

Mental capacity

- OFT guidance for creditors

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FOREWORD

The primary purpose in producing this guidance is to provide greater clarity for businesses as to practices that the Office of Fair Trading (the OFT) considers may constitute unfair or improper practices (whether unlawful or not) for the purposes of section 25(2A)(e) of the Consumer Credit Act 1974 ('the Act'). As stated in section 25(2B) of the Act, amongst the business practices that may be considered unfair or improper are practices in the carrying on of a consumer credit business that appear to the OFT to involve irresponsible lending. The OFT published updated guidance in February 2011 on what it considers may constitute irresponsible lending practices.

This guidance sets out the general approach that, in the OFT's view, should be taken by creditors when considering applications for credit from, or making offers of credit to, borrowers understood to have, or suspected of having, some form of mental capacity limitation that might constrain their ability to be able to make an informed borrowing decision. It also updates/amends (for the purposes of consistency) relevant aspects of the OFT's Irresponsible Lending Guidance (ILG),¹ as appropriate (taking account of information and responses received during our consultation on **this** guidance document).

This guidance is set out as follows:

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

Chapter 2 (Mental capacity and its relevance to a lending/borrowing decision) - defines mental capacity and sets out how mental capacity limitations might impact on a borrower's ability to make an informed borrowing decision.

Chapter 3 (Indicators that borrowers have, or may have, mental capacity limitations) - sets out some of the matters and possible indicators that **may** lead

¹ See OFT 1107 *Irresponsible lending - OFT guidance for creditors* www.oft.gov.uk/about-the-oft/legal-powers/legal/cca/irresponsible

a creditor to understand or suspect that a borrower **might** have some form of mental capacity limitation.

Chapter 4 (Practices and procedures) - sets out practices and procedures that creditors might employ, as appropriate, with a view to better enabling a borrower to make an informed borrowing decision (and enabling a creditor to make a better informed lending decision), including under circumstances in which the creditor understands or suspects that the borrower has, or may have, some form of mental capacity limitation.

Chapter 5 (Regulatory compliance and enforcement) - sets out the OFT's general approach to securing compliance.

1 INTRODUCTION

The 'section 25 test'

- 1.1 The Consumer Credit Act 1974 and its subordinate legislation ('the Act') provide a framework to protect consumers when dealing with those engaged in consumer credit business, consumer hire business and/or ancillary credit business.
- 1.2 All consumer credit businesses ('creditors')² are required to hold an appropriate standard consumer credit licence issued by the Office of Fair Trading ('OFT').³ The OFT has a duty under section 25 of the Act to ensure that licences are only given to, and retained by, those who satisfy the OFT that they are 'fit' to hold them (the 'section 25 test').
- 1.3 Amongst the matters relevant to a consideration of fitness are whether the creditor has complied with all legal duties and adhered to relevant (OFT and other) guidance and whether, in the OFT's view, the creditor has engaged in any unfair or improper business practices (whether unlawful or not). Amongst the reforms introduced by the Consumer Credit Act 2006 was the inclusion of new provision section 25(2B) of the Act, which makes it explicit that amongst the business practices the OFT may consider to be deceitful or oppressive or otherwise unfair or improper, for the purposes of the section 25 test, are practices in the carrying on of a consumer credit business that appear to the OFT to involve irresponsible lending.

² References to 'creditors' and 'consumer credit businesses', throughout this guidance document, are also **generally** applicable to their employees, agents or associates. **Employees** of a licensed business are not **themselves** required to **each separately** hold a consumer credit licence for the purposes of engaging in regulated consumer credit activities **on behalf of** the licensed business – but operate under the cover of the licence held by the business.

³ Unless covered by an appropriate group licence.

Purpose of the guidance

- 1.4 A purpose of this document is to provide guidance for creditors on mental capacity in the context of responsible lending and borrowing decisions. It sets out what the OFT would expect from creditors in terms of dealing appropriately with borrowers⁴ under circumstances in which it is **understood**⁵ or **suspected**⁶ that the borrower has, or may have, some form of mental capacity limitation that **might** constrain his ability to make an informed borrowing decision.
- 1.5 It is not our intention that the guidance should be overly prescriptive, or that it should place unnecessary burdens on businesses. Creditors should seek to devise their own practices and procedures that reflect, and build upon, the principles set out in the guidance. Furthermore, given the nature of the issues to which this guidance relates, some degree of flexibility in approach by creditors is to be expected given that both individual borrower's circumstances and the particular business models employed by individual creditors will not be identical in every case. However, the OFT would expect that any actions taken, or decisions made, by creditors - **in particular** with regard to borrowers understood to have, or suspected of having, some form of mental capacity limitation - should have proper regard for the best interests of the borrowers, taking into account their personal circumstances.

⁴ Where the word 'borrower' is used in this document it includes persons seeking or being (provisionally) offered credit, whether or not the credit is subsequently granted, as well as those actually granted credit.

⁵ 'Understood' in this context means either **knowing**, or having knowledge of facts which although not amounting to direct knowledge would cause a reasonable person knowing the same facts to reasonably conclude the same thing.

⁶ See paragraph 3.14 of this guidance document.

Scope of the guidance

- 1.6 The guidance is limited in scope to considerations regarding the granting of credit to a borrower, or significantly increasing the amount of his credit, or his credit limit under an agreement for running account credit.
- 1.7 It is **not** specifically about the practices and procedures of creditors in respect of identifying or dealing with borrowers with **mental health** issues.⁷
- 1.8 The guidance is applicable throughout the whole of the UK.

