

# RICS information alert

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August 2014

**Note:** This information alert applies to **all sales and letting agents both residential and/or commercial**. It contains only a summary of RICS' interpretation of the Office of Fair Trading [Guidance on property sales](#) (OFT guidance), the Competition and Markets Authority [Guidance for letting professionals on consumer protection law](#) (CMA guidance) and the main provisions of the *Consumer Protection from Unfair Trading Regulations 2008*.

While it offers guidance on RICS' view as to how a court would be likely to interpret such materials, it should not be read as a substitute to the legislation and the OFT and CMA guidance itself. Ultimately, it would be for a court to make the final ruling. It is recommended that RICS members seek independent legal advice if they are unsure of any provisions under the CPRs.

## 1 Introduction

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The *Consumer Protection from Unfair Trading Regulations 2008* (the CPRs) and the *Business Protection from Misleading Marketing Regulations 2008* (the BPRs) have been in force since 2008 (together, the Regulations). These Regulations apply to businesses in all sectors, including car dealers, yacht brokers and mobile phone retailers, as well as businesses involved in the sale and letting of land and property.

In September 2012 the OFT published guidance to help land and property sales businesses comply with the Regulations. That guidance is specifically aimed at:

- sales agents
- buying agents
- Internet property retailers
- property auctioneers; or
- solicitors (offering estate agency work)

whether residential or commercial, who carry out activities relating to the sale of property or land in the UK.

In June 2014 the CMA published similar guidance for letting professionals, having taken over responsibility for enforcement of consumer protection law, including the CPRs/BPRs, from the OFT in April 2014. Letting professionals are defined in section 1.3 of that CMA guidance as 'anyone who as part of their business supplies services related to the letting of privately owned residential property.' This CMA guidance applies, to a greater or lesser degree, to:

- letting agents
- landlords
- property portals; and
- 'passive intermediaries'.

However, whilst this guidance is aimed at residential letting agents, it must be noted that the CPRs and BPRs apply equally to commercial letting agents. Commercial agents should therefore also follow the principles set out in the CMA guidance.

Also see [Key principles for lettings professionals](#), a related CMA document about compliance with relevant consumer and business protection law.

## 2 Purpose of this document

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The purpose of this information alert is to provide guidance for RICS members in relation to some of the significant concepts identified in the OFT and CMA guidance. This information alert includes a practical risk assessment framework that is intended to help members involved in property sales and lettings to comply with the CPRs.

While this alert focuses on agents' compliance with the CPRs in property sales and letting, it is important that all RICS members consider how both the CPRs and BPRs and the principles outlined in the OFT's guidance note might apply to their business, even if their business does not relate to the sale or letting of property.



[www.rics.org/guidance](http://www.rics.org/guidance)

### 3 What do I need to do?

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You should:

- read in full both this information alert and the OFT and CMA guidance
- consider how the Regulations apply to your business
- if necessary, make changes to your business practices and processes
- ensure that your staff understand the Regulations and comply with them, as your business may be held responsible for their actions
- preserve all business records and ensure that they demonstrate that training has been undertaken based on the OFT and CMA guidance; and
- maintain a comprehensive paper/electronic record trail which clearly demonstrates compliance with the Regulations.

### 4 What do the CPRs cover and where do they apply?

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The CPRs prohibit businesses from engaging in unfair commercial practices in their dealings with consumers. The CPRs apply regardless of both the country in which the business is based and the country in which the property is located, provided that the marketing of the property and/or services reaches, or is capable of reaching, consumers in the UK (CMA guidance section 1.10).

The CMA lettings guidance goes further than the OFT sales guidance and covers not only the CPRs and BPRS but also the *Unfair Terms in Consumer Contracts Regulations* 1999, the *Supply of Goods and Services Act* 1982, the *Unfair Contract Terms Act* 1977 and makes reference to enforcement under the *Enterprise Act* 2002. This information alert focuses specifically on the CPRs and BPRS, as guidance on the other related legislation can be found in the *Private rented sector code of practice* and the RICS [UK residential property standards \(the Blue Book\)](#).

