

Summary of responses to the consultation on 'Credit brokers and intermediaries'

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

May 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	16
4 Service provision and marketing practices	23
5 Transparency of status, fees and commission	31
6 Refunds	40
7 Complaints handling	43
8 Regulatory compliance and enforcement	44
9 Credit intermediaries	45
A Summary of questions	49
B List of Respondents	51

1 INTRODUCTION

- 1.1 On 1 June 2011, the Office of Fair Trading (OFT) launched a consultation on draft guidance for credit brokers and credit intermediaries ('the draft guidance'). The final guidance was published on 24 November 2011 ('the guidance').
- 1.2 The primary aim of the guidance is to provide further clarity for businesses engaged in credit brokerage and credit intermediaries as to the standards expected of them by the OFT.
- 1.3 In addition, the guidance clarifies what the OFT considers to be the responsibilities of relevant businesses (primarily creditors) for the activities of credit brokers and credit intermediaries with which they do business.
- 1.4 The consultation document asked a total of 34 questions about the content of the draft guidance. We received a total of 14 responses from consumer and business representatives and individual businesses. In addition, we engaged with a number of consumer and industry representatives during the consultation period.
- 1.5 Some respondents made general comments on various aspects of the draft guidance (often supplemented with proposals for possible amendments) while others responded to each specific question in the consultation document. All of the comments and suggestions received have been reviewed and, to the extent that we consider it appropriate to do so, they have been reflected in the guidance.
- 1.6 In part to respect the confidentiality of respondents to our consultation ('respondents') and in part because we believe that it is more helpful for the respondents and other interested parties, the focus of this document is on summarising the key elements of the responses received rather than publishing extracts from – or the full content of – those responses.
- 1.7 This document contains a short summary of the main issues raised by respondents 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 the guidance document. We hope that respondents and other interested parties will find it helpful.

2 STATUS, FORM AND CONTENT OF THE GUIDANCE

Timing of guidance

- 2.1 A couple of respondents enquired about the timing of the issuing of the guidance – particularly given the anticipated likelihood of a transfer of regulatory responsibility for consumer credit from the OFT to the Financial Conduct Authority in the foreseeable future.
- 2.2 The OFT, as the consumer credit licensing authority, has a statutory duty under section 25A of the Consumer Credit Act (the Act) 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.
- 2.3 To date, we have not published specific guidance setting out our expectations in terms of the standards of conduct of licensed credit brokers (and/or those acting as credit intermediaries as defined in section 160A of the Act) in a single document.
- 2.4 It is also the case that our 'intelligence gathering' has indicated that, in recent times, one of the main growth sectors in terms of generating credit-related consumer complaints has been that of 'sub-prime credit brokerage'.
- 2.5 In advance of any possible transfer of regulatory responsibilities, it is 'business as usual' so far as the OFT is concerned. The principles of fair business practice contained within the guidance are relevant to all businesses engaged in credit brokerage (and, where relevant, to credit intermediaries), notwithstanding possible future changes to the regulatory regime.

Citizens Advice super-complaint

- 2.6 A couple of respondents made reference to the Citizens Advice super-complaint, 'Cashing in',¹ the OFT response to which was published in June 2011.²
- 2.7 One respondent suggested that the OFT was only publishing its guidance for credit brokers and intermediaries as a response to receiving the super-complaint.
- 2.8 Drafting of the guidance was already at an advanced stage before we were aware that Citizens Advice would be submitting its super-complaint in March 2011. As stated in paragraph 1.7 of the guidance itself, we produced the guidance in line with our statutory duty to do so under section 25A of the Act.
- 2.9 In finalising the draft guidance, we ensured that appropriate regard had been given to issues raised in the super-complaint – as well as to other relevant guidance and legislation and matters that had come to our attention in the course of exercising our regulatory functions.

Implementation

- 2.10 A couple of respondents to the consultation asked whether there would be a transitional period in which to implement any changes to systems and procedures considered necessary in order to be able to adhere to the standards set out in the guidance.
- 2.11 The principles set out in the guidance are ones that businesses should **already** have regard to – not least because many of them emanate **directly** from existing legislative requirements³ and/or have been set out

¹ www.citizensadvice.org.uk/cashing_in.htm

² www.of.gov.uk/news-and-updates/press/2011/62-11

³ For example, the right to recover brokerage fees under section 155 of the Consumer Credit Act and the requirements placed on credit intermediaries by 160A of the Consumer Credit Act.

in earlier OFT guidance such as *Irresponsible lending – OFT guidance for creditors* (ILG)⁴ and *Non-status lending guidelines for lenders and brokers*.

- 2.12 The guidance helps to identify steps that credit brokers and/or credit intermediaries **might** take to implement these principles/legal requirements in practice. We would expect responsible businesses to be taking such steps already.
- 2.13 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 of the Consumer Credit Act 1974).
- 2.14 For these reasons, there is no transition period or 'implementation date' as such.

Proportionality considerations

- 2.15 It was suggested that parts of the guidance set out **absolute standards** when OFT's reasonable expectations of licensees should be that they **exercise reasonable care** in their dealings with consumers.
- 2.16 Where the guidance may appear to set absolute standards, this is generally reflective of standards required as matters of law.
- 2.17 In large part the guidance is limited to setting out OFT's reasonable expectations of the standards of conduct to be observed by responsible credit brokers and credit intermediaries.
- 2.18 In considering the fitness of licensees and applicants to hold a consumer credit licence, we consider their conduct, skills, knowledge, experience, practices and procedures, in light of the standards set out in our

⁴ www.oft.gov.uk/about-the-oft/legal-powers/legal/cca/irresponsible

guidance – taking account of relevant individual factors and circumstances in each case.

- 2.19 Our recognition of the need to take **proportionality considerations** into account in adopting our regulatory approach is identified at paragraph 8.1 of the guidance:

'The OFT expects brokers and intermediaries to take 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).'

Interaction with relevant legislation

Data Protection Act 1998 (DPA) and the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECRs)

- 2.20 Some respondents sought further information regarding relevant legal obligations arising from the DPA and PECRs.
- 2.21 Primary regulatory responsibility for both the PECRs and the DPA rests with the Information Commissioner's Office (ICO). The OFT engaged with the ICO in producing the guidance and further information/advice on data protection compliance can be found on the ICO website.⁵ Credit brokers and credit intermediaries may also wish to consider seeking independent legal advice on the extent to which their individual practices and procedures are consistent with DPA and PECRs requirements.

⁵ www.ico.gov.uk

Consent to process data

2.22 Some further clarity was sought on the OFT position as (now) set out in paragraph 3.9 of the guidance. In particular, a couple of respondents contended that the OFT position on 'consent' went beyond what was required in law under the DPA.

2.23 The OFT would normally expect the borrower's consent to be sought, as a matter of **good practice**, before processing personal data. This position has been clarified in the guidance in the text box adjacent to paragraph 3.9t:

'Borrower's personal data must be processed fairly and lawfully and **only for specified purposes**.

