

# **Credit brokers and intermediaries**

**Draft OFT guidance for brokers, intermediaries and the consumer credit and hire businesses which employ or use their services**

**A consultation**

June 2011

OFT1307con

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This publication is also available from our website at: [www.oft.gov.uk](http://www.oft.gov.uk).

## Scope of this consultation

<b>Topic of this consultation</b>	The topic of this consultation is draft guidance to clarify what the OFT would expect from credit brokers and credit intermediaries when they are dealing with prospective borrowers.
<b>Scope of this consultation</b>	This consultation is focused on credit brokers' and credit intermediaries' practices when dealing with prospective or actual borrowers from advertising and sales through to refunds and complaints handling.
<b>Geographical scope</b>	UK-wide.
<b>Impact assessment</b>	There is no impact assessment linked to this consultation. The OFT does not conduct impact assessments when producing explanatory guidance. We work closely with interested parties in preparing guidance and consult fully on the content.

## Basic information

<b>To</b>	This consultation is aimed at credit brokers and credit intermediaries as well as creditors and consumer hire businesses which employ or use their services, related organisations such as trade associations, and those consumer groups with an interest in credit and debt issues.
<b>Duration</b>	This consultation will run from 1 June to 23 August.
<b>Enquiries</b>	By telephone: Paul Hosier on 020 7211 8839 By email: <a href="mailto:paul.hosier@oft.gsi.gov.uk">paul.hosier@oft.gsi.gov.uk</a> By fax: 020 7211 8604 By post: Paul Hosier, Credit Policy, Intelligence & Group Licensing Team, Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX.

<p><b>How to respond</b></p>	<p>We would welcome comments on the content of this draft guidance. Please respond to as many questions as you are able and provide any suggested changes or comments on the draft in writing (by email, or alternatively by letter or fax).</p> <p>We appreciate that respondents may have diverse opinions as to what should or should not be included in the guidance. Any evidence that you are able to supply in support of any changes that you propose is likely to add weight to our consideration of your comments.</p> <p>When responding to this consultation, please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were collated.</p> <p>We are publishing this draft guidance on the OFT website and sending it to a range of interested parties to invite comments.</p>
<p><b>Additional ways to become involved</b></p>	<p>If you wish to meet with the OFT team involved please contact Paul Hosier.</p>
<p><b>After the consultation</b></p>	<p>After the consultation we will publish our final guidance as well as a short summary of the responses received. Both documents will be available on our website at <a href="http://www.oft.gov.uk/publications">www.oft.gov.uk/publications</a></p>
<p><b>Compliance with the <i>Code of Practice on Consultation</i></b></p>	<p>This consultation complies with the BRE's Code of Practice on Consultation. A list of the key criteria can be found at Annexe E along with a link to the full document.</p>

## Background

### **Purpose of this guidance**

This guidance sets out the standards of conduct that the OFT expects of credit brokers and credit intermediaries.

With regards to credit brokerage, it draws together in one document matters that have previously been covered in other guidance documents published by the OFT, such as *Non-status lending – Guidelines for lenders and brokers* (OFT192), *Consumer Credit Act 1974 – Section 155* (OFT301), *Second charge lending – OFT guidance for lenders and brokers* (OFT1105) and *Irresponsible lending – OFT guidance for creditors* (OFT1107).

New regulations implementing the Consumer Credit Directive into UK law included the introduction of the definition of 'credit intermediary' (section 160A of the Consumer Credit Act 1974 as inserted by regulations 2 and 41 of the Consumer Credit (EU) Directive Regulations 2010).

## **Feedback about this consultation**

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

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A copy of the key criteria from the Better Regulation Executive's *Code of Practice on Consultation* can be found in Annexe E.

## **Data use statement for responses**

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. All information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may choose to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

Please note that Information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000 (FOIA). In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

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## FOREWORD

The primary aim of this guidance is to assist businesses engaged in credit brokerage and/or credit intermediaries to ensure that they meet the standards expected by the OFT, including compliance with their legal obligations.

The guidance sets out how the fitness test under section 25 of the Consumer Credit Act 1974 (the Act) will be applied in respect of credit brokerage activities and explains how the OFT may use its various regulatory powers where it is dissatisfied with any aspect of a business's practices or behaviour. It also provides illustrative examples of conduct that would cause the OFT concern.

The Consumer Credit Directive (CCD) introduces the new definition of 'credit intermediary'. This guidance also sets out what we expect from credit intermediaries, in particular in respect of transparency with regards to their status and the nature and amount of financial consideration being received. Many credit brokers may also be credit intermediaries (and vice versa).

In addition the guidance clarifies what the OFT considers to be the responsibilities of relevant businesses (primarily creditors) for the activities of their agents, or other third parties, with whom they do business.

The 'scope' of this guidance is set out in paragraphs 1.8 to 1.15 of the introduction.

Whilst this guidance represents the OFT's views on the standards expected of credit brokers and credit intermediaries, it is not meant to represent an exhaustive list of behaviours and practices that we consider may be unfair or improper. We expect relevant businesses to have regard to the spirit as well as the letter of this guidance and to other relevant OFT guidance.

We have previously set out standards of conduct that we expect from credit brokers in other OFT guidance such as our Non-Status Lending Guidance, our Second Charge Lending Guidance and our Irresponsible lending Guidance.

We started producing **this** draft guidance in 2010. In producing this guidance document at this time we are seeking to draw together in a single document the relevant elements of those other OFT guidance documents and to update our

guidance in light of our regulatory experience. It is also a response to the fact that analysis of intelligence available to us indicates significant and growing complaint levels regarding, in particular, sub-prime unsecured credit brokers.

In March 2011, the OFT received a super-complaint<sup>1</sup> submitted by Citizens Advice relating to, amongst other matters, cold calling and the charging of up-front fees by credit brokers. While it is the case, as previously stated, that our work on this draft guidance was already well underway at the time that we received the super-complaint, in producing this document we have taken into account both the information contained in the Citizens Advice submission itself and the evidence and information that we have obtained during our investigation of the super-complaint.

**The guidance is set out as follows:**

**Chapter 1 (Introduction)** includes an explanation of the section 25 'fitness test' under the Act, followed by the scope and purpose of the guidance.

**Chapter 2 (General principles of fair business practice)** sets out the overarching principles of consumer protection and fair business practice which, in our view, apply to credit brokers and, where relevant, credit intermediaries.

**Chapter 3 (Marketing practices)** covers the promotion of the services of credit brokers and intermediaries, including advertising, marketing and sales methods.

**Chapter 4 (Service provision)** deals with issues relating to the service offered by the credit broker and/or intermediary, in particular in relation to transparency of status and fees and any duties owed to the borrower.

**Chapter 5 (Post-contractual issues)** sets out the requirements in relation to documents and information once a consumer credit or hire agreement has been entered into.

**Chapter 6 (Refund of brokerage fees)** describes the requirements regarding the refund of brokerage fees, in particular under section 155 of the Act.

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<sup>1</sup> [www.citizensadvice.org.uk/cashing\\_in.htm](http://www.citizensadvice.org.uk/cashing_in.htm)

**Chapter 7 (Complaints handling)** sets out the OFT's expectations in respect of responding to queries and complaints.

**Chapter 8 (Regulatory compliance and enforcement)** sets out our approach to securing compliance and provides further information on the range of powers available to us.

The **Annexes** contain a full list of all referenced documents and legislation with links to relevant websites (where available). They also provide technical information on what, in the OFT's view, constitutes being a credit intermediary.

This guidance has been produced at a time of some considerable uncertainty in the regulatory landscape, but the principles of fair business practice it contains will continue to be relevant to all businesses involved in credit brokerage (and, where relevant, to credit intermediaries), notwithstanding possible future changes to the regulatory regime. We will continue to work with all appropriate parties over forthcoming years to seek to ensure that guidance for businesses engaging in these activities is reviewed and further developed as necessary.

# 1 INTRODUCTION

## 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 business and/or ancillary credit business including credit brokerage.<sup>2</sup>
- 1.2 All businesses engaged in credit brokerage are required to hold an appropriate standard consumer credit licence – category C – 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').
- 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,<sup>3</sup> 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 (FSMA) so far as they relate to the consumer credit jurisdiction operated by the Financial Ombudsman Service

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<sup>2</sup> As defined in paragraph A1 in Annexe A.

<sup>3</sup> Including business associates as referred to in section 25(3) of the Act.

- 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 ancillary credit businesses of that person and other persons who will participate in any business carried on by him under a licence and any practices and procedures to be implemented in connection with any such business. This means that new applicants operating in 'high risk' credit sectors - including some aspects of credit brokerage such as sub-prime credit brokerage and/or the brokerage of credit agreements in a consumer's home - will be subject to greater scrutiny at the application stage to ensure that they have appropriate regard to the standards that the OFT expects of those engaging in regulated consumer credit brokerage business<sup>4</sup> and that they are competent to engage in such business activities.

1.5 In considering a person's fitness to hold a consumer credit licence, the OFT will take into account whether he has had regard to all relevant OFT guidance. The OFT will also have regard to evidence of non-compliance with any relevant legislation, for example the Data Protection Act 1998.

1.6 Where the OFT has evidence which leads it to call into question 'fitness', it can take action to refuse or revoke the credit licences of those concerned, or to exclude an individual member from the cover of a group licence, or where appropriate, take action to change behaviour.<sup>5</sup>

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<sup>4</sup> For more information on the matters the OFT considers when assessing fitness and its approach to 'credit risk' see *Consumer Credit Licensing – General guidance for licensees and applicants on fitness and requirements* (OFT969).

<sup>5</sup> Our enforcement powers and principles of enforcement are explained in Chapter 8 of this guidance document.

1.7 Section 25A of the Act requires the OFT to prepare and publish guidance in relation to how it determines, or 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.

### **Scope of the guidance**

1.8 This guidance is primarily aimed at those engaged in, or seeking to engage in, credit brokerage and/or acting, or intending to act, as credit intermediaries.

1.9 The OFT considers that, in practice, many credit brokers may be credit intermediaries and vice versa, so we would advise anyone engaging in credit brokerage or carrying out the activities of a credit intermediary to have regard to all aspects of this guidance.

1.10 Many credit intermediaries are likely to need to hold a consumer credit licence covering the category of credit brokerage,<sup>6</sup> and a number of credit brokers are likely to need to comply with the requirements placed on credit intermediaries by section 160A of the Act.

1.11 References in this guidance to 'brokers' mean persons engaged in credit brokerage within the meaning of section 145(2) of the Act, and references to 'intermediaries' relate to credit intermediaries as defined in section 160A of the Act.

1.12 The guidance is also relevant to consumer credit businesses and consumer hire businesses who use the services of credit brokers and/or

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<sup>6</sup> Even if a credit intermediary is not a credit broker, it may fall under another category of licensable activity, such as 'debt administration' (or it could fall under both categories). Debt administration is the taking of steps to perform duties under a consumer credit or consumer hire agreement on behalf of the creditor or owner, or to exercise or enforce rights under such an agreement on behalf of the creditor or owner (so far as these steps do not constitute debt collecting).

intermediaries and so need to be aware of their responsibilities in relation to such persons.<sup>7</sup>

- 1.13 Credit brokerage also includes brokerage with a view to consumer hire agreements. References in this guidance to 'borrower' mean the debtor under a consumer credit agreement, or a prospective debtor, and include a hirer under a hire-purchase or consumer hire agreement.<sup>8</sup> References to 'creditor' mean the person providing credit, hire-purchase or hire under a consumer credit, hire-purchase or hire agreement.
- 1.14 The OFT expects all firms and individuals operating as brokers or intermediaries to have regard to both the letter and spirit of this guidance and other relevant guidance and to comply with relevant legal obligations. We expect businesses to take all reasonable and proportionate steps to ensure that they have suitable business practices and procedures in place, for example through training, monitoring, disciplinary policies/procedures or any other means necessary and appropriate to the business.
- 1.15 This guidance should be read in conjunction with other OFT fitness guidance documents, in particular *Consumer credit licensing – General guidance for licensees and applicants on fitness and requirements* (OFT969),<sup>9</sup> *Irresponsible Lending Guidance* (OFT1107)<sup>10</sup> and *Second Charge Lending Guidance* (OFT1057).<sup>11</sup>

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<sup>7</sup> See paragraphs 1.22 to 1.25 of this guidance.