Enforceability of credit agreements

- 1.9 In England, Wales and Northern Ireland, where a party to a contract **lacks** capacity to enter into such a contract by virtue of having a disturbance or impairment of brain function, the contract may be **voidable**⁸ if it can be shown⁹ that the creditor knew, or should reasonably have known, that the borrower lacked the capacity to enter into the contract at the time that he did so. In Scotland, if on the balance of probabilities it can be shown that the borrower lacked the capacity to contract, then the effect is that the contract is **void**.¹⁰

⁷ The Money Advice Liaison Group [MALG] has issued the document *Good Practice Awareness Guidelines – For Consumers with Mental Health Problems and Debt*.
www.moneyadvicetrust.org/images/Mental_Health_Guidelines_2009.pdf

⁸ 'Voidable' is a term typically used with respect to a contract that is valid and binding unless avoided or declared void at the instance of a party to the contract who is legitimately exercising a power to avoid the contractual obligations.

⁹ The burden of proof is on the borrower. This means that the borrower's case **may** need to be positively pleaded and/or evidenced.

¹⁰ A 'void' contract is not actually a contract and cannot be enforced in law.

Staff awareness

- 1.10 We would expect creditors to take responsibility for ensuring that they, their employees, and their agents,¹¹ familiarise themselves with this guidance and relevant legislative requirements as applicable in their particular jurisdiction.
- 1.11 This guidance should be read in conjunction with other OFT guidance, including (OFT1107) *Irresponsible lending – OFT guidance for creditors*¹² and (OFT969) *Consumer Credit Licensing - General guidance for licensees and applicants on fitness and requirements*.¹³

¹¹ See Annex 1 of the Irresponsible Lending Guidance – 'Creditor's Responsibility for Conduct of Agents and Third Parties' (for link see footnote 1).

¹² See footnote 1.

¹³ www.offt.gov.uk/shared_offt/business_leaflets/credit_licences/oft969.pdf

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

What is mental capacity?

- 2.1 Mental capacity is a person's ability to make a decision.¹⁴ Whether or not a person has the ability to understand, remember, and weigh-up relevant information will determine whether he is able to make a decision based on that information. The person will also need to be able to communicate his decision.
- 2.2 The mental capacity of a person may be limited in a way which prevents him from being able to make certain decisions because of an impairment of, or disturbance in the functioning of, his mind or brain.¹⁵

Borrowing decisions

- 2.3 This guidance is concerned, in part,¹⁶ with the ability of borrowers who are understood to have, or it is suspected may have, mental capacity limitations, to make appropriate and informed borrowing decisions and

¹⁴ See Mental Capacity Act 2005. www.legislation.gov.uk/ukpga/2005/9.

In Scotland, the definition of incapacity, in relation to considerations of whether a person can or cannot make decisions on his own behalf, is contained in the Adults with Incapacity (Scotland) Act 2000. www.legislation.gov.uk/asp/2000/4

It defines 'incapacity' as being when a person is incapable of: (a) acting; or (b) making decisions; or (c) communicating decisions; or (d) understanding decisions or retaining memory of decisions - by reason of mental disorder.

¹⁵ A number of such people (but not all) may fall within the definition of a 'disabled person' for the purposes of the Equality Act 2010. See *Equality Act 2010 Guidance* issued by the Office for Disability Issues. www.odj.dwp.gov.uk/docs/wor/new/ea-guide.pdf

¹⁶ The guidance is also concerned with how the practices and procedures employed by creditors might better enable them to make responsible lending decisions.

the extent to which the practices and procedures employed by creditors might better enable them to do so.

Mental capacity is always defined in relation to a specific decision at a specific time. Consequently, when considering an application¹⁷ for (more) credit by a borrower, or a request from a borrower for an increase in his credit limit, the creditor should take account of the borrower's circumstances **at the time at which the application/request is made.**

2.4 We would expect creditors to take the specific circumstances of such borrowers into account, on an **individual case by case basis**, when considering their applications for credit, including when considering what steps they might take with a view to better enabling such borrowers to make an informed borrowing decision.

2.5 We would also expect creditors to take appropriate steps to facilitate them (the creditors) being able to take a view as to:

- whether or not the borrower **appears able to understand, remember, and weigh-up the information and explanations provided to him, and, when having done so, make an informed borrowing decision**

In particular, does the borrower appear to understand the 'key risks', and appreciate the reasonably foreseeable consequences, associated with him entering into the credit agreement.

¹⁷ References in this guidance to the considerations that should apply and the steps that should be taken in respect of 'applications' for credit from borrowers similarly apply under circumstances in which borrowers are **offered and/or provided with** credit, increases in credit, or increases in credit limits, by creditors, **on the creditor's own initiative**. See text box adjacent to paragraph 2.11.

- whether the borrower **appears able to afford to make repayments under the credit agreement in a sustainable manner without adverse consequences to his financial circumstances** and
- whether the credit the borrower is seeking is **clearly unsuitable** (given the borrower's individual circumstances and, to the extent that the creditor is aware, the borrower's intended use of the credit).¹⁸

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

Creditors need to consider, at the point of making the initial lending decision (and often **subsequently**¹⁹), whether the borrower appears able to sustain repayments on an ongoing basis.

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

2.7 Paragraph 6.2 of the ILG (as updated in October 2011) identifies as a practice that the OFT considers may constitute an irresponsible lending practice which it could have regard to in determining fitness to hold a licence:

¹⁸ See paragraphs 4.43 to 4.45 inclusive of this guidance document.

¹⁹ For example, on the basis of monitoring the borrower's repayments.

Failing to monitor a borrower's repayment record.

The OFT considers that creditors should take appropriate action, including notifying the borrower of the potential risk of an escalating debt, and signposting the borrower to not-for-profit providers of free independent debt advice, when/if there are signs of apparent/possible repayment difficulties – for example, a borrower failing to make minimum required payments or making a number of consecutive small/minimum repayments or a borrower seeking to make repayments on a credit card account using another credit card.

