

Summary of responses to the consultation on 'Mental Capacity - OFT guidance for creditors'

March 2012

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CONTENTS

| <i>Chapter/Annexe</i> | <i>Page</i> |
|---|-------------|
| 1 Introduction | 4 |
| 2 Status, form and content of the guidance | 6 |
| 3 Scope and impact of the guidance | 11 |
| 4 Mental capacity and its relevance to a borrowing/ lending decision | 20 |
| 5 Indicators that borrower has, or may have, mental capacity limitations | 22 |
| 6 Practices and procedures | 29 |
| 7 Regulatory compliance and enforcement | 35 |
| 8 Other relevant guidance and legislation | 36 |
| A Respondents to the consultation | 39 |
| B Respondent suggestions on possible practices and procedures | 41 |
| C Summary of questions | 43 |

1 INTRODUCTION

- 1.1 On 6 December 2010, the Office of Fair Trading (the OFT) launched a consultation on *Mental Capacity - draft guidance for creditors* ('the draft guidance') with the aim of clarifying what the OFT expects from creditors in terms of identifying and appropriately assisting borrowers who it is understood have, or suspected may have, limitations in their mental capacity which might impact on their ability to make informed borrowing decisions.
- 1.2 The aim in producing the guidance was not only to provide clarity for creditors as to what the OFT expects of them, but, in doing so, to afford better protection to a particularly vulnerable sub-set of consumers from unsustainable borrowing, while, at the same time, seeking to ensure that they are not inappropriately denied access to credit.
- 1.3 The consultation document asked a total of 22 questions about the content of the draft guidance. We received a total of 36 formal responses to the consultation from a range of interested parties.¹ Responses consisted of a mixture of general comments (often supplemented with proposals for possible amendments to the draft guidance) as well as some responses to the specific questions.
- 1.4 In part to respect the confidentiality of respondents to our consultation ('respondents') and in part because we believe that it will be more helpful to respondents and other interested parties, the focus of this document is on summarising the key issues arising in the responses received rather than publishing extracts from, or the full content of, the responses, or providing quantitative data with regard to the responses.
- 1.5 All of the comments and suggestions made by respondents have been reviewed and, to the extent that we considered it appropriate to do so, they have been reflected in the guidance document that was published on 28 September 2011 ('the guidance').

¹ See Annexe A.

- 1.6 This document contains a short summary of the main issues raised by respondents to the consultation and provides the OFT's view on those issues. To that extent, it provides an insight into the OFT's thinking in producing the guidance and should be viewed as a 'companion' to that document. We hope that respondents and other interested parties will find it helpful.

2 STATUS, FORM AND CONTENT OF THE GUIDANCE

Size, format and structure of the guidance

- 2.1 On the basis of responses received to the consultation, we have re-structured parts of the guidance, improved our use of 'headings', and adopted a more simplified approach in terms of what we expect from creditors with regards to their practices and procedures.
- 2.2 We have also produced a quick reference guide² that is designed to be used as an aide memoire for creditors - in particular, for frontline staff. The quick reference guide is not intended to be a **substitute** for creditors familiarising themselves with the guidance and with relevant legal requirements.

Implementation date

- 2.3 A couple of respondents to the consultation asked whether there would be a transitional period in which to implement any necessary changes to systems and procedures.
- 2.4 The principles set out in the guidance are ones that businesses should already have had regard to – not least because they have already been set out, to some extent, in our *Irresponsible Lending Guidance (ILG)* (OFT 1107) since March 2010. The guidance simply helps to identify steps that consumer credit businesses **might** take to give effect to these principles in practice.
- 2.5 Furthermore, unlike new legislation which provides for new legal requirements to be implemented into UK law by a specified date, the guidance relates to established law (principally section 25(2B) of the Consumer Credit Act 1974 ('the Act'), the Data Protection Act 1998 ('DPA') and the Equality Act 2010 (EA10)).
- 2.6 For these reasons, it has no 'implementation date' as such.

² www.offt.gov.uk/shared_offt/business_leaflets/consumer_credit/OFT24289QuickGuide.pdf

The need for specific guidance on mental capacity

- 2.7 Some business respondents contended that there was no need for dedicated guidance for creditors on the subject of mental capacity. It was suggested that, as an alternative, it was sufficient for guidance on this issue to be incorporated into the ILG. A small number questioned whether specific guidance on this issue was required at all and whether any associated regulatory burden on business would be necessary/justified.
- 2.8 Creditors need to have appropriate practices and procedures in place in order to avoid lending irresponsibly in a way that could have significant adverse consequences for borrowers. We (and the majority of respondents to the consultation) consider this to be an issue of such importance that it merits stand alone guidance – in large part because of the particular vulnerability and needs of the borrowers to whom it relates.
- 2.9 It is inevitable that there is some overlap with the ILG, given that the emphasis of the document is on providing guidance for creditors in the context of responsible lending and borrowing decisions. Indeed, the guidance draws upon the most pertinent aspects of the ILG.
- 2.10 The ILG will be amended/updated in due course to the extent that it is appropriate to do so (for the purposes of consistency) to reflect relevant aspects of the Mental Capacity Guidance. Annexe 2 of the ILG, which relates specifically to mental capacity, is likely to be deleted in due course given the existence now of the stand alone guidance on this issue.

Alignment with legislative requirements

Mental Capacity Act 2005

- 2.11 A small number of business respondents stated that the Mental Capacity Act 2005 (MCA) primarily imposes obligations on those working with/caring for adults who may have mental capacity limitations

including those acting in a professional capacity and family carers or other carers,³ rather than on 'service providers' such as creditors.

- 2.12 While we have **had regard to** relevant legislation such as the MCA in producing the guidance and, to the extent that we consider that it is appropriate to do so, we have drawn upon **principles** set out in such legislation and accompanying codes of practice, we agree that the MCA has limited **direct** applicability to creditors.

Equality Act 2010

- 2.13 One respondent suggested that equality legislation prohibits creditors from discriminating on health or capability grounds and, therefore, not granting credit being sought by a borrower, carrying out a more stringent assessment of affordability and/or asking the borrower extra questions to inform such an assessment, could be considered discrimination, as it could be construed as treating a borrower who might have capacity limitations less favourably than borrowers who have no such limitations.
- 2.14 The guidance makes it clear (at paragraph 2.5) that we expect creditors to take appropriate steps to facilitate them (creditors) being able to take a view as to:
- whether or not the borrower appears able to understand, remember and weigh-up the information and explanations provided to him and, when having done so, make an informed borrowing decision
 - whether the borrower appears able to afford to make repayments under the credit agreement in a sustainable manner without adverse consequences to his financial circumstances and
 - whether the credit the borrower is seeking is clearly unsuitable (given the borrower's individual circumstances and, to the extent that the creditor is aware, the borrower's intended use of the credit).
- 2.15 Creditors need to consider what specific steps they might need to take in giving effect to their practices and procedures for assessing credit

³ The same applies to the Adults with Incapacity Act 2000 (depending on jurisdiction).

applications, in order to be better enabled to take a view of the matters set out above. A responsible creditor taking appropriate and necessary steps for the objectively justifiable reason of seeking to mitigate the risks for potentially vulnerable consumers is very unlikely to be viewed as acting in a 'discriminatory' manner.