<sup>8</sup> A borrower can include a sole trader or small partnership or unincorporated body, if this is an 'individual' for the purposes of section 189 of the Act - so the scope of the guidance extends into **some** brokerage for business purposes.

<sup>9</sup> [www.oft.gov.uk/shared\\_oft/business\\_leaflets/credit\\_licences/oft969.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/credit_licences/oft969.pdf)

<sup>10</sup> [www.oft.gov.uk/about-the-oft/legal-powers/legal/cca/irresponsible](http://www.oft.gov.uk/about-the-oft/legal-powers/legal/cca/irresponsible)

<sup>11</sup> [www.oft.gov.uk/about-the-oft/legal-powers/legal/cca/second-charge-lending](http://www.oft.gov.uk/about-the-oft/legal-powers/legal/cca/second-charge-lending)

## Purpose of the guidance

### (a) Credit brokerage

- 1.16 So far as brokerage is concerned, this guidance sets out the standards we would expect in terms of fitness to hold a consumer credit licence covering the category of credit brokerage. To assist brokers in meeting these standards, the guidance sets out the types of behaviour the OFT considers may fall within the category of unfair or improper practices and which, if engaged in, will call into question a person's fitness to be licensed.<sup>12</sup>
- 1.17 Relevant considerations of fitness will include the broker's compliance with its legal obligations and adherence to relevant OFT guidance, including consideration of whether it has engaged in unfair or improper business practices whether unlawful or not. This means that, in considering fitness, we are required to have regard to matters other than the minimum that is required in law.
- 1.18 The unfair and improper practices highlighted in this guidance are illustrative examples and are not designed to be comprehensive checklists of behaviour. Acts or omissions not included in the guidance may be taken into account by the OFT in determining fitness. When considering behaviours and practices that might be unfair or improper, we will have regard to the overarching general principles of fair business practice as set out in Chapter 2.
- 1.19 This guidance also provides a basis against which the OFT and its enforcement partners in Local Authority Trading Standards Services can undertake assessments of whether applicants have the appropriate skills, knowledge, experience, business practices and procedures, to be licensed by the OFT to operate an ancillary credit business (the 'competence assessment').

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<sup>12</sup> Some of the practices identified as 'unfair and improper' may also constitute criminal offences to which regard may be had under section 25 in assessing fitness to be licensed.

## **(b) Credit intermediaries**

- 1.20 Although a consumer credit licence is not specifically required in order to be a credit intermediary for the purposes of section 160A of the Act, credit intermediaries<sup>13</sup> will need an appropriate credit licence if they are also involved in credit brokerage or other licensable activities.
- 1.21 This guidance elaborates on the requirements placed on credit intermediaries by section 160A of the Act and should be read in conjunction with the guidance from the Department for Business, Innovation & Skills (BIS) on the regulations implementing the Consumer Credit Directive (CCD).<sup>14</sup> Breach of section 160A of the Act is a criminal offence<sup>15</sup> and can also be subject to enforcement action under Part 8 of the Enterprise Act 2002. It is also a matter that the OFT would take into account in considering fitness to hold a consumer credit licence.

## **(c) Creditors**

- 1.22 So far as creditors are concerned, the primary purpose of the guidance is to draw their attention to their responsibilities when dealing with credit brokers or intermediaries, directly or indirectly, as well as setting out those of the credit brokers and intermediaries with whom they do business.
- 1.23 The OFT considers that creditors should take appropriate responsibility for the actions or omissions of brokers and intermediaries acting as their agents and/or business associates. A broker or intermediary may be a business associate of a creditor if it works exclusively with the creditor,

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<sup>13</sup> Annexe B sets out the matters which, in the OFT's view, are relevant to a consideration of whether or not a person/business is acting as a credit intermediary and the obligations placed on intermediaries and/or those who engage with them.

<sup>14</sup> [www.bis.gov.uk/policies/consumer-issues/consumer-credit-and-debt/consumer-credit-regulation/ec-consumer-credit-directive](http://www.bis.gov.uk/policies/consumer-issues/consumer-credit-and-debt/consumer-credit-regulation/ec-consumer-credit-directive)

<sup>15</sup> A conviction for breach of section 160A of the Act may lead to a fine.

or has an ongoing relationship with the creditor, or frequently does business with the creditor. This will be a matter of fact and degree.

- 1.24 The OFT would expect creditors to take reasonable steps to satisfy themselves that employees, agents and associates (including business associates) are not engaging in unfair business practices or acting unlawfully and to take care in selecting third parties with whom to form business associations. If a creditor chooses to do business and/or continues to do business with a third party which it suspects, or reasonably ought to suspect, is engaged in behaviour which the OFT is likely to consider to be inconsistent with fitness to hold a licence, its own fitness may be called into consideration.
- 1.25 We would consider licensed businesses simply ignoring the unfair practices of those acting on their behalf – whether in-house or external – to be inconsistent with fitness to hold a consumer credit licence. Creditors should also satisfy themselves that persons they deal with are appropriately licensed. Agreements entered into following an introduction by an unlicensed credit broker are unenforceable without an order made by the OFT.<sup>16</sup>

#### **Questions**

- Q1 Does the introduction set out the scope and purpose of the guidance sufficiently clearly?**
- Q2 Are there any substantive aspects with which you disagree?**
- Q3 Do you consider that there are any significant omissions?**
- Q4 Do you have any other suggestions for improvement?**

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<sup>16</sup> See section 149 of the Act.

## 2 GENERAL 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 that apply to the conduct of all credit brokers and/or credit intermediaries.

2.2 In general terms, where applicable, credit brokers and intermediaries should:

- ensure **transparency** in all dealings with borrowers and they should not use misleading or oppressive behaviour, including when advertising or otherwise promoting consumer credit or hire agreements. This would include - but not be limited to - all advertising and marketing materials, web-sites and pre- contract information
- ensure information and documentation directed at, or provided to, borrowers, is compliant with relevant legislative requirements
- not provide advice (where advice is given)<sup>17</sup> or information (including documentary information) that is **unsuitable or inappropriate** given the borrower's circumstances
- clearly disclose their status (including any links with creditors)<sup>18</sup> and the level of service offered
- provide full and early disclosure of any fees payable by the borrower, setting out what the fees are for, when and how they are payable,

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<sup>17</sup> Some brokers may provide information but not advice, or act on an execution-only basis, or merely effect introductions.

<sup>18</sup> 'Status' in this context means any contractual or non-contractual links between the broker or intermediary with a potential creditor which **may** affect the impartiality of any advice given – or recommendations made – by the broker or intermediary to the borrower. Relevant details should be set out in full - normally in writing - before the borrower enters into a credit agreement.

and any provisions for refunds, including in accordance with the requirements of section 155 of the Act<sup>19</sup>

- **treat borrowers fairly** – borrowers should not be targeted with credit products that are clearly unsuitable for them, or subjected to aggressive or oppressive behaviour or coercion. Neither should they be subjected to conduct that is deceitful, oppressive, unfair or improper, whether unlawful or not. Borrowers who may be particularly vulnerable by virtue of their current indebtedness, poor credit history, or by reason of age or health, or disability, or for any other reason, should, in particular, not be targeted or exploited
- where appropriate, provide early disclosure of information relating to, and explanation of, key features of the credit agreement, including key risks to the borrower, to better enable borrowers to make informed choices.

2.3 Licensees should not operate business models which, by their very nature, are likely to be unfair to borrowers.<sup>20</sup>

2.4 Section 25(2) of the Act states that the OFT shall have regard to the business practices and procedures implemented in connection with consumer credit businesses, consumer hire businesses or ancillary credit businesses in determining fitness for the purposes of the section 25 test. When formulating their business practices and procedures, in order to facilitate the avoidance of engaging in unfair or improper practices, we would expect brokers and intermediaries to have regard to these general principles and to give effect to their practices and procedures in such a way as to facilitate these general principles being followed in practice.

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<sup>19</sup> In the case of credit intermediaries, the fee must be agreed in writing with the borrower before any credit agreement is entered into in accordance with the requirements of section 160A(4) of the Act.

<sup>20</sup> See paragraph 8.4

## **Questions**

- Q5** Are the draft guidelines on the general principles of fair business practice sufficiently clear?
- Q6** Are there any substantive aspects with which you disagree?
- Q7** Are there any significant omissions?
- Q8** Do you have any other suggestions for improvement?

### 3      **MARKETING PRACTICES**

#### **Advertisements and promotional material**

3.1      Advertising and other promotional material, whether in relation to credit agreements and/or the services of the broker or intermediary, should be accurate, clear and truthful and should not mislead either expressly or by implication or omission. In particular brokers or intermediaries should not mislead regarding:

- the nature of the credit
- the cost and other terms of borrowing
- the nature, extent and cost of the service being offered or
- their status and/or the service they themselves are offering (as opposed to the service(s) being offered by those to whom they may make a referral).

3.2      Advertising and other promotional material should comply with all relevant legislative and other regulatory requirements, including the Consumer Credit (Advertisements) Regulations 2010 (CCARs)<sup>21</sup> and the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).<sup>22 23</sup> Advertisers should also have regard to all relevant OFT guidance.<sup>24</sup>

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<sup>21</sup> Equivalent requirements apply under the Consumer Credit (Advertisements) Regulations 2004 in relation to second charge mortgage advertising where this is not regulated under FSMA.

<sup>22</sup> [www.oft.gov.uk/shared\\_of/business\\_leaflets/cpregs/oft1008.pdf](http://www.oft.gov.uk/shared_of/business_leaflets/cpregs/oft1008.pdf)

<sup>23</sup> Breach of the CCARs or CPRs may constitute a criminal offence and can also lead to enforcement action under Part 8 of the Enterprise Act 2002 where there is harm to the collective interest of consumers.

<sup>24</sup> [www.oft.gov.uk/about-the-oft/legal-powers/legal/cca/guidance](http://www.oft.gov.uk/about-the-oft/legal-powers/legal/cca/guidance)

- 3.3 The CPRs prohibit unfair commercial practices that distort consumers' decisions. In particular, they prohibit advertising which is misleading, by act or omission, where this affects or is likely to affect the transactional decisions of consumers or a group of consumers. Using false or misleading statements in order to induce borrowers to enter into a contract is likely to be a breach of the CPRs.<sup>25</sup>
- 3.4 Advertisers should also adhere to the requirements of the Committee of Advertising Practice (CAP) and Broadcast Committee of Advertising Practice (BCAP) codes, which are administered by the Advertising Standards Authority (ASA).
- 3.5 Certain specified canvassing activities are prohibited under the Act. Section 49 of the Act prohibits unsolicited canvassing of debtor-creditor agreements off trade premises and section 154 prohibits canvassing of certain ancillary credit services such as credit brokerage off trade premises.<sup>26</sup>
- 3.6 When carrying on direct marketing, businesses must comply with the requirements of the Data Protection Act 1998 (DPA) and the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECRs), which govern how electronic marketing and advertising, including cold calling, should be carried out. Although the Information Commissioner's Office (ICO) has the primary enforcement lead in this area, the OFT is likely to consider any breach of the DPA or PECRs by a licensee or its associates as constituting a business practice that may be unfair and/or improper within the meaning of section 25(2A)(e) of the Act.

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<sup>25</sup> The Business Protection from Misleading Marketing Regulations 2007 (BPRs) make equivalent provision in relation to practices aimed at businesses.

<sup>26</sup> It is an offence under section 154 of the Act to canvass off trade premises the services of a person carrying on a business of credit brokerage.