This is particularly important in the case of borrowers who it is suspected might not have the mental capacity to make financial decisions about repayments at the time the repayments are due, especially under circumstances in which the borrower or his representatives have specifically requested that this should be done.

A symptom of some conditions such as bipolar disorder is that the borrower may engage in unusual spending patterns.

- 2.8 Mental capacity limitations may also be **partial**. Under such circumstances the person concerned is likely to be able to make certain decisions but not others. Borrowing decisions, that may require the understanding, remembering and weighing-up of relatively complex information,²⁰ are likely to be more challenging for many individuals with mental capacity limitations than more straightforward spending decisions.²¹

²⁰ For example, the borrower may be required to make an informed decision on his ability to keep up repayments on a particular type of personal loan, taking account of his personal financial circumstances.

²¹ For example, deciding what to purchase at a grocer's shop.

Potential causes of mental capacity limitations

- 2.9 Amongst the most common potential causes of mental capacity limitations are the following (this is a non-exhaustive list):
- mental health condition
 - dementia
 - learning disability
 - developmental disorder
 - neuro-disability/brain injury
 - alcohol or drug (including prescribed drugs) induced intoxication.
- 2.10 A borrower may be understood to have, or suspected of having, any of these (or other) conditions which are **potential** causes of mental capacity limitation (for example, a **mental health condition**) - but that does not necessarily mean that he does not have the mental capacity to make an informed borrowing decision. That is to say, a borrower with, for example, a mental health condition, **might** still be able to understand what needs to be considered in respect of a particular borrowing decision, weigh-up the relevant information, and make an informed decision.
- 2.11 Consequently, a borrower understood to have, or suspected of having, such a condition should **not** automatically be considered to not have the mental capacity to make an informed borrowing decision. It is rather the case that, **in the first instance**, an understanding or suspicion that a borrower has or may have one of these conditions could justifiably act as a trigger for a creditor to consider what specific steps he might need to make in giving effect to his practices and procedures for assessing credit applications, in order to be better enabled to take a view of the matters set out in paragraph 2.5 of this guidance document.

Creditors are likely to need to take **similar** steps when considering **proactively offering** credit, increased or further credit, or an increased credit limit under an agreement for running account credit, to borrowers understood to have, or suspected of having some form of mental capacity limitation, to those taken when giving effect to their practices and procedures for assessing credit **applications** from such borrowers.

Creditors should never be **offering** borrowers **clearly unsuitable credit** – and **the OFT would consider it to be an unfair or improper practice²² for the purposes of section 25 (2A) (e) of the Act if a creditor did so.**

- 2.12 In some instances, it **may** constitute disability discrimination for the purposes of the Equality Act 2010 (EA), as well as constituting, in the OFT's view, an unfair or improper practice for the purposes of section 25 (2A)(e) of the Act, to **decline** a borrower's application for credit on a **presumption** that he doesn't have the mental capacity to make a particular decision based **solely** on the knowledge that he has a condition of the type listed in paragraph 2.9 (above).

A primary aim of the EA²³ is to ensure that individuals with 'protected characteristics',²⁴ are not **prejudicially** excluded or restricted from

²² Throughout this guidance document, any reference to practices that the OFT considers may be 'unfair or improper' means that the OFT **may** take engagement in such practices into account in considering the creditor's fitness to hold a consumer credit licence in accordance with section 25 (2A) (e) of the Act. See paragraphs 5.8 to 5.12 inclusive of this guidance document.

²³ In accordance with section 20 and Schedule 2 of the EA.

²⁴ Being a 'disabled person', as defined under the EA, is a protected characteristic. See also footnote 15.

opportunities that are available to others²⁵ (including access to services) because of the protected characteristic.

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

The duty to make reasonable adjustments for service users is 'anticipatory': that is to say, it requires service providers to take action to remove barriers that would prevent, for example, an individual disabled person, from using their service, if taking such action would be reasonable. The duty applies under the following circumstances:

- where a provision, criterion or practice puts a disabled person at a substantial disadvantage in relation to using or accessing the service in comparison with persons who are not disabled, the service provider has a duty to take reasonable steps to avoid the disadvantage, and
- where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to using the service in comparison with persons who are not disabled, the service provider has a duty to take such steps as it is reasonable to have to take to provide the auxiliary aid.

Where either of the above requirements relates to the provision of information, it is reasonable for the service provider to have to take appropriate steps to ensure that, in the circumstances concerned, the information is provided in an accessible format.

²⁵ Discrimination is likely to occur when practices and procedures are designed solely with 'standard' people in mind, thereby (actually or potentially) excluding and/or disadvantaging those who, perhaps by virtue of disability, may differ from the standard.

Financial literacy

- 2.13 Mental capacity is not the same as **financial literacy**²⁶ – although, in practice, it may often be difficult for creditors to differentiate a limitation of one from a limitation of the other. In terms of a limitation of mental capacity, the borrower has some impairment of mind or brain function. There are only likely to be limited circumstances in which creditors will have **substantive evidence** that a borrower **has** such an impairment – and we do not consider that creditors, in the absence of such evidence, can reasonably be expected to (proactively seek to) **establish** whether or not a borrower has such an impairment of mind or brain function.
- 2.14 In the alternative, a limitation in financial literacy is likely to result from inadequate financial education rendering a borrower unable to, or feeling insufficiently empowered to, manage his finances, engage confidently with creditors, and make informed financial decisions.
- 2.15 Under circumstances in which a creditor suspects that a borrower **may** have some form of mental capacity limitation, the fact that the creditor may not be able to readily differentiate between what it thinks may be a mental capacity limitation and what may actually be a limitation in financial literacy - from the perspective of the practices and procedures it employs with a view to better enabling the borrower to make an informed borrowing decision - is, in our view, unlikely in most instances to be material.
- 2.16 Those with limitations in financial literacy **and** those with limitations in mental capacity can **both** be classified as groups of actual or potentially 'vulnerable borrowers' by virtue of their respective limitations. Given that borrowers with either form of limitation (or both forms) might have difficulty making informed borrowing decisions - rather than taking steps

²⁶ 'Financial literacy' is the ability to understand finance. More specifically it refers to the set of skills and knowledge that allows an individual to make informed and effective decisions through his understanding of finances.

with a view to seeking to differentiate between the two categories of persons - we would rather expect creditors to take reasonable steps with a view to better enabling borrowers, who appear as if they may fall into **either** 'category', to make informed borrowing decisions.