2.16 The text box adjacent to paragraph 2.12 of the guidance states that:

'A primary aim of the Equality Act 2010 (EA10) is to ensure that individuals with 'protected characteristics' are not prejudicially excluded or restricted from opportunities that are available to others (including access to services) because of the protected characteristic.

This will sometimes necessitate service providers (in the context of this guidance, the service providers are 'creditors') **having to make reasonable adjustments to the way they provide services to ensure that this does not happen.'**

2.17 Paragraph C.5 in the Annexe to the guidance states that failure to make reasonable adjustments to any practice or procedure where it may be necessary to do so in order to place borrowers who may have limited capacity on an equal footing with other borrowers, could amount to discrimination under the EA10.

2.18 Creditors may wish to consider seeking independent legal advice on the extent to which their existing practices and procedures meet the requirements of the EA10.

Definition of 'disabled'

2.19 A couple of respondents suggested that not all of those affected by mental capacity limitations will necessarily fall within the definition of 'disabled' for the purposes of the EA10. We agree with that assertion.

2.20 A person has a disability for the purposes of the EA10 if he has a physical or mental impairment and the impairment has a substantial and

long-term adverse effect on his or her ability to carry out normal day-to-day activities.⁴ This means that in general:

- the person must have an impairment that is either physical or mental
- the impairment must have adverse effects which are substantial
- the substantial adverse effects must be long-term and
- the long-term substantial adverse effects must be effects on normal day-to-day activities.

2.21 However, while we agree that **some** borrowers with (possible) mental capacity limitations may not fall within the EA10 definition of 'disabled' (a point we have reflected in footnote 15 of the guidance), we nevertheless consider that failure to provide appropriate support and assistance to borrowers, where there are indicators that suggest that they may have mental capacity limitations that might impact on their ability to make informed borrowing decisions, to potentially be an irresponsible lending practice.

Case studies

2.22 On the whole, the use of case studies was welcomed. Some respondents asked whether it would be possible to identify what the creditor **should have done** when faced with the circumstances identified.

2.23 It is not our intention (nor would it be appropriate) to be overly prescriptive in respect of matters of this kind and creditors are expected to seek to devise their own practices and procedures, appropriate to their particular business models, that reflect and build upon the principles set out in the guidance. Practices and procedures are likely to differ to some degree from creditor to creditor. Most important, from the OFT's perspective, is that whatever the practices and procedures employed, the right outcome from the (potential) borrower's perspective is achieved.

⁴ See section 6(1) of EA10.

3 SCOPE AND IMPACT OF THE GUIDANCE

Impact Assessment

- 3.1 A small number of respondents asked whether the OFT had conducted/would be conducting an impact assessment of the guidance.
- 3.2 As stated in the consultation document, the OFT does not conduct impact assessments when producing explanatory guidance. However, we do work with interested parties in preparing such guidance and consult on the content where appropriate.

Unintended consequences

- 3.3 A couple of respondents contended that there might be possible unintended consequences arising from the guidance. These are:
- the financial exclusion of the vulnerable individuals the guidance is intended to help by inappropriately reducing access to credit for those understood to have, or suspected of having, mental capacity limitations
 - contentions of 'discrimination' being made against creditors by borrowers.
- 3.4 The OFT is under a statutory duty 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.⁵
- 3.5 Paragraph 4.8 of the guidance states that a creditor's approach should **not** be to unfairly/unnecessarily discriminate against the borrower, including by adopting a 'default position' that borrowers who it is understood or suspected have, or may have, mental capacity limitations, should not be granted the credit they are seeking - but rather it should **take appropriate steps to assist the borrower in being able to make an informed borrowing decision**, while at the same time mitigating possible risks to the borrower.

⁵ See section 25A of the Consumer Credit Act 1974.

3.6 Failure to do so may constitute an unfair or improper practice and could call into consideration the creditor's fitness to hold a consumer credit licence. In some instances, failure to do so could also constitute disability discrimination for the purposes of the EA10.

3.7 Paragraph 1.5 of the guidance states that the OFT would expect that any actions taken, or decisions made, by creditors – in particular with regard to borrowers understood to have, or suspected of having, some form of mental capacity limitation – should have proper regard for the best interests of the borrowers, taking into account their personal circumstances.

3.8 As stated in the text box adjacent to paragraph 4.5 of the guidance:

'It is important to balance a person's right to make a decision with their right to safety and protection when they can't make decisions to protect themselves.'

We consider it unlikely that a creditor taking objectively justifiable steps to mitigate risks for potentially vulnerable consumers, with a view to lending responsibly, would be viewed as acting in a 'discriminatory' manner.

Scope

Role of borrowers

3.9 A small number of respondents suggested the guidance might cover the role and responsibility of borrowers in the borrowing/lending process.

3.10 The OFT's statutory duty in accordance with section 25A of the Act is to prepare and publish guidance setting out how we determine whether persons are fit to hold consumer credit licences. We have no authority to 'regulate' the activities of borrowers. Given that the focus of this particular guidance document is on protecting potentially **particularly** vulnerable borrowers, who may not be able to make decisions to protect themselves, it would in any case appear to be particularly inappropriate to seek do so in this instance.

Geographic scope and impact on contract

- 3.11 Further clarity was requested on the application of the guidance to different jurisdictions - in particular with regards to differences between English and Scottish law.
- 3.12 Paragraph 1.8 states that the guidance is applicable to creditors throughout the UK. References to Scottish legislation have been added/amended as applicable.
- 3.13 As stated in paragraph 1.9 of the guidance, in England, Wales and Northern Ireland, where a party to a contract lacks capacity to enter into a contract by virtue of having a disturbance or impairment of brain function, the contract may be **voidable** if it can be shown that the creditor knew, or should reasonably have known, that the borrower lacked the capacity to enter into the contract at the time that he did so. In Scotland, if on the balance of probabilities it can be shown that the borrower lacked the capacity to contract (regardless of what the creditor knew or ought to have known) then the effect is that the contract is **void**. In all jurisdictions the burden of proof rests largely with the debtor.

