

'Debt collection'

OFT guidance for all businesses engaged in the recovery of consumer credit debts

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FOREWORD

The primary aim of this guidance is to provide clarity for licensed businesses engaging in the recovery of consumer credit debts as to the standards the Office of Fair Trading (OFT) expects of businesses engaging in such activities. It sets out how the fitness test under section 25 of the Consumer Credit Act 1974 (the Act) will be applied in respect of debt recovery activities. It also identifies the various regulatory tools available to the OFT.

Although the guidance is called 'debt collection' guidance, it has much broader application than simply covering the activities of third party debt collectors (as defined in section 145(7) of the Act). **As such, it sets out the standards expected of ALL parties engaging in the recovery of consumer credit debts.**

It identifies conduct that, in the OFT's view, may constitute an unfair or improper practice for the purposes of section 25 (2A) (e) of the Act and provides some illustrative examples. The examples are based on OFT complaint information and issues brought to our attention by organisations representing consumers, businesses and other regulators.

It is not designed to be a comprehensive/exhaustive checklist of behaviours that the OFT considers may be unfair or improper. Acts or omissions not included in the guidance may still be taken into account by the OFT in determining fitness and we expect businesses to have regard to the spirit as well as the letter of the guidance.

This guidance document is not intended to provide a basis for debtors to avoid the repayment of debts duly owed. We consider that debtors should take responsibility for engaging appropriately in the debt recovery process, to the extent that it is possible for them to do so.¹ For example, it is important that they maintain regular and effective communication with their creditors, whether directly or via an appointed representative, so that information available to the creditor (and to any third party pursuing repayment of the debt on the creditor's behalf) is kept accurate and up to date. The debtor should advise the creditor, in a timely manner, of any relevant change of circumstances that is likely to significantly impact on (any assessment of) his ability to meet his repayments.

¹ For example, see paragraph 3.7r and associated text box which sets out the possible impact of mental capacity limitation on a debtor's ability to engage with those seeking to recover debts.

This guidance replaces the previous version of our guidance on debt collection issued in 2006.

The guidance is set out as follows:

Chapter 1 (Introduction) - sets out the section 25 'fitness' test under the Act, and the purpose and scope of the guidance.

Chapter 2 (Overarching principles of fair business practice) - sets out overarching principles of consumer protection and fair business practice which, in our view, apply to all businesses engaged in the pursuance of the repayment of consumer credit debts.

Chapter 3 (Unfair or improper business practices) - sets out behaviours the OFT considers may fall within the category of 'unfair or improper' business practices and which, if engaged in, may call into question a person's fitness to retain - or be granted - a consumer credit licence.

Chapter 4 (Regulatory compliance and enforcement) - outlines our approach to securing compliance and provides further information on the regulatory options available to us.

1 INTRODUCTION

'Fitness' (The 'section 25 test')

- 1.1 The Consumer Credit Act 1974 and its subordinate legislation (the Act) provide a framework to protect consumers when dealing with those engaged in consumer credit business² and/or ancillary credit business.
- 1.2 All businesses engaged in the recovery of consumer credit related debts,³ whether on their own behalf, or on behalf of others, are required to hold an appropriate standard consumer credit licence⁴ issued by the Office of Fair Trading (OFT). The OFT has a duty under section 25 of the Act to take steps to ensure that licences are only given to, and retained by, those who are fit to hold them (the 'section 25 test').⁵

² This includes the activities of businesses which have purchased, or have been assigned, debts, and consequently become 'the creditor'.

³ This includes creditors/owners acting to recover their own debts **in addition** to those businesses whose activities fall within the definition of 'debt collecting' in section 145(7) of the Act. For further information on the businesses this guidance applies to, see paragraph 1.10 which sets out the scope of the guidance.

⁴ Businesses are required to hold a standard licence unless they are operating under the cover of an appropriate group licence. Further information on when a licence is required, and what category of licence is required, is provided in *(OFT147) - Do you need a credit licence?*

www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/consumer_credit_act/oft147

⁵ For more information on the factors the OFT considers when assessing fitness and our categorising of, and approach to, 'credit risk', see *(OFT 969) Consumer Credit Licensing – General guidance for licensees and applicants on fitness and requirements*
www.offt.gov.uk/shared_offt/business_leaflets/credit_licences/oft969.pdf

Businesses pursuing recovery of their own debts arising from consumer credit agreements (whether regulated or exempt) they have made with consumers, or pursuing recovery of such debts that have been assigned to, or purchased by, them, require a '**Category A – Consumer Credit Business**' licence.⁶

Businesses pursuing recovery of their own debts arising from consumer hire agreements (whether regulated or exempt) they have made with consumers, require a '**Category B – Consumer Hire Business**' licence.⁷

Businesses (for example debt collection businesses, bailiffs, law firms/solicitors⁸) pursuing recovery of debts due to others, arising from consumer credit or consumer hire agreements (whether regulated or exempt) and **businesses tracing debtors⁹ for the purposes of debt recovery**, require a '**Category F – Debt Collecting**' licence.

⁶ See section 146(6) (aa) of the Act.

⁷ See section 146(6) (c) of the Act.

⁸ Although law firms/solicitors may carry on debt recovery activities under cover of a group licence, the OFT considers that an individual standard consumer credit licence is **likely** to be more appropriate if, one of the **primary activities** of a business is what we would classify as high risk credit activity (and that activity has a **profit-seeking motive**). The OFT considers debt collection to be a high risk credit activity. See *(OFT 990rev) - Group licensing regime – Guidance for consumer credit group licence holders and applicants*

www.offt.gov.uk/shared_offt/business_leaflets/credit_licences/OFT990rev.pdf

⁹ Section 145(7) of the Act defines 'debt collecting' as 'the taking of steps to procure payment of debts due under consumer credit or consumer hire agreements'.

1.3 Section 25 of the Act provides that, in considering fitness to hold a consumer credit licence, the OFT shall have regard to any matters which appear to it to be relevant and in particular any evidence tending to show that an applicant, licensee, or its employees, agents or associates,¹⁰ past or present, have:

- committed offences involving fraud or other dishonesty or violence
- failed to comply with the Act or any other enactment regulating the provision of credit to individuals or other consumer protection legislation
- failed to comply with the requirements of Part 16 of the Financial Services and Markets Act 2000 so far as they relate to the consumer credit jurisdiction operated by the Financial Ombudsman Service
- practised discrimination in connection with the carrying on of their business
- engaged in business practices appearing to the OFT to be deceitful, oppressive or otherwise unfair or improper, whether unlawful or not.

1.4 The Act also requires that in determining whether a person is fit to hold a licence, the OFT shall have regard to the skills, knowledge and experience in relation to consumer credit business, consumer hire business, and/or ancillary credit business, of that person and other persons who will participate in any business carried on by him under

¹⁰ Including business associates as referred to in section 25(3) of the Act.

a licence and any practices and procedures to be implemented in connection with any such business. This means that new applicants engaging in activities considered by the OFT to be high risk credit activities, such as debt recovery activities,¹¹ **may** be subject to greater scrutiny to ensure that they have appropriate regard to the standards that the OFT expects of those engaged in such activities, as set out in this guidance and other relevant OFT guidance.

- 1.5 Section 25A of the Act requires the OFT to prepare and publish guidance in relation to how it determines, or how it proposes to determine, whether persons are fit to hold a consumer credit licence. The OFT must have regard to its guidance in carrying out its functions under the Act.

Purpose of the guidance

- 1.6 This guidance sets out the standards that the OFT expects of **all** businesses engaged in the recovery of consumer credit debts. To assist such businesses in meeting these standards, it identifies the types of behaviour the OFT considers falls within the category of unfair or improper business practices for the purposes of section 25(2A)(e) of the Act¹² and which, if engaged in, would call into question fitness to retain or be given a standard consumer credit licence or to engage in regulated consumer credit, consumer hire, or ancillary credit activity under cover of a group licence.

¹¹ The OFT considers all forms of recovery of consumer credit debts to actually or potentially be 'high risk' credit activities, whether the recovery of the debt is pursued by the original creditor, a business that has purchased the debt or to whom the debt has been assigned, or by persons acting on behalf of the creditor.

¹² Amongst the matters identified in this guidance document as unfair or improper practices for the purposes of section 25(2A)(e) of the Act are some practices which may **also** constitute criminal offences.