## Unfair or improper business practices relating to advertising and promotion

3.7 The following is a non-exhaustive list of business practices relating to advertising and promotion which, in the OFT's view, might constitute unfair or improper business practices for the purposes of the 'fitness test' under section 25 of the Act:

- a. (in the case of credit brokers) failing to include a representative example (or a representative or typical APR<sup>27</sup>) where triggered, and/or failing to comply with legal requirements regarding clarity and prominence

For example, where a credit advertisement includes a 'non-status' or 'comparative' indication or 'incentive', the advertisement should show a representative APR and give it greater prominence than the trigger information. Inclusion of an interest rate or an amount relating to the cost of credit triggers a representative example.

- b. using statements, price indications or financial incentives that are misleading in any way, including by omission of relevant information
- c. making statements in advertisements and other promotional material that are not in plain and intelligible language and/or not easily legible or (where appropriate) clearly audible (and consistent with legal requirements)
- d. making statements in advertisements guaranteeing refunds on cancellation of agreements but failing to abide by such statements in a timely manner or at all

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<sup>27</sup> Annual percentage rate of charge.

- e. failing to make sufficiently clear<sup>28</sup> the nature of the service provided (whether via a website or advertising content or when using other direct marketing contact methods such as telephone or text messaging or any other mode of communication)

For example, implying to a borrower that the broker itself provides credit when the credit is in fact provided by a third party creditor, and/or failing to make clear to the borrower that the broker is a broker and **not** a creditor, and that consequently the borrower's details will be passed on to a third party to consider his application for credit.

- f. (in the case of credit brokers or other licensed businesses) using a trading name under which the business is not licensed by the OFT
- g. not including an advertiser's name and/or postal address when required<sup>29</sup> to do so, or concealing or misrepresenting the advertiser's identity

For example, using web portals in a way that conceals the identity of the website owner.

- h. using expressions that may actually or potentially misrepresent the status of the broker or intermediary

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<sup>28</sup> 'Sufficient' in this context means what is needed in order for it to be clear to the average borrower.

<sup>29</sup> Regulation 3 of the Consumer Credit (Advertisements) Regulations 2010 requires the inclusion of the name of the advertiser and Regulation 4(1)(b) generally requires the postal address if the advertisement includes any information triggering a representative example.

For example, stating that the business is 'Government licensed'.

- i. (in the case of credit intermediaries) failing to make sufficiently clear in advertising or other documentation for consumers any limitations on the intermediary's independence including any links with creditors or other third parties that may give rise to a conflict of interest<sup>30</sup>

For example, failing to make sufficiently clear that a fee or commission is, or may be, payable by a creditor or third party to the intermediary.<sup>31</sup>

- j. failing to make to the borrower sufficiently full and early disclosure of any fee payable by the borrower including the amount or likely amount
- k. (in the case of credit intermediaries) failing to make full and early disclosure to the creditor of any financial consideration for the

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<sup>30</sup> See also chapter 4.

<sup>31</sup> In the OFT's view, the **existence** of any 'commission' payable to a broker or intermediary by a creditor in respect of the relevant credit agreement should be made known to a potential borrower by the broker or intermediary under circumstances in which the existence/amount of the commission **could** actually or potentially act as an undue incentive for the broker or intermediary to recommend a particular credit product (as opposed to an appropriate alternative, from the borrower's perspective, from the product range available to the broker/intermediary) to a potential borrower and/or where knowledge of the existence/amount of the commission **could** actually or potentially have a material impact on the potential borrower's borrowing decision. In effect, potential borrowers should be made aware of the **existence** of a financial arrangement between a broker or intermediary and a creditor that might potentially impact upon the **impartiality** of the broker or intermediary in terms of the credit products(s) that it promotes to a potential borrower.

activity payable by the debtor if the annual percentage rate of the total charge for credit is to be ascertained by the creditor

- l. misleading the borrower as to when or how the brokerage fee may be payable by him and/or the position with respect to refunds, including failing to inform the borrower that, where applicable, he has a statutory right to a refund under section 155 of the Act
- m. suggesting or implying that credit is available regardless of the income or other financial circumstances of the borrower, or that credit is 'pre-approved'<sup>32</sup> or 'guaranteed', where this is not the case<sup>33</sup>
- n. using editorial content in the media to promote a product or service, without making it sufficiently clear that payment had been received in exchange for the publication of such editorial content (for instance, an 'advertorial' and/or 'commercial blogging')<sup>34</sup>
- o. misleading the borrower about his rights in respect of cancellation of, or withdrawal from, a credit agreement.

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<sup>32</sup> Credit may not be described as 'guaranteed', 'pre-approved', or able to be provided without any credit checks being undertaken, unless it is free of any conditions regarding the financial circumstances of the borrower to whom it is to be provided. If a creditor wishes to reserve the right to make further checks on a borrower's financial circumstances, and/or to decline an application if it contains information impacting on affordability/a borrower's ability to repay, such expressions should not be used. For the credit to be genuinely pre-approved, the creditor should have undertaken an appropriate affordability assessment of the borrower in advance of offering him the credit.

<sup>33</sup> See also regulation 10 of the CCARs.

<sup>34</sup> Banned practice number 11 under the CPRs.

## Sales practices

- 3.8 Using misleading or high-pressure sales tactics on prospective borrowers to persuade them to enter into agreements may constitute unfair or improper practices for the purposes of section 25(2A)(e) of the Act.**

### Unfair or improper business practices relating to sales

- 3.9 The following is a non-exhaustive list of business practices relating to sales which, in the OFT's view, might constitute unfair or improper business practices for the purposes of the 'fitness test' under section 25 of the Act:<sup>35</sup>
- a. making or instigating unsolicited calls or faxes to any number on the Telephone Preference Service (TPS)<sup>36</sup> register or the Fax Preference Service (FPS) register or to a borrower who has previously notified the caller that he does not wish to receive any such unsolicited contact
  - b. sending or instigating electronic mail (text message, email, voicemail) and/or making automated calls, for the purposes of marketing, without obtaining prior informed consent from the borrower to whom they are sent
  - c. if cold calling (or warm calling<sup>37</sup>), not making sufficiently clear at the outset the identity of the relevant business and the purpose of the call

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<sup>35</sup> These are in addition to the practices listed under 'Advertisements and promotional material' which may also be relevant to other aspects of the sales process.

<sup>36</sup> [www.tpsonline.org.uk](http://www.tpsonline.org.uk)

<sup>37</sup> Warm calling is the practice by which a consumer receives an unexpected call from a business which has the consumer's consent to contact him – although it may not be apparent to the consumer that he has given such consent. For example, the consumer may have previously

For example, representing a call as being for 'market survey' purposes when this is not the case and/or where a purpose is to promote the sale of credit products/services.

- d. canvassing off trade premises without the borrower's prior invitation and informed consent to a particular visit and without making clear the purpose of the visit
- e. visiting a borrower at a time that is known to be, or likely to be, inconvenient/particularly undesirable for the borrower
- f. continuing with a visit after a borrower has made it known that he wishes the visit to end
- g. inappropriately<sup>38</sup> asking or instructing borrowers to make contact on telephone numbers that are premium rate numbers
- h. conducting telephone conversations with borrowers, who have called on premium rate service numbers, over an unreasonably prolonged period

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ticked a box on the business' web-site, granting consent, without being aware what he had agreed to.

<sup>38</sup> For example, this would be inappropriate where a consumer credit service provider did not have 'prior permission' from PhonepayPlus ('PPP') to operate a premium rate service and/or it was otherwise in breach of the PPP Code of practice – perhaps, for example, because it was referring customers seeking refunds to a premium rate service number. Whether brokers have complied with the PPP code of practice, which sets out a number of requirements in respect of premium rate services, is a relevant consideration for the OFT with regards to fitness to hold a consumer credit licence. [www.code.phonepayplus.org.uk/](http://www.code.phonepayplus.org.uk/)

Borrowers should not have to make more than one call to apply for credit and this call should not exceed 15 minutes in duration.

The broker should not do anything to encourage repeat use. In particular borrowers should not be advised or encouraged to call for updates before there is likely to be a definite answer as to their credit application.

Calls to check on the status of a credit application should not last longer than five minutes in duration.

Callers should be informed in any promotional material of the likely total cost of the premium rate service including the price per minute of calls, the likely duration of the call, and the total cost which the consumer will incur if he calls for the full duration.

- i. inappropriately offering a financial, or other form of inducement or incentive to the borrower to sign a credit agreement quickly/immediately
- j. making false representations with a view to persuading the borrower to sign a credit agreement

For example, telling a borrower that the price will rise if he does not sign the agreement straight away or that a discount or special offer will be withdrawn when this is not the case.

- k. where appropriate, the broker or intermediary not allowing the borrower sufficient opportunity to read and reflect on the terms and conditions of the credit, and consider the implications, before entering into the agreement, or failing to advise him to do so
- l. pressurising borrowers to enter into a new credit agreement or to extend an existing commitment

- m. encouraging or allowing the borrower to sign blank forms or photocopies, or any other document that has not been properly completed
- n. filling in any part of the credit application intended for completion by the borrower, except with the borrower's express consent and on the basis of information provided by the borrower<sup>39</sup>
- o. misleading the borrower as to the availability of a particular credit product, from the business itself or at all (whether or not for the purpose of securing a brokerage/introduction fee from the borrower)

For example, stating or implying that a borrower will be introduced to a source of 'mainstream credit'<sup>40</sup> and then effecting an introduction to a high cost credit provider.<sup>41</sup>

- p. failing to display privacy notices<sup>42</sup> in a way that the borrower's legal rights under the DPA will be clearly brought to his attention in such a way as to make him fully aware of his rights and how to exercise them

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<sup>39</sup> Unless, in the alternative, the content of the completed (by the broker or intermediary) form is subsequently made available to the borrower for his consideration and approval before it is submitted to a creditor as an application for credit.

<sup>40</sup> In this context, 'mainstream credit' would include financial products that a large number of consumers have historically had access to such as traditional personal loans, credit cards and overdrafts on current accounts.

<sup>41</sup> In this context, an example of a 'high cost credit provider' would be a payday lender.

<sup>42</sup> A 'privacy notice' is a legal document that discloses the ways a party gathers, uses, discloses and manages a customer's personal data.

The OFT would expect any privacy notice to be clearly displayed in a sufficiently prominent position such that it is likely to come to the attention of the borrower

We would expect it to explain the way in which the licensee intends to use borrowers' personal information, and what it requires from borrowers in terms of 'consent' prior to being able to do so, clearly, transparently and in plain and intelligible language.

- q. referring the borrower to a third party, who is a provider of consumer credit or ancillary credit services, or other services,<sup>43</sup> without obtaining the borrower's informed prior consent to do so

For example, where consent is deemed to arise from a clause in the small print of documents/information provided by the broker or intermediary to the borrower.

- r. passing the borrower's personal data to a third party without obtaining the borrower's informed prior consent to do so
- s. passing the borrower's personal data to a third party for a purpose other than that for which consent was sought and given
- t. failing to provide a sufficiently clear and easy method for borrowers to cancel their consent
- u. failing to be sufficiently clear as to what the borrower's details (personal data) will be used for

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<sup>43</sup> For example, a claims management company.

- v. failing to disclose where the borrower's details were obtained from, upon receipt of a request from the borrower to do so<sup>44</sup>
- w. passing the borrower's personal data to a business for use in any regulated consumer credit or ancillary credit activity (even where the borrower has given consent to his data being passed on) if the business is not licensed to undertake that activity
- x. referring the borrower to a 'linked' third party without informing the borrower, prior to making the referral, of the existence of, and nature of, the links with the third party.

For example, failing to inform the borrower that the creditor he is being referred to is a member of the same corporate group as the broker.

## Questions

**Q9** Are the draft guidelines on marketing practices sufficiently clear?

**Q10** Are there any substantive aspects with which you disagree?

**Q11** Are there any significant omissions?

**Q12** Do you have any other suggests for improvement?

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<sup>44</sup> If a court is satisfied that an organisation has not dealt with a subject access request in line with the requirements of the Data Protection Act 1998, the court can order it to comply. The court also has the power to award compensation. See Annexe C for other Relevant Legislation and Guidance.