While it **may** still be possible to **lawfully** pass a borrower's (sensitive) personal data to an **appropriate** third party, in the absence of the borrower's prior consent having been obtained, where one of the other DPA conditions relevant for the purposes of processing **personal** data is met (**and**, where appropriate, one of the other conditions relevant for the purposes of processing **sensitive** personal data is met),⁶ the OFT would normally expect the borrower's consent to be sought (as a matter of **good practice**) before doing so.'

Subject access requests and recording the source of data

2.24 It was contended that there is no **legal** requirement **per se** to record the source of personal data, only to disclose it in response to a subject access request if it **is recorded**.

⁶ See paragraphs C.7 – C.10 inclusive in (OFT1373) *Mental Capacity – OFT guidance for creditors*

www.ofc.gov.uk/OFTwork/publications/publication-categories/guidance/consumer_credit_act/ofc1373

- 2.25 A key principle of the guidance is that credit brokers and intermediaries ensure **transparency** in all dealings with consumers. If a record is held showing where the borrower's details were obtained from then, in accordance with paragraph 3.9w of the guidance, the OFT would expect that information to be disclosed upon receipt of a request from the borrower to do so.
- 2.26 The OFT's policy position in this regard is, **in part**, aimed at discouraging- and facilitating the identification of- businesses engaging in 'phishing'.⁷

Privacy notices

- 2.27 In line with helpful suggestions made by respondents, we have included a text box adjacent to paragraph 3.9q of the guidance setting out our expectations in respect of the use of privacy notices:

'The OFT would expect any privacy notice to be clearly presented⁸ in such a way that it is likely to come to the attention of the borrower.

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

We would also expect brokers and intermediaries to have proper regard to the *Privacy Notices Code of Practice*⁹ issued by the Information Commissioner's Office.'

⁷ 'Phishing' is a means by which a business may attempt to acquire a consumer's sensitive information by deception by masquerading as a trustworthy entity (typically in an email or through instant messaging).

⁸ For example, in credit adverts, on websites, or in the terms and conditions of credit agreements.

Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

- 2.28 Paragraph 4.1 of the guidance emphasises the need for credit brokers and credit intermediaries to be **transparent** in all their dealings with borrowers and sets out that they should clearly disclose at the outset the full nature and extent of the services they offer to the borrower, any charges, and the nature and extent of any relevant associations with creditors or other third parties.
- 2.29 One respondent suggested that failure to be sufficiently transparent in dealings with borrowers **could** also potentially constitute an **offence** for the purposes of the CPRs (in terms of potentially being a 'misleading omission') – and we agree with this contention.
- 2.30 Chapter 8 of the guidance sets out the various compliance tools/options available to the OFT – including the use of the CPRs where we would consider it appropriate to do so (see footnote 96).

Equality Act 2010

- 2.31 One respondent contended that the OFT should require credit brokers/intermediaries to make 'reasonable adjustments' to better meet the needs of **all** people with a disability, not just those with a mental capacity limitation.
- 2.32 It was also suggested that the inappropriate targeting and/or exploiting of vulnerable consumers and/or failure to make the necessary reasonable adjustments with a view to better enabling those with disabilities to access services on an equal footing with other debtors, should be considered to be unfair business practices.
- 2.33 Paragraph 4.37 of the guidance states that borrowers may be vulnerable **for a variety of reasons**, including disability, and states that they should

⁹www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/privacy_notices_cop_final.pdf

not be inappropriately targeted or exploited. The guidance also sets out at paragraph 4.38 that the OFT expects the policies and procedures of credit intermediaries and credit brokers, where relevant and applicable, to make specific provision for, amongst other matters, the fair and appropriate treatment of vulnerable borrowers such as these.

- 2.34 References to 'vulnerable' and/or 'disabled' borrowers in paragraphs 4.37 and 4.38 include, **but are not limited to**, borrowers with mental health problems and/or who have mental capacity limitations.
- 2.35 Paragraph 2.2 of the guidance, which sets out overarching principles of consumer protection and fair business practice that apply to the conduct of all credit brokers and credit intermediaries, states that credit brokers and intermediaries should take appropriate steps with a view to:
- 'Treating borrowers fairly – borrowers should not be targeted with credit products that are clearly unsuitable for them, or subjected to aggressive or oppressive behaviour or coercion. Neither should they be subjected to conduct that is deceitful, oppressive, unfair or improper whether unlawful or not. Borrowers who may be particularly vulnerable by virtue of their current indebtedness, poor credit history or by reason of age or health or **disability**, or for any other reason, should, in particular not be targeted or exploited.'
- 2.36 Failure to have appropriate regard to these principles is a matter that the OFT would take into account in considering fitness to hold a consumer credit licence.

Financial Services Distance Marketing Regulations 2004 (FSDMRs)

- 2.37 Some respondents to the consultation suggested that credit brokers/intermediaries should be **required** to inform consumers of their rights under the FSDMRs - and that failure to do so should be an unfair business practice.
- 2.38 Under the FSDMRs, businesses are required to give consumers information about the contract including their right to cancel.

2.39 We have added the following additional bullet point to paragraph 2.2 of the guidance (which sets out a number of steps that the OFT considers it appropriate for credit brokers and intermediaries to take in their dealings with borrowers):

'providing full and early disclosure to borrowers, **as applicable**, of their right to cancel brokerage agreements entered into at a distance under the Financial Service (Distance Marketing) Regulations 2004, their right to cancel a cancellable credit agreement under section 69 of the Act, and their right to withdraw from credit agreements in accordance with section 66A of the Act.'

2.40 As stated in footnote 85 of the guidance:

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

Definitions

Lead generators and aggregators

2.41 Some respondents asked for further information on the extent to which the guidance is applicable to lead generators and aggregators.

2.42 In general terms, the scope of the guidance is set out in chapter 1, with fuller definitions of the types of businesses covered provided in Annexes A and B.

2.43 The extent to which the guidance applies to lead generators (as is the case with any other business) depends on the extent to which the business concerned is engaged in credit brokerage as defined in section 145(2) of the Act (see paragraph A.1 of the guidance) and/or is acting

as a credit intermediary for the purposes of section 160A of the Act (see paragraphs B.2 and B.3 of the guidance).

- 2.44 Paragraph A.4 sets out that lead generators (who sell leads to other brokers) and aggregators or sub-aggregators (who filter borrowers' details to match them to brokers) may be engaged in brokerage where they effect introductions to sources of credit or other credit brokers.

Sub-prime

- 2.45 One respondent asked what is meant by 'sub-prime' in the context of this guidance.
- 2.46 In very general terms, references to sub-prime borrowers relate to borrowers who may have restricted access to sources of mainstream credit.

3 SCOPE AND IMPACT OF THE GUIDANCE

Impact assessment

- 3.1 A small number of consultation respondents asked whether the OFT 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.