**Important:** Broadly speaking, if you treat your consumers, business customers and competitors fairly, then you are unlikely to breach the CPRs or BPRS. However, if you treat them unfairly, you may face criminal or civil enforcement action.

In practice, the requirements under the CPRs appear fundamentally to change the relationship between an agent and the consumers (particularly actual or prospective purchasers and tenants) with whom they deal.

Over the years there has been a shift away from the traditional consumer law concept of caveat emptor ('buyer beware'). However, many agents appear to have continued to act on the assumption that the buyer beware concept applies to sales and lettings. In a similar vein, many agents have assumed that the legal contractual duty owed to their client (usually the seller or landlord) carries greater weight than any legal obligation owed to the applicant, tenant or purchaser (such as the requirement to treat them honestly, fairly and promptly).

The OFT and CMA guidance suggest that agents should take a different, more cautious approach to how they deal with all 'consumers' under the CPRs. Under the CPRs a consumer can be the contractual client, a potential client or a potential or actual buyer or tenant (see section 5.2 below). This means that, at all stages of the property transaction process, agents must understand the specific application and relevance of the CPRs to the consumers with whom they are dealing and the particular business context. In doing so, agents must ensure that they do not engage in any unfair commercial practice by saying, doing or omitting to say or do something which causes, or is likely to cause, the 'average consumer' to take a different 'transactional decision'.

**Important:** To mitigate the risk of breaching the CPRs, agents must critically assess the relevancy and accuracy of their commercial practices and the information they do or do not provide to consumers at each stage of the transactional process. Agents must also undertake effective due diligence on each transaction and maintain complete and accurate business records.

#### 4.1 The now repealed *Property Misdescriptions Act* 1991

Members involved in the property sales business have been familiar with complying with the *Property Misdescriptions Act* 1991 (PMA 1991). Whilst not as prescriptive, the general requirements in the CPRs cover many of the same areas as the PMA 1991 did.

Members will not be complying with the CPR requirements if they continue just to comply with what were the requirements of the PMA 1991.



## 5 Important concepts under the CPRs

### 5.1 Commercial practices

The CPRs contain broad rules outlining when commercial practices are unfair. These fall into five main categories:

- 1 Giving false or misleading information to consumers ('misleading actions' (OFT guidance pp. 20–24) and 'giving misleading information to consumers' (CMA guidance p. 22)).
- 2 Hiding or failing to provide material information to consumers ('misleading omissions' (OFT guidance pp. 24–32) and 'failing to give necessary information to consumers' (CMA guidance pp. 23–26)).
- 3 Exerting undue pressure on consumers ('aggressive practices' (OFT guidance pp. 32–33) and 'acting aggressively' (CMA guidance pp. 27–28)).
- 4 Not acting with the standard of care and skill that is in accordance with honest market practice and in good faith (failing to show professional diligence (OFT guidance pp. 36–38) and 'professional diligence and the general prohibition against unfair commercial practices' (CMA guidance pp. 28–29)).
- 5 Engaging in any of the 31 specific practices that the CPRs (at schedule 1) ban outright (OFT guidance pp. 34–35, and CMA guidance pp. 29–33).

For a commercial practice falling within categories 1–4 above to be regarded as unfair, it must cause, or be likely to cause, the 'average consumer' to take a different 'transactional decision'. With regard to category 5 above, examples are given in both the OFT and CMA guidance.

**Important:** As long as RICS members already adhere to existing OFT guidance, CMA guidance, the *Private rented sector code*, RICS guidance and any additional industry guidance and codes, the likelihood of falling foul of categories 1, 3, 4 and 5 above should be low. It is in respect of category 2 that agents are most likely to need to review their practices and take action to ensure compliance in light of the OFT 2012 guidance and the CMA 2014 guidance.

### 5.2 Consumers

#### 5.2.1 Sales only

Under the CPRs, the main 'consumers' to whom sales agents owe a legal duty include (see section 3.2 of the OFT guidance):

- clients (who are not themselves a business) who have contracted to use your property sales services
- potential clients (who are not themselves a business) who are looking to pay for property sales services and have come into contact with you and/or your marketing
- potential or actual buyers or sellers (who are not themselves a business) who come into contact with you and/or your marketing as you act on your client's behalf; and
- prospective or actual viewers.