## 4 SERVICE PROVISION

### Transparency

- 4.1 **There should be transparency in all dealings with borrowers. Brokers and intermediaries should clearly disclose at the outset the full nature and extent of the service offered to the borrower by the broker or intermediary, any charges, and the nature and extent of any relevant associations with creditors or other third parties.**

### Status

- 4.2 The OFT would expect all brokers and intermediaries to make sufficiently clear to the borrower their status<sup>45</sup> in relation to any potential creditors, and to do so sufficiently early in the relationship so that the borrower is aware of the service he will be receiving, any limitations on this, and anything that may give rise to a potential conflict of interest prior to him being introduced to a potential creditor or being presented with a credit agreement. The broker or intermediary should not mislead in any way, or conceal information that should be disclosed to a borrower on the basis that it may be material to the borrower's decision.
- 4.3 In particular, section 160A(3) of the Act requires credit intermediaries to disclose – in all advertising and other documentation intended for consumers – the extent of their independence and in particular whether they work exclusively with one or more creditors.<sup>46</sup>
- 4.4 An intermediary's independence could be affected by his business arrangements with a creditor (or a credit broker or other intermediary) and/or by the method of remuneration. For example, a person would be unlikely to be considered independent if he:

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<sup>45</sup> See footnote 18.

<sup>46</sup> Breach of this requirement is a criminal offence.

- works exclusively with one or more creditors
- is otherwise tied<sup>47</sup> in any way to a creditor or
- gives preference to particular products (for example, because of differential commission rates, volume over-riders or other benefits).

4.5 An intermediary should only describe himself as 'independent' if he is able to access a representative range of products from the relevant product market on competitive terms – and is not constrained in this, whether or not by agreement with a creditor.<sup>48</sup>

4.6 If an intermediary is not genuinely independent, he should disclose any limitations on his independence. Such disclosure should be clear and easily comprehensible. It should be reasonably prominent, and disclosed in such a way that the borrower is likely to see it and take note. In some cases it may be necessary to draw the borrower's attention to the disclosure, particularly if it is provided as one of a number of disclosures, whether verbal or written (documented).

4.7 We would also expect brokers who are not intermediaries to disclose their status in some appropriate way if they are not independent, and disclosing to a borrower that this is the case may potentially impact on his borrowing decision.<sup>49</sup>

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<sup>47</sup> By 'tied' we mean any contractual or non-contractual links between the parties which are liable to impact on the service provided by the broker/intermediary, or any advice given, over and above normal commission arrangements, for example a 'right of first refusal' agreement or an agreement that the broker/intermediary will give preference to the creditor's products.

<sup>48</sup> This is similar to the test proposed by the Financial Services Authority (FSA) of a 'fair and representative analysis of the relevant market'.

[www.fsa.gov.uk/pages/Library/Policy/CP/2010/10\\_28.shtml](http://www.fsa.gov.uk/pages/Library/Policy/CP/2010/10_28.shtml)

<sup>49</sup> See footnote 31.

## Unfair or improper business practices relating to disclosures by brokers or intermediaries regarding their status

4.8 The following is a non-exhaustive list of business practices relating to disclosures by brokers or intermediaries regarding their status which, in the OFT's view, might constitute unfair or improper business practices for the purposes of the 'fitness test' under section 25 of the Act:

- a. failing to communicate the identity of the creditor (where this is known) to the borrower
- b. failing to make sufficiently clear, in advertising and documentation intended for borrowers, the nature and extent of the service offered by the broker or intermediary and any limitations on this or on the extent of the broker's or intermediary's powers<sup>50</sup>

For example, that the broker or intermediary cannot access a representative range of products from the relevant market or cannot do so on competitive terms.

- c. failing to make sufficiently clear to the borrower the status of the broker or intermediary including setting out any organisational or contractual links with a creditor (or with another broker or intermediary)

For example, that the broker or intermediary is part of the same corporate group as a relevant creditor, or is an agent or associate of the creditor.

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<sup>50</sup> In particular, whether the broker or intermediary works exclusively with one or more creditors or as an independent broker.

- d. failing to inform the borrower of any other links with a creditor (or with another broker or intermediary) where these may give rise to a potential conflict of interest that may impact on the service provided and/or any advice offered to the borrower

For example, that the broker or intermediary has undertaken to give preference to a particular creditor's products or to offer a 'right of first refusal' for particular product types.

## Fees

- 4.9 **If a fee is or may be payable by the borrower to the broker or intermediary, this should be made clear at the outset. The purpose and nature of the fee should be made sufficiently clear to the borrower, together with how and when it may be payable and the position on refunds.**
- 4.10 In particular, section 160A(4) of the Act requires credit intermediaries to disclose to the borrower any fee charged to the borrower for their services and to agree the fee in writing with the borrower. This must be done before the borrower concludes a relevant credit agreement.<sup>51</sup>
- 4.11 We would also expect brokers who are not intermediaries, for the purposes of transparency, to disclose the existence<sup>52</sup> of any brokerage fees to borrowers by appropriate means.
- 4.12 Section 160A(4) of the Act does not require the intermediary to disclose any fee or commission payable by the creditor or a third party. However, as noted above, section 160A(3) of the Act requires the intermediary to disclose, in advertising and other relevant documentation, the extent of

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<sup>51</sup> Breach of this requirement is a criminal offence.

<sup>52</sup> See footnote 31.

his independence and in particular whether he works exclusively with a creditor. An intermediary's independence could be affected by the method of remuneration including different levels of fee or commission available.

- 4.13 In the OFT's view, credit intermediaries should therefore disclose, as part of disclosure under section 160A(3) of the Act, whether they are entitled to any fee or commission from a creditor or third party, to the extent that this could affect the intermediary's independence and give rise to a conflict of interest impacting on the service provided to the borrower and any advice offered.
- 4.14 Whilst section 160A of the Act does not in our view require the proactive disclosure of the **amount** of the fee or commission, we consider that this should be disclosed to the borrower on request. This is because it may be material to whether there is a potential conflict of interest (and hence whether the borrower should deal with the intermediary). This should be done in a way that is sufficiently clear and readily comprehensible, whilst accepting that commercial considerations may limit the extent of the disclosure and the amount of information provided.
- 4.15 In addition, section 160A(5) of the Act requires credit intermediaries to disclose to the creditor any fee charged to the borrower for the intermediary's services, if the APR of the total charge for credit is to be ascertained by the creditor.

#### Unfair or improper business practices relating to fees

- 4.16 The following is a non-exhaustive list of business practices relating to fees which, in the OFT's view, might constitute unfair or improper business practices for the purposes of the 'fitness test' under section 25 of the Act:
- a. failing to notify the borrower of the existence of any fee payable by the borrower to the broker or intermediary and the position on

refunds. This should be done before any relevant agreement is concluded

- b. lack of clarity about how and when the fee will be payable including whether it will be deducted from the cost of the credit

For example, taking bank account details for 'security purposes' or 'identity verification purposes' but deducting the fee at that point without informing the borrower prior to doing so or at all.

- c. taking a fee from a borrower's bank account without the borrower's express authorisation to do so<sup>53</sup>
- d. (in the case of credit intermediaries) failing to agree the fee in writing with the borrower before the credit agreement is concluded
- e. misleading the borrower as to the amount of the fee or the position on refunds
- f. failing to disclose that a fee or commission may be payable by a creditor or third party under circumstances in which the existence/amount of the commission **could**, actually or potentially, act as an undue incentive for the broker or intermediary to recommend a particular credit product (as opposed to an appropriate alternative, from the borrower's perspective, from the product range available to the broker/intermediary) to a potential borrower and/or where knowledge of the existence/amount of the commission **could**, actually or potentially, have a material impact on the potential borrower's transactional decision

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<sup>53</sup> Where a transaction is found to be unauthorised, the payment service provider has an obligation under the Payment Services Regulations 2009 to provide a refund.

- g. failing to disclose the amount or likely amount of the fee/commission, on receipt of a request by the borrower to do so, or, if not ascertainable, the method of calculation<sup>54</sup>
- h. failing to disclose that a fee charged for seeking an introduction to a source of a particular type of credit (even if any such introduction is not subsequently effected) **may** be retained by the broker if, in the meantime, the broker effects an introduction to a type of credit which is different to that applied for by the consumer<sup>55</sup>

For example, if the borrower applies for mainstream credit but is then introduced to a high cost credit provider.

### **Fiduciary duty – acting in the borrower's best interests**

- 4.17 Where the broker or intermediary is acting as the **borrower's agent** in relation to the transaction, he owes a duty of reasonable care as part of this relationship, including a duty to act in the borrower's best interests.
- 4.18 Where brokers and intermediaries are acting, in whole or part, as agents of the borrower, they should be aware of the implications of this including under the common law.<sup>56</sup>

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<sup>54</sup> For these purposes, fee/commission includes any financial consideration such as an introducer's fee, arrangement fee, volume over-rider or non-cash benefit (in other words any benefit that might impact on the impartiality of the advice given or service provided by the broker/intermediary or might otherwise give rise to a conflict of interest).

<sup>55</sup> See also paragraph 3.9 o.

<sup>56</sup> For instance the judgment in *Wilson & Another v Hurstanger Limited [2007] EWCA Civ 299*, which found that an agent receiving commission without the informed consent of the borrower would be in breach of his fiduciary duty.

- 4.19 Customer-facing staff should have adequate training and information to ensure that they have sufficient understanding of the products and services and their features and associated risks to enable them to provide accurate information and explanations to borrowers where appropriate.
- 4.20 Brokers and intermediaries should, as far as is reasonable and practicable, ensure that all information on a credit application is correct. They must not falsify details (for example as to income or employment), nor encourage or knowingly allow the borrower to do so. If there are doubts as to the accuracy of information provided on, or in support of, the application, these should be brought to the creditor's attention, so that the creditor can decide whether to refuse the application or seek additional information or verification.
- 4.21 Brokers and intermediaries should take reasonable steps to satisfy themselves that a product is appropriate<sup>57</sup> for the borrower's needs and circumstances, and should inform the borrower if this appears not to be the case. In some cases, they may need to seek additional information from the borrower.
- 4.22 Any explanation, advice, or recommendation provided by a broker or intermediary should be sufficiently clear, accurate and not misleading.<sup>58</sup> The broker or intermediary should take reasonable steps to ensure that the borrower understands any such explanation, advice, or recommendation including the key features of the credit agreement and the key risks to the borrower.
- 4.23 If the broker or intermediary suspects that the borrower has not understood key elements of the proposed agreement, or has not received the required pre-contract information and explanation, we would expect the broker to contact the creditor before proceeding, unless the broker or

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<sup>57</sup> 'Appropriate' in this context means 'not unsuitable'

<sup>58</sup> It may be appropriate to confirm in writing before any relevant agreement is entered into.

intermediary takes steps to provide the relevant information and explanation itself.

- 4.24 Brokers and intermediaries should be aware of the need to take appropriate steps to consider and address the potential risk to borrowers who may have some form of mental capacity limitation. They may need to make appropriate adjustments to their normal practices and procedures in order to support borrowers who might have limited mental capacity. Such borrowers might require additional support to enable them to understand information and explanations provided in order to be better enabled to avoid subsequent adverse outcomes in terms of unsustainable and/or unsuitable borrowing.<sup>59</sup>

#### Unfair or improper business practices relating to fiduciary duty

- 4.25 The following is a non-exhaustive list of business practices relating to the broker's or intermediary's fiduciary duty which, where relevant, in the OFT's view, might constitute unfair or improper business practices for the purposes of the 'fitness test' under section 25 of the Act:
- a. misrepresenting or concealing the terms of the credit agreement or any ancillary service (for example, brokerage) contract
  - b. failing to explain sufficiently clearly to the borrower what the contract documents are and what they mean, or misrepresenting the form or nature of the credit or hire agreement
  - c. not advising that a guarantor may be required when this is a pre-condition of the credit agreement
  - d. misleadingly giving the impression that a request for credit will be met in full when, in fact, a lower amount may be offered (for

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<sup>59</sup> The OFT has provided guidance to creditors on mental capacity issues, within the context of irresponsible lending. Many of the principles contained in these documents will also be applicable to credit brokerage. See *Mental capacity – Draft OFT guidance for creditors* (OFT1293con) at: [www.of.gov.uk/shared\\_of/consultations/oft1293con.pdf](http://www.of.gov.uk/shared_of/consultations/oft1293con.pdf)

instance because the borrower does not meet the criteria for the higher amount)

- e. securing more credit for the borrower than he requested or needed and/or at a higher interest rate, where the object of doing so is, or can reasonably be concluded as having been, for personal gain or advantage rather than in the best interests of the borrower

For example, in order to obtain a higher commission payment from the creditor.