Applicability to SMEs

- 3.14 **All** consumer credit businesses need to be able to form a view as to whether or not the borrower is able, perhaps with assistance, to make an informed borrowing decision and whether he is able to make repayments under the credit agreement in a sustainable manner.
- 3.15 The OFT expects creditors, regardless of size of business (or primary sales channel employed to provide credit/consider applications for credit), to take reasonable steps, subject to proportionality considerations, to ensure that they have suitable business practices and procedures in place for the appropriate treatment of (this potentially particularly vulnerable group of) borrowers.

Post contract issues

- 3.16 It was suggested that the guidance **might** additionally cover **post contract** issues as some mental capacity issues might only become apparent **after** credit has been provided.

- 3.17 This particular guidance document has been specifically designed to be limited in scope to considerations regarding the granting of credit to a borrower, increasing the amount of his credit, or increasing his credit limit under an agreement for running account credit. There is guidance⁶ available on dealing with debtors, including those who may have mental health/mental capacity issues, who (may) have been granted inappropriate loans.
- 3.18 **This guidance** is primarily aimed at 'prevention rather than cure'. The benefits of producing guidance focussed on addressing issues at the pre-granting of credit stage were recognised by a number of respondents who commented that preventing borrowers from taking out inappropriate financial products in the first instance was obviously preferable to having to deal with problems further down the line.

Mental health

- 3.19 The guidance is **not** specifically about the practices and procedures of creditors in respect of identifying or dealing with borrowers with **mental health** issues.
- 3.20 An individual can have a mental health issue, but not necessarily lack the capacity to make an informed (borrowing) decision. A borrower with a mental health issue **may** still have the capacity to be able to understand what needs to be considered in respect of a particular decision, weigh up the relevant information and make an informed decision.

Applicability to sales channels

- 3.21 Some respondents to the consultation made reference to the different challenges faced by creditors who employ distance sales channels for considering applications for credit.

⁶ See *MoneySavingExpert.com Guide to Mental Health & Debt*
<http://images.moneysavingexpert.com/images/attachment/mentalhealthguide.pdf>

See also *Royal College of Psychiatrists' Guide to Debt and Mental Health*
www.rcpsych.ac.uk/mentalhealthinfo/problems/debtandmentalhealth.aspx

3.22 We accept that employing the use of 'remote channels' such as the internet may **limit** a creditor's ability to observe indicators of possible mental capacity limitations or form a view on the borrower's level of understanding of explanations provided. As stated in paragraph 3.17 of the guidance:

'The extent to which indicators suggesting that a borrower may have some form of mental capacity limitation might be observable, will vary to some extent depending on the particular sales channel employed to apply for/offer credit. For example, where there is no 'face to face' interaction between the creditor and the borrower, the creditor is less likely to be able to 'observe' certain indicators that might suggest that the borrower may have some form of mental capacity limitation.

Creditors can only reasonably be expected to form a suspicion that a borrower may have some form of mental capacity limitation (and give effect to their practices and procedures on the basis of having such a suspicion) where they have information or evidence, and/or observe an indicator, which may trigger such a suspicion.

The OFT considers that regardless of the (primary) sales channel employed to allow borrowers to apply for credit, the creditor should seek to ensure, subject to proportionality considerations, that its practices and procedures for assessing the affordability and (un)suitability of credit applications are designed, in part, with a view to mitigating the potential risk of granting unaffordable or clearly unsuitable credit to borrowers who do not have the capacity to make informed borrowing decisions.'

3.23 However, it should not be assumed that there will be **no** indicators of possible mental capacity limitations where a distance sales channel is employed. Paragraph 3.18 of the guidance states:

'There are indicators that suggest that a borrower may have some form of capacity limitation that might constrain his ability to make informed borrowing decisions that even creditors who have no face to face interaction with borrowers may observe.

For example, a creditor may observe that self-declared information, provided by a borrower in support of his application for credit, at

least in part to inform an affordability assessment, is substantively inconsistent with other information already held on the borrower (possibly including information previously provided by the borrower himself) or accessed/obtained about the borrower.'

- 3.24 In our view, some of the different challenges faced by creditors who employ the use of distance sales channels, arise directly from the need to meet underlying legal requirements (such as those emanating from the Consumer Credit Directive - CCD) with regard to, for example, the provision of adequate pre-agreement explanations, rather than as a specific consequence of OFT's explanatory guidance.
- 3.25 The more 'interpretive' elements of the guidance arise from our consideration of steps that creditors may need to consider in order to ensure compliance with relevant legal requirements.
- 3.26 As stated in the ILG at paragraph 3.6, it is accepted that the use of distance sales channels, such as the internet, by their nature, limit the creditor's ability to take a view on the borrower's level of understanding of explanations provided. Given that creditors employing the use of remote channels will need to advise borrowers how they can ask for further information and explanation (in accordance with the requirement of section 55A(1)(d) of the Act), they **might**, for example, wish to consider providing (local rate) telephone contact details for those borrowers who may wish to seek further information and explanation.
- 3.27 Whatever the sales channel employed, we expect creditors to make a reasonable assessment of whether a borrower can afford to meet repayments in a sustainable manner and to provide an adequate explanation of the key features of the credit agreement. We would have concerns if it appeared to us that the means employed, for example, for assessing affordability by a particular business, were inadequate and were contributing to borrowers being granted credit that they cannot afford, resulting in, or appearing to us to be likely to result in, adverse outcomes for the borrowers concerned.

The lending decision

- 3.28 Some respondents to the consultation enquired as to whether the guidance should cover borrowing decisions over the **term** of the agreement rather than only the **initial** lending decision. Some also

enquired as to whether it relates only to **significant** increases in credit limits.

3.29 Paragraph 1.6 of the guidance states that:

'The guidance is limited in scope to considerations regarding the granting of credit to a borrower, or **significantly** increasing the amount of his credit under an agreement for running account credit.'

3.30 Paragraph 2.6 of the guidance states:

'Mental capacity limitations can be either **permanent or temporary** (including fluctuating over time). Consequently, the fact that a person may not have had the mental capacity to make a particular type of borrowing decision in the past, does not necessarily mean that he currently does not have, or will never have, the capacity to make such a decision.

Creditors need to consider, at the point of making the initial lending decision (and often **subsequently**), whether the borrower appears able to sustain repayments on an ongoing basis.

The OFT would expect creditors to react promptly and appropriately to any signs of borrowers experiencing difficulty meeting repayments.'

3.31 Paragraph 2.7 of the guidance contains an extract from the ILG which identifies as a potentially irresponsible lending practice:

'Failing to **monitor** a borrower's repayment record.'