#### 5.2.2 Lettings only

The CMA guidance includes definitions for both letting professionals (or traders) and consumers (see sections 3.6–3.11). The guidance assumes that most residential tenants are consumers and most letting and managing agents are businesses. However, landlords can be either a consumer or a business and sections 3.9–3.10 seek to define the difference and acknowledge that some landlords may be classified as big businesses.

The guidance advises residential agents to avoid committing a criminal or any breach of the Regulations by treating landlords as consumers, unless there is clear evidence to the contrary. For similar reasons, landlords are also advised to comply with the CPRs when dealing with tenants (section 3.11).

**Important:** In the CPRs, 'consumer' goes beyond a client who pays for your services or someone who buys directly from you. It also includes:

- a prospective client
- a prospective or actual viewer
- a potential buyer for a property (e.g. where you are selling homes you have built)
- someone who buys/rents or seeks to buy/rent from your client; and
- someone who sells/lets property to you.

The CPRs apply to the whole range of your business activities that affect consumers.

## 5.3 Average consumers

Under the CPRs, an 'average consumer' is someone who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors. It is someone who takes reasonable care of their own interests, as opposed to a statistically 'average' consumer. Note that the definition of average consumer can change. For example, where a commercial practice is targeted at:

- a particular group of consumers, the average consumer will refer to a member of that group rather than the average consumer generally; that is, the average targeted consumer; or
- 'vulnerable' consumers under the CPRs, such as the elderly (as a result of age) or a first time buyer/renter (as a result of credulity), the 'average consumer' will refer to a member of that group; that is, the average vulnerable consumer. This means that the agent's standards should be higher to address the vulnerability of the average member of that group.

Section 3.4 of the OFT guidance and pp. 19–20 of the CMA guidance provide examples of what the average consumer may be expected to do, such as make their own enquiries (e.g. through publicly available facts where this is easy to do) or make known their own particular requirements.

**Important:** In the CPRs and in the OFT and CMA guidance the 'average consumer' therefore means one of the following (whichever is applicable):

- the average consumer
- the average targeted consumer; or
- the average vulnerable consumer.

Your commercial practices will be judged accordingly.

## 5.4 Transactional decision

The OFT and CMA guidance define 'transactional decision' broadly. It is not limited to a consumer's decision to use your services or to buy or rent a property. It could, for example, include a consumer's decision to:

- accept an offer
- view a property
- commission a survey; or
- pay a pre-contract deposit.

People who want to sell, buy, let or rent a property are likely to make many different transactional decisions before they actually commit to going ahead.

**Important:** A transactional decision is defined widely; pp. 17–18 of the OFT guidance and p. 21 of the CMA guidance provide some helpful examples of transactional decisions, but agents must consider all potential transactional decision points in light of the particular circumstances of each case.

## 6 Failing to give accurate and/or necessary information to consumers

The OFT guidance (sections 4.3–4.6) and CMA guidance (sections 3.16–3.18) outline potential breaches under the CPRs and the BPRs (OFT sections 4.25–4.28), including some illustrative examples, associated with giving misleading information/action to consumers and businesses respectively. The key test under the CPRs is whether the average consumer would be misled and, as a result, would take a different transactional decision.

Section 4.7 of the OFT guidance and sections 3.19–3.23 of the CMA guidance cover the area of disclosure of necessary information in relation to sales and lettings respectively. It is a breach of the CPRs for businesses to mislead consumers by failing to give them the information they need to make an informed decision, where this causes or is likely to cause the average consumer to take a different transactional decision. This is known as a misleading omission (Regulation 6 of the CPRs).

**Important:** This duty differs from the duty not to make false or misleading statements that sales agents would have been familiar with under the now-repealed PMA 91. The difference is that a 'misleading omission' focuses on what you have **not** said. The duty not to mislead by omission is limited to providing what is necessary information, described in the CPRs as 'material information', and is applicable in all business to consumer relationships that any type of agents or professional landlord encounters.