3 INDICATORS THAT BORROWERS HAVE, OR MAY HAVE, MENTAL CAPACITY LIMITATIONS

Initial presumption of capacity

- 3.1 A creditor should always consider any application²⁷ for (more) credit on the basis of an **initial presumption** that the borrower has the mental capacity to make the relevant borrowing decision at the time the decision has to be made.
- 3.2 Under circumstances in which the creditor has a basis for understanding, or suspecting, that a borrower has, or may have, some form of capacity limitation that **might** constrain his ability to make the required borrowing decision,²⁸ the borrower should not be regarded as being **unable** to make an informed borrowing decision unless/until reasonable steps to help him do so have been taken (by the creditor) without success.

Forming a view as to whether a borrower has, or may have, a capacity limitation

- 3.3 There are significant complexities and difficulties involved in seeking to proactively **establish** that an individual has some form of mental capacity limitation which, by definition, has arisen from some form of disturbance in, or impairment of, brain function. Indeed, in attempting to do so, creditors would risk inadvertently causing undue and unnecessary distress to many borrowers.²⁹

²⁷ See footnote 17.

²⁸ See also paragraphs 2.13 to 2.16 inclusive for approach to dealing with borrowers who may have limited financial literacy.

²⁹ For example, we consider that it **may** be inappropriate for the borrower to be specifically asked by the creditor whether a registered Lasting Power of Attorney (LPA), Continuing Power of Attorney (CPA) or Enduring Power of Attorney (EPA) is in operation, **unless** the creditor has been given good reason to understand that this is the case. See Annexe B entitled 'Powers of Attorney and Deputyship'.

- 3.4 Creditors are **not** required to, for example, carry out (or to have carried out) a clinical assessment of borrowers with a view to seeking to establish whether they have some form of mental capacity limitation. We understand and appreciate that creditors are unlikely to have ready access to medically qualified staff with the relevant skills to do so and we would not expect them to carry out such an assessment.
- 3.5 We accept that there may only be limited circumstances in which creditors are likely to be in a position of 'understanding'³⁰ that a borrower has a mental capacity limitation which might constrain him from being able to make an informed borrowing decision at a particular time. This is most likely to be the case where the creditor is in possession of **information** of a reliable evidential nature. There are likely to be significantly more occasions when a creditor has a basis for '**suspecting**' that a borrower may have some form of capacity limitation that might constrain his ability to make an informed borrowing decision at the time that it needs to be made compared to the number of occasions when a creditor has a basis for **understanding** that this may be the case.
- 3.6 A non-exhaustive list of examples of circumstances in which a creditor **may** have sufficient basis/evidence to **understand** that a borrower has a mental capacity limitation which might constrain him from being able to make an informed borrowing decision includes:
- where **evidence** has been provided to the creditor that a **relevant** power of attorney exists, or deputyship order is in operation,³¹ which authorises a third party to act for, and on behalf of, the borrower

³⁰ See footnote 5.

³¹ See Annexe B entitled 'Powers of Attorney and Deputyship'.

(including in respect of matters such as the borrowing decision in question)

- there is other **evidence** (for example, medical evidence) that the borrower has some form of disturbance of the mind and/or impairment of brain function.

Under circumstances in which there has been what appears might be a **credible disclosure**³² to the creditor that the borrower has some form of capacity limitation that might constrain his ability to make informed borrowing decisions - but there is no **evidence** to substantiate the disclosure - it is likely to only be sufficient to trigger a **suspicion** that the borrower **may** have some form of mental capacity limitation rather than an **understanding** that this **is** the case.

Mr A has a diagnosis of bi-polar disorder. He is a well-known customer at his local bank branch and has advised bank staff at the branch about his condition, the fact that it fluctuates, and that at times he does not have the capacity to make appropriate considered decisions in respect of financial matters. Bank staff had also been made aware that the only income coming into his bank account was incapacity and disability benefits.

³² Such a disclosure is more likely to be considered 'credible' if it is made by either the borrower himself or a person close to him who is likely to have an informed view of such matters (for example, a close friend, relative, carer, or clinician). The consideration of whether any such disclosure by the **borrower himself** is likely to be 'credible' will be influenced, in part, by the relationship between the creditor and the borrower (where the creditor has a long and established relationship with a borrower it is more likely to be familiar with the borrower's individual personal circumstances – including whether he may have some form of mental capacity limitation and the extent and nature of any such limitation).

Mr A subsequently went into the branch one day and asked for an overdraft - which was granted. As well as considerable sums of money being withdrawn from his account by Mr A to fuel his consumption of various 'luxury items', regular payments of household bills were being made from Mr A's account by direct debit and his overdraft limit was very quickly exceeded resulting in the imposition of interest and charges.

At the time, Mr A was in a manic bipolar phase and had no comprehension that the money he was spending would have to be repaid from his benefits or that interest and charges could accrue. His only purpose for wanting the overdraft was to fuel his unsustainable level of spending during the manic phase.

The bank refused to engage with Mr A's wife when she sought its co-operation to constrain his access to further credit even though she was willing to provide evidence of his condition.