Second charge lending

3.32 The guidance applies to second charge lending to the extent that it is appropriate to do so.

3.33 For example, the **legal requirement** to provide an adequate pre-agreement explanation to a borrower, in accordance with section 55A of the Act, does not apply to loans secured on land. However, as stated at the beginning of chapter 3 of the ILG:

'Although the specific legal requirements of section 55A of the Act **do not apply** to certain categories of regulated credit agreement – including those secured on land – we would expect all creditors to consider the extent to which the **principles** outlined in this chapter may be applied to all aspects of their regulated consumer credit business. For example, before an agreement is made, we would expect all creditors 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 a loan is secured where applicable.'

- 3.34 We similarly expect second charge lenders **to have regard to** the 'principles' underpinning the Mental Capacity Guidance even under circumstances in which a specific legal obligation may not be applicable.

Creditor responsibility for third parties

- 3.35 Some business respondents contended that creditors should not be held responsible for the conduct of third parties. It was suggested that, in some circumstances, creditors will have no direct contact with the customer and a credit broker or intermediary will manage the application.
- 3.36 As stated in our guidance document – *Credit brokers and intermediaries – guidance for brokers, intermediaries and the consumer credit and consumer hire businesses that employ or use their services* (OFT1388)⁷ (the Credit Brokerage Guidance) - the OFT considers that creditors should take **appropriate responsibility** for the acts 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, or frequently does business with the creditor. This will be a matter of fact and degree.
- 3.37 We 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.

⁷ www.of.gov.uk/OFTwork/credit/credit-brokers

3.38 The aforementioned Credit Brokerage Guidance states at paragraph 4.25 that:

'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. Such borrowers might require assistance to enable them to understand information and explanations provided in order to be better enabled to avoid subsequent adverse outcomes in terms of unsustainable credit and/or clearly unsuitable borrowing.'

3.39 Credit brokers and intermediaries also need to comply with, for example, the EA10 as and where appropriate. Paragraph 4.39 of the Credit Brokerage Guidance states that:

'failure to make reasonable adjustments to any practice or procedure, where it may be necessary to do so in order to place borrowers who may have limited capacity on an equal footing with other borrowers, could amount to discrimination under the Equality Act 2010.'

3.40 We expect creditors to take reasonable steps to satisfy themselves that credit brokers and intermediaries acting as their agents and/or business associates are taking such actions and are not engaging in unfair practices or acting unlawfully.

4 MENTAL CAPACITY AND ITS RELEVANCE TO A BORROWING/LENDING DECISION

Mental capacity and financial literacy

- 4.1 In response to suggestions made by respondents, we have amended the heading of the section previously entitled 'financial capability' to 'financial literacy' - which better reflects the focus of the relevant sub-section.
- 4.2 When considering the relevance of financial **literacy** to mental capacity, the focus for the creditor should be on identifying the borrower's ability to **understand** financial information, and not, as could be implied by the term 'financial capability',⁸ their **motivation** to act upon that knowledge.
- 4.3 Mental capacity is not the same as financial literacy. If a borrower has some form of mental capacity limitation, he must have some form of impairment of mind or brain function. There are only likely to be limited circumstances in which creditors will have substantive evidence that a borrower has such an impairment.
- 4.4 In the alternative, a limitation in financial literacy is likely to result from inadequate financial education rendering a borrower unable to, or feeling insufficiently empowered to, manage his finances, engage confidently with creditors and make informed financial decisions.
- 4.5 As the guidance sets out at paragraph 2.13, in practice, it may often be difficult **to distinguish** between borrowers who potentially have mental capacity limitations and those who have limited financial literacy, and we consider that there is little merit in trying to draw a distinction between the two. Indeed, we would rather expect creditors to take reasonable steps with a view to better enabling borrowers, who appear as if they may fall into **either** category, to make informed borrowing decisions.

⁸ Financial capability is a broad concept encompassing a person's knowledge and skills to understand their own financial circumstances, along with their motivation to take action.

4.6 The guidance states at paragraph 2.15 that:

'Under circumstances in which a creditor suspects that a borrower may have some form of mental capacity limitation, the fact that the creditor may not be able to readily differentiate between what it thinks may be a mental capacity limitation and what may actually be a limitation in financial literacy – from the perspective of the practices and procedures it employs with a view to better enabling the borrower to make an informed borrowing decision - is, in our view, unlikely in most instances to be material.

To seek to do so would place a significant and unnecessary burden on creditors.'

5 INDICATORS THAT BORROWER HAVE, OR MAY HAVE, MENTAL CAPACITY LIMITATIONS

Initial presumption of capacity

- 5.1 Some respondents enquired as to whether or not borrowers with a history of mental capacity/mental health issues should have applications for credit declined.
- 5.2 Creditors should not inappropriately discriminate and should always consider any application for credit on an **initial presumption** that the borrower has the mental capacity to make an informed borrowing decision. Any knowledge of a history of mental capacity limitations should trigger a creditor to take reasonable steps to provide that borrower with appropriate assistance with a view to better enabling him to be able to make an informed borrowing decision. At paragraph 3.2 of the guidance it states:
- 'Under circumstances in which the creditor has a basis for understanding, or suspecting, that a borrower has, or may have, some form of capacity limitation that **might** constrain his ability to make the required borrowing decision, the borrower should not be regarded as being **unable** to make an informed borrowing decision unless/until reasonable steps to help him do so have been taken (by the creditor) without success.'
- 5.3 Mental capacity can fluctuate over time. Therefore, it **should not** be assumed that because a borrower did not have the capacity to make an informed borrowing decision at a previous point in time, he will not have the capacity to do so at some point in the future.

Clinical assessments to establish capacity

- 5.4 The guidance makes clear that the OFT does not expect creditors to undertake clinical assessments of borrowers' capacity – and, indeed, recognises that they would be very unlikely to have the capability to do so.
- 5.5 The guidance states (at paragraph 3.3) that there are significant complexities and difficulties in seeking to proactively establish that an

individual has some form of mental capacity limitation which, by definition, has arisen from some form of disturbance in, or impairment of, the brain or mind. Paragraph 3.4 of the guidance goes on to state that:

'Creditors are not required to, for example, carry out (or to have carried out) a clinical assessment of borrowers with a view to seeking to establish whether they have some form of mental capacity limitation. We understand and appreciate that creditors are unlikely to have ready access to medically qualified staff with the relevant skills to do so and we would not expect them to carry out such an assessment.'

- 5.6 Each case will need to be looked at on an individual basis - but the starting point should be that a borrower has the capacity to contract unless/until there are indicators that suggest otherwise.

