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Dear Claudine

FCA Withdrawal of Unfair Contract Terms Guidance

The City of London Law Society ("**CLLS**") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

This letter has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). The Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

We note with concern that the FCA has withdrawn a large body of materials and guidance ("**Guidance**") on unfair contract terms from the Unfair Contract Terms Library section of its website on 2 March 2015 without providing any real explanation or substitute guidance.

The materials are said to have been removed whilst consideration is given to how they should be updated in light of the Consumer Rights Bill, the Competition & Markets Authority's related guidance consultation on unfair contract terms, and certain recent developments in EU case-law. However, the FCA has also stressed that the Guidance removed no longer reflects the FCA's views on unfair contract terms and should not be relied on by firms. No proper explanation of how the FCA's views have changed, or of why the material withdrawn is inconsistent with these new or developing views, has been provided.

It seems to us unreasonable to expect firms to second guess in what way the FCA now considers its former guidance to be deficient. Firms have been encouraged to have reference to this Guidance and to rely on it for their compliance, in the case of some of the material, for just under a decade. Furthermore, it seems surprising that some firms should remain legally bound by undertakings which form part of the Guidance which the FCA says no longer reflects its views.

The suggestion that firms may wish to take legal advice on the implications for their businesses of CJEU cases generally is not particularly helpful. It is also not apparent why the FCA should be unwilling to provide an explanation of the two judgments specifically referred to (handed down in April 2012 and April 2014), when it has in the past provided such explanations (for example in respect of the removal of an undertaking in respect of DAS Legal Expenses Insurance Company following the decision of the CJEU in *Erhard Eschig v UNIQA Sachversicherung AG* (C-199/08) on 10 September 2009).

Firms have effectively been left in a state of regulatory limbo, without any timeframe for the release of any updated guidance, and without any explanation or guidance. This seems unlikely to advance the interests of consumers.

As a regulator, the FCA is expected to adhere to the principle of transparency. Section 3B(h) of the Financial Services and Markets Act 2000 provides that the FCA (and the PRA) "*should exercise their functions as transparently as possible*". In addition, pursuant to s.21(2)(a) of the Legislative and Regulatory Reform Act 2006 ("**LRRA**"), any person exercising a regulatory function must have regard to the principle that "*regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent*". "*Setting standards or giving guidance*" are included within the concept of regulatory function (s.32(2) LRRA).

We recognise that the withdrawal of this Guidance may not trigger a formal requirement for public consultation, although section 139B(4) requires that the revocation of any general guidance should be notified to HMT in writing without delay. Clearly the FCA must adopt some process before removing important website guidance and materials of this nature. It is not apparent what considerations led to the removal of the Guidance, nor how the FCA expects firms to respond.

It would be helpful to understand the internal process undertaken by the FCA for the removal of the Guidance without proper explanation or guidance, and why it was considered that the FCA's statutory and operational objectives would be best served by placing firms in a state of uncertainty. If it is the fact that the FCA no longer intends to provide guidance in this area, and envisages that firms should instead rely solely on the Competition & Markets Authority's guidance, then surely it would have been better to say so.

We would encourage the FCA to release a further statement:

- indicating when it expects updated guidance to be published, and

- providing some indication of how it envisages that firms should, in the interim, respond to the removal of the Guidance, and further clarity on any particular aspects of the Guidance that it considers may no longer represent good practice.

Following this explanation, we note that firms will also need time to enable them to adapt their documentation in order to meet whatever the FCA's expectations or the new guidance may prove to be.

If you would find it helpful to discuss any of these comments then we would be happy to do so. Please contact either Karen Anderson by telephone on +44 (0) 20 7466 2404 or by email at karen.anderson@hsf.com, or Peter Richards Carpenter by telephone on +44 (0) 20 3400 4178 or by email at peter.richards-carpenter@blplaw.com, in the first instance.

Yours sincerely

Karen Anderson
Co-chair, CLLS Regulatory Law Committee

Peter Richards-Carpenter
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THE CITY OF LONDON LAW SOCIETY
REGULATORY LAW COMMITTEE

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