3.7 There may be circumstances in which third parties, such as relatives or close friends of the borrower (including those who do **not** have the legal authority to act on his behalf),³³ **might** have a (commercial) incentive to vexatiously contend that a borrower does not have the capacity to make a particular borrowing decision - when this is not the case.

3.8 The OFT considers that while any such (credible) contention by a close friend or relative should act as a 'trigger' for a creditor to make further reasonable enquiries³⁴ with a view to considering the likely veracity of such a contention – the creditor should not simply accept it at face value

³³ That is to say, the third party does not have a Lasting Power of Attorney, Continuing Power of Attorney, Enduring Power of Attorney or authority to act as a Deputy.

³⁴ For example, asking the person making the contention to provide some form of 'evidence' to corroborate the contention.

and automatically reject the borrower's application for credit in the absence of any evidence to support the contention or further consideration/investigation. **We consider that to do so would be very likely to constitute an unfair or improper practice.**

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

Mr B has Alzheimer's disease. He was granted a loan by a home credit provider in 2009. Mr B's wife asked the creditor's agent not to provide her husband with any further credit - contending that, as a consequence of his condition, he did not have the capacity to make informed borrowing decisions – and providing some evidence to the creditor in support of her contention. This was agreed. However, in February 2010, in spite of having previously being made aware of Mr B's condition, the same creditor offered to him, and subsequently provided him with, additional credit (at a higher rate of interest). Mr B subsequently had no recollection of having taken out the loan.

- 3.10 While acknowledging that there are limits that creditors can reasonably be expected to go to in seeking to form a view as to whether or not a borrower has, or may have, some form of capacity limitation, we would consider it to be a matter of good practice for creditors, in **literature** provided to borrowers prior to granting credit, increasing the amount of his credit, or increasing his credit limit under an agreement for running account credit, to **invite** borrowers to disclose (on a voluntary basis) whether there are any issues relating to their health or general well-being which may be relevant to the consideration of any borrowing/lending decision.

- 3.11 In the OFT's view, any such invitation should be worded so as to avoid being overly intrusive in such a way as might unduly/inappropriately cause embarrassment to the recipient.

It is accepted that less intrusive wording might also be less likely to induce the recipient to voluntarily provide information of a sensitive or personal nature. However, we consider that issues of 'balance' and 'proportionality' must be taken into consideration as well as the consumer protection objective of seeking such information.

An example of a possible form of wording for such an 'invitation' might be along the lines of:

'Is there any further information that you might wish to bring to our attention at this time that you think may be relevant to our consideration of your application for credit?'

However, it is open to creditors to devise their own alternative form of (appropriate) wording.

- 3.12 Any such literature should make very clear that the only purpose such information would be used for would be to better facilitate an informed lending/borrowing decision being reached.³⁵
- 3.13 If a borrower provides information which indicates that he does, or may, have some form of mental capacity limitation that **might** impact on his ability to make an informed borrowing decision, this should **not** lead to him automatically being denied access to the credit he is seeking.

³⁵ Such information and explanations should be included in, but not limited to, 'Privacy Notices'. Creditors need to produce these in accordance with Data Protection Act requirements, if/where applicable. These Notices inform individuals providing personal information how their personal information will be used.

Rather, in the first instance, it should act as a trigger for the creditor to consider what reasonable steps he might take, in giving effect to his practices and procedures for dealing with credit applications (for example, with regards to the provision of pre-agreement explanations and/or assessing affordability³⁶), in order to be better enabled to take a view of the matters set out in paragraph 2.5 of this guidance document, prior to taking a decision regarding the appropriateness or otherwise of granting the (additional) credit being sought (see paragraph 4.24 below).

Indicators that a borrower may have a mental capacity limitation

- 3.14 In the context of this Guidance, a creditor would have reasonable grounds to suspect that a borrower **may** have some form of mental capacity limitation if the creditor observes (the 'observation' need not always be 'visual') something **specific** (behavioural or otherwise) that could be **indicative** of the borrower having some form of capacity limitation. While the threshold for having reasonable grounds to suspect that a borrower may have some form of mental capacity limitation is low, it should be more than a 'hunch' or a 'feeling'.

Mr C has bi-polar disorder and is also an alcoholic.

He took out loans totalling £55,000. He told his bank that he required the loans to clear his existing debts. At the time he agreed the loans with his bank he was (visibly) drunk.

Mr C has a fixed 'income', consisting of pensions and incapacity benefit.

Mr C was able to take out the loans even though his intoxication would have been very apparent during his interview with bank staff and he had made them aware of his existing high level of indebtedness.

³⁶ See Chapter 4.

3.15 While there is no exhaustive list of indicators that might cause a creditor to suspect that a borrower may have some form of mental capacity limitation, the Mental Capacity Act Code of Practice³⁷ identifies a number of indicators of potential mental capacity limitation which the OFT considers³⁸ may lead a creditor to suspect that a borrower might not have the capacity to make a specific borrowing decision at the time that the decision needs to be made:

- the borrower may make a decision that is unexpected and/or out of character

Knowledge that a borrower's behaviour is 'out of character' is only likely to be possible under circumstances in which a creditor has a pre-existing relationship with a borrower – unless the creditor is advised that this is the case by a third party who has a relationship with the borrower of a type that would be likely to enable the third party to make such an assessment.

- a person who is likely to have an informed view of such matters, for example a close friend or relative of the borrower, his carer, or his clinician, raises concerns with the creditor about the borrower's capacity to make an informed borrowing decision at the time the decision needs to be made³⁹
- it is understood that the borrower has **previously** been diagnosed as having an impairment or disturbance of the mind or brain and that,

³⁷ See www.webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/legal-policy/mental-capacity/mca-cp.pdf

³⁸ In our view, these indicators have general applicability to considerations of mental capacity in the context of lending/borrowing decisions.