## 7 Material information

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Section 4.9 of the OFT guidance and pp. 23–26 of the CMA guidance cover the definition of ‘material information’, defined in the CPRs as ‘the information that the average consumer needs, according to the context, to take an informed transactional decision’.

Material information is not the same as the information that a consumer might like to have, but rather is material that, without which, the consumer could not make a properly informed decision.

The type of material information which should be disclosed in practice is likely to depend on the stage that the consumer has reached in the buying/selling or letting/renting process and what transactional decision they are considering.

The information that is material and which you should provide to potential buyers/tenants who are considering whether to view a property is likely to include, as a minimum:

- the asking price/rent
- location
- number and size of rooms; and
- the form of ownership (for example freehold or leasehold) or the length of the tenancy being offered.

In the most straightforward transactions there may be little you need to add to this as the prospective buyer’s/tenant’s interest in the property grows. However, much will depend on the circumstances of each transaction. Both the OFT guidance and the CMA guidance provide examples, although these are not exhaustive, of what material information might also include.

**Important:** What information a consumer needs to know at each stage of the process in order to make a sufficiently informed transactional decision should be approached objectively. Each stage in the property transaction process, each consumer and each property might well be different.

### 7.1 What if I do not know a piece of information?

If you do not know a piece of material information it could still be a misleading omission not to disclose that information, particularly if you have not taken reasonable steps to find out the information and if such information is relevant to the average consumer at that particular time.

In determining whether you have misled by omission, the context of your commercial practices will be taken into account, including what you actually know and what is expected of you as a property business in light of the services you are offering. For example, if your firm is only being retained by a consumer to market a property for sale, then you would not be expected to carry out your own survey of a property or do conveyancing checks.

However, you would still need to be able to demonstrate that you:

- gave material information to consumers in good time
- did not deliberately hide or leave out necessary information when dealing with consumers; and
- took reasonable steps to find out information and to check things out when you discovered a problem or consumers identified a potential problem to you, and responded appropriately.

**Important:** You cannot avoid liability for misleading by omission by adopting an ‘ask no questions, shut one’s eyes and close one’s ears’ approach.

## 8 What are reasonable steps?

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Section 4.14 of the OFT guidance and section 3.21 of the CMA guidance clarify the reasonable steps that agents should take to obtain information. These steps should be read carefully and should form part of your due diligence processes:

- Record material information known to you.
- If there are gaps in that information, ask the client or third parties such as conveyancers for additional information.
- If you have reason to doubt the accuracy of information you receive, verify it through other sources.
- If any responses ring alarm bells, investigate further or challenge what you have been told.

- Provide any material information you have obtained or which has come to your attention to the consumer before he or she makes a transactional decision.
- If you become aware of certain information later, still disclose it to the consumer.
- You may receive information from a variety of sources and some of these sources will be less reliable than others. When considering information, you should use your professional judgment in assessing its credibility and whether it needs further corroboration before you decide whether to disclose it.

Most importantly, with respect to all the above bullet points, ensure that you document all the facts so that there is a clear paper trail. This will help to provide a due diligence defence should this become necessary (see also section 10 below).

What is reasonable to expect of you will depend on the nature of your business practice, the services that you provide and the factual context (e.g. what stage in the property transaction process you have reached, or the vulnerability of the consumer).

Section 4.15 of the OFT guidance and section 3.22 of the CMA guidance give some illustrative examples of misleading omissions. In each case the test is whether the average consumer would be misled and, as a result, would take a different transactional decision. In the case of sales in the preliminary stages it is unlikely that a court would expect you to make detailed enquiries into issues undertaken by a surveyor or conveyancer (unless you have led consumers and business customers to believe that these are part of the services that you offer), but the court is likely to want to be satisfied that you asked the client and you looked into any issues or concerns. Later in the property transaction process, if you discovered a problem or were alerted to a potential problem, the court would be likely to expect you to make further enquiries and, if relevant, disclose the information you discover.