Scope

The Consumer Credit Directive (CCD)

- 3.3 Some respondents suggested that aspects of the draft guidance went beyond the requirements of the CCD – specifically with regard to:
- the provision of adequate explanations before a consumer credit agreement is made and
 - applicability to consumer hire agreements.
- 3.4 Section 55A of the Act introduces a requirement on creditors to provide borrowers with adequate explanations of certain specified matters before a credit agreement is made with a borrower. However, section 55A (5) states that the creditor does not have to meet this obligation if a credit intermediary has already done so. Hence, there is an expectation that the pre-agreement explanation will, in some instances, be provided by a credit intermediary.
- 3.5 Paragraph 4.27 of the guidance has been amended slightly from the position as stated in the draft:
- 'Section 55A of the Act introduces a requirement on creditors to provide borrowers with adequate explanations before entering into credit agreements. However, the Act envisages circumstances when credit

intermediaries may provide such explanations to borrowers instead of, or on behalf of, creditors. In such cases, the OFT would expect the creditor to take reasonable steps to satisfy itself that the intermediary had given an explanation, that this was adequate in the circumstances, and that the intermediary had also complied with the other requirements of section 55A of the Act.'

3.6 It states in the text box adjacent to paragraph 4.29 of the guidance:

'Although the specific legal requirements of section 55A of the Act do not apply to consumer hire agreements, before an agreement is made, we would expect all suppliers of goods to consumers **on hire**, or, where appropriate, those acting as brokers or intermediaries in respect of such agreements, to consider highlighting key features of the consumer hire agreement to the hirer such as (where applicable) the consumer's right to cancel the hire agreement.'

Dual regulation

3.7 Some respondents suggested that breaches of legislation for which the OFT does not have **primary regulatory responsibility** - for example the DPA - should not be considered as unfair business practices and/or provide a basis for calling into consideration the fitness of the business concerned to hold a consumer credit licence. It was suggested that licence holders may be subject to 'sanctions' imposed by different regulators in respect of the same breach.

3.8 Section 25 of the Act provides that, in considering fitness to hold a consumer credit licence, the OFT shall have regard to **any** matters that 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 (amongst other matters) engaged in business practices appearing to the OFT to be deceitful, oppressive or otherwise unfair or improper, **whether unlawful or not**.

3.9 It is clear from the above that, in undertaking its statutory duty to consider the 'fitness' of licensees and applicants, the OFT is required to

have regard to relevant breaches of legislation and that this requirement is not limited to breaches of the Act and its associated regulations. This statutory duty is no less applicable under circumstances in which a licensee may have been subjected to a sanction by another regulator as a consequence of having engaged in some form of misconduct. Indeed, the fact that the misconduct was considered sufficiently serious to merit the imposition of such a sanction would be relevant to the OFT's fitness consideration.

- 3.10 Neither the imposition of requirements where the OFT is dissatisfied with any matter in connection with a licensed business nor the revocation or refusal of a credit licence where the OFT considers a business to be 'unfit' are **punitive sanctions** as such – but are rather regulatory actions taken by the OFT with a view to protecting consumers from actual or potential harm.
- 3.11 The OFT is committed to fair, effective and proportionate enforcement. In practice this means that where we identify non-compliance with the law and/or non-adherence to relevant OFT guidance, we will decide on the appropriate regulatory response in the light of the facts and circumstances of the individual case.

Applicability to both credit brokers and credit intermediaries

- 3.12 Some respondents requested further clarity on the aspects of the guidance that apply to credit brokers and the aspects that apply to credit intermediaries – in particular that certain requirements pertaining to consumer hire agreements, that apply to credit brokers, do not apply to credit intermediaries.
- 3.13 As stated in paragraph 1.9 of the guidance:

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

- 3.14 However, where it appears to us applicable/appropriate to do so, we have sought to identify in the guidance that a particular 'requirement' applies only to credit brokers or to credit intermediaries.
- 3.15 For example, footnote 10 states that the definition of credit intermediary does not encompass activities relating to consumer hire agreements.¹⁰
- 3.16 However, paragraph 4.29 of the guidance and the adjacent text box state that even where specific legal requirements may not be applicable (in respect of consumer hire agreements or otherwise), the OFT still expects credit brokers or credit intermediaries to have regard to the **general principles of consumer protection** which are (predominantly) set out in chapter 2 of the guidance.
- 3.17 Annexes A and B of the guidance provide definitions of credit brokers and credit intermediaries (respectively) and set out the key differences (and similarities) between the two categories of person.

Distinction between 'ancillary' and 'primary' functions

- 3.18 One respondent contended that the guidance should differentiate between credit brokerage/intermediation as an **ancillary** function and credit brokerage/intermediation as a **primary** function as there are differences between point of sale finance (ancillary) and introducing borrowers to, for example, sources of high cost credit such as 'payday loans' (primary). It was suggested that the regulatory regime might be less onerous where the credit is an ancillary product.
- 3.19 'Credit brokerage' and 'credit intermediaries' are both defined in the Act. The Act does not differentiate between those who engage in these activities as an ancillary as opposed to a primary business activity –

¹⁰ Footnotes 13 and 28 also state that the Consumer Credit (Advertisements) Regulations 2010 do not apply to consumer hire agreements.

consequently, it would not be appropriate for the OFT to do so in producing 'statutory guidance'.¹¹

3.20 However, the OFT adopts a risk-based approach to the regulation of licensed businesses and will tend to focus its finite resources on those matters/activities that it considers pose the greatest risk of consumer harm. Consequently, if we consider that businesses engaging in regulated activities ancillary to their primary business activity pose less of a risk of consumer harm than those businesses that engage in the regulated activity as a primary business activity, we are likely to adopt a somewhat 'lighter touch' regulatory approach to the former category of business.

Application to business lending

3.21 A small number of respondents to the consultation considered that the guidance should further clarify the extent of its applicability to business lending.

3.22 Footnote 12 of the guidance sets out that the scope of the guidance extends to include some brokerage for business purposes.

3.23 Section 145(2) of the Act states that credit brokerage is the effecting of introductions of **individuals** desiring to obtain credit to consumer credit businesses (or other credit brokers).

3.24 Similarly, section 160A of the Act identifies credit intermediaries as persons engaging in the following activities:

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

¹¹ See section 25A of the Act.

- entering into regulated credit agreements, other than agreements secured on land, with **individuals** on behalf of creditors.

3.25 As stated in section 189 of the Act, an **individual** includes:

- a partnership consisting of two or three persons, not all of whom are bodies corporate, and
- an unincorporated body of persons which does not consist entirely of bodies corporate and is not a partnership.

Creditor responsibility for third parties

3.26 Some respondents (creditors) stated that although they accepted that it was not unreasonable for them to be expected to take 'reasonable steps' to satisfy themselves that business associates were not engaging in unfair practices, they questioned whether their **own** (the creditor's) fitness should be called into question if such business associates (credit brokers and/or intermediaries) were engaged in such practices.

