

Power to suspend consumer credit licences– Draft OFT guidance for licence holders

October 2012

OFT1458

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Any enquiries regarding this publication should be sent to us at: Marketing, Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX, or email: marketing@oft.gsi.gov.uk.

This publication is also available from our website at: www.oft.gov.uk.

Scope of this consultation

Topic of this consultation	This consultation is focused on the proposed new powers to be given to OFT to suspend consumer credit licences under a new section 32A of the Consumer Credit Act 1974.
Scope of this consultation	This consultation is relevant to all consumer credit licence holders.
Geographical scope	UK-wide.
Impact assessment	There is no impact assessment linked to this consultation. The OFT does not conduct impact assessments when producing explanatory guidance. We work closely with stakeholders in preparing guidance and consult fully on the content.

Basic information

To	This consultation is aimed at all businesses that hold a current consumer credit licence under any category and covers those with an interest in any stage of the lending process as conducted by consumer credit businesses. This includes large and small businesses, trade associations, professional bodies, regulators, enforcement agencies, consumer organisations and borrower groups.
Duration	The consultation will run from 23 October 2012 to 15 January 2013.
Enquiries	By telephone: Rajnish Mathur on 020 7211 8251. By email to: rajnish.mathur@oft.gsi.gov.uk By fax to: 020 7211 8536. By post to: Rajnish Mathur, Credit Policy Team, Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX.

<p>How to respond</p>	<p>We would welcome your comments on the content of this draft guidance document. 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, as indicated above).</p> <p>We appreciate that respondents may have diverse opinions as to whether certain practices 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.</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 consultation on the OFT website and sending it to a range of stakeholders to invite comments.</p>
<p>Additional ways to become involved</p>	<p>If you wish to meet with the OFT team involved please contact Rajnish Mathur (details given above).</p>
<p>After the consultation</p>	<p>After the consultation we will publish our final guidance as well as a summary of responses received. Both documents will be available on our website at www.offt.gov.uk/publications.</p>
<p>Compliance with the <i>Cabinet Office Consultation Principles</i></p>	<p>This consultation complies with Cabinet Office Consultation Principles. A list of the key criteria can be found at Annexe B along with a link to the full document.</p>

Background

Previous engagement	<p>We have met for initial discussions with a number of organisations from a variety of backgrounds including other regulators with similar powers, business representatives, consumer representatives, and trading standards representatives.</p> <p>We are grateful to all with whom we have consulted during the production of this draft guidance for taking the time to provide us with their views.</p>
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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 Cabinet Office's *Consultation Principles* can be found in Annex B.

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. Our use of all information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may wish 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. 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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1 THE CONSULTATION

- 1.1 The Office of Fair Trading (OFT) is to be given a new power to suspend consumer credit licences with immediate effect or from a date specified in the notice, in order to prevent actual and potential detriment, where this is urgently necessary for the protection of consumers.
- 1.2 The power is being provided by way of a Government amendment to the Financial Services Bill.¹ It will take effect two months after Royal Assent, and the Government therefore expects it to come in to force during Q1 2013. Until the Bill has received Royal Assent, the draft power (as set out in Annexe C) remains subject to change.

Purpose and aim of the guidance

- 1.3 We are consulting now with the aim of producing guidance on how we will use the new power, including the processes employed for doing so.
- 1.4 The purpose of this consultation is to obtain comments on the content of the guidance and how it is presented. We have asked a series of questions, a summary of which can be found at Annexe A. Details of how to respond can be found at the front of this document.

Structure of the consultation document

- 1.5 The consultation document is structured as follows:

Chapter 2 sets out the background to the power including details of the test for suspension.

Chapter 3 sets out the grounds for using the power and summarises the key elements to which OFT will have regard in making the decision to suspend with immediate effect or from a date specified with the notice.

¹ www.publications.parliament.uk/pa/bills/lbill/2012-2013/0025/lbill_2012-20130025_en_1.htm

Chapter 4 contains details of the procedures to be employed when suspending a consumer credit licence.

Chapter 5 sets out OFT's general enforcement principles.

Chapter 6 contains further information on consumer credit licensing.

Annexe A Summary of questions

Annexe B Consultation criteria

Annexe C Draft clause

Annexe D Proposed decision-making model

Next steps

- 1.6 The consultation closes on 15 January 2013. We will continue to liaise with interested parties during the consultation period. We will publish our guidance, together with a short summary of the responses that we receive to this consultation, on our website at www.oft.gov.uk/consultations.

2 INTRODUCTION

Purpose of the guidance

- 2.1 This guidance sets out how the OFT will use the new power to suspend consumer credit licences with immediate effect or from a date specified in the notice. It covers the circumstances in which we would be likely to suspend and the decision-making processes that we will employ.