## 9 Signposting

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In the case of lettings, examples of misleading omissions would be a failure to present clearly and upfront all the fees that a tenant may have to pay in the course of the transaction.

A further way of protecting yourself is to 'signpost' consumers to publically available information on the wider context of a property, which may also help them with their transactional decision-making during that particular property transaction. This might include matters such as school catchment areas, flood history, flight paths and so on. From a due diligence point of view, this will also help to show that you have taken reasonable steps, and may limit your potential liability to the accuracy and relevance of information about the property itself. What publicly available information you signpost will, to some extent, depend on your local knowledge.

Examples of signposting might include:

- questions on leases could be referred to the [Leasehold Advisory Service](#)
- questions on flooding could be referred to the [Environment Agency](#); and
- questions on crime levels could be referred to [UK Crime Statistics](#).

Questions on local planning, conservation areas and restrictions on listed buildings can often be answered by consumers visiting the website of the relevant local authority. You should have the relevant website links available to hand out.

## 10 Steps to help you comply with the Regulations

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Section 5 of the OFT guidance and pp. 24, 25, and 36 of the CMA guidance provide some useful steps which can help you to demonstrate compliance with the Regulations. This is all about risk assessment, process, training and record keeping. A diagram summarising this risk assessment framework can be found in Appendix A. The key points to note are:

- Consider what systems and safeguards you currently have in place in your business. Do they work in practice and do they include staff training? Are you open and transparent with consumers about costs they are likely to incur? Is the relevant information on a property collected and is it verified by the staff member and by the client? If not, take action to improve your existing systems and safeguards.
- Consider what enquiries and checks are appropriate to carry out at particular stages in a property transaction.
- Where you rely on others for information, you need to be able to show that you were justified in making that decision and that it was reasonable for you to act in that way. Should you have double checked?
- Consider for each property who the 'average consumer' is likely to be and whether you need to take any additional care to demonstrate due diligence.
- Ensure audit trails are in place to demonstrate that you acted in an appropriate manner and with due diligence.
- Ensure that you regularly review conduct, processes and training and implement all necessary changes arising from such reviews.



In addition, throughout the CMA guidance there are a range of examples of potential breaches of consumer protection law (pp. 40, 42, 46, 50, 54, 60, 64, 66, 69, 70, 72, 76, and 84) that will aid your understanding of what non-compliance might look like.

## 10.1 Defence of due diligence

In addition to complying with the above steps, which should help you mitigate your risk of committing a criminal offence under the CPRs, a defence of 'due diligence' may also be available.

**Important:** Section 5.5 of the OFT guidance and sections 3.27–3.29 of the CMA guidance set out what you need to show in order to succeed with a CPR due diligence defence.

## 11 Misleading marketing of services

Section 5 of the OFT guidance and section 4 of the CMA guidance explain what you need to do and what you need to avoid in exercising your professional judgment when advertising for new business and gaining new clients and instructions. While RICS recommends you carefully read these sections to ensure that your current practices comply with the CPRs/BPRs, professional agents should already be compliant in this regard.

Please also review the various sections of the *Private rented sector code*, the RICS [UK residential property standards \(Blue Book\)](#), the RICS [UK commercial real estate agency standards](#), and other relevant guidance available on [www.rics.org](http://www.rics.org).

## 12 Sanctions for non-compliance

Section 6.1 of the OFT guidance and section 10 of the CMA guidance outline the enforcement action that might be taken against you for failing to comply. If you do not comply with the CPRs (or BPRs) you may face civil and/or criminal enforcement action.

A number of consumer enforcement bodies, for example the local authority trading standards services (TSS), have a duty to enforce these regulations.

If enforcement action is taken, potential adverse consequences for the business, a person in charge and/or an employee include:

- a court order which requires you to stop a particular breach of the Regulations
- an unlimited fine
- imprisonment for up to two years
- a prohibition order banning you from undertaking estate agency work
- a consumer complaint to an approved redress scheme which, if upheld, may require you to apologise to the complainant and/or pay compensation of up to £25,000
- bad publicity and reputational damage to the business; and
- loss of business.

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