Automated systems

- 5.7 Some respondents stated that their current IT systems aren't designed to make assessments of whether or not a borrower has sufficient mental capacity to make informed borrowing decisions.
- 5.8 We expect creditors to take reasonable steps (subject to proportionality considerations) to ensure that they have suitable business practices and procedures in place for the appropriate treatment of borrowers who it is understood have, or it is suspected may have, mental capacity limitations which might impact on their ability to make informed borrowing decisions. Individual creditors need to take appropriate steps to ensure that the practices and procedures they employ enable them to do so.
- 5.9 A primary aim of the EA10 is to ensure that individuals with 'protected characteristics' are not prejudicially excluded or restricted from opportunities that are available to others⁹ (including access to services)

⁹ Discrimination is likely to occur when practices and procedures are designed solely with 'standard' people in mind, thereby (actually or potentially) excluding and/or disadvantaging those who, perhaps by virtue of disability, may differ from the standard.

because of those protected characteristics. This will sometimes necessitate service providers (creditors) having to make '**reasonable adjustments**' to the way they provide services to ensure that this does not happen.

5.10 As stated in paragraph C.5 of the guidance:

'Failure to make reasonable adjustments to any practice or procedure, where it may be necessary to do so in order to place borrowers who may have limited capacity on an equal footing with other borrowers, could amount to discrimination under the Equality Act 2010. **This includes where the sole aim of giving effect to practices and procedures in a particular way (rather than making reasonable adjustments as necessary) is to reduce costs.**'

Knowing, reasonable cause to believe and reasonable grounds to suspect

5.11 Clarification was requested regarding the distinctions made in the draft guidance between knowing/believing and suspecting that a borrower may have a limitation in his mental capacity. We have simplified the position in this regard in the guidance.

5.12 In the guidance, we differentiate only between a scenario in which a creditor may have an 'understanding' that a borrower has mental capacity limitations (which is most likely to occur where the creditor is provided with information of a reliable evidential nature, for example, from an attorney) - and one in which the creditor 'suspects' that a borrower may have mental capacity limitations (a lower threshold). In the case of the latter, the creditor may, for example, observe (the observation need not always be visual) something specific (behavioural or otherwise) that could be indicative of the borrower having some form of mental capacity limitation.

5.13 In practical terms, the steps that may be taken by creditors in either scenario will often be very similar or the same.

Indicators

5.14 At the request of some respondents to the consultation, a list of **some** of the main causes of mental capacity limitations has been included at

paragraph 2.9 of the guidance. Chapter 3 also provides a non-exhaustive list of possible indicators that a borrower may have mental capacity limitations.

5.15 There is not, however, a specific 'checklist' for identifying whether a person does not/might not have the required mental capacity to make a particular borrowing decision at a particular time and creditors will need to make their lending decisions on a case by case basis drawing on their own experiences.¹⁰

5.16 Paragraph 3.14 of the guidance states that:

'While the threshold for having reasonable grounds to suspect that a borrower may have some form of mental capacity limitation is low, it should be more than a 'hunch' or a 'feeling'.'

5.17 As stated in the text box adjacent to paragraph 4.24 of the guidance:

'Creditors need to be careful to avoid engaging in 'discrimination by perception' whereby they treat a borrower 'less favourably' (for example, denying his application for credit) **solely** on the basis of, for example, a perception that the borrower **must** lack the capacity to contract as he has, or appears as if he may have, one of the conditions as set out in paragraph 2.9 of this guidance document.'

Working with authorised third parties

5.18 Some respondents questioned whether they might be prevented from acting upon disclosures about mental capacity issues made by a (unauthorised) third party who does, or is likely to, have knowledge of the borrower. This was in part because of concerns about possible constraints being placed on creditors by the DPA regarding the processing of data.¹¹

¹⁰ Front line staff in particular may find the OFT's quick reference guide on Mental Capacity to be a useful aide-memoire

www.of.gov.uk/shared_of/business_leaflets/consumer_credit/OFT24289QuickGuide.pdf

¹¹ See also, in particular, paragraphs 8.7 to 8.10 of this document.

5.19 The OFT does not expect creditors to **automatically** accept information from a (unauthorised) third party as a matter of fact. Creditors should look at each situation on a case by case basis.

5.20 Paragraph 3.8 of the guidance states:

'The OFT considers that while any such (credible) contention by a close friend or relative should act as a 'trigger' for a creditor to make further reasonable enquiries with a view to considering the likely veracity of such a contention – the creditor should not simply accept it at face value and automatically reject the borrower's application for credit in the absence of any evidence to support the contention or further consideration/investigation. We consider that to do so would be very likely to constitute an unfair or improper practice.'

Paragraph 3.9 of the guidance states:

'The OFT would also be very likely to consider it to be an unfair or improper practice for a creditor to simply disregard such a contention and to grant the credit being sought without making any further reasonable enquiries in order to be able to better consider the likely veracity of the contention.'

Power of Attorney, deputies and guardians

5.21 Some questions were raised regarding the legal requirements around the creation and operation of a power of attorney and equivalent powers in Scotland.

5.22 We have amended the text, where appropriate, taking on board a number of helpful suggestions from respondents. Annexe B of the guidance provides information on powers of attorney, deputyships and guardians (Scotland). In particular, paragraph B.4 of the guidance refers to the duties of deputies and we have also included reference to other financial proxies such as guardians under the Adults with Incapacity Act (Scotland) 2000.

5.23 Creditors should consider seeking independent legal advice if they require further assistance/guidance on the requirements governing the creation and operation of such authorities.

Disclosure by the borrower

- 5.24 Some respondents commented on the OFT's proposal regarding the use of **voluntary disclosure** as a means of seeking to ascertain whether a borrower may have some form of mental capacity limitation. Some considered that borrowers would be unlikely to disclose such information. Others considered that some creditors might place sole reliance on voluntary disclosure as a means of identifying limitations in capacity. Some requested suitable wording that might be used by creditors when seeking voluntary disclosure by borrowers regarding any mental capacity limitations which might potentially impact on their ability to make an informed borrowing decision.
- 5.25 Voluntary disclosure is only one possible means creditors might adopt to identify borrowers who may have mental capacity limitations. Creditors should also employ whatever other means of seeking to identify borrowers who might have possible mental capacity limitations that appear necessary and appropriate to them (taking into account, for example, their business models and communication channels with borrowers).
- 5.26 In the text box adjacent to paragraph 3.11 of the guidance, we have set out **an example** of a **possible** form of words that might be used to invite voluntary disclosure. However, it is ultimately for creditors to decide on their own form of appropriate wording.
- 'Is there any further information that you might wish to bring to our attention at this time that you think may be relevant to our consideration of your application for credit?'
- 5.27 We accept that the use of wording such as the above, which is not overly intrusive, **may** only have limited success in encouraging borrowers to disclose that they have some form of mental capacity limitation. However, as stated in the aforementioned text box, 'we consider that issues of 'balance' and 'proportionality' must be taken into consideration as well as the consumer protection objective of seeking such information.'
- 5.28 Disclosure of a condition relevant to mental capacity (by the borrower or otherwise) is unlikely, on its own, to constitute a basis for dismissing an application for credit. Such a disclosure should, in the first instance, act

as a trigger for the creditor to consider what steps it might take to assist the borrower to be enabled to make an informed borrowing decision.