- 1.7 In monitoring and assessing fitness of licence holders and applicants, we will also, where appropriate, take account of their behaviour when recovering non-consumer credit debts.¹³
- 1.8 Where the OFT has evidence which calls into question 'fitness', we can take action to refuse or revoke the credit licences of those concerned, or to exclude, or seek the exclusion of, an individual person/business/agency from the cover of a group licence. Where we are dissatisfied with any matter in connection with the business, but do not consider the business to be 'unfit', we may take appropriate action to change behaviour.¹⁴
- 1.9 This guidance document also provides a basis against which the OFT and its enforcement partners in local authority Trading Standards Services can undertake assessments of whether applicants (or licensees) have the appropriate skills, knowledge, experience, business practices and procedures, to be licensed by the OFT to operate a consumer credit, consumer hire, or ancillary credit business (the 'competence assessment').

Scope of the guidance

- 1.10 This guidance applies to all businesses or persons engaged in the recovery of debts arising from regulated consumer credit or consumer hire agreements. It is relevant, therefore, to **all** holders of, and applicants for, standard licences covering the appropriate categories¹⁵

¹³ 'Non-consumer credit debts' might include, for example, debts arising from utilities bills or council tax bills. Businesses which are **only** engaged in the recovery of debts which **do not** arise from consumer credit or consumer hire agreements, do not require a consumer credit licence **to engage in the recovery of such debts**.

¹⁴ The OFT's enforcement powers and principles are explained further in Chapter 4 of this guidance document.

¹⁵ See text box adjacent to paragraph 1.2.

of consumer credit or ancillary credit business which allow the holder of such a licence to engage in the recovery of debts it is owed, the debts of others, or both. This includes creditors (whether the original provider of the credit or those who have subsequently become the creditor by virtue of having purchased, or having been assigned, the debt), tracing agents engaged to participate in the debt recovery process and third party debt collection businesses. It also applies to persons covered by a relevant group licence, such as law firms or solicitors who may be engaged in the recovery and/or enforcement of debts. As such, **this guidance has a much broader application than simply to (third party) 'debt collectors'**.¹⁶

1.11 In the context of this guidance:

- 'creditor' includes the owner under a hire purchase agreement, a supplier under a consumer hire agreement, or a member of staff, an agent or associate, acting on behalf of a creditor in the debt recovery process; and
- 'debtor' includes a purchaser under a hire purchase agreement and a hirer under a consumer hire agreement.

1.12 In this guidance, the term 'debtor', where appropriate and applicable, also covers individuals who are being **wrongly** pursued for a debt in respect of which they are not the actual debtor.

For example, this would include an individual who is the subject of an incorrect trace and, as a consequence, is being wrongly pursued for the repayment of a debt.

¹⁶ As defined in section 145(7) of the Act.

- 1.13 This guidance also seeks to clarify, amongst other matters, the OFT's view as to the responsibilities of licensees for the activities of their agents or other third parties with whom they do business, and the responsibilities of the various parties involved in debt sale and purchase.
- 1.14 This guidance should be read in conjunction with other relevant OFT (and other) guidance as set out in Annexes C (in particular) and D.

2 OVERARCHING PRINCIPLES OF FAIR BUSINESS PRACTICE

2.1 In the OFT's view, there are a number of overarching principles of consumer protection and fair business practice which apply to all debt recovery activities.

2.2 In general terms, businesses¹⁷ should:

- **treat debtors fairly** – debtors should not be subjected to aggressive practices, inappropriate coercion, or conduct which is deceitful, oppressive, unfair or improper, whether unlawful or not
- **be transparent** in their dealings with debtors and others – information provided should be clear and should not be confusing or misleading
- **exercise forbearance and consideration – in particular towards debtors experiencing difficulty** - we would expect businesses to work with debtors with a view to providing them with reasonable time and opportunity to repay debts and, where appropriate, to signpost them to sources of free independent debt advice
- **act proportionately** when seeking to recover debts, taking into account debtors' circumstances - actions taken in respect of

¹⁷ **Consumer credit businesses** should also have regard to the 'General Principles of Fair Business Practice' set out in Chapter 2 of *Irresponsible Lending – OFT Guidance for creditors (OFT 1107)* and Chapter 7 of the same document on 'Handling of Default and Arrears'

arrears or default should give proper consideration to available options and the likely effect of such actions on the debtor¹⁸

- establish and implement **clear, effective and appropriate policies and procedures** for engaging with debtors and other relevant parties,¹⁹ including having appropriate mechanisms for responding to reasonably queried and disputed debt²⁰ and (other) complaints
- establish and implement clear, appropriate and effective policies and procedures for identifying and dealing with **particularly vulnerable debtors**.

Most debtors may be regarded as 'vulnerable', to some degree, by virtue of their financial circumstances. Of these, some may be, permanently or temporarily, rendered **particularly vulnerable** by virtue of the fact that they are significantly constrained in terms of their ability to engage appropriately with those pursuing them for the repayment of debts owed.

Debtors with mental health issues and/or with mental capacity limitations (amongst other types of actually or potentially particularly vulnerable individuals) **may** fall into this category.

¹⁸ Taking account of the information available to the business at that time. We would expect those seeking to recover debts to take reasonable steps to obtain sufficient information to appropriately inform their actions.

¹⁹ 'Other relevant parties' in this context might include, for example, third parties seeking to represent the interests of debtors, or parties participating in the debt recovery process such as agents or associates of the creditor.

²⁰ See Annexe A.

- 2.3 Where they are dealing with debtors in a different jurisdiction (for example, a business based in England dealing with a debtor residing in Scotland) businesses should ensure that they take appropriate account of any differences in law or court procedure between jurisdictions that may impact significantly on the debtor's position/rights.

Licensees' responsibility for third parties

- 2.4 If licensees (or those operating under cover of an appropriate group licence) choose to do business (or continue to do business) with third parties whose conduct is inconsistent with fitness to hold a licence, then their own fitness may be called into question.
- 2.5 'Licensed businesses' can not ignore the unfair or improper practices of others instructing them or acting on their behalf. It is not for the OFT to be prescriptive as to how choices about third party selection are made. However, we would expect to see that care has been taken in the selection process, complaints about such third parties are properly investigated, and that effective action is taken as necessary to ensure that similar problems do not recur.
- 2.6 Similarly, licensees must ensure that third parties with which they do business are appropriately licensed to engage in any licensable activities undertaken in the course of their business.

For example, a creditor engaging the services of an **unlicensed** debt collector to pursue the recovery of debts, may find its own fitness to hold a consumer credit licence called into question.

3 UNFAIR OR IMPROPER BUSINESS PRACTICES

3.1 This chapter identifies matters that the OFT considers to be unfair or improper business practices for the purposes of section 25(2A)(e) of the Act. These are set out under the following sub-headings:

- **Communication:** businesses should communicate in a clear, accurate and transparent manner
- **False representation of authority and/or legal position:** businesses should accurately and truthfully represent their authority/status and the correct legal position with regard to debts and the debt recovery process
- **Physical/psychological harassment:** businesses should not engage in physical or psychological harassment of debtors, or relevant third parties
- **Deceptive and/or unfair methods:** businesses should be truthful and fair in their dealings with debtors and others
- **Charging for debt recovery:** charges should not be levied inappropriately or unfairly
- **Debt collection visits:** those visiting debtors must not act in a threatening or unclear manner
- **Statute barred debt:** businesses should not use unfair methods (including misrepresenting the legal position) if seeking to recover statute barred debt
- **Data accuracy:** businesses should have appropriate processes in place with a view to ensuring that customer data is accurate and take reasonable steps to ensure that it is adequate, with a view to only the actual debtor and valid debts being pursued for repayment.

Communication

3.2 It is unfair to communicate with debtors, or their representatives, in whatever form, in an unclear, inaccurate or misleading manner.²¹

3.3 Examples of unfair or improper practices are as follows:

- a. use of official looking documents intended to, or likely to, mislead debtors as to their status.

For example, documents made to resemble court documents.

- b. leaving out or presenting information in such a way that it creates, or has the potential to create, a false or misleading impression, or exploits a debtor's lack of knowledge
- c. those contacting debtors not making clear who they are, who they work for, what their role is and the purpose of the contact
- d. sending misleading communications or making misleading statements which may induce a debtor to make contact on the basis of a false or misleading premise

For example, leaving a calling card at a debtor's address, which states or implies that the debtor has missed a delivery and encourages him to make contact.