Background to the power

- 2.2 The power to suspend is being given to the OFT through proposed changes to the Act, which will be brought about through the Financial Services Bill. The draft of this amendment – new section 32A - can be found at Annexe C.
- 2.3 The relevant clauses providing for the power will add new sections 32A (setting out the mechanics of the new power), 32B (setting out the duration of the suspension) and 34ZA (setting out the licensee's right to representations) to the Act.
- 2.4 The new power will enable the OFT to suspend **all** aspects of the business covered under the licence that is, no partial suspension, with immediate effect or on a date specified in a notice, with the consequence that **any** consumer credit activity undertaken by the suspended licensee from that point on will be unlicensed, and therefore illegal and (if applicable to the type of activity) unenforceable, until the suspension is ended.
- 2.5 New section 32B will set a limit on the length of suspension of one year unless the OFT serves a 'Minded to Revoke the Consumer Credit licence' (MTR) notice upon the licensee, in which case the suspension will last until the OFT decides not to proceed with the revocation, or if it goes ahead with the determination to revoke, until the end of the appeal period.

- 2.6 Currently where the OFT commences revocation proceedings the licensee may continue to operate pending the outcome of all appeals, with the risk of continued consumer detriment. Under the new power, licensees will retain the right to make representations as they do where subject to revocation proceedings, but the suspension will take effect on a date specified in the suspension notice (whether that date is immediate or some weeks hence). In contrast to our other licensing powers, it will therefore take effect well before the exhaustion of any appeals process.

The 'test' for suspension

- 2.7 New section 32A of the Act will specify that the OFT may suspend a consumer credit licence with immediate effect or on a date specified within the notice, if during the currency of the licence :

it appears to the OFT to be urgently necessary for the protection of consumers [that the licence should cease to have effect immediately or on a specified date]

Scope of the guidance

- 2.8 The guidance is relevant to all UK businesses holding consumer credit licences and provides a general framework for consideration of whether a licence should be suspended. It is not intended to be a 'tick box' exercise. OFT will consider the circumstances of each case and take the most appropriate action.

- Q1 Do you have any comments about the structure and format of the guidance document?**

3 GROUNDS FOR SUSPENDING A LICENCE

'Fitness' ('The section 25 test')

- 3.1 The Act and its subordinate legislation provide a framework to protect consumers when dealing with those engaged in consumer credit business and/or ancillary credit business.
- 3.2 All businesses engaged in consumer credit and/or ancillary credit are required to hold an appropriate standard consumer credit licence issued by the OFT. We have 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').

Considerations in respect of the test for suspension

- 3.3 In our view there are three elements to the statutory test for suspension, and we will have regard to **all** three when considering whether a licence should be suspended:
- There must be an **urgent necessity** to protect consumers, not a mere necessity, so the judgement must be that there is an **imminent** risk.
 - That necessity must relate to **potential for harm** (that is inherent in the concept of protection and gives rise to the question 'What forms of harm might, in principle, be relevant?')
 - In order to achieve that protection it must be necessary to suspend the licence, as opposed to using some other form of regulatory action. A judgement must be made that suspension is the necessary and proportionate tool to use.
- 3.4 Consideration also needs to be given as to whether the suspension should take effect immediately or prospectively from a date specified in the notice.

What forms of harm might, in principle, be relevant?

3.5 The new power does not set out which forms of harm are relevant to the exercise of the power. However, in principle, within the context of the Act (which is a statute set up for the protection of consumers) the relevant forms of harm are, in our view, any which cause, or have the potential to cause, physical, economic, or other harm from which it is necessary to protect consumers. We may have regard to any of these when considering whether or not to suspend. A useful indicative list of the forms of harm which are likely to be relevant when considering suspension are those matters relevant to the fitness of a licensee listed in section 25 of the Act. Section 25 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, past or present, have:

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

and with particular regard to any failures to adhere to OFT guidance. This could include evidence of irresponsible lending.

- 3.6 In assessing whether a licensee is fit to retain a licence we will look at evidence that raises doubts about the personal integrity of individuals running or controlling or associated with a licensed business. Integrity concerns are also likely to give rise to risks to consumers, and consequently will be relevant considerations in deciding whether to exercise the power to suspend. Concerns about integrity arise where there is clear evidence of past misconduct, in relation to standards of business behaviour as well as non-compliance with the law. This evidence does not have to relate to a licensable activity and consumer credit does not have to be the primary business activity.
- 3.7 **The presence of a form of harm alone will not be sufficient to trigger the need for suspension - there must be other factors at play which meet the 'urgent necessity' element of the suspension test.**

What factors might make it urgently necessary for the protection of consumers to suspend with immediate effect (or from a date specified in the notice)?