6 PRACTICES AND PROCEDURES

Providing appropriate assistance and support

- 6.1 One respondent to the consultation suggested that if creditors know or suspect that someone has, or may have, mental capacity limitations, then they should not enter into the agreement with them - nor should the creditor be expected to make reasonable adjustments. Similarly, a small number of respondents to the consultation questioned whether the taking of 'reasonable steps' to assist a borrower to be enabled to make an informed borrowing decision might increase the risk of contracts subsequently being rendered voidable, if challenged, as it would suggest that the creditor knew the consumer lacked the capacity to make the borrowing decision. Another respondent suggested that there was a possibility that, even if reasonable steps were taken, they would be of no effect.
- 6.2 There are unlikely to be many circumstances where a creditor knows with 100 per cent certainty that a borrower has mental capacity limitations that will prevent him from making a particular borrowing decision. Creditors need to start with the initial presumption that the borrower has capacity. Even with the knowledge that the borrower has one of the possible causes of mental capacity limitations, a creditor should not assume that the individual will **(always)** be unable to make an informed borrowing decision. Mental capacity can fluctuate, it can be partial or temporary, and, with assistance,¹² many borrowers will be enabled to make an informed borrowing decision.
- 6.3 Consequently, the creditor's approach should not be to unfairly or unnecessarily discriminate against the borrower, including by adopting a 'default position' that borrowers who it is understood or suspected have, or might have, capacity limitations, should not be granted the credit they

¹² Borrowers with mental capacity limitations may need appropriate assistance from creditors (and possibly others such as authorised third parties where applicable and appropriate) in order to be enabled to make an informed borrowing decision. However, this does not necessarily mean that they **cannot** make such a decision. The MCA Code of Practice identifies that an individual, who at first appears as if he might lack capacity to make a particular decision at a particular time, may be enabled to make the decision if he is provided with appropriate help and assistance.

are seeking – but rather the creditor should **take appropriate steps to assist the borrower in being able to make an informed borrowing decision**, while at the same time mitigating possible risks to the borrower (for example, by applying a particularly high level of scrutiny to the borrower's credit application). **Failure to do so may constitute an unfair or improper practice and could call into consideration the creditor's fitness to hold a consumer credit licence. In some instances, it may also constitute disability discrimination for the purposes of the EA10.**

- 6.4 At paragraph 4.24 we state that where a borrower still appears unable to understand (in particular the key risks associated with the credit agreement), retain, weigh up the information or communicate his borrowing decision, even after the provision by the creditor of appropriately clear information about, and explanations of, the credit agreement, then the creditor may need to take a view as to whether the borrower has the 'capacity to contract' in respect of the credit agreement – that is to say - whether the borrower is able to understand the nature of the transaction he is entering into and make an informed decision.

Practices and procedures employed

- 6.5 Some respondents to the consultation commented on the types of practices and procedures that could be employed by creditors to assist borrowers to make informed borrowing decisions and mitigate risks to both borrowers and creditors. A number of the suggestions made by respondents are listed at Annexe B of this document (**for information purposes only – this should not necessarily be regarded as any form of endorsement of these practices by the OFT**).

Sales channels

- 6.6 A couple of respondents suggested that creditors employing the use of distance sales channels have limitations in the mechanisms available to them by which assistance can be provided to borrowers.
- 6.7 We acknowledge at paragraph 3.17 of the guidance that the extent to which indicators of a borrower having a mental capacity limitation may be discernable will vary to some extent depending on the sales channel employed. However, the use of remote sales channels does not absolve

creditors of the need to lend responsibly and provide appropriate assistance to borrowers as required. We state in the text box adjacent to paragraph 3.17 that:

'Creditors can only reasonably be expected to form a suspicion that a borrower may have some form of mental capacity limitation (and give effect to their practices and procedures on the basis of having such a suspicion) where they have information or evidence, and/or observe an indicator, which may trigger such a suspicion.

The OFT considers that **regardless of the (primary) sales channel employed to allow borrowers to apply for credit**, the creditor should seek to ensure, subject to proportionality considerations, that its practices and procedures for assessing the affordability and (un)suitability of credit applications are designed, in part, with a view to mitigating the potential risk of granting unaffordable or clearly unsuitable credit to borrowers who do not have the capacity to make informed borrowing decisions.'

Dedicated borrower support

6.8 Several respondents suggested that it would be good practice for creditors to have a dedicated service for assisting borrowers understood to have, or suspected of possibly having, mental capacity limitations.

6.9 Creditor staff providing support services could be trained to deal with such issues and provide appropriate advice and assistance to borrowers. As the guidance suggests at paragraph 4.9, these staff could also be equipped to deliver support **to colleagues** on mental capacity issues.

6.10 As stated in the text box adjacent to paragraph 4.9 of the guidance:

'Creditors employing the use of remote sales channels might consider providing a dedicated 'help line' telephone number...'

6.11 We accept that the nature of the support service provided will in part be relative to the size and infrastructure of the creditor's business. However, being a small business is not an objectively justifiable basis for 'opting out' of providing appropriate support to borrowers. Ultimately, any assistance provided should have the aim of (better) enabling the borrower to make an informed borrowing decision.

Checking a borrower's understanding of information and explanations provided

- 6.12 Suggestions were made by some respondents as to how creditors could check a borrower's understanding of information and explanations provided.
- 6.13 It is not our intention that the guidance should be overly prescriptive. The guidance does, however, include a number of suggestions in this regard such as, for example, asking borrowers to reflect back what has been said to them by the creditor (in respect of the creditor's explanation of the credit product(s)) and creditors not relying on answers to 'closed questions' when attempting to establish a customer's understanding of an explanation that has been provided about a product.

Allowing the borrower sufficient time make an informed decision

- 6.14 While we understand that creditors cannot keep offers of credit open indefinitely, borrowers should not be rushed into making decisions and should be allowed sufficient time to weigh-up and consider information and explanations provided and to shop around for alternative credit products should they wish to do so.
- 6.15 We would have particularly serious concerns about any creditors taking steps to 'discourage' borrowers from reflecting on information/ explanations provided and/or shopping around.

Assessment of affordability

- 6.16 References to a 'stringent'¹³ affordability assessment primarily relate to the (additional) steps taken to verify information provided to inform such an assessment.