²¹ Guidance on the use, form and content of standard debt collection letters has been produced by the Credit Services Association/Debt Buyers and Sellers Group (CSA/DBSG) in association with the OFT, and can be found on the OFT web-site.

www.offt.gov.uk/shared_offt/business_leaflets/consumer_credit/debt-letters.pdf

- e. unnecessary and unhelpful use of legal and technical language

For example, use of Latin phrases.

- f. failing to provide debtors or their appointed representatives with information on the status of debts

For example, not providing balance statements when reasonably requested.

- g. failing to provide 'debtors' with information on the outcome of investigations into reasonably queried or disputed debts

- h. failing to confirm,²² formally and unequivocally, that an offer to settle a debt, accompanied by the relevant payment, has been accepted as full and final settlement of that debt (when this is the case)

- i. failing to make the debtor fully aware²² of the status of the debt where:

- a. the debtor has offered a settlement payment lower than the total amount owing and/or
- b. the creditor decides to no longer pursue the debt, and informs the debtor that this is the case

²² We would expect the relevant **creditor** to take **primary** responsibility for ensuring that the debtor is provided with the relevant confirmation/information. However, the creditor does not necessarily have to provide the confirmation/information itself. It can, for example, agree with a debt collection business acting on its behalf that it (the debt collection business) will provide the confirmation/information to the debtor instead, depending on what is more sensible in the circumstances. It is important, however, that the confirmation/information is given to the debtor **promptly** and in a way that is clearly understandable by the debtor.

The debtor should be made aware that the debt still exists (where this is the case)²³ and could be pursued at a later date and that even if the creditor **itself** commits not to further pursue the debt, the debt could still subsequently be purchased from the creditor by another business that may decide to pursue the debt.

- j. contacting debtors at unreasonable times
- k. ignoring or disregarding debtors' reasonable requests in respect of when, where and how to contact them

For example, shift workers may ask not to be telephoned during certain times of the day.

Also, some debtors may request contact by email rather than by telephone.

- l. asking or instructing debtors to make contact on premium rate or other special rate²⁴ telephone numbers.

²³ This would **not** be the case if, for example, the debt had been 'extinguished'. See paragraph B.5 in Annexe.

²⁴ This includes any phone numbers, the cost of calling which is higher than to standard geographic numbers.

False representation of authority and/or legal position

- 3.4 Those contacting debtors must not be deceitful by misrepresenting their authority and/or the correct legal position with regards to debts or the debt recovery process.
- 3.5 Examples of unfair or improper practices are as follows:
- a. falsely implying or claiming authority or misrepresenting authority

For example, in England and Wales, claiming to work on instructions from the courts as bailiffs or, in Scotland, sheriff officers or messengers-at-arms or, in Northern Ireland, claiming to work on instruction from the Enforcement of Judgements Office, when this is not the case.

- b. falsely implying or stating that action can, or will, be taken, when legally it cannot be taken

Examples of this include:

- stating or implying that bankruptcy or sequestration proceedings might be initiated when the balance of the outstanding debt is too low to qualify for such proceedings
- stating or implying that steps will be taken to enforce a debt where a debtor is making payments under a Debt Payment Programme Arrangement agreed under the Debt Arrangement and Attachment (Scotland) Act 2002
- claiming a right of entry will be exercised when no court order to this effect has been granted

- claiming that a court order/judgement would be enforced in the absence of having the proper legal authority to do so
- stating that goods will be repossessed when they are 'protected goods' (as defined under section 90(7) of the Act), in the absence of having been granted the specific authorisation of a court to do so.

- c. falsely stating or implying that a particular course of action **will**²⁵ ensue before it is possible to know whether such action would be permissible

For example, stating or implying that enforcement proceedings **will** ensue, including (this is a non-exhaustive list)

- warrant of execution
- charging order
- attachment of earnings

under circumstances in which a court judgment has not been obtained.

- d. misrepresenting status or backing

²⁵ There is a difference between a course of action that **will** take place (for example, because a court judgment has already been obtained which the business is enforcing) as opposed to one that in theory **could/may** take place, subject to legal proceedings being instigated.

For example:

- using a business name or logo which falsely implies government backing or a connection with the courts
- using a business name which implies public body status
- falsely claiming trade body membership or accreditation
- falsely implying or claiming to be a solicitor, or otherwise employed as a legal service provider.²⁶

- e. falsely implying or stating that action has been taken when it has not

For example, stating that civil action has been taken when it has not or that a court judgment has already been obtained when it has not been.

- f. falsely implying or stating that failure to pay a debt is a criminal offence and/or that criminal proceedings will be brought
- g. pursuing third parties for payment when they are not liable

For example, pursuing a relative of a debtor for a debt when the relative is not a joint party to the credit agreement.

²⁶ This is a criminal offence under section 17 of the Legal Services Act 2007.

- h. taking or threatening to take court action in the wrong jurisdiction.

For example, taking action against a debtor residing in Scotland in an English court.

Physical/psychological harassment

3.6 Putting undue pressure on debtors or relevant third parties²⁷ (for example, appointed representatives) is considered to be oppressive and an unfair or improper practice.

3.7 Examples of unfair or improper practices are as follows:

- a. contacting debtors at unreasonable times and/or at unreasonable intervals²⁸
- b. pressurising debtors to raise funds by selling their property or by taking on further borrowing (including extending their existing borrowing)
- c. multiple businesses²⁹ seeking to recover the same debt at the same time, resulting in repetitive and/or frequent contact with the debtor (or his representative) by different parties

²⁷ A 'relevant third party' in this context is any person representing, or acting on behalf of, the debtor in respect of the debt recovery process.

²⁸ The OFT expects businesses to comply with OFCOM's revised 'Statement of policy on the persistent misuse of an electronic communications network or service' (as amended)

http://stakeholders.ofcom.org.uk/binaries/consultations/persistent_misuse/summary/amendment.pdf

- d. 'threatening' to refer the debt to a third party debt collection business, with potential cost implications for the debtor, under circumstances in which the evidence suggests that, in reality, the creditor has, or can be reasonably concluded as having, no current intention of doing so
- e. When seeking to recover a debt, failing to take appropriate steps with a view to ensuring that available data/information to inform the pursuit and recovery of a debt is accurate and adequate, such that the debtor and the (amount of the) debt can be correctly identified from that data/information

Failure to do so may result in:

- the wrong person being pursued for a debt, or
- a person being pursued for a debt that does not exist, or
- a person being pursued for an incorrect amount.

- f. failing to ensure that an accurate and adequate history of the debt is passed between parties, as appropriate and necessary

Failure to do so may result in repetitive and/or frequent contact with the debtor by different parties.

²⁹ 'Multiple businesses' in this context could be a number of different debt recovery businesses instructed by a creditor to pursue the same debt or may include the creditor itself and others acting on its behalf in pursuit of the same debt.

Where it is ascertained that an individual is not the actual debtor in question, advising relevant parties as appropriate that this is the case may prevent (further) repetitive contact with the individual by different parties involved in the debt recovery process.

- g. failing to inform the debtor³⁰ when responsibility for recovery of a debt and/or the legal right to recover a debt has been transferred or assigned to a (named) third party³¹
- h. failing to provide notice and relevant information to a debtor **in a sufficiently timely manner** when responsibility for recovery of a debt is transferred or assigned to a (named) third party, such that it impacts adversely on any existing repayment arrangements established
- i. pressurising debtors to pay more than they can reasonably afford³² without experiencing undue difficulty³³ or to pay within an unreasonably short period

³⁰ As and when the debtor has been located/identified.

³¹ See section 82A of the Act for responsibilities following assignment of rights and chapter 16 of the guidance produced by the Department for Business, Innovation and Skills (BIS) '*Consumer Credit Regulations: Guidance on the regulations implementing the CC Directive*' August 2010 (see Annex D for link to BIS guidance).

³² For example, pressurising a debtor to make unreasonably large repayments or to pay off his debts in full in a single (or very few) repayment(s), when to do so would have an adverse impact on the debtor's financial circumstances.

³³ The OFT would regard 'without undue difficulty' in this context as meaning the debtor being able to make repayments while also meeting other debt repayments and other

For example, by using the threat of enforcement action through the courts - including but not limited to applications for charging orders (or inhibitions in Scotland) and orders for sale - to pressure debtors in financial difficulties to pay more than they can reasonably afford.