- 3.8 In our view, whether or not it is urgently necessary to suspend with immediate effect will depend on the following factors:

- Evidence that the risk of harm is **current or foreseeable**

Evidence of harm, even serious harm, will not in itself be sufficient to trigger the need for suspension. The test is clear that there must be an **urgent necessity** to protect the interests of consumers. This means that there must be **an imminent risk** to consumers. So, for example, convictions sufficiently remote in time so as not to present a likely imminent risk to consumers, would be unlikely to trigger the need to suspend with immediate effect without something more. However, a pattern of violent or dishonest behaviour, consumer complaints and/or additional, more recent convictions would.

- The **seriousness** of the harm or risk of harm

What constitutes serious harm is a question of judgement based upon the facts and will depend upon the circumstances of each case. However, in considering whether the harm or risk of harm of a particular case is sufficiently serious to meet the threshold for the test for suspension, OFT would have regard to the following factors:

- The **nature of the business**, for example, whether it involves face-to-face contact with customers and/or is aimed at a particularly vulnerable sector of society, **and the extent to which the harm relates directly to [licensable] business activities.**
- The direct effect of the **business model** is that it leads to serious consumer harm, particularly if it is aimed at vulnerable consumers.
- The **nature of the harm/detriment to consumers**, for example, evidence of violence. Convictions for dishonesty or violence, particularly where a licensee comes into direct contact with consumers during the course of the business, would be relevant to our considerations, as would a pattern of harm (including convictions) tending to show a course of conduct likely to be repeated.
- **Proportionality** – for example, whether the harm arises from an isolated practice or in an isolated part of the business, or is of itself of such a magnitude, or indicative of wider (for example, integrity) concerns with the business that the (risk of) harm outweighs any 'mitigation'.
- The **quality of the evidence** – anecdotal evidence would be unlikely to result in suspension action.
- **Repeated breaches of the Act** or other consumer protection legislation.

- **The efforts that have been made to stop it already**

Situations where a licensee continually ignores requests to address any legitimate concerns raised by the OFT or a partner organisation such as Local Authority Trading Standards Services (LATSS) will cast doubt on the licensee's fitness to hold a licence and, depending on the seriousness of the harm arising, will be a factor in the decision of whether or not to suspend.

- **The other options (tools) open to OFT**

Suspension of a consumer credit licence is a serious step that we would only take where necessary or appropriate. OFT is committed to the fair, effective and proportionate enforcement of consumer law. In practice this means that we will decide on the appropriate enforcement mechanism² in the light of the facts and circumstances of the individual case, especially the risk of detriment to consumers.

In most cases, where the conduct of a licensee is serious enough for us to consider exercising our powers to suspend a licence, we will, if we judge it appropriate to do so, inform the licensee that such action is a possible outcome of our investigations.

- 3.9 For information on other enforcement options available to the OFT to address concerns about licensees, see our *General guidance for licensees and applicants on fitness and requirements* (OFT969).
- 3.10 Any of these factors are relevant to our considerations, but for a licence to be suspended, the circumstances of the cases must demonstrate that there is an urgent necessity to protect consumers. At the heart of our considerations will be the question of whether there is an **imminent risk** to consumers if the licence is not suspended.

² The OFT's enforcement powers and principles are explained further in Chapter [5] of this guidance document.

Example case studies in which suspension would be an appropriate enforcement tool

We have set out below some examples of the circumstances in which the facts of the case would suggest that suspension would be the most appropriate tool. Note these examples are for guidance only and are not to be treated as definitive or the **only** circumstances in which suspension might be appropriate. We have also set out a number of examples of cases where, on the basis of the facts, suspension would be unlikely, instead we would be more likely to issue an MTR notice or take alternative action. It should be noted that these examples are fictitious and were designed to illustrate the OFT's views on when it would be appropriate to use the new power.

EXAMPLE 1: Licensee (company) involved in home security sector.

Local Authority Trading Standards Service (LATSS) contacted the licensee about 20 complaints regarding trading practices in relation to the sale of both the products and the credit used to purchase the products.

Unfair business practices included aggressive and misleading sales practices relating to credit activities, remaining in consumer homes after requests to leave, persistent phone calls despite clear statements that consumers are not interested in the products, home security devices (and subsequent services) not satisfactory or fit for purpose, and not providing or honouring cancellation rights. The licensee appeared to focus its sales practices on more vulnerable consumers, including the elderly or inform.

The licensee failed to comply with action agreed with LATSS.

Ten months later LATSS wrote to the licensee about 20 complaints of a similar nature to the original 20 which LATSS had already contacted the licensee about. The licensee signed formal undertakings under the

Enterprise Act.

Licensee persisted with unfair business practices and an Interim Enforcement Order was obtained by LATSS three months later, covering breaches of Consumer Protection from Unfair Trading Regulations (CPRs), Consumer Credit Act, Sale of Goods Act, and Supply of Goods and Services Act.