- f. discouraging or preventing the borrower from obtaining insurance or other linked products or services from any source
- g. encouraging the borrower to replace unsecured debt with secured debt, or to consolidate other debts, when it is clearly not in the best interests of the borrower to do so and/or the risks of doing so are not sufficiently clearly explained to the borrower
- h. inappropriately encouraging the borrower to increase, aggregate or roll over existing debts to unsustainable levels.

### **Adequate explanations**

**4.26 Section 55A of the Act introduces a requirement on creditors to provide borrowers with adequate explanations before entering into credit agreements. Creditors can arrange for credit intermediaries to provide such explanations on their behalf. In such cases the creditor should take reasonable steps to satisfy itself that the intermediary had given an explanation, that this was adequate in the circumstances, and that the intermediary had also complied with the other requirements of section 55A of the Act.**

4.27 Brokers who are also credit intermediaries will need to have regard to the provisions of section 55A of the Act.

- 4.28 Although the specific legal requirements of section 55A of the Act do not apply to certain categories of credit agreement,<sup>60</sup> we would expect brokers and intermediaries, where appropriate, to consider the extent to which the principles outlined in this section may be applied to **all** aspects of their regulated consumer credit business. For example, before an agreement is made, we would expect them to consider highlighting key risks to the borrower such as the potential consequences of missing payments or under-paying – including the risk of repossession of property on which credit is secured where applicable.
- 4.29 Where a credit intermediary is providing a pre-agreement explanation on behalf of a creditor, it should have regard to chapter 3 of the OFT's Irresponsible Lending Guidance (ILG).<sup>61</sup>

#### Unfair or improper business practices relating to the provision of pre-agreement (adequate) explanations

- 4.30 The following is a non-exhaustive list of business practices relating to the provision of pre-agreement (adequate) explanations by intermediaries (or brokers) to borrowers, **where relevant and applicable**, which, in the OFT's view, might constitute unfair or improper practices for the purposes of the 'fitness test' under section 25 of the Act:
- a. failing to provide a borrower with an adequate explanation<sup>62</sup> (orally where applicable)

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<sup>60</sup> The requirement in section 55A of the Act does not apply to credit agreements secured on land or under which the creditor provides the borrower with credit exceeding £60,260 or overdraft agreements (except those for non-business purposes where the credit is not repayable on demand or within three months).

<sup>61</sup> See footnote 10.

<sup>62</sup> See section 55A(5) of the Act.

- b. pressurising or requiring a borrower to acknowledge, in writing or by any other means, that he has been provided with an **adequate** explanation
- c. failing to advise the borrower to consider the pre-contract information and explanation and (where this is disclosed in person) that he can take it away
- d. failing to provide the borrower with an opportunity to ask questions about the agreement
- e. failing to advise the borrower how to ask the creditor for further information and explanation
- f. providing information or explanation that is unclear, inaccurate or misleading or is not readily comprehensible
- g. failing to point out adverse features and associated risks (such as the implications if the borrower fails to keep up repayments)
- h. failing to explain how and on what basis interest rates or charges may be varied, in particular where they are not linked to bank base rates and may be varied at the creditor's discretion.

### **Assessment of product suitability and affordability**

**4.31 If a broker or intermediary is providing explanations, advice, or making recommendations, when doing so it should have proper regard to the borrower's needs and circumstances. In particular, this should take into account whether the product is affordable and whether there are any factors that may make the product clearly unsuitable for the individual borrower.**

4.32 Chapter 4 of the OFT's ILG sets out what the OFT expects from creditors with regard to the assessment of creditworthiness and affordability. We would expect brokers and intermediaries to have appropriate regard to the underlying principles set out in the ILG if

offering advice to borrowers on the suitability or affordability of credit products.

4.33 'Assessing affordability' is a 'borrower-focused test' that involves assessing a borrower's ability to undertake a specific credit commitment, or specific additional credit commitment, in a sustainable manner, without the borrower incurring (further) financial difficulties and/or experiencing adverse consequences.

4.34 By 'in a sustainable manner' we mean credit that can be repaid by the borrower:

- without undue difficulty (such as incurring or increasing problem indebtedness)
- over the life of the credit agreement or, in the case of open-end agreements, within a reasonable period of time, and
- out of income or savings, without having to realise any security or assets.

4.35 Any assessment of affordability should have regard to such factors as:

- the type of credit product
- the amount of credit to be provided and the associated cost and risk to the borrower
- the borrower's financial situation at the time the credit is sought
- the borrower's credit history
- the borrower's existing and future financial commitments (such as repayments on other financial products) where known
- the impact of future changes in personal circumstances (where known or likely, such as retirement or the end of an employment contract), and

- the vulnerability of the borrower.

- 4.36 Borrowers may be vulnerable for a variety of reasons such as current indebtedness, poor credit history, age, health or disability and should not be inappropriately targeted or exploited. Sub-prime borrowers, for example, may be particularly vulnerable financially.
- 4.37 In addition there will be those who are vulnerable because they are experiencing mental health problems and/or who have limited mental capacity. We expect the policies and procedures of intermediaries and brokers, where relevant and applicable, to make specific provision for, amongst other matters, the fair and appropriate treatment of vulnerable borrowers such as these. Failure to make appropriate adjustments to any normal practices or procedures where it may be necessary to do so in order to place borrowers who may have limited capacity on an equal footing with other debtors, may amount to discrimination under the Equality Act 2010 or the Disability Discrimination Act 1995 as amended by the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.<sup>63</sup>
- 4.38 If the product appears to be affordable, but in the opinion of the broker or intermediary would be unsuitable for the individual borrower, given his needs and circumstances, we would expect the broker or intermediary to inform the borrower accordingly. We would expect a broker or intermediary (even one acting on an execution-only basis) to inform a borrower of the associated risks of entering into a credit agreement that is clearly unsuitable for that borrower.

#### Unfair or improper business practices relating to considerations of product suitability and/or affordability

- 4.39 The following is a non-exhaustive list of business practices relating to product suitability and affordability which, **where relevant and applicable**,

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<sup>63</sup> Further information can be found in the Mental Capacity Guidance – see footnote 59 for details.

in the OFT's view, might constitute unfair or improper business practices for the purposes of the 'fitness test' under section 25 of the Act:

- a. failing to give appropriate consideration to 'affordability' if providing explanations, advice or recommendations to borrowers regarding credit products
- b. basing any consideration of affordability primarily or solely on an assessment of the value of any security provided by or on behalf of the applicant, such as the value of equity in the property on which the credit is to be secured
- c. failing to take adequate steps, so far as is reasonable and practicable, to ensure that information on a credit application relevant to an assessment of affordability is complete and correct
- d. persuading, inducing or allowing the borrower to distort, falsify or misrepresent details relevant to an assessment of affordability
- e. distorting, falsifying or misrepresenting details relevant to an assessment of affordability, with or without the borrower's consent
- f. advising or encouraging the borrower to take out credit for a higher amount than that initially requested when, on the basis of an assessment of affordability, it is known, or reasonably ought to be suspected, that repayment of the higher amount is unsustainable
- g. providing insurance or an extended warranty that is unsuitable or unnecessary given the borrower's needs and circumstances or on which the borrower would be unlikely to be able to make a successful claim because of the exclusions or other policy terms

For example, selling payment protection insurance (PPI) where it is apparent that the borrower already has suitable cover through an existing policy such as a work scheme or trade union membership, or alternative insurance or similar protection.

- h. encouraging 'churning' (where further credit is added to existing credit or the amount or term is extended) where this is, or is likely to be, to the detriment of the borrower
- i. referring a borrower to a creditor where it is clear that the borrower does not meet the creditor's criteria for the credit he is seeking
- j. failing to search the whole or a substantial part of the relevant product market, where the broker or intermediary has represented to the borrower that he will be doing so
- k. giving undue preference to the products of particular creditors where the object of doing so is, or can reasonably be concluded as having been, for personal gain or advantage rather than in the best interests of the borrower.

For example, because the broker or intermediary stands to benefit financially if the borrower purchases a product being offered by a particular creditor because of the financial arrangements between the parties.

## Questions

- Q13** Are the draft guidelines on service provision sufficiently clear?
- Q14** Are there any substantive aspects with which you disagree?
- Q15** Are there any significant omissions?
- Q16** Do you have any other suggestions for improvement?

## **5 POST-CONTRACTUAL ISSUES**

- 5.1 If the creditor delegates to the credit broker or intermediary the requirement to provide a copy agreement or other documents, in accordance with section 61A of the Act (or sections 61B, 62 or 63 as applicable) or sections 77 to 79 of the Act, the broker or intermediary should ensure that it is familiar with the relevant statutory requirements and has procedures in place to ensure compliance.
- 5.2 Similarly, if the broker or intermediary is involved in the provision of post-contractual information (such as statements or notices), or receipt of any notice of withdrawal from, or cancellation or termination of, a credit agreement, on the creditor's behalf, it should ensure that it is familiar with the statutory requirements and has procedures in place to ensure compliance.
- 5.3 The creditor should in any event take reasonable steps to ensure that the relevant requirements are complied with, taking appropriate responsibility for the actions or omissions of any broker or intermediary acting on its behalf.

### **Questions**

- Q17 Is this chapter on post-contractual issues sufficiently clear?**
- Q18 Are there any substantive aspects with which you disagree?**
- Q19 Are there any significant omissions?**
- Q20 Do you have any other suggestions for improvement?**

## 6 REFUND OF BROKERAGE FEES

### Refund of brokerage fees under section 155

- 6.1 **Under section 155 of the Act, a borrower is, subject to limited exceptions, entitled to a refund (less £5) of the fee paid to a credit broker if the borrower does not enter into a relevant agreement within six months of an introduction to a source of credit or hire.**
- 6.2 It is immaterial why there has been no agreement. For example, the broker may have identified an offer of credit, but it might have been considered by the borrower to be unsuitable, or no longer meeting the borrower's requirements or the borrower may simply have changed his mind. If the borrower decides not to proceed, **for any reason**, he will be entitled to a refund (less £5) in accordance with the requirements of section 155 of the Act.
- 6.3 Section 155 of the Act applies where an individual<sup>64</sup> is seeking entry into:
- a regulated consumer credit agreement or consumer hire agreement
  - an agreement secured on land to finance the acquisition or provision of a dwelling<sup>65</sup> to be occupied by the borrower or a relative, or

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<sup>64</sup> 'Individual' is defined in section 189 of the Act and includes a sole trader, small partnership or other unincorporated body. It is not limited to individual consumers.

<sup>65</sup> 'Dwelling' means a property to be used wholly or substantially for residential purposes. Acquisition of a dwelling would include where an individual purchases a property that he already occupies as a tenant. Provision of a dwelling would include where a property already owned by the individual is converted into flats to be occupied in whole or part by the individual and/or one or more relatives. It would also include credit to finance repairs or improvements to a property where these are necessary to maintain occupation of the property or to make it fit for occupation.

- certain agreements which are exempt under the Act.<sup>66</sup>

6.4 Section 155 of the Act does not apply where the agreement would be a regulated mortgage contract or home purchase plan under FSMA, provided that the broker is authorised by the FSA or is an appointed representative.