³⁹ See paragraphs 3.6 to 3.9 inclusive of this guidance document.

at that time, he did not have the capacity to make certain decisions (including of a type similar to the type of decision that he is currently required to make – for example, a decision relating to some form of financial commitment)

- the borrower clearly not understanding what he is applying for
- the borrower clearly being unable to understand information provided to him (including information about the consequences – in particular the key risks - of entering into the credit agreement)
- the borrower clearly being unable to retain information provided for the purpose of helping him to make an informed borrowing decision (long enough for him to be able to make such a decision)
- the borrower clearly being unable to weigh-up information provided for the purpose of helping him to make an informed borrowing decision
- the borrower being unable to communicate his borrowing decision by any reasonable means.

3.16 Other indicators that a person is, or might be, unable to make an informed borrowing decision, **possibly** as a consequence of some form of impairment of, or disturbance in, the functioning of the mind or brain, would include him showing signs of any of the following:

- appearing to be confused about the personal information he is required to provide to the creditor such as his date of birth or his address
- appearing to be confused about the financial information he is required to provide to the creditor to inform the creditor's affordability assessment

Mr D's capacity had diminished significantly over a reasonably short period of time and his behaviour had changed markedly. He often appeared confused and to have no awareness of, amongst other matters, his financial circumstances (he had accrued a significant level of indebtedness).

He returned one day from a trip to the high street to buy some groceries having gone into three different banks. In each of these he met with bank staff and completed applications for credit cards – all three of which were subsequently issued to him.

Mr D had experienced a significant disturbance in the functioning of his brain, and there were clearly observable indicators to any reasonable person who engaged in communication with him that he might not have the capacity to make an informed borrowing decision at the time that he completed his applications for the credit cards.

Mr D quickly built up a substantial credit card debt that was unsustainable (in particular due to his pre-existing indebtedness). Nevertheless, despite his clearly apparent ongoing confusion over his finances, including his lack of awareness of his credit card debts (and the scale of his overall indebtedness), he was still subsequently granted a further £20,000 bank loan (in respect of which he could not meet repayments in a sustainable manner) by one of the banks that had issued him with a credit card.

- appearing to have no awareness of his own financial circumstances.

Mr E had learning difficulties and was in debt. He had never worked and was in receipt of severe disablement allowance. He made an application to take out a credit card but, during the process of doing so, he couldn't provide the creditor with either his address (he advised that he couldn't remember it) or the financial information that the creditor required to inform his consideration of Mr E's application.

He informed the creditor that he was unemployed. When asked by the creditor to provide details of any form of income (including benefits) that he was currently receiving, he copied the 'example' on the application form.

The creditor did not query the information in Mr E's application and Mr E was granted the credit card.

- 3.17 The extent to which indicators suggesting that a borrower may have some form of mental capacity limitation might be observable, will vary to some extent depending on the particular sales channel employed to apply for/offer credit. For example, where there is no 'face to face' interaction⁴⁰ between the creditor and the borrower, the creditor is **less likely** to be able to 'observe'⁴¹ certain indicators that might suggest that the borrower may have some form of mental capacity limitation.

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

⁴⁰ As **may** be the case for on-line (distance) applications for/offers of credit.

⁴¹ 'Observation' in this context may be 'auditory' if, for example, the creditor speaks on the telephone to the borrower who has made the distance application for/been offered the credit.

indicator, which may trigger such a suspicion.

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

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

For example, a creditor may observe that self-declared information, provided by a borrower in support of his application for credit, at least in part to inform an affordability assessment, is substantively inconsistent with other information already held on the borrower⁴² (possibly including information previously provided by the borrower himself) or accessed/obtained⁴³ about the borrower.

⁴² It is accepted that there are a number of other possible explanations for such an inconsistency arising, other than the borrower having some form of mental capacity limitation (for example, see text box adjacent to paragraph 4.31 of the ILG - link to ILG at footnote 1). However, such an observation should act as a trigger for the creditor to take reasonable steps to verify the veracity of the information provided by the borrower in support of his application for credit.

⁴³ We expect creditors to **always** take reasonable steps to obtain sufficient/appropriate information to inform an affordability assessment.

4 PRACTICES AND PROCEDURES

General approach

- 4.1 The OFT expects creditors to take reasonable steps (subject to proportionality considerations) to ensure that they have suitable business practices and procedures in place for the appropriate treatment of borrowers who it is understood have, or it is suspected may have, mental capacity limitations which might impact on their ability to make informed borrowing decisions.
- 4.2 We also expect creditor's documented practices and procedures to set out the steps that that they take when they receive applications⁴⁴ for credit from such borrowers.⁴⁵
- 4.3 In circumstances where a creditor understands or suspects that a borrower has, or may have, mental capacity limitations, appropriate practices and procedures should be employed with a view to facilitating the borrower, where possible, being enabled to make an informed borrowing decision – and the creditor itself being enabled to make an informed and responsible lending decision.
- 4.4 Creditor's practices and procedures should be designed with a view to being able to assist borrowers to overcome the effect of any capacity limitation and, to the extent possible, place them on an equivalent footing to borrowers who do not have such a limitation, in order to increase the likelihood of them being enabled to make informed borrowing decisions.

⁴⁴ See footnote 17.

⁴⁵ See subsection in chapter 5 entitled 'Evidence of compliance'.