One year later found in contempt of court for five breaches of the Interim Enforcement Order. Again similar unfair business practices to those which led to the Interim Order.

Two months after that the licensee was made subject to Final Enforcement Order, covering the same legislation. OFT also commences revocation action, licence ultimately revoked.

Decision: Suspension (from a date specified in the notice) - in this case suspension would most likely have been considered when LATSS had to re-approach the business.

Rationale for suspension decision:

Persistent and ongoing evidence of serious consumer harm suggesting that the licensee would be likely to continue with that behaviour – imminent risk of [serious] harm to consumers.

Failure to address harm or comply with action agreed with LATSS and indeed evidence of a persistent failure to co-operate with LATSS despite enforcement action.

Nature of the business – aimed at more vulnerable consumers with direct access to them - serious consumer harm relates to the credit activities of the business.

EXAMPLE 2: Licence issued for debt collection.

An enforcement body informs OFT that the licensee had previous convictions. No convictions had been declared on licence application. Information provided by the enforcement body suggests ongoing harassment of consumers by the licensee.

A Police National Computer (PNC) search showed convictions dating back over the previous eight years up to the current time. Offences included assault; affray; Grievous Bodily Harm; criminal damage; sexual assault; violent disorder; arson; theft; fraud; and failure to surrender.

Decision: Immediate suspension.

Rationale for the decision:

Numerous unspent and recent convictions for violence showing a persistent pattern of behaviour, which would suggest that the licensee would be likely to continue with that behaviour if the licence was not suspended– imminent risk of serious physical harm to consumers.

The **nature of the business** - the licensee has direct contact with consumers therefore posing a higher risk of further harm.

Example 3 Licensee issued for all categories with right to canvas off trade premises. Licensee provides stair lifts and mobility vehicles. Target customer base was the elderly.

LATSS warning letter issued following consumers complaints about aggressive and misleading sales practices including in relation to the sale of the credit. Consumer cancellation rights were apparently ignored, consumers were pressured into signing agreements and devices were supplied without regard as to their suitability for the individual in question, including devices obviously too large to fit into the consumer's homes. Some complaints indicated a failure to conduct any assessment of affordability of the finance packages being provided to elderly customers, or to pay any regard to, or to make any allowance for, consumers that evidenced significant mental capacity limitations.

OFT similarly raised concerns with the licensee. It provided undertakings to the OFT under the Enterprise Act 2002, in relation to breaches of the Consumer Credit Act, Sale of Goods Act and Consumer Protection from Unfair Trading Regulations.

Despite the warning letter and undertakings, a significant number of additional complaints followed and OFT took action to revoke the licence.

Decision: Suspension (from a date specified in the notice) taken before the Minded To Revoke (MTR)

Rationale for the decision: Licensee displayed a persistent pattern of behaviour that caused serious harm to consumers and persisted even after OFT and LATSS expressed concern about the practices operated. This suggests that the licensee would not have stopped his unfair business practices without suspension action – imminent risk to consumers.

The nature of the complaints – actively targeting and misspelling to a potentially vulnerable group with an apparent disregard for their

consumer rights - suggests a business model the main effect of which was consumer harm. Also, many of the complaints related to the selling of the credit.

Nature of the business – the target customers were elderly so there is a greater risk of some customers being more vulnerable –added to that is the fact that most sales took place in customers' homes. The facts of the case also show that in fact some of those customers were also vulnerable by virtue of mental capacity limitations.

Example case studies in which suspension action would be unlikely to be considered

EXAMPLE 4: Licence issued for consumer credit – loans to sub-prime consumers.

Licensee only declared his most recent conviction from six years ago for theft. Failed to declare all previous convictions or use of aliases.

Numerous convictions leading to prison sentences over a period of 20 years prior to the most recent conviction six years ago. They include many motoring offences (disqualified driving, no insurance, allowing to be carried), Trade Description Act offences and convictions for criminal damage, affray, assault, burglary, handling stolen goods, and Actual Bodily Harm.

Decision: No suspension but proceed with MTR

Rationale for decision: Serious offences, but the most recent conviction was for theft six years ago and there had been no evidence of ongoing consumer harm since that time. Does not pass the 'urgently necessary test' - no suggestion of imminent risk of harm to consumers, though the OFT may also consider prosecution for breach of section 7 of the Act if

appropriate.

EXAMPLE 5: Motor dealer with licence for consumer credit and credit brokerage.

Licence application contained misleading information about previous conviction for assault, making the offence appear more minor than it was.

Licensee recently convicted of forgery and fraud in relation to false consumer loan applications and currently serving a prison sentence.