3.27 Paragraph 1.24 of the guidance states that the OFT considers that creditors should take **appropriate responsibility** for the acts or omissions of credit brokers and intermediaries acting as their agents and/or business associates.

3.28 Paragraph 1.25 of the guidance states that if a creditor chooses to do business (or continues to do business) with a third party which it suspects, or reasonably ought to suspect, is engaged in behaviour which the OFT is likely to consider to be inconsistent with fitness to hold a consumer credit licence, its own fitness may be called into consideration.

3.29 Our aim is to ensure that licensed businesses do not ignore the unfair or improper practices of others instructing them or acting on their behalf. This does not constitute the OFT sub-contracting regulatory responsibility for the actions of credit brokers and/or intermediaries to creditors that are their business associates. It is rather the case that if

creditors simply 'turn a blind eye' to unfair practices, engaged in by their associates, which might harm consumers, then they are, to some extent, facilitating the continuance of the unfair practices in question and, in so doing, are not exercising the level of responsibility that the OFT expects from businesses that it licenses. In any event, the OFT is required, **as a matter of law**, to take account of any malpractice of a 'business associate' in considering a licensee's fitness.

4 SERVICE PROVISION AND MARKETING PRACTICES

Fees payable by borrowers

4.1 Some respondents requested some additional information on the OFT position with regards to fees payable by borrowers to credit brokers or intermediaries.

4.2 Our position on the disclosure of fees is set out in paragraphs 4.9 to 4.16 of the guidance.

4.3 As stated in paragraph 4.10 of the guidance:

'...section 160A (4) of the Act requires credit intermediaries to disclose to the borrower any fee charged to the borrower for their services and to agree the fee in writing with the borrower. This must be done before the borrower concludes a relevant credit agreement.'

4.4 As stated in paragraph 4.11:

'We would also expect brokers who are not intermediaries, **for the purposes of transparency**, to disclose to the borrower any fee charged to the borrower for their services before the borrower concludes a relevant credit agreement.'

4.5 Paragraph 4.17a identifies the following as an unfair business practice:

'failing to notify the borrower of the existence of any fee payable by the borrower to the broker or intermediary and the position on refunds. This should be done before any relevant agreement is concluded.'

Premium rate phone numbers

4.6 The PhonepayPlus Code of Practice¹² requires businesses operating premium rate numbers to ensure that there are arrangements in place for

¹² <http://code.phonepayplus.org.uk/pdf/PhonepayPlusCOP2011.pdf>

customers wishing to make complaints and/or seek refunds to be able to do so by means other than accessing the premium rate number.

- 4.7 Paragraph 7.3b of the guidance identifies the following as an unfair practice:

'failing to provide (or effectively publicise) a non-premium rate UK telephone number as a means by which consumers can pursue complaints'

- 4.8 Paragraph 3.9h identifies the following as an unfair practice:

'**inappropriately** asking or instructing borrowers to make contact on telephone numbers that are premium rate numbers'

- 4.9 One respondent was concerned about the costs that may be incurred by a borrower calling a credit broker/intermediary repeatedly, to check on the status of his credit application, on a premium rate number. Another respondent questioned how much time might be spent on a call received on a premium rate number if, for example, an intermediary was providing a borrower with a pre-agreement explanation of a credit product (in accordance with section 55A(5) of the Act).

- 4.10 The OFT position on both these issues – which **has regard to** the PhonepayPlus Code of Practice - is set out in the text box adjacent to paragraph 3.9i of the guidance:

'Borrowers should not have to make more than one call to apply for credit and this call should not normally exceed 15 minutes in duration. If a creditor considers that this is insufficient time to provide a borrower with an adequate pre-agreement explanation of the credit agreement that the borrower is considering entering into, the OFT would expect the creditor to ensure that such an explanation is provided to the borrower in a way that does not involve the borrower having to meet the cost of an extended telephone conversation to a premium rate telephone number.'

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

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

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

Responsibility for assessment of product suitability and affordability

- 4.11 One respondent stated that creditors may typically **work in partnership** with their third party agents/associates (credit brokers and/or intermediaries) to assess product suitability and affordability.
- 4.12 The guidance recognises that the extent to which credit brokers/intermediaries may play a part in these assessments will vary – in part due to the differing relationships that may exist between creditors and credit brokers/intermediaries with which they have business associations.
- 4.13 Paragraph 4.32 of the guidance states:
- 'If a credit broker or intermediary is providing explanations, advice, or making recommendations, when doing so it should have proper regard to the borrower's needs and circumstances. In particular, this should take into account whether the product is affordable and whether there are any factors that may make the product clearly unsuitable for the individual borrower.'**

4.14 Paragraph 4.33 of the guidance states:

'We would expect brokers and intermediaries to have appropriate regard to the underlying principles set out in the ILG if offering advice to borrowers on the suitability or affordability of credit products.'

4.15 Most important from the OFT's perspective is that if credit brokers/intermediaries are carrying out such assessments, either in conjunction with, or instead of/on behalf of, creditors, they should do so to the standards the OFT expects (as set out in detail in the ILG), having proper regard to the interests of the borrowers.

Provision of 'advice'

4.16 One respondent asked for further clarity on OFT's expectations in respect of the provision of advice to borrowers by credit brokers or intermediaries. In particular, the respondent was concerned that the OFT might expect all credit brokers and/or intermediaries to **always** provide **positive advice/recommendations** to borrowers about **the most suitable** product for them given their needs and financial circumstances.

4.17 We do not expect **every** sale to be treated as an 'advised sale'. However, we would expect **all** credit brokers and intermediaries to inform a borrower of the associated risks of entering into a credit agreement where it is apparent, or reasonably ought to be apparent, that it is **clearly unsuitable** for that borrower.

4.18 As stated in paragraph 4.40 of the guidance:

'If the product appears to be affordable, but in the opinion of the broker or intermediary would be clearly unsuitable for the individual borrower, given his needs and circumstances, we would expect the broker or intermediary to inform the borrower accordingly. We would expect a broker or intermediary (even one that is otherwise acting on an execution-only basis), to inform a borrower of the associated risks of entering into a credit agreement that is **clearly unsuitable** for that borrower.'

Providing access to a different product from that being sought

4.19 Paragraph 4.16h of the draft guidance identified as an unfair practice:

'**failing to disclose** that a fee charged for seeking an introduction to a source of a particular type of credit (even if any such introduction is not subsequently effected) may be retained by the broker if, in the meantime, the broker effects an introduction to a type of credit which is **different** to that applied for by the consumer.'

4.20 However, some respondents contended that the **charging of a fee at all** under circumstances in which the borrower is introduced to a type of credit other than that which he is seeking ought to be considered an unfair practice (rather than limiting the 'unfair practice' to the absence of an appropriate **disclosure**).