- j. failing to allow for alternative, affordable, repayment amounts when a reasonable proposal is made by a debtor or a third party representative acting on his behalf (for example, a debt adviser)
- k. not having appropriate regard to the principles of the Common Financial Statement (or equivalent)
- l. making threatening statements or gestures or taking actions which could reasonably be construed as suggesting harm, or risk of harm, to debtors
- m. failing to suspend the active pursuit of recovery of a debt for a reasonable period³⁴ under circumstances in which it can be evidenced that the debtor is developing a repayment plan on his own account, or with the assistance of an appropriate third party representative³⁵
- n. making undue, excessive or otherwise inappropriate use of statutory demands when pursuing arrears or debts

normal/reasonable outgoings and without having to borrow further to meet these repayments.

³⁴ See also *Irresponsible Lending – OFT Guidance for Creditors (OFT 1107)* – text box following paragraph 7.12 for further information on what might constitute a ‘reasonable period’ (see link to the Irresponsible Lending Guidance in Annexe D).

³⁵ For example, a debt adviser.

- o. ignoring and/or disregarding claims that debts have been settled or are disputed and continuing to make demands for payment without providing clear justification and/or evidence as to why the claims are not valid
- p. **inappropriately** disclosing, or threatening to disclose, debt details to third parties
- q. acting in a way likely to be publicly embarrassing to the debtor, either deliberately or negligently (that is to say, through lack of care)

For example:

- using postcards, or other correspondence, or leaving answer phone messages (including via interactive voice messaging (IVM)³⁶) in a way which may disclose to someone other than the intended recipient the involvement of a debt recovery business
- asking others to pass on messages to debtors, and in so doing potentially revealing to them that the intended recipients of such messages are being pursued for repayment of debts
- posting messages on social networking sites in a way that might potentially reveal that an identifiable person is being pursued for the repayment of a debt.

³⁶ Interactive voice messaging (IVM) and other similar means of communication should not be employed in the debt recovery process in the absence of sufficient safeguards being employed to prevent a debtor's personal information being communicated to/accessed by a person other than the debtor (or his nominated representative).

- r. failing to suspend the pursuit of recovery of a debt under circumstances in which it is understood³⁷ that the debtor might not have the mental capacity to make relevant decisions regarding the management of the debt and/or to engage in the debt recovery process at that time.

In our view, the policies and procedures employed by those seeking to recover debts, for the appropriate treatment of debtors who it is understood might not have the mental capacity to make the requisite financial decisions, at a time at which they are experiencing problem over-indebtedness and are being pursued for a debt, might appropriately have regard to the **principles** outlined in the Money Advice Liaison Group (MALG) Guidelines 'Good Practice Awareness Guidelines for Consumers with Mental Health Problems and Debt'.³⁸ While it is the case that mental health problems/disorders are by no means the same as not having the mental capacity to make a particular decision (a borrower could have a mental health problem but still have the capacity to make relevant financial decisions), we consider that there is a degree of general applicability of the MALG Guidelines in terms of the treatment of particularly vulnerable debtors.

A reasonable period of time should be allowed for relevant evidence to be provided as to the likely impact of any capacity limitation on the debtor's ability to manage his debt and engage with a debt recovery business.

³⁷ 'Understood' in this context means either knowing, or having knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person knowing the same facts to reasonably conclude the same thing.

³⁸ www.malg.org.uk/documents/MentalHealthGuidelinesEd2Final2009.pdf
[www.moneyadvicetrust.org/images/Mental Health Guidelines 2009.pdf](http://www.moneyadvicetrust.org/images/Mental_Health_Guidelines_2009.pdf)

The OFT considers that one appropriate means of collecting evidence, in appropriate circumstances, could be to use the standard Debt and Mental Health Evidence Form (DMHEF),³⁹ developed between MALG and the Royal College of Psychiatrists. The DMHEF is designed to assist financial advisers and creditors in requesting relevant and proportionate information from health/social care practitioners.

The MALG Guidelines suggest that 28 days is a reasonable length of time to allow for the gathering of relevant evidence. In our view, further negotiation would be reasonable under circumstances in which it is made clear to the debt recovery business that unavoidable delays in collecting such evidence have occurred (although all reasonable steps should be taken to keep such delays to a minimum).

The OFT considers that it would be appropriate for a debt recovery business to **at least** delay pursuance of a debt under circumstances in which it is understood that a debtor might not have the capacity to make relevant financial decisions at that time, until the debtor regains capacity, or to only pursue the debt via a responsible third party, acting on behalf of the debtor and with the debtor's prior consent – for example, a person managing the debtor's affairs pursuant to a Lasting Power of Attorney or an order of the Court of Protection.⁴⁰

³⁹ www.moneyadvicetrust.org/section.asp?cid=53

It should be noted that the DMHEF form is not necessarily a suitable means for gathering evidence on the effects of a person's autism on their ability to meet repayments.

⁴⁰ Lasting Powers of Attorney do not exist in Northern Ireland. An enduring power of attorney can be granted and must be lodged in the High Court through the Office of Care and Protection.

In the OFT's view, creditors should **consider** not pursuing debts where a debtor lacked the mental capacity to make the relevant financial decision at the time that he entered the credit agreement with the creditor. The legal position in England and Wales is that a contract is voidable where the creditor knew of the incapacity or must be taken to have known of it. In Scotland, debts can be written off where there is incapacity regardless of whether the creditor was given notice of the incapacity or not (in line with common law on contract in Scotland - where a party to the contract lacks legal capacity, the contract is void – although this would be potentially subject to legal challenge based on the facts in individual cases).

- s. not having appropriate regard to relevant pre-action protocols⁴¹
- t. taking steps to repossess the debtor's home, other than as a last resort.⁴²

Deceptive and/or unfair methods

3.8 Dealings with debtors and others are not to be deceitful and/or unfair.

3.9 Examples of unfair or improper practices are as follows:

- a. Sending demands for payment, by any means, to an individual, when it is uncertain whether he is the actual debtor

⁴¹ For further information see *(OFT 1107) - Irresponsible Lending – OFT Guidance for Creditors* paragraphs 7.9 and 7.14 and adjacent text boxes. (See Annexe D for link to guidance document).

⁴² See footnote 41.

For example:

- threatening debt recovery action against 'the occupier' of particular premises or
- sending a payment demand to all people sharing the same name/date of birth as a debtor in the hope that contact with the actual debtor will be made.

- b. disclosing debt details to an individual when it is uncertain that he is the actual debtor

For example, disclosing debt details to an individual occupying the last known address of the debtor, without first establishing (by suitably appropriate means) that he is the actual debtor.

- c. refusing to engage, appropriately or at all, with a third party representative, such as a debt adviser at a free advice centre or a debt management business, or with a debtor developing his own repayment plan,⁴³ unless there is an objectively justifiable reason for doing so
- d. contacting debtors directly and bypassing their appointed representatives, without permission from the debtor or his representative, unless there is an objectively justifiable reason for doing so

⁴³ For example, using CASHflow - www.cashflow.uk.net/

Where those seeking to recover debts refuse to engage with (or bypass) third party representatives and contact debtors directly, the OFT may require them to satisfy us that there was an objectively justifiable basis for doing so.

For example, it may be objectively justifiable to contact the debtor directly where repeated efforts have been unsuccessfully made to communicate with the debtor's representative.

Operating a **policy** of refusing to negotiate with certain third party representatives or with a debtor developing his own repayment plan would not, in the OFT's view, constitute an 'objectively justifiable basis' in this context.

- e. **inappropriately** passing on debtor's details to lead generators, debt management businesses, creditors, debt collectors or brokers

Debtor's personal data must be processed fairly and lawfully and only for specified purposes. While it **may** still be possible to **lawfully** pass a debtor's (sensitive) personal data to an **appropriate** third party, in the absence of the debtor's prior consent having been obtained, where one of the other DPA conditions relevant for the purposes of processing **personal** data is met (**and**, where appropriate, one of the other conditions relevant for the purposes of processing **sensitive** personal data is met), the OFT would normally expect the debtor's consent to be sought (as a matter of **good practice**) before doing so.

- f. under appropriate circumstances, failing to refer on to the creditor reasonable offers to pay by instalments
- g. not passing on to creditors payments received from debtors and/or updated details of debtor's outstanding balances, in a timely manner⁴⁴ or at all

Failure to do so may result in adverse financial consequences for debtors.