### **Introductions**

6.5 Section 155 of the Act applies only if:

- there has been an introduction<sup>67</sup> by the broker to a source of credit or hire (whether a creditor or another broker), and
- no relevant agreement has resulted within the following six months.

6.6 If there has been no introduction, section 155 of the Act does not apply. It **may**, however, be open to the borrower, under general principles of contract law, to seek to recover all or part of the sums paid to the broker on the basis of a failure of consideration if no introduction is made within a reasonable period - for example, within one month of appointing the broker - unless otherwise agreed between the parties.

6.7 If an introduction has been effected, the borrower may also have a right of recovery under contract law without waiting the full six months for section 155 of the Act to apply, if the introduction was in breach of the brokerage agreement or the broker had insufficient regard to the borrower's requirements.

6.8 If the borrower enters into a credit agreement within the six month period, but this was not as a result of the broker's introduction, section 155 of the Act would still apply and the borrower would be entitled to a refund.

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<sup>66</sup> See paragraph A5 in Annexe A.

<sup>67</sup> See paragraphs A7 to A10 in Annexe A for the meaning of 'effecting an introduction'.

- 6.9 The right to a refund in accordance with section 155 of the Act applies where a borrower enters into a relevant agreement within the 6 months following an introduction by a credit broker – but the agreement is subsequently **cancelled** under section 69(1) of the Act or becomes subject to section 69(2) of the Act. As stated in section 69(4), unless otherwise stated in the Act, the cancelled agreement should be treated as if it had never been entered into. Under such circumstances section 155(1) of the Act would be 're-activated' and the borrower should be entitled to a refund if no further agreement is entered into within six months.
- 6.10 In the OFT's view, section 155 of the Act also applies if the borrower enters into a credit agreement but then exercises his right of **withdrawal** under section 66A of the Act. Section 66A(7) of the Act provides that where the borrower exercises such a right of withdrawal, the agreement shall be treated as if it had never been entered into. Consequently, it would appear that under such circumstances section 155(1) of the Act would again be re-activated and the borrower entitled to a refund.<sup>68</sup>

### **The broker's fee or commission**

- 6.11 Section 155 of the Act relates to any fee or commission charged by the credit broker for his services. By virtue of section 155(4) of the Act, this also extends to any other sum payable or paid to the broker if it enters, or would enter, into the total charge for credit (TCC) under a regulated agreement.

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<sup>68</sup> Under section 66A, borrowers have the right to withdraw from most types of credit agreement within 14 days, without the need to provide justification. They may also withdraw from financial services contracts such as brokerage contracts within 14 days where these are concluded at a distance, under the Financial Services (Distance Marketing) Regulations 2004, in which case the broker should provide a refund within 30 days.

- 6.12 This means, for example, that if PPI or other insurance is mandatory,<sup>69</sup> and so forms part of the TCC, it will be treated as part of the broker's fee or commission if it is payable via the broker rather than direct to the creditor or insurer. On the other hand, it will not be covered if a cheque is made out to the creditor or insurer and is merely handed to the broker for onward transmission.
- 6.13 Similarly, if a fee is payable to a third party, such as a solicitor or surveyor, this may form part of the TCC and, if so, would be treated as part of the broker's fee or commission for the purposes of section 155 of the Act where it is paid via the broker.
- 6.14 If a fee is paid direct to a third party, such as a solicitor or surveyor, but there is an arrangement whereby all or part of the fee will be rebated to the broker, in respect of services provided by the broker, then it **may** be treated as part of the broker's fee or commission. This may also apply if a fee is charged by a packaging agent or other intermediary. The packaging agent may also be a broker in its own right.
- 6.15 In determining whether a sum forms part of a broker's fee or commission, and so would be recoverable under section 155 of the Act, a court would be likely to look at the substance of the transaction rather than how the sum was described. A broker cannot evade the requirements of section 155 of the Act simply by calling a fee, for example, a 'website registration fee', or something similar.
- 6.16 It is not permissible to 'contract out' of the provisions of section 155 of the Act. Any such terms would be rendered void by section 173 of the Act, and would, in the OFT's view, be likely to be considered unfair under the Unfair Terms in Consumer Contracts Regulations 1999. The use of such terms would also be likely to be viewed by the OFT as

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<sup>69</sup> Including where the insurance or other ancillary service is compulsory in order to obtain the credit on the terms and conditions marketed – for example, where a discounted interest rate is conditional upon insurance being taken out.

engaging in an unfair business practice for the purposes of section 25 of the Act.

### **When refunds are payable**

- 6.17 We would consider it to be an unfair practice if a broker did not respond to requests for refunds, in a timely manner or at all, where section 155 of the Act applies, or not to make refunds, where appropriate, promptly after having received such a request.
- 6.18 In addition, the OFT would be likely to regard it to be an unfair business practice if brokers adopted a policy of making borrowers wait the full six months before providing a refund in cases where it is absolutely clear that no relevant agreement would be entered into.

For example, if the borrower has asked for a refund because he no longer wishes to obtain credit, or he has made it clear that he wishes to do so via another broker or direct with a creditor. Provided that it is absolutely clear that no credit would be provided within six months, as a result of the broker's introduction, the OFT would reasonably expect the broker to refund fees (less £5) on request.

### **Unfair or improper business practices relating to refunds**

- 6.19 The following is a non-exhaustive list of business practices relating to the provision of refunds by brokers which, in the OFT's view, might constitute unfair or improper business practices for the purposes of the 'fitness test' under section 25 of the Act:
- a. not making a borrower sufficiently aware of his right to request a refund, including when and how it applies, in a written brokerage

agreement and at the same time<sup>70</sup> as informing the borrower about any brokerage fees and when and how these may be payable

- b. seeking to avoid the requirements of section 155 of the Act by including in a brokerage agreement a term purporting to contract out of those provisions, or by seeking to disguise any part of the fee or commission by giving it some other name, or by transferring payment to a connected third party
- c. where fees are repayable under section 155 of the Act, keeping the fees for the full six months even if it is absolutely clear that there is no reasonable prospect that an agreement will result from the introduction
- d. not making a borrower aware of his right to request a refund, and how to exercise that right, by any appropriate means,<sup>71</sup> if he has not entered into a relevant credit agreement within six months of him being introduced by the broker to a (potential) source of credit, at or around<sup>72</sup> the expiry of the six-month period
- e. failing to respond promptly or at all to requests for refunds, or unreasonably delaying providing refunds, where section 155 of the Act applies – including where the consumer has entered into a relevant agreement within the six months following an introduction by a broker but has subsequently withdrawn from the agreement in accordance with section 66A of the Act or cancelled the agreement in accordance with section 69 of the Act

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<sup>70</sup> This should be communicated to the borrower **prior** to him concluding the brokerage agreement.

<sup>71</sup> 'By any appropriate means' in this context means in any way that the borrower's legal rights in this regard will be clearly brought to his attention in such a way as to make him fully aware of his rights and how to exercise them.

<sup>72</sup> We would consider 'at or around' in this context to be within 5 working days of the expiry of the 6 month period.

- f. asking or instructing borrowers seeking to recover refunds (including where contracts have been cancelled) to make contact on telephone numbers that are premium rate numbers<sup>73</sup>
- g. failing to make an appropriate refund of fees paid (upfront or otherwise) where any, or part of, the service or outcome(s) that has been promised, under the terms of the contract or otherwise, has not been provided or delivered, at all or to a reasonable standard.

## Questions

**Q21** Is this chapter on refund of brokerage fees sufficiently clear?

**Q22** Are there any substantive aspects with which you disagree?

**Q23** Are there any significant omissions?

**Q24** Do you have any other suggestions for improvement?

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<sup>73</sup> The PPP Code of Practice states that service providers must ensure that there are in place customer service arrangements which must include a non-premium rate UK customer service phone number and an effective mechanism for the consideration of claims for refunds and their payment where justified.

## 7 COMPLAINTS HANDLING

7.1 **We would expect credit brokers and intermediaries to respond to queries and complaints promptly, appropriately and fairly, and explain any undue delays to borrowers.**

7.2 Rules that set out in detail how businesses should handle complaints are published in the FSA's Handbook. These rules apply to all businesses that are, or have been, regulated by the FSA or the OFT.<sup>74</sup> The rules largely reflect common sense and good business practice. In simple terms, they require consumer credit licence holders to have effective and clear procedures for dealing with any complaints fairly and reasonably. Businesses' complaints procedures must take into account, amongst other matters, the time limits for dealing with complaints and the borrower's ultimate right to refer any unresolved dispute to the Financial Ombudsman Service.<sup>75</sup>

### Unfair or improper business practices relating to complaints handling

7.3 The following is a non-exhaustive list of business practices relating to complaints handling which, in the OFT's view, might constitute unfair or improper business practices for the purposes of the 'fitness test' under section 25 of the Act:

- a. not publishing or making readily available to borrowers details of complaints procedures

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<sup>74</sup> Section 226A of the Financial Services and Markets Act 2000 provides that a complaint, relating to an act or omission of a business licensed under a standard consumer credit licence, qualifies to be dealt with by the Financial Ombudsman Service, if certain conditions are satisfied.

<sup>75</sup> For more information see the Financial Ombudsman Service website: [www.financial-ombudsman.org.uk](http://www.financial-ombudsman.org.uk) [www.financial-ombudsman.org.uk/publications/technical\\_notes/QG6.pdf](http://www.financial-ombudsman.org.uk/publications/technical_notes/QG6.pdf) [www.financial-ombudsman.org.uk/publications/pdf/guide\\_complaints\\_handlers.pdf](http://www.financial-ombudsman.org.uk/publications/pdf/guide_complaints_handlers.pdf)

- b. failing to provide (or effectively publicise) a non-premium rate UK telephone number as a means by which consumers can pursue complaints<sup>76</sup>
- c. not acknowledging receipt of complaints promptly or at all
- d. not providing a substantive response to complaints within eight weeks of receipt (in accordance with FSA complaints handling rules)
- e. not informing a complainant, where appropriate, that he may refer the complaint to the Financial Ombudsman Service if he is not satisfied with the way that his complaint has been handled by the business concerned.

## Questions

- Q25** Is this chapter on complaints handling sufficiently clear?
- Q26** Are there any substantive aspects with which you disagree?
- Q27** Are there any significant omissions?
- Q28** Do you have any other suggestions for improvement?

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<sup>76</sup> A consumer should be advised of such a number by a broker within the first few minutes of his initial call to the broker with a view to arranging a loan.

## **8 REGULATORY COMPLIANCE AND ENFORCEMENT**

### **Adherence to the guidance and compliance**

- 8.1 The OFT expects brokers and intermediaries to take all reasonable steps (subject to proportionality considerations) to ensure they have suitable business practices and procedures 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).
- 8.2 To the extent that it is appropriate to do so, we would also expect brokers and intermediaries to pay due regard to both the letter and the spirit of this guidance, other relevant guidance (including, but not limited to, that highlighted previously in this guidance and in Annexe C) and relevant legal obligations.

### **Evidence of compliance**

- 8.3 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.
- 8.4 If we form a view that a licensee's or applicant's actual or proposed business model is, or is likely to, in itself, be the cause of significant consumer 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 borrowers and/or to deny them their legitimate rights.

- 8.5 If the OFT requires them to do so, it will be incumbent on brokers and intermediaries 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.
- 8.6 Brokers and intermediaries should keep a record of the checks they undertake to assess adherence to this guidance.
- 8.7 Similar assessments may be made of applicants for licences.