4.21 We considered these contentions to be very persuasive. As a consequence, paragraph 4.17f of the guidance now replaces paragraph 4.16h from the draft guidance and sets out the following as being an unfair practice:

'charging a borrower a fee (or retaining a fee) for effecting an introduction to a source of credit of a type substantively different to that promised to the borrower or advertised and/or of a type substantively different to that which the borrower has made known (to the broker or intermediary) he is seeking (unless the borrower subsequently consents to an introduction to such a source of credit – it having been fully explained to him by the broker or intermediary, prior to the introduction, the key features of the credit product to which he is being introduced and, in particular, the associated key risks).

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

Establishing whether a borrower meets a creditor's lending criteria

4.22 In the light of comments received by respondents, we have added paragraphs 3.9z, 3.9aa and 3.9bb - relating to 'inappropriate referrals of

borrowers to creditors' - to the guidance. These paragraphs all cover different scenarios where an inappropriate referral to a source of credit may be made by a broker – **possibly** with a view to the broker securing a fee and/or commission. The three scenarios – all potentially constituting unfair practices – are listed below:

'referring the borrower to a creditor prior to taking steps to ascertain the reasonably foreseeable likelihood that the borrower **might** meet that creditor's lending criteria'

'referring the borrower to a creditor, after having taken steps to ascertain the reasonably foreseeable likelihood that the borrower might meet that creditor's lending criteria, even though it is, or should be, apparent that the borrower does not meet the relevant criteria'

'continuing to refer borrowers, or borrowers of a 'type' specified by a creditor, to that creditor, after the creditor has requested that the broker or intermediary should cease referring any borrowers to it, of the specified type (or at all).

For example, under circumstances in which after a creditor has stated its specific lending criteria to a broker or intermediary, the broker or intermediary continues to refer borrowers who clearly do not meet the criteria to the creditor.'

- 4.23 Paragraph 6.19g of the guidance sets out the OFT view that where a credit broker or intermediary has made an inappropriate referral of a borrower to a source of credit, it would be an unfair practice not to refund to the borrower any fees charged in respect of the referral/introduction.

Canvassing off trade premises

- 4.24 As stated in paragraph 3.5 of the guidance:

'Certain specified canvassing activities are prohibited under the Act. Section 49 of the Act prohibits unsolicited canvassing of debtor-creditor agreements **off trade premises** and section 154 prohibits canvassing of

certain ancillary credit services such as credit brokerage off trade premises.'¹³

- 4.25 One respondent enquired whether a credit broker, whose primary business premises were based at his own home, could classify his home as his 'trade premises' for the purposes of sections 49 and 154 of the Act.
- 4.26 It is apparent from section 48(2) of the Act, that a 'place' may be classified as 'trade premises' for the purposes of the Act, 'if it is a place where a business is carried on (whether on a permanent or temporary basis)' by (amongst others) the canvasser, or the person whose employee or agent the canvasser is.'

Inappropriate incentives

- 4.27 One respondent suggested that offering borrowers an incentive to sign up to a credit agreement (quickly) should not be considered to be a per se unfair practice. The respondent stated that this should not be the case under circumstances in which the borrower is given appropriate information and explanation prior to his entering into the credit agreement, sufficient time to consider the information and explanation provided, time to shop around for alternative credit products if he so wishes and/or to seek independent advice - and provided that sufficient time is allowed for the undertaking of a proper affordability assessment.
- 4.28 We would agree with the above. The guidance (at paragraph 3.9j) identifies as an unfair practice:

'inappropriately' (emphasis on the word 'inappropriately') offering a financial, or other form of, inducement or incentive to the borrower to sign a credit agreement quickly/immediately'

¹³ It is an offence under section 154 of the Act to canvass off trade premises the services of a person carrying on a business of credit brokerage.

4.29 An example of what we might consider to be an 'inappropriate inducement' is provided in the text box adjacent to paragraph 3.9j of the guidance:

'For example, telling the borrower that the offer will be withdrawn if the credit agreement is not signed **immediately** (even under circumstances in which the offer might only be available for a further few days).'

5 TRANSPARENCY OF STATUS, FEES AND COMMISSION

Independence

- 5.1 A couple of respondents requested some additional clarification regarding what the OFT would consider necessary for a broker or intermediary to be able to legitimately describe his status as being 'independent'.
- 5.2 Our position – which takes account of, amongst other matters, the legal position under section 160A (3) of the Act (with regards to credit intermediaries) and relevant BIS Guidance¹⁴ – is set out in paragraphs 4.2 to 4.7 of the guidance. Amongst the key extracts of the guidance are as follows:

'An intermediary's independence could be affected by his business arrangements with a creditor (or a credit broker or other intermediary) and/or by the method of remuneration. For example, a person would be unlikely to be considered independent if he:

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

'An intermediary should only describe himself as 'independent' if he is able to access a representative range of products from the relevant

¹⁴ *Consumer Credit Regulations – Guidance on the regulations implementing the Consumer Credit Directive* – Department for Business Innovation & Skills (BIS)
www.bis.gov.uk/policies/consumer-issues/consumer-credit-and-debt/consumer-credit-regulation/ec-consumer-credit-directive

product market on competitive terms – and is not constrained in this, whether or not by agreement with a creditor.'

'We would also expect brokers, who are not intermediaries, to disclose their status in some appropriate way if they are not independent. Disclosing to a borrower that this is the case may potentially impact on his borrowing decision.'

- 5.3 Further guidance on the issue of 'independence' – with particular reference to price comparison web-sites ('PCWs') - is provided in paragraphs B.25 to B.27 of the guidance. The following is an extract from those paragraphs:

'Intermediaries must not mislead consumers as to their independence. For example, if a PCW is acting as an intermediary and preferentially recommending or making available particular prospective regulated credit agreements/products to consumers because of fees or commission available to it if consumers subsequently conclude those agreements with the relevant creditors, consumers should be made aware by the intermediary that this is the case. The consumers can then decide whether to use the PCW, or to validate its results by also using another PCW or third party, or by approaching creditors directly.

If the consumer believes that a PCW is independent and 'whole of market' when it is not, this could distort his transactional decision and lead him to conclude a credit agreement when he otherwise may not have done so, and purchase a particular credit product when better options may have been available to him.'

Linked third parties

- 5.4 Paragraph 3.9y of the guidance identifies as an unfair practice:

'referring the borrower to a **'linked'** third party without informing the borrower, prior to making the referral, of the existence of, and nature of, the links with the third party.

For example, failing to inform the borrower that the creditor he is being referred to is a member of the same corporate group as the broker or has common ownership or directors.'

5.5 A couple of respondents to the consultation requested additional information on what the OFT might consider to be a 'linked third party' in this context.

5.6 We state in footnotes 24 and 63 (respectively) in this regard:

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

'In particular (with regards to any **limitation** in the service offered by the broker or intermediary), whether the broker or intermediary works exclusively with one or more creditors or as an independent broker.'

5.7 Information provided to borrowers about links with third parties should be sufficient to enable the borrower to form a view as to whether the link may create any potential conflict of interest which might impact on the impartiality of advice given and/or on the overall service provided (including the cost of the service).