¹³ Referred to in the draft guidance as an 'enhanced' affordability assessment. The extent to which a creditor's affordability assessment **may** need to be more **stringent**, under circumstances where it is understood or suspected that a borrower has or may have some form of mental capacity limitation, will in large part depend on how stringently the creditor undertakes more 'routine' assessments of affordability – for example, the extent to which it routinely checks the veracity of self-declared information provided by borrowers to inform an affordability assessments.

- 6.17 The undertaking of a stringent affordability assessment by the creditor is even more important where there is a risk that the borrower might be somewhat constrained in his **own** ability to be able to assess whether or not he will be able to sustain repayments on a loan without it adversely impacting on his financial situation.
- 6.18 The guidance provides examples of a number of different sources of information that a creditor **might** wish to consider as a means of better informing his affordability assessment including evidence of income, a credit score, and evidence of expenditure.
- 6.19 As stated in paragraph 4.35, we do not consider that creditors should place over-reliance on 'self-declared information' provided by the borrower to help inform an affordability assessment, unless sufficient steps are taken by the creditor to verify the accuracy and veracity of any such information, **in particular** where it is understood or suspected that the borrower has, or may have, some form of mental capacity limitation. With some conditions that may lead to a person having some form of mental capacity constraint, self-declared information may be unreliable.
- 6.20 However, in general terms, creditors should apply their own discretion (acting reasonably) in deciding the types and sources of information they employ to assess affordability.

Unsuitability

- 6.21 A business respondent to the consultation suggested that consideration could be given to the type of credit offered - for instance offering a personal loan instead of a credit card - if the circumstances suggest this to be a more appropriate product. It was also contended that it should not be for the creditor to decide what is in the best interests of the borrower (in the context of applying a high level of scrutiny when considering applications).
- 6.22 Our position is set out in paragraphs 4.43 - 4.45 of the guidance, which state that we expect a creditor, when considering granting credit to a borrower, significantly increasing the amount of his credit, or increasing his credit limit under an agreement for running account credit, to take

particular¹⁴ care to ensure that where it understands or suspects that the borrower has, or may have, mental capacity limitations that might impact on his ability to make an informed borrowing decision, he is not provided with **clearly unsuitable** credit¹⁵ - even if it is otherwise affordable. The text box adjacent to paragraph 4.44 of the guidance provides examples of what might constitute irresponsible lending practices in the context of 'unsuitability'.

- 6.23 It is not our expectation that every (potential) sale that a creditor makes to a borrower understood to have, or suspected of having some form of mental capacity limitation will have the status of being an 'advised sale'¹⁶ – but rather the case that the creditor takes appropriate steps to ensure that the borrower is enabled to understand and recognise that a particular product might be wholly inappropriate for him given his needs and circumstances (where this is the case).
- 6.24 Paragraph 4.45 of the guidance sets out that the OFT is aware of instances of clearly unsuitable credit being provided to borrowers under circumstances in which it must have been wholly apparent to the creditors both that there were at least reasonable grounds for suspecting that the borrowers might not have the capacity to make the required borrowing decisions and that the credit being provided to them was clearly unsuitable. We consider that such conduct is very likely to be considered an unfair or improper practice that would call a creditor's fitness to hold a consumer credit licence into question.

¹⁴ Particular care should be taken by the creditor under such circumstances since the borrower, dependent on the nature and the extent of his capacity limitation, may not himself be able to take an informed view as to the unsuitability or otherwise of the credit product.

¹⁵ See first text box in paragraph 3.13 of the ILG.

¹⁶ With an 'advised sale', the creditor normally makes some form of **recommendation** to the borrower as to what might be the best product for him.

7 REGULATORY COMPLIANCE AND ENFORCEMENT

- 7.1 Some respondents asked for an indication of the extent to which the OFT would expect creditors to demonstrate compliance.
- 7.2 We have not been overly prescriptive in terms of stating what we would specifically expect all creditors to do, in all cases, in order to satisfy us that they are giving effect to appropriate practices and procedures. We have left it to individual creditors to decide the most appropriate means for them to employ. However, whatever means is adopted it must be sufficient to be able to satisfy us of the licensee's fitness in this regard.¹⁷
- 7.3 The OFT expects creditors to take all reasonable steps (subject to proportionality considerations) to ensure that 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).
- 7.4 Two respondents requested some more detail about the range of possible enforcement options available to the OFT and the penalties for non-compliance.
- 7.5 Information can be found in OFT guidance – *Irresponsible lending – OFT guidance for creditors* (OFT1107).

¹⁷ We do consider that, in some circumstances, it may be more difficult for creditors to satisfy the OFT in this regard in the absence of well-documented audit trails. We also consider that the maintenance of such audit trails may facilitate creditors being able to rebut vexatious assertions by borrowers or their representatives that they have been the subject of irresponsible lending practices as a consequence of the actions of the business.

8 OTHER RELEVANT GUIDANCE AND LEGISLATION

Data Protection Act 1998 (DPA)

8.1 Respondents made a number of comments and enquiries in relation to data protection issues. Some further clarity was requested in respect of the following issues.

Consent

8.2 A couple of respondents raised questions about obtaining consent to record data and what to do where consent to retain data is declined.¹⁸

8.3 Two respondents also asked for examples of acceptable wording for creditors to use in circumstances where consent to retain (sensitive) personal data is given.

8.4 We accept that in the absence of appropriate consent, there **may** be a limit to the information that can be processed. However, we have set out in the guidance the conditions in Schedule 2 to the DPA (at least one of which creditors will need to meet in order to process any '**personal data**') and in Schedule 3 to the DPA (which need to be met in respect of '**sensitive personal data**' alongside at least one Schedule 2 condition) which may allow for the processing of (sensitive) personal data.

8.5 Some creditors advised that they are currently not able to process sensitive personal data under their existing Data Protection Notification procedures/systems. 'Financial information' is not defined as sensitive personal data for the purposes of the DPA.

8.6 Creditors may need to revise their Data Protection Notification procedures and introduce enhanced procedures for processing and disclosure of sensitive personal data if existing systems are not adequate to mitigate the risk of granting unsuitable and/or unaffordable loans to a particularly vulnerable group of borrowers.

¹⁸ Some respondents asked for clarification of what the OFT expects if a mental capacity limitation is disclosed or becomes apparent during the application process but there is no consent on behalf of the borrower (or his attorney) to the retention of this information.