### **Enforcement powers and principles**

- 8.8 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 businesses failing to have regard to relevant OFT and other appropriate guidance, we will decide on the appropriate regulatory response in the light of the facts and circumstances of the individual case.
- 8.9 The type of OFT action taken will be guided by the level of actual or potential harm to borrowers 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.
- 8.10 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.<sup>77</sup>

- 8.11 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. Engaging in unfair or improper business practices would constitute grounds for the OFT to consider fitness to hold a licence.
- 8.12 Any action taken by the OFT with a view to refusing or revoking a 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. 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) provided that there are appropriate grounds to do so.<sup>78</sup>

## Questions

**Q29 Are these draft guidelines on regulatory compliance and enforcement sufficiently clear?**

**Q30 Are there any substantive aspects with which you disagree?**

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<sup>77</sup> 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) –

[www.of.gov.uk/shared\\_of/business\\_leaflets/enterprise\\_act/oft512.pdf](http://www.of.gov.uk/shared_of/business_leaflets/enterprise_act/oft512.pdf). The OFT also coordinates such actions undertaken by other enforcers. The OFT also has both civil and criminal enforcement powers under the Consumer Protection from Unfair Trading Regulations 2008 – [www.of.gov.uk/shared\\_of/business\\_leaflets/cpregs/oft1008.pdf](http://www.of.gov.uk/shared_of/business_leaflets/cpregs/oft1008.pdf)

<sup>78</sup> 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/oft661.pdf](http://www.of.gov.uk/shared_of/business_leaflets/credit_licences/oft661.pdf)

- Q31** Are there any significant omissions?
- Q32** Do you have any other suggestions for improvement to this chapter?
- Q33** Do you have any comments about the structure and format of the guidance document?
- Q34** What do you consider might be the appropriate time, following publication of this guidance, for the OFT to initiate a review to assess business compliance and the effectiveness of the guidance?

# ANNEXE(S)

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## **A CREDIT BROKERAGE**

### **What is credit brokerage?**

A.1 Credit brokerage is a form of ancillary credit business and it is defined in section 145(2) of the Act as the effecting of introductions<sup>79</sup> of individuals desiring to obtain credit or goods on hire to consumer credit businesses or consumer hire businesses. It is also credit brokerage to introduce individuals to other credit brokers.

A.2 Credit brokers include (but are not limited to):

- independent financial advisers (IFAs) and professional brokers who introduce people to a source of credit or to other introducers
- traders such as car dealers who introduce consumers to sources of credit to finance hire-purchase or loan agreements
- retailers who introduce consumers to finance companies offering credit facilities in order to enable those consumers to purchase the retailer's goods, and
- certain price comparison websites.

A.3 They may also include 'packagers' and similar persons undertaking administrative functions on behalf of the creditor.<sup>80</sup> This will depend on whether they actually effect an introduction to a creditor or whether, in the alternative, they only become involved after such an introduction has been made.

A.4 Brokerage may be involved even if the introduction is to another broker rather than direct to a creditor, and irrespective of the number of 'links in

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<sup>79</sup> See paragraphs A7 to A10.

<sup>80</sup> Packagers may, for example, prepare an individual's application for credit such that it could be used to apply for multiple different sources of credit with the same correct information.

the chain'. Someone who is an 'introducer' for the purposes of FSMA may nevertheless be involved in brokerage for the purposes of the Act. Similarly, lead generators (who sell leads to other brokers) and aggregators or sub-aggregators (who filter borrowers' details to match them to brokers) may be engaged in brokerage where they effect introductions to sources of credit or other credit brokers.

A.5 Credit brokerage is not limited to introductions with a view to entry into a regulated consumer credit or consumer hire agreement. It also applies where the prospective agreement:

- is exempt under section 16 of the Act, except in the case of a consumer credit agreement that is exempt under section 16(5)(a) of the Act<sup>81</sup> or a consumer hire agreement that is exempt under section 16(6) of the Act,<sup>82</sup> or
- is unregulated because it is subject to a law of a country outside the UK but would have been regulated had it been subject to UK law in accordance with section 145(3)(c) of the Act.

A.6 Effecting introductions with a view to obtaining credit under a regulated mortgage contract or a regulated home purchase plan under FSMA does not constitute credit brokerage where the introduction is to an authorised person (with permission to enter into relevant agreements) or a qualifying broker under FSMA.<sup>83</sup>

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<sup>81</sup> Section 16(5)(a) of the Act provides for the exemption of consumer credit agreements by reference to the number of payments to be made by the debtor.

<sup>82</sup> Section 16(6) provides for the exemption of consumer hire agreements relating to metering equipment for electricity, gas or water supplies.

<sup>83</sup> See section 146(5A) of the Act. There is also an exemption in section 146(5) of the Act for certain introductions effected by an individual by canvassing off trade premises.

## Effecting of introductions

- A.7 An essential element of credit brokerage is the effecting of introductions of individuals seeking credit to potential sources of credit or other credit brokers.
- A.8 An introduction may include forwarding an application to a creditor, but does not depend on it – a recommendation to deal with a particular creditor or broker may amount to credit brokerage.
- A.9 There does not need to be any direct connection between the person effecting the introduction and the creditor, so it is not necessary to demonstrate any arrangement (remuneration or otherwise) between the creditor and the broker. In the OFT's view, a person need not communicate with a creditor in order to be a broker – effecting an introduction may include bringing about, or being the cause of, an application to a creditor for credit, for instance by providing the contact details of a creditor who is thought likely to offer the borrower credit. Where the borrower is introduced to a creditor by a third party, for instance by being given an application form to obtain credit from that creditor, but that creditor is not in turn introduced to the borrower by the third party, that may still be credit brokerage.
- A.10 In the OFT's view, a number of commercial price comparison websites ('PCWs') may be engaged in credit brokerage. A PCW that merely displays information provided by, or on behalf of, creditors, about various credit options, is most likely to be considered to be a 'publisher of credit advertisements' rather than a credit broker since the mere display of such information would not in itself constitute effecting an introduction. On the other hand, the PCW may, for example, include 'click throughs' to creditors' websites. The nature and presentation of any web-links may be material, in some instances, to a consideration of whether brokerage is involved. Whether or not a PCW is engaged in credit brokerage will depend on the way in which it operates, and will be a question of fact in each case.

## **B CREDIT INTERMEDIARIES**

B.1 Article 3 (f) of the Consumer Credit Directive (CCD) states that:

'credit intermediary' means **a natural or legal person** who is **not acting as a creditor** and who, in the course of his trade, business or profession, **for a fee, which may take a pecuniary form or any other form of financial consideration:**

- (i) presents or offers credit agreements to consumers;
- (ii) assists consumers by undertaking preparatory work in respect of credit agreements other than as referred to in (i);  
or
- (iii) concludes credit agreements with consumers on behalf of the creditor.

B.2 Article 3 (f) was implemented into UK law by section 160A of the Consumer Credit Act 1974 ('the Act'). Under this section, a credit intermediary is someone who carries out the activities listed below in relation to consumers in return for a fee or other consideration and is not the creditor. The consideration may be a fee payable by the consumer, a fee or commission payable by a third party – which could include the creditor - or payment in kind.<sup>84</sup>

B.3 The activities are:

- (i) recommending or making available prospective regulated credit agreements (other than agreements secured on land) to consumers
- (ii) assisting consumers by undertaking other preparatory work in relation to such agreements,

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<sup>84</sup> If there is no 'financial consideration', the business can not be a credit intermediary – even if it is engaged in credit brokerage.

In the OFT's view, this could include, for example, assisting a consumer to complete an application for credit.

Aggregators and/or lead generators **may** undertake various forms of preparatory work in respect of credit agreements for the purposes of section 160A(2)(b) of the Act ((ii) above). this will be dependent on the facts in any particular instance.

or

- (iii) entering into regulated credit agreements, other than agreements secured on land, with consumers on behalf of creditors.

Article 3(f) CCD refers to 'concluding' credit agreements with consumers on behalf of the creditor. In the OFT's view, this will generally apply where the intermediary signs the credit agreement on the creditor's behalf. He is unlikely, however, to sign the agreement as a party in his own right since he may be acting as the creditor's **agent**, but will not be 'the creditor'

B.4 Given that Member States are precluded from maintaining or introducing provisions diverging from those in the CCD within the harmonised areas, in our view, the words 'recommending or making available prospective regulated credit agreements' in section 160A(2)(a) of the Act must be construed consistently with the words 'presents or offers credit agreements' in Article 3(f)(i) of the CCD.

B.5 It is our view that a person will **not** be 'recommending or making available' prospective regulated consumer credit agreements for the purposes of section 160A(2)(a) of the Act where such a person:

- does no more than provides information, or access to information, about prospective regulated credit agreements to potential consumers

To coincide with the introduction of the CCD, BIS issued Guidance ('the BIS Guidance')<sup>85</sup> in August 2010 Paragraph 18.4 of that Guidance states that

'The action of recommending or making available prospective credit agreements does not include merely providing information about credit agreements. **The activities mentioned must also be carried out by him to be an intermediary.** Therefore, the display by a person of leaflets advertising the credit agreements of others (for example, credit cards), for example, or the display of advertisements in a newspaper or on a website, would not be considered the carrying out by that person of the activity of recommending or making available prospective credit agreements.'

- does no more than provides information or leads about consumers to creditors.

B.6 We consider that '**recommending or making available**' prospective regulated consumer credit agreements for the purposes of section 160A(2)(a) of the Act necessarily includes a person **putting forward or offering such prospective agreements to the consumer,**<sup>86</sup> as being **expressly or by implication potentially suitable for him.**

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<sup>85</sup> *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](http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1053-consumer-credit-directive-guidance.pdf)

<sup>86</sup> We consider that the recommending or making available of prospective regulated consumer credit agreements must involve the intermediary engaging in some form of 'activity' as opposed to, for example, simply passively displaying an advertisement.

For example, a supplier of goods (perhaps cars) providing details to consumers of specific credit agreements/products suitable to finance the purchase of its goods may, in our view, amount to recommending or making available prospective regulated credit agreements. However, this will depend on the facts and circumstances in any particular instance

- B.7 The words 'prospective regulated consumer credit agreement' are intended to include, in our view, details of a specific credit product(s) and are not limited to an unexecuted written agreement.<sup>87</sup>
- B.8 Recital 16 of the CCD states that where credit cards are co-branded or have an affinity relationship with another organisation, for example, a charity, that organisation would not be deemed to be a credit intermediary.

#### **Price Comparison Websites ('PCWs') and aggregators**

- B.9 PCWs are websites enabling consumers to compare credit products, whether on the basis of price or cost or other features. A PCW will typically list a number of credit products and/or providers and provide contact details which may (but will not always) include a link to the provider's website.
- B.10 In some cases, the PCWs may simply list credit products and include a 'click through' link to the creditor's own website if the consumer wants to find out more about the creditor's product(s). In other cases, some creditors may ask PCWs to undertake further services. Some PCWs may

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<sup>87</sup> For the purposes of section 160A(2)(a) of the Act, we consider that the recommending or making available of prospective regulated consumer credit agreements can take place **without** there being a clear prospect that a credit agreement may be entered into between the consumer and the creditor, the carrying out, or the completion of, an affordability/creditworthiness assessment, or the entry into, or conclusion of, a credit agreement.

also specifically recommend certain prospective regulated credit agreements/products to consumers and/or rank prospective regulated credit agreements/products based on differing criteria, or offer a facility enabling the consumer to do so or sift and sort on the basis of price and/or other features.

- B.11 An 'aggregator' is a person who collates information from consumers who are considering applying for credit, for onward transmission to a particular creditor(s) or other third party. He may also provide information to consumers in relation to particular credit products and/or providers, or otherwise facilitate credit applications.
- B.12 In addition to the main PCWs and aggregators, there are also 'affiliates' and smaller aggregators who advertise credit products via their websites and include click-throughs to creditors' websites if the consumer wants to find out more. These smaller aggregators and affiliates are essentially any website which includes the creditor's advertising. They may be managed on the creditor's behalf by a third party who will provide them with the creditor's advertising and check that the website concerned is acceptable to the creditor. This third party may also co-ordinate any payments to be made.
- B.13 Given that PCWs and aggregators operate in a variety of different ways, depending on the way they operate their businesses, each needs to be looked at individually to assess whether it falls within the definition of a credit intermediary.
- B.14 Ultimately, it may fall to the courts to decide whether or not a particular PCW or aggregator meets the definition of a credit intermediary on the basis of the individual facts and circumstances in each case.