Decision: Not to suspend, but proceed with MTR

Rationale for decision: Does not pass the 'urgently necessary' test - no imminent risk to consumers as licensee serving a prison sentence.

EXAMPLE 6: Licence issued for consumer credit.

The licensee's application contained several omissions of relevant information, including complete and accurate details of the nature of the proposed business.

Five years ago the police started investigating serious counterfeiting and drugs offences alleged to be committed by those involved in the running of the business following an anonymous tip-off.

Four years ago individuals involved in the running of the business were convicted of criminal damage and possession of an offensive weapon and made the subject of a civil cash forfeiture order under the Proceeds of Crime Act 2002.

Decision: Not to suspend, but proceed with MTR

Rationale for decision: Does not pass the 'urgently necessary' test as most recent offences are four years old. Insufficient evidence to support allegation of counterfeiting and drugs offences.

S34A issues

3.11 S34A of the Act will apply in suspension cases. This allows for the OFT, for the purpose of enabling the licensee's business, or any part of his business, to be transferred or wound up, to include as part of a determination for the licensee to carry on for a specified period in respect of:

(a) specified activities, or

(b) activities of specified descriptions

which, because of that determination, the licensee will no longer be licensed to carry on.

3.12 OFT may make use of s34A powers in circumstances where it judges that it is proportionate to permit some licensed activity to continue for a period of time after suspension in order to facilitate winding up or transferring the business. This may allow, for example, some consumer accounts to still be serviced for a period of time after suspension in order to allow the business to be wound up in an orderly fashion. In such a situation, this would, as a side effect, give consumers sufficient time to rearrange their affairs where they are making use of the services of a business whose licence had been suspended.

3.13 The power is flexible and we may tailor its use to the individual circumstances of a licensee. We could allow for the licensee to be able to undertake certain limited licensable activities (whether limited to a particular category or in a particular manner) for a set period, as necessary to allow the business to be transferred or wound up.

- Q2** Is the guidance clear on the circumstances in which the power to suspend may be employed?
- Q3** Are there any substantive aspects with which you disagree?
- Q4** Are the case studies and the rationale for the decisions clear?
- Q5** Do you consider that there are any significant omissions particularly in respect of the circumstances in which you would expect to see OFT suspend a licence with immediate effect?

4 PROCEDURES FOR USE OF THE POWER

4.1 The statutory process for suspension laid down by the new legal provisions is a three-stage decision process:

- (a) Decision by OFT under section 32A(2) to suspend the licence and inviting representations on that decision.
- (b) If the licensee wishes to make representations, a determination under section 34ZA (following reconsideration of the decision under 32A) whether or not that first decision is confirmed.
- (c) If that determination is adverse, and if an appeal is made under section 41, a decision (by way of re-hearing) by the First Tier Tribunal.

4.2 The OFT can suspend a licence:

- before issuing a 'minded to revoke' notice ('MTR')
- after issuing a MTR notice but before a 'determination to revoke' ('DTR')
- after a DTR, but before an appeal (to protect consumers from on-going risks during a [potentially protracted] appeal period)
- during an appeal to the First Tier Tribunal or after a judgement against the trader, but before the end of any subsequent appeal to the Upper Tribunal (or beyond).

4.3 Whatever stage the action is taken, the judgement must still be that it is **urgently necessary** to protect consumers. The facts must justify that action and **it will not follow automatically** that in **all** cases where a trader is deemed unfit and a DTR is issued, the licence will be suspended. OFT does not consider suspension to be a means by which to circumvent the appeals mechanisms. There must be an **imminent** risk of harm sufficient to justify suspension.

- 4.4 In circumstances where a suspension is after a DTR it will be for the OFT to explain why suspension is necessary now when it was not thought necessary earlier in the process. That may be influenced by the emergence of new or clearer facts at adjudication or at an appeal.

Decision-making model

- 4.5 In considering how the decision-making process should operate we have had regard to the need to balance fairness to the licensee with the need to operate swiftly to address the urgent necessity that the power seeks to address. We recognise the importance for the licensee of the decisions we will be called upon to make and have sought to ensure that our proposed decision-making model secures the maximum possible procedural fairness to the licensee.
- 4.6 The OFT is consulting on a proposal to introduce collective decision-making on suspension cases. The model offers a number of positive features: collective judgement; enhanced senior oversight and; separation of the investigation team and decision-makers.
- 4.7 The process will operate as follows: Following investigation by the OFT, the Credit Group Director ('the Director') will be responsible for presenting the evidence and putting forward a recommendation to an independent Case Decision Group ('CDG'), appointed by senior officials within the OFT. The Director will play no role in deciding on the proposed suspension, and his recommendation carries no presumption that the CDG will agree. The CDG will not have had any earlier involvement in the investigation thus reducing any perception of, or risk of, confirmation bias. The CDG will consist of three senior members of OFT staff (at least one of which will be a lawyer – but not the case lawyer). It will be for the CDG to review the evidence and consider whether the case meets the statutory test for suspension. The CDG will take the decision whether to suspend with immediate effect or on a date specified in the notice.

