instructs Agent not to tell 1st Buyer until 2nd Buyer’s deposit is paid. This takes 10 days during which time 1st Buyer incurs expense.

**Dilemma** – Does the Agent need to disclose the alternative offer to the 1st Buyer as soon as it is made by the 2nd Buyer?

**Current practice** – likely to be for the Agent to follow their Client’s instructions.
Case Study 2 – Communicating offers

Impact of OFT guidance – Agent alerts the Seller (their Client), and then tells the 1st Buyer about the 2nd Buyer’s offer.
Case Study 3 – No Lift to 2nd Floor Flat

• **Issue** – 2nd floor flat in good condition and good location has no lift access.

• **Dilemma** – Does the Agent need to include the lack of a lift on the property details? And/or mention the lack of a lift to prospective buyers?

• **Current practice** – likely to be ‘do nothing’. ‘Caveat emptor’ applies

• **Impact of OFT guidance** – Unlikely to need to disclose on property details. However, will need to disclose at an early stage to those buyers with mobility problems
Case Study 4 – Underground Pipeline

• **Issue** – White post in a garden pond of a large detached property marks the location of an underground oil pipeline. Seller expressly forbids the Agent from disclosing the nature of the post to prospective buyers.

• **Dilemma** – What does the Agent need to say to buyers?

• **Current practice** – likely to be ‘do what the client requests’. ‘Caveat emptor’ applies.

• **Impact of OFT guidance** – Agent needs to try and verify the ownership and condition of the pipeline through a range of sources, and then judge what information about the pipeline needs to be disclosed to future prospective buyers.
Case Study 5 – Restrictions on Lease

• **Issue** - Information on restrictions in lease on keeping animals in a property.

• **Dilemma** – What does the Agent need to say to prospective buyers?

• **Current practice** – likely to alert prospective buyers who express a keen interest in the property if know they keep animals – otherwise high risk of a failed transaction later in the sales process.

• **Impact of OFT guidance** – If Agent knows such lease restrictions apply in a property, and knows a prospective buyer keeps animals, then needs to disclose.
Case Study 6 – Guide Price at Auction

• **Issue** – A property is due to be sold at auction. Agent is instructed by their Seller to show a guide price in the catalogue of £80,000-£100,000, even though the Seller indicates at that stage they have no intention of accepting less than £90,000.

• **Dilemma** – What does the Agent need to say to prospective buyers ahead of the auction?

• **Current practice** – likely to be ‘do nothing’. ‘Caveat emptor’ applies

• **Impact of OFT guidance** – Agent seeks to clarify the absolute ‘bottom line’ of the Seller, and explain to them why the guide price will need to reflect that.
Case Study 7
Hearsay Evidence about Upward Chain

• **Issue** – Hearsay evidence questioning the viability of the upward chain – marriage breakdown involving one of the sellers in the upward chain

• **Dilemma** – What does the Agent need to say to prospective buyers?

• **Current practice** – likely to be ‘do nothing’. ‘Caveat emptor’ applies

• **Impact of OFT guidance** – Agent takes ‘reasonable steps’ to verify the hearsay evidence through a range of sources, and then judges what information needs to be disclosed to future potential buyers
Case Study 8 – Seller’s Optimum Selling price

• **Issue** – Seller informs agent that £XXX,000 is acceptable – below the asking price - but they would like more if possible

• **Dilemma** – Is Agent obliged to tell a prospective Buyer that the Seller will accept £XXX,000 if asked a direct question in that regard?

• **Current practice** – the Agent does not disclose the Seller’s bottom line; simply restates the asking price and says Seller will consider all reasonable offers.

• **Impact of OFT guidance** – none.
Practical Steps to Future Proof your Business

• Section 5 of OFT guidance
• Risk assessment framework – Annex 1 of the RICS technical advice note
  – Sound business practice
  – Accurate record keeping
  – Training
  – Regular review and continuous improvement
Misleading marketing of services

• Section 5 of the OFT guidance
• Professional agents should already be compliant
• Section 5.14 – includes new advice on best practice in terms of showing charges and fees – whether as a fixed fee or % of unknown sale price – as inclusive of VAT
Sanctions for non-compliance

• Civil and/or Criminal enforcement action by OFT, Trading Standards or DTI in Northern Ireland
• Potential adverse consequences for the business, the business owner, or an employee could include:
  • Court order to stop a breach of the CPRs
  • Unlimited fine
  • Imprisonment for up to 2 years
  • Prohibition order by OFT banning you from estate agency work under the Estate Agents Act 1979
  • Consumer complaint to a redress scheme which if upheld could lead to you having to apologies and/or pay compensation of up to £25K
  • Bad publicity and reputational damage
  • Loss of business
What do I need to do?

- RICS and OFT GN
- Application to your Business
- Update your Business practice and processes
- Staff update and training
- Record Training
- Keep records of good practice
Individual Action Planning

• Reflect on today’s workshop

• How are you going to apply your learning in your business?
Back to the objectives

You now should be able to:

• Undertake a high level risk assessment of your processes

• Brief your team on their main duties and the risks

• Explain and advise on the key points of the new OFT Guidance

• Understand which marketing and sales tactics present more risks
Questions and Answers

And, please complete your evaluation forms. Thanks!
Closing Summary

Peter Bolton King
RICS Global Residential Director

Paul McCormack
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