Disclosure of commission

5.8 Amongst the points raised regarding the OFT's policy position on the disclosure of commission by credit brokers and intermediaries to borrowers were the following:

- system limitations may impact on the ability of a broker or intermediary to provide commission information to borrowers
- agreements between credit brokers/intermediaries may need to be re-drafted to allow for such disclosures to be made and

- there is some risk that greater transparency about commission might potentially have some influence on 'price convergence'.

- 5.9 In the OFT's view, licensed businesses to whom the first two bullet points in paragraph 5.8 (above) apply should take reasonable steps to overcome any potential constraints on their ability to follow the OFT's guidance regarding the disclosure of commission payments. We do not consider that this should be overly onerous – and we consider it appropriate in order to facilitate greater transparency for borrowers when making transactional decisions (by allowing them better access to information about any possible conflict of interest and/or matter that might impact on the impartiality of information provided by credit brokers or intermediaries about credit products and/or information that might otherwise have a material impact on a borrower's transactional decision).
- 5.10 With regards to the third bullet point in paragraph 5.8(above), we consider that the likely risk of such disclosures being made to borrowers, **in themselves**, having an appreciable impact on the competitive pricing of credit products, to be relatively low.
- 5.11 A couple of respondents to the consultation questioned whether there might be any inconsistency between the OFT's policy position on disclosure of commission and that of the FSA in respect of general insurance products (where disclosure of commission by brokers or intermediaries is not required).
- 5.12 It wasn't apparent why respondents to the consultation focused on the position of disclosure of commission under FSA's general insurance rules, when the more obvious parallel would be with the FSA's approach adopted in its rules relating to the regulation of mortgages (a more comparable credit product). Here, the FSA position is unambiguous. MCOB 5.6.113R¹⁵ requires the product disclosure given to the consumer to include a clear statement of any sums payable by the lender to

¹⁵ www.fsahandbook.info/FSA/html/handbook/MCOB/5/6/

the mortgage intermediary or to third parties. As well as giving the amount it must also make clear who is making the payment, the name of the intermediary, and the names of any third parties involved.

- 5.13 The OFT policy position on disclosure of commission by credit brokers is not new. It was first set out in the ILG in March 2010 and subsequently, in more detail, in the associated *Summary of responses to the consultation on 'Irresponsible Lending – OFT guidance for creditors (OFT1107resp)*¹⁶ and updated versions of the ILG.
- 5.14 While we carefully considered comments made by respondents on the issue of disclosure of commission, we did not consider that a compelling case was made for the OFT amending its substantive policy position on this issue.
- 5.15 In the OFT's view, **transparency** to borrowers by credit brokers or intermediaries about their **status** – in particular with regards to their **independence or otherwise** – is a key aspect of the broker/intermediary-borrower relationship. Such transparency better enables borrowers to make informed transactional decisions on the basis of advice/recommendations made by the brokers or intermediaries, since they are better enabled to take a view as to the likely **impartiality/independence** of such advice/recommendations.
- 5.16 As stated in the text box¹⁷ adjacent to paragraph 3.7i of the guidance:

¹⁶ www.of.gov.uk/about-the-of/legal-powers/legal/cca/irresponsible

¹⁷ As suggested by some respondents, footnote 31 from the draft guidance, relating to disclosure of the existence of any commission payable to a credit broker or intermediary, has been given more prominence in the guidance – being placed in the text box adjacent to paragraph 3.7i.

'In the OFT's view, the **existence** of any 'commission' payable to a broker or intermediary by a creditor in respect of the relevant credit agreement should be made known to a potential borrower by the broker or intermediary under circumstances in which the existence/amount of the commission **could** actually or potentially act as an undue incentive for the broker or intermediary to recommend a particular credit product (as opposed to an appropriate alternative, from the borrower's perspective, from the product range available to the broker/intermediary) to a potential borrower and/or where knowledge of the existence/amount of the commission **could** actually or potentially have a **material impact** on the potential borrower's borrowing decision.

In effect, potential borrowers should be made aware of the **existence** of a financial arrangement between a broker or intermediary and a creditor that might potentially impact upon the **impartiality** of the broker or intermediary in terms of the credit products(s) that it promotes to a potential borrower.

The **amount or likely amount** of any commission should be disclosed by the broker or intermediary, before the credit agreement is made, **on request by the borrower**, in order that the borrower should be enabled to take a view as to whether there is likely to be any conflict of interest.'

- 5.17 Section 160A of the Act gives effect in UK law to the provisions of the EC Consumer Credit Directive pertaining to credit intermediaries. Sections 160A (3), (4) and (5) are very much focussed on requirements in respect of transparency about fees and the extent to which the credit intermediary is independent. Paragraphs 4.12 and 4.13 of the guidance state:

'....Section 160A (3) of the Act requires the intermediary to disclose, in advertising and other relevant documentation, the extent of his independence and in particular whether he works exclusively with a creditor. **An intermediary's independence could be affected by the method of remuneration including different levels of fee or commission available.**

'In the OFT's view, credit intermediaries should therefore disclose, as part of disclosure under section 160A (3) of the Act, whether they are entitled to any fee or commission from a creditor or third party, to the extent that this could affect the intermediary's independence and give rise to a conflict of interest impacting on the service provided to the borrower and any advice offered/recommendation made.'

5.18 Paragraph 4.16 of the guidance states:

'We would also expect brokers who are not intermediaries, for the purposes of transparency, to disclose to the borrower whether they (the brokers) are entitled to any fee or commission from a creditor or third party, to the extent that this could affect the broker's independence and give rise to a conflict of interest impacting on the service provided to the borrower and any advice offered/recommendation made.'

5.19 The OFT's policy position on the disclosure of commission has had regard to the court ruling in *Harrison v Blackhorse Ltd [2011] EWCA civ1128*. In our view, the judgment does not materially impact on our position on disclosure of commission as set out in our guidance. It appears to us that this case turned on its particular facts and was tightly restricted to those facts. In any event, the court was focused on the question of whether non-disclosure of commission constituted an 'unfair relationship', allowing it, potentially, to rewrite the contract and compensate the consumer.

5.20 We were asked whether we considered that it was necessary to disclose the existence of a commission under circumstances in which the credit broker or intermediary only had access to a **single credit product**. It was contended that there could be no 'conflict of interest' if the broker or intermediary only had a single credit product to promote.

5.21 In line with our position as stated in the text box adjacent to paragraph 3.7i in the guidance, we consider that disclosure of the existence of commission is **particularly important...**

'..under circumstances in which the existence/amount of the commission **could** actually or potentially act as an undue incentive for the broker or intermediary to recommend a particular credit product (**as opposed to an appropriate alternative, from the borrower's perspective, from the product range available to the broker/intermediary**) to a potential borrower'

- 5.22 However, we state in the text box that the existence of a commission should **also** be disclosed...