4.8 A diagram of the proposed decision-making model can be found at Annexe [D].

Notice of suspension

4.9 OFT is required to issue a notice under s32A(2) of the Act. The notice must contain the following information:

- It must inform the licensee that the licence is to be suspended from the date of the notice or from a later date specified in the notice.
- It must state the reasons for the suspension.
- It must state either that the suspension is to end on a specified date, which must be no later than the last day of the 12 months beginning with the day on which the suspension takes effect, or that the duration of the suspension is to be as provided by section 32B (where a Minded to Revoke Notice is issued by the OFT).
- An invitation to submit representations to an independent OFT adjudicator within 21 days.

Representations

4.10 There is no requirement within the legislation for the licensee to be offered the opportunity to make representations **prior** to the suspension decision. The legislation allows for the licensee, following receipt of a notice of suspension, to submit either written or oral representations, or both, within 21 days.

4.11 In order to ensure the process is fair to licensees, unless the nature of the harm which consumers are exposed to is of such magnitude as to warrant immediate suspension (the OFT views physical harm as being most likely to meet this test), then the decision to suspend will not take effect until a later date identified in the notice. This will provide the licensee with a short period to make representations to an OFT adjudicator for a reconsideration of the suspension before it comes into

effect. As set out above, only in rare cases – where the harm which would be prevented by immediate suspension is particularly grave, would a licence be suspended with immediate effect and representations would be invited after the suspension has come into effect.

- 4.12 Given the scope to suspend at any stage, should new or clearer facts emerge **after** issuing a MTR or DTR, or during an appeal to the First Tier Tribunal, which make it urgently necessary to suspend to protect consumers, the same process of issuing a notice followed by representations on the suspension will be employed.
- 4.13 On the basis of the facts in the example case studies in Chapter 3, only example 2 would require **immediate** suspension – due to the violent pattern of behaviour demonstrated by the licensee. The licensees in the other suspension examples (1 and 3) would be invited to make representations before the suspension came into effect as, whilst the harm was serious and persistent, no violence was involved.
- 4.14 The adjudicator considering any representations will not have been part of the original decision-making process with regards to the suspension (that is, they will not be a member of the CDG or the investigative team) and they will also be independent of any other enforcement action including MTR/DTR action. The adjudicator will reconsider the suspension decision in the light of the representations and any actions taken by the licensee, and can either confirm or revoke the suspension decision. If the decision has not yet come into effect the adjudicator can either revoke the decision before it takes effect or confirm the date of the suspension or, if appropriate, decide on a new date for it to take effect.
- 4.15 Representation hearings on suspension cases will be expedited and we anticipate that a written decision would be issued to the trader no later than 14 days from the latest representations (oral or written) given by the trader. We anticipate that the whole process (assuming representations are made) from issue of notice, representations and

reconsideration of the decision by the adjudicator, would take approximately one month.

- 4.16 Should representations relate to evidence/arguments which OFT had not been aware of at the time of the suspension decision, the licensee should give OFT advance notice of that information before the hearing. OFT representatives will attend the hearing and be given the opportunity to respond (the licensee will be able to respond to any further submissions by the OFT).

Appeals of suspension decisions

- 4.17 Once OFT processes have been exhausted the licensee has the right to appeal against the decision of the Adjudicator to the First Tier Tribunal General Regulatory Chamber (Consumer Credit), which is independently administered by the Tribunals Service, an agency of the Ministry of Justice. See *First Tier Tribunal (Consumer Credit) – General Regulatory Chamber – Explanatory Leaflet*.³

Publicity and suspension

- 4.18 The Act requires the OFT to maintain a public register (the Consumer Credit register) of decisions made under the licensing regime. The decision to suspend a licence will be noted on the public register from the date it takes effect. We may issue press notices concerning the suspension if we consider that it helps the performance of our functions [to protect the interests of consumers] to do so.

Q6 Is the decision-making model clear?

Q7 Do you have any concerns about the process for decision-making, including representations?

³ www.justice.gov.uk/downloads/global/forms/tribunals/consumer-credit/consumer-credit-short-guide.pdf

- Q8 Is the guidance clear on representations and appeals mechanisms?**
- Q9 What is your opinion on the time it will take for decisions to be made once representations have been made?**
- Q10 An alternative to issuing a detailed record of the adjudicator's reconsideration of the decision within two weeks of representations, is the option of a short (skeleton) record provided in a quicker timeline. What would be your thoughts/preferences on this as an option?**
- Q11 Are there any substantive aspects with which you disagree?**
- Q12 Do you consider that there are any significant omissions?**

5 FURTHER INFORMATION ON CONSUMER CREDIT LICENSING

Additional booklets and information on consumer credit licensing and the Consumer Credit Act and related Regulations are available from our website www.offt.gov.uk.