- 4.5 Creditors should also seek to ensure that they have appropriate protections in place to **mitigate the potential risks** to such potentially vulnerable borrowers.⁴⁶

As stated in the Mental Capacity Act Code of Practice, **it is important to balance a person's right to make a decision with their right to safety and protection when they can't make decisions to protect themselves.**

Providing borrowers with appropriate assistance

- 4.6 The Mental Capacity Act Code of Practice identifies that an individual, who at first appears as if he might lack the capacity to make a particular decision at a particular time, may be enabled to make the decision if he is provided with appropriate help and assistance.
- 4.7 Borrowers with capacity limitations may need appropriate assistance from creditors (and possibly others such as third parties authorised to act on the borrower's behalf where applicable and appropriate) in order to be enabled to make an informed borrowing decision. However, this does not necessarily mean that they **cannot** make such a decision.
- 4.8 Consequently, the creditor's approach should not be to unfairly/unnecessarily **discriminate** against the borrower,⁴⁷ including by adopting a 'default position' that borrowers who it is understood or suspected have, or might have, capacity limitations, should not be granted the credit they are seeking - but rather it should **take appropriate steps to assist the borrower in being able to make an informed borrowing**

⁴⁶ Creditors will also need to ensure that whatever practices and procedures they adopt are compliant with relevant legal requirements.

⁴⁷ For example, by denying the borrower access to credit under circumstances in which it is inappropriate and unnecessary to do so.

decision while at the same time mitigating possible risks to the borrower. **The OFT considers that failure to do so would be likely to constitute an unfair or improper practice for the purposes of section 25 (2A) (e) of the Act and would call into consideration the creditor's fitness to hold a consumer credit licence.**

- 4.9 Creditors might wish to consider nominating a dedicated person or specialist team within the organisation who/which is both equipped to deliver support to colleagues on mental capacity issues and to provide assistance to borrowers where it is understood or suspected that the borrower has, or may have, some form of capacity limitation that might constrain his ability to make an informed borrowing decision.

Creditors employing the use of remote sales channels might consider providing a dedicated 'help line' telephone number providing a similar support service to borrowers.

- 4.10 The OFT would consider it to be **good practice** for creditors to provide services of the type described in paragraph 4.9 (above).

If creditors providing such services are not taking appropriate steps to assist the borrower to make an informed borrowing decision - but rather are giving 'advice' and/or acting in a way, the object or effect of which is actually or potentially to further their own personal/commercial interests⁴⁸ without having proper regard to possible adverse consequences for the borrower - it would be likely to be regarded by the OFT as an unfair or improper practice for the purposes of section 25 (2A) (e) of the Act.

⁴⁸ This would include the commercial interests of the business as a whole or an individual/individuals employed by/acting on behalf of the business.

- 4.11 Creditors should also consider, where appropriate, the role that third parties such as carers or family members might **additionally** play in assisting the borrower to be able to make an informed borrowing decision.

The fact that third parties may be assisting a borrower to make an informed borrowing decision does not diminish the creditor's own responsibility in this regard.

- 4.12 Prior to making any form of unsolicited contact with a third party, with a view to the third party potentially providing additional assistance to the borrower (in terms of better enabling the borrower to make an informed borrowing decision), creditors need to take proper account of their obligations under the Data Protection Act 1998 (DPA).

Creditors should make borrowers aware, by Privacy Notice⁴⁹ and/or other appropriate means, of the ways that they intend to gather, use, disclose and manage borrowers' (sensitive) personal data.

The OFT would expect any privacy notice to be clearly brought to the attention of the borrower by the creditor (or his agent).

We would also expect creditors to explain to borrowers, clearly, transparently, and in plain and intelligible language, what they require from borrowers in terms of 'consent'⁵⁰ prior to communicating any (sensitive) personal data to third parties.

⁴⁹ See the Information Commissioner's Office *Privacy Notices Code of Practice* www.ico.gov.uk/for_organisations/data_protection/topic_guides/privacy_notices.aspx

⁵⁰ Personal data must be processed fairly and lawfully and only for specified purposes. While it may still be possible to lawfully pass the borrower's (sensitive) personal data to an appropriate third party, in the absence of a borrower's prior consent having been obtained, where one of the

4.13 The OFT would consider the following practices, relating to the handling and use of borrowers' (sensitive) personal data, to constitute unfair or improper practices:

- failing to present⁵¹ privacy notices to borrowers in a way that the borrower's legal rights under the DPA will be clearly brought to his attention **with a view to making him fully aware of his rights and how to exercise them**
- failing to provide a sufficiently clear and easy method for borrowers to cancel their consent
- failing to be sufficiently clear to the borrower as to what his details ((sensitive) personal data) will be used for.

4.14 Creditors should build into their lending practices and procedures allowance for a reasonable time for any third parties, who might be approached about providing additional assistance, to be enabled to do so. They should also have a clear policy on who within their organisation is authorised to contact third parties in order to seek any such assistance and under what circumstances.

Consideration of credit applications

4.15 As previously stated in paragraph 2.5, when considering an application for credit from a borrower understood to have, or suspected of having, a mental capacity limitation that might constrain his ability to make an informed borrowing decision, creditors will need to take appropriate steps in order to be able to form a view as to:

other conditions relevant for the purposes of processing personal data is met (and one of the other conditions relevant for the purposes of processing sensitive personal data is met), we would normally expect the borrower's consent to be sought (as a matter of good practice) before doing so. See paragraphs C.9 and C.10 in Annexe C.

⁵¹ See text box adjacent to paragraph 4.12 (above).

- whether or not the borrower appears able to understand, remember, and weigh-up the information and explanations provided to him, and, when having done so, make an informed borrowing decision⁵²
- whether the borrower appears able to afford to make repayments under the credit agreement in a sustainable manner without adverse consequences to his financial circumstances and
- whether the credit the borrower is seeking is clearly unsuitable (given the borrower's individual circumstances and, to the extent that the creditor is aware, the borrower's intended use of the credit).⁵³

4.16 We now consider each of the above.

Considering the borrower's understanding of information and/or explanations provided

4.17 In accordance with the requirements of section 55A(1) of the Act,⁵⁴ before a regulated consumer credit agreement other than an excluded agreement is made with a borrower, the creditor **must provide the borrower with an adequate explanation** of the matters referred to in section 55A(2) of the Act **in order to place him in a position enabling him to assess whether the agreement is adapted to his needs and his financial situation.**

⁵² In particular, does the borrower appear to be aware of the 'key risks' associated with him entering into the credit agreement.