'..where knowledge of the existence/amount of the commission **could** actually or potentially have a **material impact** on the potential borrower's borrowing decision.'

- 5.23 The position as stated in paragraph 5.22 (above) allows the borrower to take a view as to whether the mere existence of a commission might act as an undue incentive to the credit broker or intermediary to promote a particular credit product (even from a 'range' of only **one** product) as being suitable for his needs and circumstances (when it may not be).

- 5.24 One respondent suggested that borrowers being proactively informed by a credit broker or intermediary that there is a commission payment associated with a particular credit product might make them 'suspicious', and may lead to them forming a view that the credit broker or intermediary may be engaged in some form of inappropriate behaviour.

- 5.25 Section 55A of the Consumer Credit Act already requires borrowers to be provided with an explanation of a number of matters pertaining to a credit agreement, before the agreement is made. This includes 'features of the agreement which may make the credit to be provided under the agreement unsuitable for particular types of use' and 'features of the agreement which may operate in a manner which would have a significant adverse effect on the debtor in a way which the debtor is unlikely to see'.

- 5.26 Clearly, creditors (and in some cases, credit intermediaries) are **already** communicating information/explanations to borrowers that might have

the potential to make them 'suspicious' **if the information/explanation is not communicated to the borrower in a clear and appropriate manner.**

We consider that credit brokers/intermediaries communicating to borrowers the existence of a commission payment in a clear and appropriate manner should offset the risk of borrowers forming a view that such a communication may be suggestive of the broker/intermediary possibly acting in some way inappropriately.

6 REFUNDS

6.1 One respondent asked whether it might be unfair for a credit broker or intermediary to charge a borrower a fee for introducing him to a source of **inappropriate**¹⁸ credit.

6.2 Paragraph 6.19g of the guidance identifies as an unfair practice:

'failing to make an appropriate refund of fees paid (upfront or otherwise) where any, or part of, the service or outcome(s) that has been promised, under the terms of the contract or otherwise, has not been provided or delivered, as described or implied, or to a reasonable standard, or at all.

6.3 It states in the adjacent text box:

'This would include where the broker or intermediary has introduced the borrower to a source of credit of a type other than that advertised (unless of a type subsequently discussed and agreed with the borrower) or **of a type clearly unsuitable for the borrower given his needs and/or financial circumstances.**'

6.4 One respondent asked for further clarity on the OFT's position with regards to ensuring that information provided by brokers to borrowers on refunds will be brought to the borrower's attention.

6.5 Paragraph 3.7n of the guidance identifies as an unfair practice:

'misleading the borrower, by act or omission, as to when or how the brokerage fee may be payable by him and/or the position with respect to refunds.'

¹⁸ 'Inappropriate' given the borrower's circumstances and/or intended use of the credit.

6.6 The adjacent text box states:

'This includes failing to inform the borrower in a way that his legal rights in this regard will be clearly brought to his attention (in such a way as to make him fully aware of them and how to exercise them) that, where applicable, he has a statutory right to a refund under section 155 of the Act.'

6.7 Paragraph 6.19d of the guidance identifies the following as being an unfair practice:

'not making a borrower aware of his right to request a refund, and how to exercise that right, by appropriate means, if he has not entered into a relevant credit agreement within six months of him being introduced by the broker to a (potential) source of credit, at or around the expiry of the six-month period.'

Failure to provide a service

6.8 A small number of respondents asked whether the OFT considered it unfair for a credit broker not to refund fees to borrowers under circumstances where **no** service had been provided.

6.9 Our position is set out in paragraph 6.19g of the guidance (see paragraph 6.2 above).

Timing of refunds

6.10 One respondent asked if the OFT could state in the guidance a **specific period of time** within which an introduction of a borrower by a broker to an appropriate source of credit **must** be made – and that if an appropriate referral is not made within that time period, the borrower would have an automatic right to a refund. It was contended that this would obviate the need for borrowers to have to seek redress through the courts under contract law for a total failure of consideration.

6.11 The OFT is not empowered to make a 'rule' of this type. This would require an amendment to the Consumer Credit Act – which would be a matter for the consideration of Parliament.

The £5 credit-brokerage fee

6.12 As stated in paragraph 6.1 of the guidance:

'Under section 155 of the Act, a borrower is, subject to limited exceptions, entitled to a refund (**less £5**) of the fee paid to a credit broker if the borrower does not enter into a relevant agreement within six months of an introduction to a source of credit or hire.'

6.13 A couple of respondents to the consultation contended that the amount a credit broker is allowed to retain out of any fee refunded in accordance with section 155 should be increased – it was set at £5 more than twenty years ago and has not been increased since then to take account of inflation.

6.14 As stated in paragraph 6.11 (above), the OFT is not empowered to make a 'rule' of this type.

7 COMPLAINTS HANDLING

Complaints procedures for online sales channels

- 7.1 One respondent asked for the guidance to include a **requirement** for credit brokers/intermediaries to prominently display information on how to complain in an easily accessible format on their websites.
- 7.2 Paragraph 7.3a of the guidance identifies the following as an unfair practice:
- 'not publishing or making readily available to borrowers details of complaints procedures'.
- 7.3 It was also suggested by one respondent that the OFT should require credit brokers/intermediaries who allow borrowers to apply for credit online to similarly provide a means whereby borrowers could make complaints online, either by email or an online complaints form, rather than having to make complaints in writing or by telephone.
- 7.4 While the OFT would not prescribe the **specific** complaints procedures that businesses should make available to their customers, we do consider that if a transaction can be entered into online, then it is not unreasonable for a borrower to expect to be able to similarly make a complaint about that transaction online. At the very least, we consider that it would be **good practice** for on-line businesses to provide such a facility.

8 REGULATORY COMPLIANCE AND ENFORCEMENT

Timing of compliance reviews

- 8.1 A couple of respondents suggested that any review undertaken by the OFT in respect of compliance with the guidance, should not take place earlier than one year after publication of the guidance, in order to allow businesses time to ensure their systems, practices and procedures, are in accord with OFT expectations.
- 8.2 The OFT has **already** taken action against businesses, over a period of many years, for engaging in a number of the unfair practices identified in the guidance. It was clearly appropriate for us to do so if licensed businesses were engaged in practices that appeared to us to be 'deceitful or oppressive or otherwise unfair or improper' for the purposes of section 25 of the Act.
- 8.3 Given that section 25 of the Act requires the OFT to take account of 'unfair or improper business practices whether unlawful or not', when considering the fitness of licensed businesses, the **core principles** set out in the guidance are something that businesses should already - and always - have had regard to in terms of the practices and procedures that they employ. The guidance helps to flesh out and provide greater transparency in respect of what we consider may constitute unfair practices.
- 8.4 The guidance document relates to **established law** (section 25(2A)(e) of the Act) which covers business practices that the OFT considers unfair or improper. The matters identified in the guidance as unfair practices did not become so only from the date the final guidance was issued.
- 8.5 Consequently, we would not expect responsible credit brokers or intermediaries to require a transition period (of a year) before they were able to meet the standards set out in the guidance. As such, we do not consider that there is any reason why we should not undertake a compliance review within a year of publishing final guidance should we consider it appropriate/necessary to do so.