### **Transparency and disclosure**

- B.15 Section 160A of the Act also implements Article 21 of the CCD, which sets out certain disclosure/transparency obligations placed on credit intermediaries vis-à-vis consumers. In the OFT's view, the primary purpose of Article 21 of the CCD is to ensure transparency to consumers

where they are dealing with a credit intermediary - in particular as regards **status** (that is to say its independence or otherwise) and **fees**.

- B.16 Consumers need sufficient/appropriate information in order to be enabled to consider whether the intermediary is truly **independent** or not. That is to say, whether there might be any conflict of interest which might impact on/influence its selection of the prospective regulated credit agreements/products that it recommends or makes available to consumers. Consumers also need to be made aware if they will be charged a fee by the intermediary.
- B.17 Section 160A(3) of the Act states that a credit intermediary must, in **advertising or documentation** of his relating to an activity (as listed in paragraph B.3 of this document), which is intended for individuals not acting in the course of a business, indicate the extent to which the intermediary is acting independently and in particular whether he works exclusively with a creditor.
- B.18 Section 160A(4) of the Act states that where a credit intermediary carries on an activity (as listed in paragraph B.3 of this document) for a consumer, the intermediary must secure that any financial consideration payable to him by the consumer for the activity is disclosed to the consumer and then agreed in writing before the regulated consumer credit agreement is concluded.

With regards to the disclosure requirements under sections 160A(3) and 160A(4) of the Act, the BIS Guidance states:

'There is no particular format in which the information must be disclosed. This will depend on what is appropriate in the circumstances. However, it should be clear and easily comprehensible. It should also be reasonably prominent and disclosed in such a way that the consumer is likely to see it and take note. In some cases it may be necessary to draw the consumer's attention to the disclosure, particularly if it is provided as part of a group of documents.'

- B.19 The Consumer Credit (Disclosure of Information) Regulations 2010 ('the Information Regulations') require a statement in the Pre-contract Information (PCI) Form of the identity and geographical address of the creditor and, if applicable, of the credit intermediary. Similarly, the Consumer Credit (Agreements) Regulations 2010 ('the Agreements Regulations') require, where relevant, a statement in the regulated consumer credit agreement of the identity and geographical address of any credit intermediary involved.
- B.20 Section 55(2) of the Act provides that if the Information Regulations are not complied with, the agreement is not properly executed. Similarly, section 61(1)(a) of the Act provides that a regulated agreement is not properly executed unless a document in the prescribed form itself containing all the prescribed terms and conforming to regulations under section 60(1) (which includes the Agreements Regulations) is signed in the prescribed manner. Section 65 of the Act provides that an improperly-executed regulated agreement is enforceable against the consumer on an order of the court only.
- B.21 Paragraph 9.11 of the BIS Guidance states that:
- 'The creditor must include in the PCI details of any credit intermediary, if applicable. However, there may be situations where the creditor is unaware of the involvement of a credit intermediary and cannot therefore reasonably be expected to include details...'
- B.22 Similarly, paragraph 10.22 of the BIS Guidance states that:
- 'The agreement must contain details of any credit intermediary involved, where relevant. However, there may be situations where the creditor is unaware of the involvement of a credit intermediary and cannot therefore reasonably be expected to include details...'
- B.23 The OFT considers that a creditor should take **reasonable steps** to make itself aware of whether a credit intermediary is involved in relation to the transaction.

This may be possible in some circumstances, by, for example, the use of originator codes or 'cookies'.

Alternatively, the creditor might seek to establish whether someone has carried out in relation to him activities of the type as set out in paragraph B.3 above simply by asking the borrower.

- B.24 As stated in paragraph B.20 (above), failure to include the appropriate information in the PCI or agreement will render the credit agreement unenforceable against the consumer without a court order. Section 160A(6) of the Act also provides that a credit intermediary who fails to comply with a requirement of section 160A commits an offence.

#### **Independence of the intermediary**

- B.25 The BIS guidance states that an intermediary's independence may be affected by his business arrangement with a creditor or the method of remuneration. It also states that an intermediary **may** be able to describe himself as independent if he is able to access a truly representative range of credit products on competitive terms – **provided** that he is not constrained in this, whether or not by agreement with a creditor.

The BIS Guidance states: 'An intermediary would not be independent where he is tied in any way to a creditor, works exclusively with one or more creditors, only offers the products of a particular creditor (or creditors) or gives preference to those products (for example, if he is influenced by differential commission rates, volume over-riders or other benefits). He may also not be independent where he does not offer certain products or does not offer them on competitive terms. This might be by agreement with another person, or because of different levels of fee or commission available.'

- B.26 Intermediaries must not mislead consumers as to their independence. For example, if a PCW is acting as an intermediary and preferentially recommending or making available particular prospective regulated credit agreements/products to consumers because of fees or commission available to it if consumers subsequently conclude those agreements with the relevant creditors, consumers should be made aware by the intermediary that this is the case. The consumers can then decide whether to use the PCW, or to validate its results by also using another PCW or third party or by approaching creditors directly.
- B.27 If the consumer believes that a PCW is independent and 'whole of market' when it is not, this could distort his transactional decision and lead him to conclude a credit agreement when he otherwise may not have done so, and purchase a particular credit product when better options may have been available to him.

## **C LIST OF OTHER RELEVANT GUIDANCE AND LEGISLATION**

### **OFT guidance**

Do you need a credit licence? (OFT147) [www.offt.gov.uk/OFTwork/credit-licensing/credit-licence/requiring](http://www.offt.gov.uk/OFTwork/credit-licensing/credit-licence/requiring)

Consumer credit licensing – General guidance for licensees and applicants on fitness and requirements (OFT969)  
[www.offt.gov.uk/shared\\_offt/business\\_leaflets/credit\\_licences/oft969.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/credit_licences/oft969.pdf)

Consumer credit licensing – Statement of policy on civil penalties (OFT971)  
[www.offt.gov.uk/about-the-offt/legal-powers/legal/cca/CCA2006/requirements/](http://www.offt.gov.uk/about-the-offt/legal-powers/legal/cca/CCA2006/requirements/)

Licensing – your right to make representations (OFT661)  
[www.offt.gov.uk/shared\\_offt/business\\_leaflets/credit\\_licences/oft661.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/credit_licences/oft661.pdf)

Irresponsible lending – OFT guidance for creditors (OFT1107)  
[www.offt.gov.uk/shared\\_offt/business\\_leaflets/general/oft1107.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/general/oft1107.pdf)

Draft Mental Capacity Guidance (OFT1293con)  
[www.offt.gov.uk/shared\\_offt/consultations/oft1293con.pdf](http://www.offt.gov.uk/shared_offt/consultations/oft1293con.pdf)

Second charge lending – OFT guidance for lenders and brokers (OFT1105)  
[www.offt.gov.uk/about-the-offt/legal-powers/legal/cca/second-charge-lending](http://www.offt.gov.uk/about-the-offt/legal-powers/legal/cca/second-charge-lending)

Credit advertising [www.offt.gov.uk/about-the-offt/legal-powers/legal/cca/guidance](http://www.offt.gov.uk/about-the-offt/legal-powers/legal/cca/guidance)

Draft Guidance for consumer credit licence holders and applicants on the Group Licensing regime (OFT1297con)  
[www.offt.gov.uk/shared\\_offt/business\\_leaflets/credit\\_licences/oft1297con](http://www.offt.gov.uk/shared_offt/business_leaflets/credit_licences/oft1297con)

Enforcement of consumer protection legislation – Guidance on Part 8 of the Enterprise Act 2002 (OFT512)  
[www.offt.gov.uk/shared\\_offt/business\\_leaflets/enterprise\\_act/oft512.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft512.pdf)

Consumer Protection from Unfair Trading Regulations 2008  
[www.offt.gov.uk/shared\\_offt/business\\_leaflets/cpregs/oft1008.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf)

## **Other guidance**

Consumer Credit Regulations – Guidance on the regulations implementing the Consumer Credit Directive – Department for Business Innovation & Skills (BIS)  
[www.bis.gov.uk/policies/consumer-issues/consumer-credit-and-debt/consumer-credit-regulation/ec-consumer-credit-directive](http://www.bis.gov.uk/policies/consumer-issues/consumer-credit-and-debt/consumer-credit-regulation/ec-consumer-credit-directive)

## **Legislation**

Consumer Credit Act 1974

Consumer Credit Directive (as implemented into UK law by the Consumer Credit (EU Directive) Regulations 2010

Consumer Credit (Advertisements) Regulations 2010

Consumer Credit (Advertisements) Regulations 2004

Financial Services and Markets Act 2000

Financial Services (Distance Marketing) Regulations 2004

Unfair Terms in Consumer Contracts Regulations 1999

Payment Services Regulations 2009

Data Protection Act 1998

Privacy and Electronic Communications (EC Directive) Regulations 2003

Equality Act 2010

Mental Capacity Act 2005 (England & Wales)

The Adults with Incapacity Scotland Act 2000

Enterprise Act 2002 (Part 8)

Consumer Protection from Unfair Trading Regulations 2008

## **D SUMMARY OF QUESTIONS**

### **Chapter 1**

- Q1 Does the introduction set out the scope and purpose of the guidance sufficiently clearly?
- Q2 Are there any substantive aspects with which you disagree?
- Q3 Do you consider that there are any significant omissions?
- Q4 Do you have any other suggestions for improvement?

### **Chapter 2**

- Q5 Are the draft guidelines on the general principles of fair business practice sufficiently clear?
- Q6 Are there any substantive aspects with which you disagree?
- Q7 Do you consider that there are any significant omissions?
- Q8 Do you have any other suggestions for improvement?

### **Chapter 3**

- Q9 Are the draft guidelines on marketing practices sufficiently clear?
- Q10 Are there any substantive aspects with which you disagree?
- Q11 Are there any significant omissions?
- Q12 Do you have any other suggestions for improvement?

### **Chapter 4**

- Q13 Are the draft guidelines on service provision sufficiently clear?
- Q14 Are there any substantive aspects with which you disagree?

Q15 Are there any significant omissions?

Q16 Do you have any other suggestions for improvement?

## **Chapter 5**

Q17 Is this chapter on post-contractual issues sufficiently clear?

Q18 Are there any substantive aspects with which you disagree?

Q19 Are there any significant omissions?

Q20 Do you have any other suggestions for improvement?

## **Chapter 6**

Q21 Is this chapter on refund of brokerage fees sufficiently clear?

Q22 Are there any substantive aspects with which you disagree?

Q23 Are there any significant omissions?

Q24 Do you have any other suggestions for improvement?

## **Chapter 7**

Q25 Is this chapter on complaints handling sufficiently clear?

Q26 Are there any substantive aspects with which you disagree?

Q27 Are there any significant omissions?

Q28 Do you have any other suggestions for improvement?

## **Chapter 8**

Q29 Are these draft guidelines on regulatory compliance and enforcement sufficiently clear?

Q30 Are there any substantive aspects with which you disagree?

- Q31 Are there any significant omissions?
- Q32 Do you have any other suggestions for improvement?
- Q33 Do you have any comments about the structure and format of the guidance document?
- Q34 What do you consider might be the appropriate time, following publication of this guidance, for the OFT to initiate a review to assess business compliance and the effectiveness of the guidance?

## E CONSULTATION CRITERIA

**Public bodies are required to perform consultations in accordance with the following criteria wherever possible:**

1. **When to consult** – formal consultation should take place at a stage when there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – officials running consultations should seek guidance in how to run effective consultation exercises and share what they have learned from the experience.

The full *Code of Practice on Consultation* can be found on the website of the Department for Business, Enterprise and Regulatory Reform:  
[www.berr.gov.uk/files/file47158.pdf](http://www.berr.gov.uk/files/file47158.pdf).