- h. taking steps to enforce a debt when the debtor is understood to be subject to a debt relief order (DRO) (or, in Scotland, a low income low asset order), or other statutory scheme (for example, an Individual Voluntary Arrangement (IVA) or a Debt Arrangement Scheme (DAS))
- i. when a debt is reasonably queried or disputed, failing to investigate and/or provide details (possibly including, for example, details of account history, payment schedules and relevant correspondence) to the debtor, as appropriate, in a timely manner or at all

Failure to do so could possibly result in:

- the wrong person being pursued for a debt, or
- a person being pursued for a debt that does not exist, or

⁴⁴ We would normally expect 'in a timely manner' in this context to be within five working days.

- a person being pursued for an incorrect amount.

- j. **requiring**⁴⁵ an individual to prove he is not the actual debtor who owes an outstanding debt

For example, **requiring** an individual to establish that he is not the actual debtor by producing his driving licence or passport, or by providing a copy of his signature.

- k. failing to cease debt recovery activity whilst investigating a reasonably queried or disputed debt when the debtor has, or appears as if he may have, valid grounds for the query or dispute⁴⁶
- l. exercising a right of 'set off' without first undertaking an associated affordability assessment or under circumstances in which such an assessment has been undertaken and it is clearly apparent that the borrower is already experiencing an unsustainable level of indebtedness or would be if a right of set off is exercised⁴⁷

⁴⁵ A business may reasonably **request** this information, but there is no **obligation** on the individual to supply it (and this should be made clear to the individual at the time any such request is made) - and the debt recovery business should not seek to place the onus on the person being pursued for a debt to establish that he is not the debtor in question.

⁴⁶ See Annexe A.

⁴⁷ See paragraph 7.19 (and associated text box) of *(OFT 1107) Irresponsible Lending – OFT Guidance for Creditors* (see Annexe D for link to guidance document).

- m. misusing a continuous payment authority, including by (this is a non-exhaustive list):
- debiting a debtor's account other than on a date or dates as expressly set out in the relevant agreement, unless otherwise **specifically agreed** with the debtor subsequent to the agreement having been concluded (for example, where an alternative repayment plan has subsequently been agreed between the creditor and the debtor)
 - debiting lesser or greater amounts than those expressly set out in the relevant agreement unless the debiting of such amounts has been **specifically agreed** with the debtor subsequent to the agreement having been concluded (for example, where an alternative repayment plan has subsequently been agreed between the creditor and the debtor)
 - debiting from a debtor's account other than the account specifically designated by the debtor (in a contract or otherwise) for repayment of the credit that is the subject of the continuous payment authority.

The OFT considers that while it is not unfair or improper for a creditor or a debt recovery business acting on its behalf to use continuous payment authority to recover 'recurring repayments' (for example, repayments of £100 per month, on the first day of the month, over 10 months, to recover a loan of total cost to the debtor of £1,000) it is unfair and improper to seek to use it to make recurring attempts to recover a 'SINGLE repayment' (for example, making numerous consecutive attempts to recover, in full or in part, a single repayment of £100 on a loan of total cost to the debtor of £1,000).

If a debtor is, or appears as if he may be, experiencing difficulties meeting repayments (for example, because an attempt by the creditor to recover a repayment is unsuccessful), we would expect the creditor, or the business seeking to recover repayment on the creditor's behalf, **to exercise forbearance**, and, if appropriate to do so, amend or suspend any continuous payment authority (or any other means of recovering repayments) in order that a more sustainable repayment plan might be agreed with the debtor.

Continuing to seek to extract any or all monies from a debtor's account, where a debtor has failed to make a full or partial repayment, by repeated attempts to exercise a continuous repayment authority would, in the OFT's view, constitute an irresponsible lending practice for the purposes of section 25 (2B) of the Act since such a practice facilitates 'failing to treat borrowers in default or arrears difficulties with forbearance'.

The OFT considers the inclusion of a term in a contract that facilitates the misuse of a continuous payment authority in this way, **in itself**, to constitute an irresponsible lending practice⁴⁸. Legal processes exist whereby, where necessary and appropriate, the courts can exercise their discretion as to how the rights of each party to a contract should be addressed under circumstances in which one party has failed to, or been unable to, meet all or part of its obligations under the contract.

In the OFT's view, it is not appropriate for creditors or businesses acting on their behalf in pursuit of recovery of debts, in pursuance of their own interests, to seek to bypass such systems which are designed to give balanced consideration to the interests of **both**

⁴⁸ Depending on the circumstances, a contractual term in a regulated agreement that is inconsistent with a provision for the protection of a debtor contained in the Act may be void in accordance with section 173(1) of the Act.

parties.

Where borrowers are using continuous payment authority (but not 'misusing' as described above) we would still expect creditors to set out clearly to borrowers in pre-agreement explanations that this is the case and that:

- Where borrowers are using continuous payment authority (but not 'misusing' as described above) we would still expect creditors to set out clearly to borrowers in pre-agreement explanations that this is the case and that continuous payment authorities are not covered by bank guarantees (unlike direct debits).

Where applicable, we consider that a failure to include this information in a pre-agreement explanation, in such a way that it would be brought to a borrower's attention, would be a breach of section 55A(1)(a) of the Act by failing to refer to matters of the kind set out in section 55A(2) (c) of the Act. Such a breach would constitute an irresponsible lending practice for the purposes of section 25(2B) of the Act.⁴⁹

Charging for debt recovery

3.10 Charges should not be levied inappropriately or unfairly.

3.11 Examples of unfair or improper practices are as follows:

- a. misleading debtors into believing they are legally liable to pay recovery charges when this is not the case

⁴⁹ See paragraph 3.23 of the OFT's Irresponsible Lending Guidance. A link to the Guidance can be found in Annexe D.

- b. claiming recovery costs from a debtor in the absence of express contractual provision to be able to do so⁵⁰

For example, where there is no provision in the credit agreement that expressly allows for such charges to be levied.

- c. not giving a clear indication in credit agreements of the amount of any charges payable on default⁵¹
- d. applying unreasonable⁵² charges.

In the OFT's view, creditors should **consider** reducing or stopping interest and charges where a borrower evidences that he is in financial difficulty and is unable to meet repayments as they fall due or when he can only make 'token' repayments such that his level of debt would continue to increase if interest and charges continue to be applied

⁵⁰ Even where there is an express provision, a charge may still be unfair if it does not reflect actual and necessary costs.

⁵¹ The Consumer Credit (Agreements) Regulations 2010 require the agreement to include a statement of 'any charges payable for late payment' and 'any other charges deriving from the credit agreement and the conditions under which those charges may be changed'

⁵² An 'unreasonable charge' in this context would be a charge, the level of which, is not based on the recovery of actual and necessary costs.

Debt collection visits

3.12 Those visiting debtors must not act in a threatening manner or be unclear about the purpose of the visit.

3.13 Examples of unfair or improper practices are:

- a. not making clear the purpose and intended outcome of any proposed visit

For example, it is not sufficient to inform the debtor that collectors or field agents will visit him and not tell him the intended purpose of the visit.

- b. visiting a debtor at a time when it is understood or suspected that he is, or may be, particularly vulnerable⁵³

For example, when a doctor's certificate has been provided stating that the debtor is ill.

- c. not leaving the debtor's property when it becomes apparent that he is unduly distressed or otherwise is, or appears as if he may be, particularly vulnerable⁵⁴

⁵³ See text box adjacent to paragraph 2.2.

⁵⁴ See text box adjacent to paragraph 2.2.

For example, if it is understood or suspected that the debtor might not have the mental capacity to make an informed repayment decision and/or engage in the debt recovery process at that time.⁵⁵

- d. entering the debtor's property without his consent or an appropriate court order
- e. not leaving the debtor's property when reasonably asked to do so
- f. visiting or 'threatening' to visit a debtor, without his prior agreement, when the debt is deadlocked or reasonably queried or disputed⁵⁶
- g. not giving adequate notice to the debtor of the time and date of a visit

We would not **necessarily** consider this to be unfair when a person(s) pursuing repayment of an outstanding debt makes an **initial** visit to a debtor (as it may not always be possible for him to give **adequate** notice of the time and date of **that** visit).

In the OFT's view, what is 'adequate' will vary depending on individual circumstances. When initial contact is made, a debtor may be happy to speak to the person(s) pursuing recovery of the debt at that time.

If that is the case, carrying out the visit would **not** be considered to be an unfair or improper practice. Where a debtor indicates that

⁵⁵ See paragraph 3.7 r.

⁵⁶ See Annexe A.

he prefers to use that first visit to agree a more convenient time for a future visit, the person(s) pursuing recovery of the debt should respect his wishes.