Working with third parties

- 8.7 Some respondents considered that they **may** not be able to act on a disclosure of a mental capacity limitation by an 'unauthorised' third party who is close to the borrower (that is to say, someone who doesn't have **legal** authority (LPA/EPA etc) to make decisions on behalf of the borrower). Consequently they considered that they would **only** be in a position to accept and record information about an individual's mental capacity limitations where the third party has the right, in law, to act on behalf of the borrower.
- 8.8 Some other respondents suggested that when a third party expresses concern to a creditor, the creditor should give information to the third party about how to support the borrower such as information on LPAs or sources of advice and/or support.
- 8.9 At Annexe B.7 of the guidance we suggest that creditors may indicate to third parties that they can seek advice from the Office of the Public Guardian or OCP.
- 8.10 While we understand and accept that there may be some limitations in respect of the **recording** of information, paragraph 3.8 of the guidance states:

'The OFT considers that while any such (credible) contention by a close friend or relative should act as a 'trigger' for a creditor to make further reasonable enquiries with a view to considering the likely veracity of such a contention – the creditor should not simply accept it at face value and automatically reject the borrower's application for credit in the absence of any evidence to support the contention or further consideration/investigation. We consider that to do so would be very likely to constitute an unfair or improper practice.'

Paragraph 3.9 of the guidance states:

'The OFT would also be very likely to consider it to be an unfair or improper practice for a creditor to simply disregard such a contention and to grant the credit being sought without making any further reasonable enquiries in order to be able to better consider the likely veracity of the contention.'

Retention limits

- 8.11 Some business respondents requested further guidance about reasonable retention times for personal information about borrowers stored on files - particularly in the context that mental capacity may fluctuate over time and that any capacity limitations may be 'short term', given that compliance with data protection legislation requires such data to be kept for 'no longer than necessary'.
- 8.12 There is no 'black and white' generic guidance that can be provided on this matter. The length of time that it is 'necessary' to retain personal data will need to be determined by individual creditors on a case by case basis taking account of (amongst other matters) 'business need'.
- 8.13 Where the use of automatic (or manual) systems constrains creditors' ability to process data effectively (and within the bounds provided for in law), we would expect creditors to take reasonable steps to overcome any such constraints.
- 8.14 We consider that any retained record of a history of a borrower having mental capacity limitations should act only as a 'trigger' for the creditor to take reasonable steps to enable the borrower to make an informed borrowing decision and mitigate any risk to that borrower.

The Information Commissioner's Office

- 8.15 Primary responsibility for data protection issues rests with the Information Commissioner's Office (ICO). The OFT liaised closely with the ICO in producing the guidance. For further information/advice on data protection compliance see the ICO website.¹⁹ You may also wish to consider seeking independent legal advice.

¹⁹ www.ico.gov.uk

A RESPONDENTS TO THE CONSULTATION

Alzheimer's Society

Angus Council Social Work and Health

Anthony Sharp Associates

Association of British Credit Unions

Barclays

British Bankers Association

British Cheque and Credit Association

British Retail Consortium

Consumer Credit Association

Consumer Credit Counselling Service

Consumer Finance Association

Consumer Focus

Citizens Advice

Civil Court Users Association

Dr David Thompson

Deputy Support Group

Disability Action

Experian

Finance and Leasing Association

HSBC

Institute of Credit Management

The Law Society

The Law Society Scotland

Lloyds Banking Group

Mental Health Foundation

Mental Welfare Commission Scotland

MIND

Money Advice Trust

Money Advice and Community Support

National Association of Student Money Advisers

Nationwide Building Society

Office of the Public Guardian

Royal Bank of Scotland

Sainsbury's Bank

Solicitors for the Elderly

The UK Cards Association

B RESPONDENT SUGGESTIONS ON POSSIBLE PRACTICES AND PROCEDURES

- B.1 Staff may need training as to what questions to ask borrowers (and how to ask such questions) where it appears as if the borrower may have some form of mental capacity limitation.
- B.2 Providing information to borrowers (for example, pre-agreement information explaining key risks) in more 'user friendly' documents for **all** borrowers would **help** limit the need to single out individuals requiring specialised materials and/or explanations.
- B.3 When conducting **online** transactions, borrowers could be advised (on screen) to ring a (local rate) general helpline if they consider that they might require more personal interaction and support.
- B.4 In order to reduce the risk of a potential conflict of interest where sales staff (incentivised by operating on a commission basis) are also the ones having to assist borrowers through the lending process, creditors might wish to consider having a dedicated service or specialist team for supporting borrowers with mental capacity limitations. They might also wish to consider having a dedicated person or team equipped to deliver support to colleagues on mental capacity issues, for example on handling LPA queries.
- B.5 Effectively publicising the availability of **dedicated specialist teams** to provide support to borrowers who might have mental capacity limitations might encourage borrowers to be more open with creditors about their conditions.
- B.6 A similar process for frontline staff similar to that set out in *Debt collection and mental health: 10 steps to improve recovery* – by the Royal College of Psychiatrists and the Money Advice Trust - could be adapted for a potential borrower who discloses that he has some form of mental capacity limitation:
- ACKNOWLEDGE the disclosure
 - INFORM the customer how this will be used
 - REQUEST his consent

- ASK questions to obtain key information
- SIGNPOST or refer to internal and external help

C SUMMARY OF QUESTIONS

Chapter 1

- Q.1 Does the introduction set out the scope of the guidance sufficiently clearly?
- Q.2 Are there any substantive aspects with which you disagree?
- Q.3 Do you consider that there are any significant omissions?
- Q.4 Do you have any other suggestions for improvement?

Chapter 2

- Q.5 Are the draft guidelines on the comparison between financial capability and mental capacity sufficiently clear?
- Q.6 Are there any substantive aspects with which you disagree?
- Q.7 Are there any significant omissions?
- Q.8 Do you have any other suggestions for improvement to this section?

Chapter 3

- Q.9 Is this section on identifying and dealing with mental capacity issues sufficiently clear?
- Q.10 Are there any substantive aspects with which you disagree?
- Q.11 Are there any significant omissions?
- Q.12 Do you have any other suggestions for 'reasonable adjustments' that creditors might consider making to their practices and procedures where they either know - or have reasonable cause to believe or reasonable grounds to suspect – that a borrower has some form of capacity limitation?
- Q.13 Do you have any views on what a creditor should do where a

friend/neighbour/family member of a borrower, without an LPA/CPA/EPA, advises the creditor that the borrower has a mental capacity constraint that impacts on his ability to make informed borrowing decisions?

Chapter 4

- Q.14 Is the section on data protection considerations sufficiently clear?
- Q.15 Are there any substantive aspects with which you disagree?
- Q.16 Do you have any views on the practical implications of creditors retaining information about a borrower's mental capacity?
- Q.17 Are there any significant omissions?

Chapter 5

- Q.18 Are these draft guidelines on regulatory compliance and enforcement sufficiently clear?
- Q.19 Are there any substantive aspects with which you disagree?
- Q.20 Are there any significant omissions?
- Q.21 Do you have any suggestions for improvement to this section?
- Q.22 Do you have any comments about the structure and format of the guidance document?