9 CREDIT INTERMEDIARIES

Price comparison websites

- 9.1 Some respondents made further enquiries as to the extent to which certain activities could be construed to be those of a credit intermediary – with particular focus being placed on the OFT's position as regards PCWs.
- 9.2 Annexe B of the guidance sets out some of the matters that the OFT considers may influence whether or not a PCW can be considered to be acting as a credit intermediary. At paragraph B.4 of the guidance it states that:
- '...in our view, the words 'recommending or making available prospective regulated credit agreements' in section 160A(2)(a) of the Act must be construed consistently with the words 'presents or offers credit agreements' in Article 3(f)(i) of the CCD.'
- 9.3 It is further stated at paragraph B.7 of the guidance (and related footnote number 109) that:
- 'The words 'prospective regulated consumer credit agreement' are intended to include, in our view, details of a specific credit product(s) and are not limited to an unexecuted written agreement.'
- 'For the purposes of section 160A(2)(a) of the Act, we consider that the recommending or making available of prospective regulated consumer credit agreements can take place **without** there being a clear prospect that a credit agreement may be entered into between the consumer and the creditor, the carrying out, or the completion of, an affordability/creditworthiness assessment, or the entry into, or conclusion of, a credit agreement.'
- 9.4 One respondent questioned whether the scope of Article 3(f) of the CCD should be construed more **narrowly** than the construction applied by the OFT as set out in Annexe B of the guidance.

9.5 The EU Commission received a number of queries from Member States during the process of transposition of the CCD, and the Commission posted responses to these on the CIRCA website. One such query related to the definition of 'credit intermediary'. The Commission's response stated:

'The underlying concept of Article 3(f) is to give a wide definition of credit intermediaries encompassing the existing business models.'

Provision of information

9.6 We agree with the contention made by a couple of respondents that for a person to be a credit intermediary, he needs to be doing more than merely **providing information**.¹⁹

9.7 Paragraph B.6 of the guidance (and related footnote 108) states that:

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

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

¹⁹ This is consistent with the position as stated in paragraph 18.4 of the BIS Guidance *Consumer Credit Regulations – Guidance on the regulations implementing the Consumer Credit Directive* (August 2010) – www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1053-consumer-credit-directive-guidance.pdf

Examples

- 9.8 Some respondents enquired as to whether the OFT might provide further **specific examples** in the guidance of persons acting as credit intermediaries.
- 9.9 While we do provide a couple of 'indicative examples' in the guidance, as stated in paragraph B.14, whether or not a person is acting as a credit intermediary will be very much dependent on **the facts and circumstances in each individual case**. Consequently, if the OFT was to seek to provide a number of specific examples, there is a risk that, in doing so, we might inadvertently 'mislead' rather than assist with interpretation. As further stated in paragraph B.14, ultimately it may fall to the courts to decide in any particular case – based on the individual facts of that case.

Responsibility of creditors

- 9.10 Some questions were raised by respondents regarding the issues covered in paragraphs B.19 and B.20 of the guidance:

'The Consumer Credit (Disclosure of Information) Regulations 2010 ('the Information Regulations') require a statement in the Pre-contract Information (PCI) Form of the identity and geographical address of the creditor and, if applicable, of the credit intermediary. Similarly, the Consumer Credit (Agreements) Regulations 2010 ('the Agreements Regulations') require, where relevant, a statement in the regulated consumer credit agreement of the identity and geographical address of any credit intermediary involved.

Section 55(2) of the Act provides that if the Information Regulations are not complied with, the agreement is not properly executed. Similarly, section 61(1)(a) of the Act provides that a regulated agreement is not properly executed unless a document in the prescribed form itself containing all the prescribed terms and conforming to regulations under section 60(1) (which includes the Agreements Regulations) is signed in the prescribed manner. Section 65 of the Act provides that an

improperly-executed regulated agreement is enforceable against the consumer on an order of the court only.'

9.11 One respondent to the consultation contended that it was not always possible for creditors to know whether a particular application had arisen as a direct result of, for example, a recommendation made by a PCW or some other form of credit intermediary.

9.12 We accept that it may not always be **immediately apparent** to creditors whether a prospective regulated consumer credit agreement has arisen as a consequence of the actions of a credit intermediary. As stated in paragraph B.23 of the guidance and the related text box:

'The OFT considers that a creditor should take **reasonable steps** to make itself aware of whether a credit intermediary is involved in relation to the transaction.'

'....the creditor might seek to establish whether someone has carried out in relation to him activities of the type as set out in *section 160A (2) of the Act*²⁰ simply by asking the borrower.'

9.13 We do not consider that expecting creditors to take 'reasonable steps' of a type as set out in the guidance, with a view to seeking to establish whether a particular application was as a direct result of a recommendation made by some form of credit intermediary, should constitute an onerous burden.

9.14 Also, aside from any other considerations, given that a consequence of failing to properly execute a credit agreement by not complying with the Act and relevant associated regulations **may** be to render an agreement unenforceable without a court order, it would appear to be in creditors' best interests to take reasonable steps with a view to avoiding the risk of such an outcome.

²⁰ See paragraph B.3 of the guidance.

A SUMMARY OF QUESTIONS

Chapter 1

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

Chapter 2

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

Chapter 3

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

Chapter 4

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

Chapter 5

- Q17 Is this chapter on post-contractual issues sufficiently clear?
- Q18 Are there any substantive aspects with which you disagree?
- Q19 Are there any significant omissions?

Q20 Do you have any other suggestions for improvement?

Chapter 6

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

Q22 Are there any substantive aspects with which you disagree?

Q23 Are there any significant omissions?

Q24 Do you have any other suggestions for improvement?

Chapter 7

Q25 Is this chapter on complaints handling sufficiently clear?

Q26 Are there any substantive aspects with which you disagree?

Q27 Are there any significant omissions?

Q28 Do you have any other suggestions for improvement?

Chapter 8

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

Q30 Are there any substantive aspects with which you disagree?

Q31 Are there any significant omissions?

Q32 Do you have any other suggestions for improvement?

Q33 Do you have any comments about the structure and format of the guidance document?

Q34 What do you consider might be the appropriate time, following publication of this guidance, for the OFT to initiate a review to assess business compliance and the effectiveness of the guidance?

B LIST OF RESPONDENTS

Association of British Credit Unions Limited

Association of Finance Brokers

Barclays Bank PLC

British Bankers Association

British Vehicle Rental and Leasing Association

Citizens Advice

Consumer Finance Association

Experian

Finance and Leasing Association

Institute of Credit Management

Law Society Scotland

National Franchised Dealers Association, Retail Motor Industry Federation (RMI)

UK Cards Association

Yes Loans Limited