A debtor may prefer to defer a visit until a later date so that he can seek advice about his situation and/or arrange for a third party to be present.

What is important is that a debtor is given reasonable time to prepare for the visit. Debtors should not be coerced or pressurised into immediate discussions/decisions.

- h. visiting debtors, unless with the debtor's consent, at potentially inappropriate locations.

For example, at the debtor's place of work or at a hospital where a debtor is a patient.

Statute barred debt

- 3.14 This guidance applies to the pursuit of debt regardless of its age. This section seeks to address specific issues related to 'statute barred' debt and sets out what we consider may be unfair or improper practices, whether unlawful or not. It also sets out the differences between the law in England and Wales, Northern Ireland and Scotland.⁵⁷

⁵⁷ See Annexe B for further information on the legal position in each jurisdiction

3.15 The OFT position with regard to the recovery of statute barred debt is:

a. we accept that the situation in England, Wales and Northern Ireland is that statute barred debt still exists and is therefore recoverable. However, in Scotland, statute barred debt is 'extinguished' and is consequently no longer recoverable

b. where businesses seek to recover statute barred debt in England, Wales or Northern Ireland, we consider that the following may be unfair or improper practices:

(i) pursuing the debt under circumstances in which the debtor has heard nothing from a creditor during the relevant limitation period.⁵⁸ If a creditor has been in regular contact with a debtor before the debt is statute barred, then we do not consider it unfair to continue to attempt to recover the debt

(ii) misleading debtors as to their rights and obligations

For example, stating or implying that debtors may be the subject of court action for the sum of the statute barred debt when it is known, or reasonably ought to be known, that the relevant limitation period has expired.

The person seeking to recover the debt would effectively be relying on the debtor not knowing the relevant legal provisions.

(iii) continuing to press a debtor for payment after he has stated that he will not be paying a debt because it is statute barred

⁵⁸ See Annexe B for further information on relevant limitation periods.

- c. where businesses seek to recover debt that they know, or reasonably ought to know, is extinguished, we would be very likely to consider this an unfair or improper practice which calls fitness to hold a consumer credit licence into question.

Data Accuracy

- 3.16 Businesses processing⁵⁹ (sensitive) personal data⁶⁰ are subject to a number of legal obligations under the Data Protection Act 1998 ('DPA'). The obtaining, recording, holding and passing (including 'selling') of information about individuals for the purposes of debtor tracing/debt recovery will involve the processing of personal data - so businesses processing such data, in part for the purposes of debt recovery, are obliged (as 'data controllers') to observe and adhere to the eight data protection principles.⁶¹
- 3.17 Personal data must be processed fairly and lawfully and only for **specified purposes**.⁶² Where the data is used by those pursuing repayment of debts **for the purposes of debt recovery**, the use of the

⁵⁹ 'Processing' has a very broad meaning for the purposes of the DPA and includes obtaining, recording or holding the data, or carrying out any operation on the data including disclosing or disseminating the data (as well as using it for a particular purpose).

⁶⁰ 'Personal data' is data relating to a living individual who can be identified from the data.

⁶¹ See the Information Commissioner's Office 'Guide to data protection'
www.ico.gov.uk/for_organisations/data_protection/the_guide.aspx

⁶² Personal data should also be kept for no longer than is necessary. The length of time that it is 'necessary' to retain personal data will need to be determined by individual debt recovery businesses on a case by case basis taking account of 'business need'.

data is likely to meet the DPA condition of 'being necessary for the pursuance of the legitimate interests of the data controller'.⁶³

Under the DPA, it is a criminal offence to obtain or disclose personal data by unlawful means. This would include obtaining information by deceit.⁶⁴

Section 55 of the DPA states that is unlawful for a person to knowingly or recklessly, without the consent of the data controller, obtain or disclose personal data or the information contained in personal data, or procure the disclosure to another person of the information contained in personal data. Non-compliance with section 55 of the DPA would seriously call into question fitness to hold a consumer credit licence.

3.18 Any non-compliance with the DPA may call into consideration fitness to hold a consumer credit licence.

3.19 In order to avoid the risk of 'mistaken identity' (where a person who is not the actual debtor is pursued for the repayment of a debt) and with a view to ensuring that debtors are pursued for the correct amount of any unpaid debt, all businesses involved in debt recovery need to take reasonable steps to ensure that they maintain accurate and adequate data (including in respect of debt history).

3.20 Reasonable steps should also be taken to ensure that accurate (available) data is passed on to other businesses involved in the debt

⁶³ Steps also need to be taken with a view to ensuring that the rights and freedoms of the data subject are not prejudiced.

⁶⁴ This is sometimes referred to as 'blagging'.

recovery process and, where appropriate, to credit reference agencies (CRAs).⁶⁵

- 3.21 In our experience, many of the problems associated with mistaken identity and disputed debt, can be linked to the following issues:
- a. inadequate **maintenance** of accurate and adequate account data
 - b. deficiencies in the **exchange** of accurate and adequate account data between businesses involved in the debt recovery process, and between such parties and CRAs
 - c. businesses **acting on** inaccurate and inadequate data when pursuing the recovery of a debt.
- 3.22 The OFT considers that businesses should seek to ensure that they have accurate and adequate data, **prior** to pursuing debtors for outstanding debts, by taking appropriate steps to verify the data.
- 3.23 The OFT considers that the following may constitute unfair or improper practices:
- a. businesses pursuing debtors for the repayment of debts without taking reasonable steps to verify the accuracy and adequacy of relevant data
 - b. creditors failing to ensure that accurate and adequate information held about a borrower in relation to the provision of credit to him by that creditor, is made available to its own department/staff involved in the debt recovery process

⁶⁵ In the OFT's view, issues surrounding 'data quality' are particularly relevant to the debt sale and purchase sector.

This may be particularly relevant to larger businesses, which have different departments handling different aspects of their business activities. Examples of the type of information held which needs to be made available include, information relating to the borrower:

- being in financial difficulty, and/or
- being particularly vulnerable, and/or
- disputing the debt, and/or
- having a representative acting on his behalf.

- c. creditors⁶⁶ failing to identify to prospective debt purchasers debts known to be statute barred
- d. creditors failing to identify to prospective debt purchasers debtors understood to be 'gone-aways'
- e. creditors failing to identify to prospective debt purchasers debtors understood to be particularly vulnerable⁶⁷
- f. businesses failing to update systems or records or CRA data (where applicable), where it has been established that an individual being pursued for a debt is not the actual debtor, or the debt has been paid

Such a failure could result in the individual continuing to be pursued for repayment of the debt.

⁶⁶ Debt purchasers are **themselves** 'creditors' since the rights and duties of the original creditor under a consumer credit or consumer hire agreement are passed to them by assignment or operation of law.

⁶⁷ See text box adjacent to paragraph 2.2

- g. businesses negligently passing on inaccurate or inadequate account data/debt history to other parties involved in the debt recovery process
- h. third parties, including tracing agents, debt collection agencies and law firms, which are involved in the debt recovery process, failing to pass on to creditors information provided by individuals who are disputing debts
- i. a creditor imposing limitations on the number and the extent of reasonable applications that can be made to it for documents or other relevant information pertaining to debtors, in respect of agreements in which it is, or has been, the creditor, by a business seeking such information to better facilitate its pursuance of the relevant debt(s).

While we would expect creditors to appropriately respond in a timely manner to any such reasonable requests, businesses engaged in debt recovery should take proportionality considerations into account when submitting such data requests.

We would consider it to be an unfair practice for creditors to impose unreasonable limits on the number of accounts, the percentage of accounts, or the timescales, in respect of which other businesses pursuing the recovery of debts can apply for documents or information.

This is **particularly** the case where there is a statutory duty to provide the information (for example, in accordance with sections 77-79 of the Act).⁶⁸

⁶⁸ See Annexe C for further information on *(OFT 1272) Guidance on sections 77, 78 and 79 of the Consumer Credit Act 1974*.

Denying access to such data increases the risk of, for example, the wrong person being pursued for recovery of a debt or the correct person being pursued for the wrong amount.