If you have any queries about consumer credit licensing, you can contact the OFT at:

Consumer Credit Licensing
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX

Phone: 020 7211 8608

Email: enquiries@oft.gov.uk

For information about FSA authorisation, you can visit the FSA website at www.fsa.gov.uk or phone them on 020 7066 0082.

For further help and advice you can also contact:

- your Local Authority Trading Standards Service (see local phone book for contact details, or go to www.tradingstandards.gov.uk)
- your trade association, if appropriate
- an independent legal adviser.

ANNEXE(S)

A. SUMMARY OF QUESTIONS

- Q1 Do you have any comments about the structure and format of the guidance document?**
- Q2 Is the guidance clear on the circumstances in which the power to suspend may be employed?**
- Q3 Are there any substantive aspects with which you disagree?**
- Q4 Are the case studies and the rationale for the decisions clear?**
- Q5 Do you consider that there are any significant omissions particularly in respect of the circumstances in which you would expect to see OFT suspend with immediate effect?**
- Q6 Is the decision-making model clear?**
- Q7 Do you have any concerns about the process for decision-making, including representations?**
- Q8 Is the guidance clear on representations and appeals mechanisms?**
- Q9 What is your opinion on the time it will take for decisions to be made once representations have been made?**
- Q10 An alternative to issuing a detailed record of the adjudicator's reconsideration of the decision within two weeks of representations, is the option of a short (skeleton) record provided in a quicker timeline. What would be your thoughts/preferences on this as an option?**
- Q11 Are there any substantive aspects with which you disagree?**
- Q12 Do you consider that there are any significant omissions?**

B. CONSULTATION CRITERIA

[The Civil Service Reform Plan](#) commits the Government to improving policy making and implementation with a greater focus on robust evidence, transparency and engaging with key groups earlier in the process.

As a result the Government is improving the way it consults by adopting a more proportionate and targeted approach, so that the type and scale of engagement is proportional to the potential impacts of the proposal. The emphasis is on understanding the effects of a proposal and focusing on real engagement with key groups rather than following a set process.

The key Consultation Principles are:

- departments will follow a range of timescales rather than defaulting to a 12-week period, particularly where extensive engagement has occurred before
- OFT guidance remains that teams conducting technical consultations adhere to a 12-week period as extensive and detailed engagement will be required
- departments will need to give more thought to how they engage with and consult with those who are affected
- consultation should be 'digital by default', but other forms should be used where these are needed to reach the groups affected by a policy, and
- the principles of the Compact between government and the voluntary and community sector will continue to be respected.

The new Consultation Principles will be promoted within Whitehall now, and the public will begin to see the new guidance take effect in early autumn 2012.

The full Cabinet Office *Consultation Principles* can be found on the Cabinet Office website at: www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance

This guidance replaces the [Code of Practice on Consultation](#) issued in July 2008 on the BIS website.

C. DRAFT CLAUSE

196A

After Clause 91

LORD SASSOON

Insert the following new Clause—

‘Suspension of licences under Part 3 of Consumer Credit Act 1974

(1) The Consumer Credit Act 1974 is amended as follows.

(2) In section 32 (suspension or revocation)—

(a) in subsection (1), omit ‘or suspended’,

(b) in subsection (2)—

(i) in paragraph (a), omit ‘, as the case may be,’ and ‘, or suspend it until a specified date or indefinitely,’, and

(ii) in paragraph (b), omit ‘or suspension’ and ‘or suspend’,

(c) in subsection (3)—

(i) in paragraph (a), omit ‘, as the case may be,’ and ‘, or suspend it until a specified date or indefinitely,’, and

(ii) in paragraph (b), omit ‘or suspension’,

(d) in subsection (4)—

(i) in paragraph (a), omit ‘, as the case may be,’ and ‘, or suspend it until a specified date or indefinitely,’, and

(ii) in paragraph (b), omit ‘or suspension’,

(e) in subsections (6) and (7), omit ‘or suspension’,

(f) omit subsection (8),

(g) in subsection (9), omit ‘or to suspend’, and

(h) for the title, omit ‘Suspension and’.

(3) After section 32 insert—

‘32A Power to suspend licence

(1) If during the currency of a licence it appears to the OFT to be urgently necessary for the protection of consumers that the licence should cease to have effect immediately or on a specified date, the OFT is to proceed as follows.