4 REGULATORY COMPLIANCE AND ENFORCEMENT

Adherence to the guidance and compliance

- 4.1 The OFT expects businesses engaged in the recovery of debts arising from regulated consumer credit or consumer hire agreements to take reasonable steps (subject to proportionality considerations) to ensure that they have suitable business practices and procedures⁶⁹ in place to facilitate their own compliance and (as appropriate) that of any agents and associates (for example, through training, monitoring, record keeping, disciplinary policies/procedures, contractual requirements, or any other means necessary and appropriate to the business).
- 4.2 We would expect such businesses to have regard to both the letter and spirit of this guidance, other relevant OFT guidance and relevant legal obligations.

Evidence of compliance

- 4.3 Policies, practices and procedures should be documented and capable of being made available for inspection by the OFT and/or the relevant local authority Trading Standards Service. They should contain sufficient detail in respect of the actual procedures employed to allow the OFT to be able to form a view as to whether the procedures appear appropriate.
- 4.4 If we form a view that a licensee's or applicant's actual or proposed business model is, or is likely to be, in itself, the reasonably foreseeable cause of significant actual or potential consumer

⁶⁹ We expect the policies and procedures of such businesses to make specific provision for the fair and appropriate treatment of **particularly** vulnerable debtors. See text box adjacent to paragraph 2.2.

detriment, we are likely to consider the business unfit to hold a consumer credit licence.

For example, if it appears to us that the likely intention or effect of the business model is to mislead debtors and/or to deny them their legitimate rights.

4.5 If the OFT requires them to do so, it will be incumbent on licensed businesses to be able to demonstrate, to the OFT's satisfaction, that their practices and procedures:

- have been implemented in practice and are effective
- are proactively monitored to assess their ongoing effectiveness
- have been appropriately amended on the basis of the results of such monitoring as and when appropriate to do so.

4.6 Businesses should keep a record of the checks they undertake to assess adherence to this guidance.

4.7 Similar assessments may be made of applicants for licences.

Enforcement principles

4.8 The OFT is committed to fair, effective and proportionate enforcement. In practice this means that where we identify non-compliance with the law and/or non-adherence to relevant OFT guidance, we will decide on the appropriate regulatory response in the light of the facts and circumstances of the individual case.

4.9 The type of OFT action taken will be guided by the level of actual or potential harm to debtors and by the scale or frequency of identified misconduct. In considering whether conduct is non-compliant, we

will take account of the statutory requirements at the time the conduct occurred.

- 4.10 Where we wish to change conduct, we will use one of the appropriate 'tools' available to us. For example, we can impose 'requirements' on a business where we are dissatisfied with any matter in connection with the operation of the licensed business. Failure to comply with such a requirement can lead to the imposition of a financial penalty of up to £50,000 per instance of non-compliance. We may also compulsorily vary a licence, for instance to limit the activities for which a trader is licensed, or limit the life of the licence.⁷⁰
- 4.11 In serious cases, where there is evidence tending to show that a person is unfit to hold a consumer credit licence, the OFT can take action with a view to refusing or revoking the credit licence of the person concerned. Similarly, if we consider a person is unfit to operate under cover of a group licence, we can take steps with a view to that person being excluded from the cover of the group licence.⁷¹ Engaging in unfair or improper business practices would constitute grounds for the OFT to consider fitness to hold a licence.

⁷⁰ The OFT can also take action under Part 8 of the Enterprise Act 2002 in respect of domestic or Community infringements falling within sections 211 or 212 of that Act. Our approach to the use of these powers is discussed in *Enforcement of consumer protection legislation – Guidance on Part 8 of the Enterprise Act (OFT512)*. The OFT also co-ordinates such actions undertaken by other enforcers.

www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft512.pdf

The OFT also has both civil and criminal enforcement powers under the Consumer Protection from Unfair Trading Regulations 2008

www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf

⁷¹ The OFT has the power under section 28 of the Act to exclude any person from the cover of a group licence. However, we expect group licence holders themselves to take the lead in

4.12 Any action taken by the OFT with a view to refusing or revoking a licence, or excluding a person from the cover of a group licence, is subject to an independent decision making process. The licensee or applicant has a right to make representations to an independent adjudicator that the proposed action would be disproportionate or otherwise objectionable, prior to the adjudicator making a final decision.⁷² Following the final decision by the adjudicator, there is a right to appeal the decision (if there is an adverse determination) to the First Tier Tribunal (Consumer Credit)⁷³ provided that there are appropriate grounds to do so.

excluding unfit members from the group and notifying the OFT that they intend to do so and, where applicable, have done so. If a group licence holder fails to exclude unfit members of the group from operating under cover of its group licence, it would seriously call into consideration whether it remains in the public interest for the group licence in question to continue to remain in force.

⁷² Further information about the adjudication process can be found in our guidance document *Licensing – your right to make representations (OFT661)*

www.of.gov.uk/shared_of/business_leaflets/credit_licences/of661.pdf

⁷³ The First Tier Tribunal (Consumer Credit) is independently administered by the Tribunals Service, an agency of the Ministry of Justice. See *'First Tier Tribunal (Consumer Credit) – General Regulatory Chamber – Explanatory Leaflet'*

www.justice.gov.uk/downloads/global/forms/tribunals/consumer-credit/consumer-credit-short-guide.pdf

ANNEXE(S)

A DISPUTED AND DEADLOCKED DEBT

Disputed debt

- A.1 Where we refer to 'reasonably queried or disputed debt' we mean **justifiably** queried or disputed. We are not seeking to protect 'won't pay' from repaying debts duly owed but those who are being mistakenly pursued for a debt they do not owe (or genuinely believe they do not owe) or those who are being pursued for an incorrect amount of unpaid debt.
- A.2 We may require businesses to satisfy us that any query/dispute has been properly investigated.
- A.3 A non-exhaustive list of examples of what the OFT would consider valid grounds for disputing a debt include:
- the individual being pursued for the debt is not the actual debtor (or the guarantor of the debt) or
 - the debt does not exist or
 - the amount of the debt being pursued is incorrect.

Deadlocked debt

- A.4 Where we refer to discussions about debt repayment being 'deadlocked' we mean that a debtor (or the debtor's representative) has acknowledged (the debtor's) liability for a debt and has proposed a repayment programme – but the proposed repayment programme is not acceptable to the debt recovery business (or the creditor if not pursuing recovery of repayment of the debt on its own behalf).
- A.5 While businesses should not be required to accept **any** offer, we would expect them to give serious consideration to accepting any **reasonable** offer. Under circumstances in which a business rejects a

repayment offer because it considers it to be unacceptable, we do not consider it appropriate for the business to engage in any conduct intended to, and/or likely to, have the effect of **intimidating** the debtor into increasing his repayment offer.⁷⁴

For example, following receipt of an unacceptable offer from a debtor, the debt recovery business immediately communicates to the debtor that it will be 'sending field agents to visit'.

Many debtors would view such a communication as 'threatening'

- A.6 We consider that visiting or 'threatening' to visit a debtor, following receipt of an unacceptable (to the creditor) repayment offer, **may** constitute an unfair or improper practice.

We would have particular concerns under circumstances in which a debt recovery business rejects a debtor's repayment offer as being unacceptable – but cannot subsequently demonstrate to our satisfaction why the offer was considered to be unreasonable (for example, if assessed against the Common Financial Statement or equivalent).

⁷⁴ The OFT would have particular concerns under such circumstances if the initial repayment offer made by the debtor was the maximum that he could **sustainably** afford at that time given his financial circumstances. 'Sustainably' in this context means without undue difficulty and, in particular, without incurring or increasing problem indebtedness.

B STATUTE BARRED DEBT

Legal Position

- B.1 In England and Wales, statute barred debts are governed by the Limitation Act 1980 and the limitation period is generally 6 years. There are exceptions for certain loans without a fixed or determinable duration or where the loan document is signed as a deed. In England, Wales and Northern Ireland, the limitation period for deeds is 12 years.
- B.2 In Northern Ireland, statute barred debts are governed by the Limitation (Northern Ireland) Order 1989. The time allowed to enforce payment of a debt by civil proceedings is generally restricted to 6 years from the date on which the cause of action accrued (although there are exceptions for certain loans without a fixed or determinable duration or where the loan document is signed as a deed).
- B.3 In Scotland, statute barred debts are governed by the Prescription and Limitation (Scotland) Act 1973. Unlike the situation in England, Wales and Northern Ireland, the debt itself ceases to exist (is 'extinguished') providing the following criteria have been met:
- a relevant claim from the creditor has not been made during the relevant limitation period (the limitation period in Scotland is 5 years), and
 - the debt has not been acknowledged by, or on behalf of, the debtor in the relevant limitation period.
- B.4 The Prescription and Limitation (Scotland) Act 1973 regulates the extinction of a right arising from the abandonment or long neglect to exercise or enforce that right. If a debt has subsisted for a continuous period of five years:
- without any 'relevant claim' having been made, and

- without the subsistence of the debt having been 'relevantly acknowledged'

then, as from the expiry of the five years, the debt is extinguished.