- (2) In the case of a standard licence the OFT must, by notice—
- (a) inform the licensee that the OFT is suspending the licence from the date of the notice or from a later date specified in the notice,
 - (b) state the OFT’s reasons for the suspension,
 - (c) state either—
 - (i) that the suspension is to end on a specified date, which must be no later than the last day of the 12 months beginning with the day on which the suspension takes effect, or
 - (ii) that the duration of the suspension is to be as provided by section 32B,
 - (d) specify any provision to be made under section 34A, and
 - (e) invite the licensee to submit to the OFT in accordance with section 34ZA representations—
 - (i) as to the suspension, and
 - (ii) about the provision (if any) that is or should be made under section 34A.
- (3) In the case of a group licence the OFT must—
- (a) give general notice that the OFT is suspending the licence from the date of the notice or from a later date specified in the notice,
 - (b) state in the notice the OFT’s reasons for the suspension,
 - (c) state in the notice either—
 - (i) that the suspension is to end on a specified date, which must be no later than the last day of the 12 months beginning with the day on which the suspension takes effect, or
 - (ii) that the duration of the suspension is to be as provided by section 32B,
 - (d) specify in the notice any provision to be made under section 34A, and
 - (e) in the notice invite any licensee to submit to the OFT in accordance with section 34ZA representations as to the suspension.
- (4) In the case of a group licence issued on application the OFT must also—
- (a) inform the original applicant of the matters specified under subsection (3)(a) to (d) in the general notice, and

(b) invite the original applicant to submit to the OFT in accordance with section 34ZA representations as to the suspension.

(5) Except for the purposes of sections 29 to 32 and section 33A, a licensee under a suspended licence is to be treated, in respect of the period of suspension, as if the licence had not been issued.

(6) The suspension may, if the OFT thinks fit, be ended by notice given by it to the licensee or, in the case of a group licence, by general notice.

(7) In this section 'consumers', in relation to a licence, means individuals who have been or may be affected by the carrying on of the business to which the licence relates, other than individuals who are themselves licensees.

32B Duration of suspension

(1) This section applies where a notice under section 32A provides for the duration of a suspension under that section to be as provided by this section.

(2) The suspension ends at the end of the period of 12 months beginning with the day on which it takes effect, but this is subject to—

(a) subsections (3) and (4) (where those subsections give a later time), and

(b) the powers of the OFT under section 32A(6) and section 33.

(3) Subsection (4) applies where—

(a) the OFT gives notice under section 32 that it is minded to revoke the licence, and

(b) it gives that notice—

(i) on or before giving the notice under section 32A, or

(ii) after giving that notice but before the end of the period of 12 months mentioned in subsection (2).

(4) The period of suspension is to continue until—

(a) the time of any determination by the OFT not to revoke the licence in pursuance of the notice under section 32, or

(b) where the OFT determines to revoke the licence in pursuance of the notice, the end of the appeal period.'

(4) In section 33 (application to end suspension), for subsection (1) substitute—

'(1) On an application made by a licensee the OFT may, if it thinks fit, by notice to the licensee end the suspension of a licence under section 32A, whether the suspension was for a fixed period or for a period determined in accordance with section 32B.'

(5) In section 33A (power of OFT to impose requirements on licensees) after subsection (6) insert—

'(6A) A requirement imposed under this section during a period of suspension cannot take effect before the end of the suspension.'

(6) After section 34 insert—

'34ZA Representations to OFT: suspension under section 32A

(1) Where this section applies to an invitation by the OFT to any person ('P') to submit representations, the OFT must invite P, within 21 days after the notice containing the invitation is given to P or published, or such longer period as the OFT may allow—

(a) to submit P's representations in writing to the OFT, and

(b) to give notice to the OFT, if P thinks fit, that P wishes to make representations orally,

and where notice is given under paragraph (b) the OFT must arrange for the oral representations to be heard.

(2) The OFT must reconsider its determination under section 32A and determine whether to confirm it (with or without variation) or revoke it and in doing so must take into account any representations submitted or made under this section.

(3) The OFT must give notice of its determination under this section to the persons who were required to be invited to submit representations about the original determination under section 32A or, where the invitation to submit representations was required to be given by general notice, must give general notice of the confirmation or revocation.'

(7) In section 34A (winding-up of standard licensee's business), in subsection (2)—

(a) in paragraph (c), omit 'suspend or', and

(b) after paragraph (c) insert—

'(d) a determination to suspend such a licence under section 32A (including a determination made under section 34ZA on reconsidering a previous determination under section 32A);'.

(8) In section 41 (appeals) after subsection (1) insert—

‘(1ZA) References in the table to a determination as to the suspension of a standard licence or group licence are to be read as references to a determination under section 34ZA to confirm a determination to suspend a standard licence or group licence.’

(9) Nothing in this section affects the powers conferred by section 22 of FSMA 2000 or section 91 of this Act.

D. DECISION-MAKING MODEL