- B.5 The term **extinguished** differentiates the Scottish concept of 'prescription' from the English Limitations Act, as once an obligation has been extinguished it no longer exists as a legal right and is deemed to have been abandoned or satisfied.
- B.6 A **relevant claim** will normally take the form of the creditor raising an action for payment in court. Simply sending a default notice or a letter demanding payment will not constitute a relevant claim.
- B.7 A **relevant acknowledgement** will normally be made by performance of the debtor (or his representative). For example, by making payments or by making an unequivocal written admission clearly acknowledging that the obligation still subsists.

C OTHER RELEVANT GUIDANCE AND LEGISLATION

- C.1 Businesses engaged in the recovery of debts arising from regulated consumer credit or consumer hire agreements should have regard to all relevant guidance and legislation. Evidence of not having regard to relevant guidance⁷⁵ and/or non-compliance with any relevant legislation may be taken into account by the OFT when considering 'fitness' to hold a consumer credit licence.
- C.2 In drawing up this guidance, the OFT has had regard to relevant legislation and, to the extent that we consider that it is appropriate to do so, we have drawn upon **principles** set out in such legislation, accompanying codes of practice and other guidance documents.
- C.3 Specific guidance that the OFT would expect businesses engaged in debt recovery activities to have regard to includes the following (this is a non-exhaustive list):

OFT1272 - Guidance on sections 77, 78, and 79 of the Consumer Credit Act 1974

- C.4 Businesses should be aware that, under certain circumstances, a consumer credit or consumer hire agreement may be unenforceable against the debtor,⁷⁶ or may be capable of enforcement only on an order of the court or only once certain steps are taken.

⁷⁵ See Annexe D for a non-exhaustive list of other relevant legislation and guidance.

⁷⁶ Whether certain specific activities amount to 'enforcement' was considered in the High Court case of *McGuffick-v- The Royal Bank of Scotland plc (2009) EWHC 2386 (Comm)*.

For example:

- where the creditor has failed to comply with requirements relating to making the agreement,⁷⁷ rendering the agreement only enforceable on order of a court
- where the creditor has failed to comply with a request to provide information,⁷⁸ rendering the agreement unenforceable until that information is provided.

C.5 The OFT has issued guidance⁷⁹ in relation to sections 77-79 of the Act. In particular, this sets out the consequences if an agreement is unenforceable. This guidance also highlights the fact that if a creditor or other party was to threaten court action, under circumstances in which judgment would not be possible, this would be likely to be considered by the OFT to be misleading or oppressive and consequently an unfair or improper practice.

OFT1293 - Mental capacity – OFT guidance for creditors

C.6 The OFT has issued guidance for creditors on mental capacity in the context of responsible lending and borrowing decisions.⁸⁰ One of the

⁷⁷ For example, the pre-contract disclosure requirements set out under section 55 of the Act.

⁷⁸ For example, the duty to give certain information to debtors set out under sections 77-79 of the Act.

⁷⁹ www.oft.gov.uk/shared_of/business_leaflets/consumer_credit/OFT1272.pdf

⁸⁰ Initially in *(OFT 1107) Irresponsible Lending Guidance* –and subsequently in *(OFT 1373) Mental Capacity OFT guidance for creditors*.

www.oft.gov.uk/about-the-oft/legal-powers/legal/cca/irresponsible

aims in producing this guidance is to afford better protection to a particularly vulnerable sub-set of consumers.

- C.7 We consider that the general **principles** of fair business practice that apply to creditors in their dealings with borrowers understood to have, or suspected of having, some form of mental capacity limitation that might constrain their ability to make an informed borrowing decision, as set out in the Mental Capacity Guidance, are applicable to those engaged in seeking to recover debts from such individuals.

Debt collection and mental health: ten steps to improve recovery

- C.8 A number of practical steps that debt recovery businesses can take to help them deal appropriately with debtors who have mental health issues are set out in guidance⁸¹ produced by the Royal College of Psychiatrists and the Money Advice Trust.

Good practice awareness guidelines – for consumers with mental health problems and debt

- C.9 The OFT expects businesses engaging in debt recovery activities to have regard to The Money Advice Liaison Group's (MALG) voluntary guidelines for best practice in the management of debt.⁸²

www.oft.gov.uk/about-the-oft/legal-powers/legal/cca/mental-capacity-guidance/

⁸¹ www.rcpsych.ac.uk/recovery

⁸² www.malg.org.uk/documents/MentalHealthGuidelinesEd2Final2009.pdf

D LIST OF USEFUL REFERENCES

The following is a non-exhaustive list of useful references for businesses involved in debt recovery activities.

OFT Guidance

Do you need a credit licence? (OFT147), July 2008

www.offt.gov.uk/OFTwork/credit-licensing/credit-licence/requiring

Consumer Credit Licensing – General guidance for licensees and applicants on fitness and requirements (OFT 969), January 2008

www.offt.gov.uk/shared_offt/business_leaflets/credit_licences/oft969.pdf

Licensing – your right to make representations (OFT661)

www.offt.gov.uk/shared_offt/business_leaflets/credit_licences/oft661.pdf

Irresponsible lending – OFT guidance for creditors (OFT 1107), (originally issued March 2010 – see latest version)

www.offt.gov.uk/about-the-offt/legal-powers/legal/cca/irresponsible

Guidance on sections 77, 78 and 79 of the Consumer Credit Act 1974 (OFT 1272), October 2010

www.offt.gov.uk/shared_offt/business_leaflets/consumer_credit/OFT1272.pdf

Mental Capacity Guidance (OFT 1293), September 2011

www.offt.gov.uk/about-the-offt/legal-powers/legal/cca/mental-capacity-guidance/

Guidance for consumer credit licence holders and applicants on the Group Licensing regime (OFT990rev), August 2011

www.offt.gov.uk/OFTwork/consultations/closed/2011/group-licensing-regime/

Enforcement of consumer protection legislation – Guidance on Part 8 of the Enterprise Act (OFT512)

www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft512.pdf

Guidance on the Consumer Protection from Unfair Trading Regulations 2008

www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf

Consumer Credit Act 1974 Post-contract information requirements (OFT 1002), July 2008

www.offt.gov.uk/shared_offt/business_leaflets/consumer_credit/oft1002.pdf

Legislation

Consumer Credit Act 1974

Data Protection Act 1998 (particularly section 55)

Equality Act 2010

Mental Capacity Act 2005 (England & Wales)

The Adults with Incapacity Scotland Act 2000

Limitation Act 1980 (England & Wales);

Prescription and Limitation (Scotland) Act 1973

Limitation (Northern Ireland) Order 1989

Administration of Justice Act 1970 (particularly section.40 (1))

Enterprise Act 2002 (Part 8)

Consumer Protection from Unfair Trading Regulations 2008

Communications Act 2003 (particularly sections 128-130)

Other Guidance

Lending Code – Lending Standards Board

www.lendingstandardsboard.org.uk/thecode.html

Consumer Credit Regulations: Guidance on the regulations implementing the Consumer Credit Directive (August 2010)

www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1053-consumer-credit-directive-guidance.pdf

Guide to Data Protection - Information Commissioner's Office

www.ico.gov.uk/for_organisations/data_protection/the_guide.aspx

Good Practice Awareness Guidelines for Consumers with Mental Health Problems and Debt – Money Advice Liaison Group (MALG)

www.malg.org.uk/dmhdocslist.html

www.moneyadvicetrust.org/images/Mental_Health_Guidelines_2009.pdf

Debt Collection and mental health: ten steps to improve recovery - The Royal College of Psychiatrists and the Money Advice Trust

www.rcpsych.ac.uk/recovery

Credit Services Association Code of Practice

www.csa-uk.com/page/codes-and-standards

Guidance Document: Use, format and content of standard Debt Collection Letters – CSA & DBSG

www.oft.gov.uk/about-the-oft/legal-powers/legal/cca/debt-collection

Revised statement of policy on the persistent misuse of an electronic communications network or service – OFCOM

http://stakeholders.ofcom.org.uk/binaries/consultations/persistent_misuse/summary/amendment.pdf