⁵³ See paragraphs 4.43 to 4.45 inclusive of this guidance document.

⁵⁴ Compliance by creditors with the requirements of section 55A(1) of the Act is mandatory subject to sections 55A(5) to 55A(7) inclusive of the Act.

www.legislation.gov.uk/uksi/2010/1010/regulation/3/made

- 4.18 The OFT expects creditors to **fully** meet the requirements of section 55A(1) of the Act – and this is **particularly** important when providing information or explanations to borrowers who may have particular difficulty understanding explanations provided – possibly by virtue of having some form of capacity limitation.

The OFT is aware of instances of creditors apparently 'going through the motions' with regards to compliance with the requirements of section 55A(1) of the Act.

For example, reading to borrowers from a script, with no apparent regard for whether or not the explanation and/or information provided is 'adequate' to place the borrower concerned in a position in which he has been enabled to assess whether the agreement is adapted to his needs and his financial situation.

We are similarly aware of instances of creditors not providing borrowers with an opportunity to ask questions about the agreement or advising borrowers how to ask the creditor for further information or explanation.

The OFT considers that creditors which fail to FULLY meet the requirements of section 55A(1) of the Act are likely to be engaging in an unfair or improper practice for the purposes of section 25(2A)(e) of the Act.⁵⁵

⁵⁵ See in particular paragraphs 3.18 and 3.19 of the ILG.

4.19 The Mental Capacity Act Code of Practice identifies a number of steps⁵⁶ a person (in this case a creditor) might take which could assist an individual (in this case a borrower) who may have a capacity limitation that might constrain his ability to make a particular decision at a particular time. These include:

- providing relevant information (including explanations) in a clear and accessible form.⁵⁷

4.20 **Appropriate communication** of the key features of credit agreements, when creditors are considering granting credit to a borrower, increasing the amount of his credit, or increasing his credit limit under an agreement for running account credit, should increase the likelihood of him being enabled to make an informed borrowing decision. Clear, jargon-free information should be presented and explained in a way that makes it as easy as possible for the borrower to understand. Creditors should consider ways to present information in alternative, more 'user-friendly' formats where it appears appropriate to do so.

For example, 'Easy Read' is a format that uses plain English, in large type, with supporting images to aid understanding.⁵⁸

⁵⁶ A number of the identified steps would be likely to benefit not only borrowers who have mental capacity limitations, but also a wider group of borrowers including those with poor financial literacy.

⁵⁷ The Mental Capacity Act Code of Practice identifies that providing relevant information (in this case to the borrower), explained or presented in a way that is easy to understand, is an integral part of helping him to be able to make a decision.

⁵⁸ The Disability Rights Commission has produced a guidance booklet on Easy Read - '*How to use Easywords and Pictures*'.

www.equalityhumanrights.com/uploaded_files/how_to_use_easy_words_and_pictures.pdf

4.21 In order to be better placed to take a view as to whether or not any explanation provided has been sufficient to place the borrower in a position in which he has been enabled to assess whether the agreement is adapted to his needs and his financial situation, a creditor could, for example, consider asking the borrower to reflect back what has been explained to him.

Placing reliance on responses to 'closed questions',⁵⁹ put to the borrower by the creditor, is unlikely to be an effective means of attempting to assess the borrower's understanding of the information and/or explanation that has been provided to him to inform his borrowing decision.

4.22 In taking a view as to the borrower's understanding of the information and/or explanation provided, a creditor might wish to consider his apparent understanding of the following (amongst other matters)⁶⁰ in particular:

The features of the agreement (if any) which may make the credit to be provided under the agreement unsuitable for particular types of use
How much he (the borrower) will have to pay under the agreement⁶¹

⁵⁹ That is to say questions that can be responded to with an answer of 'yes' or 'no'.

⁶⁰ See paragraph 3.13 of the ILG.

⁶¹ This should include the borrower having an understanding of matters such as how much he is borrowing, when repayments need to be made, the cost of repayments and the total cost of the credit (including interest). The borrower should also understand that he is entering into a legally binding agreement and that the credit has to be repaid.

The principal consequences for (risks to) him of not keeping up with repayments

The features of the agreement which may operate in a manner which would have a significant adverse effect on him in a way which he is unlikely to foresee

The advisability of him considering pre-contract information which is required to be disclosed to him and where this information is disclosed in person to him, his ability to take the information away and

His ability to be able to request further information and explanation about the agreement if he requires it.

4.23 In many instances in which a borrower's capacity is limited, subject to the nature and extent of the capacity limitation, the provision of better/more transparent explanations by a creditor **might** be sufficient to enable the borrower to make an informed borrowing decision. Some indication that this **may** be the case may be derived from the creditor's consideration of the borrower's apparent level of understanding of the information and/or explanation that the creditor has provided to him.

4.24 However, where a borrower still appears unable to understand (in particular the key risks associated with the credit agreement), retain, weigh-up the information or communicate his borrowing decision, even after the provision by the creditor of appropriately clear information about, and explanations of, the credit agreement, then the creditor may need to take a view as to whether the borrower has the 'capacity to contract'⁶² in respect of the credit agreement – that is to say, whether the borrower is able to understand the nature of the transaction he is entering into.

⁶² See paragraph 1.9.

While the OFT accepts that reaching such views (and subsequently acting on them) may often be very difficult for creditors, we would expect them to be able to satisfy us, if requested to do so, that they have appropriate and effective practices and procedures in place to ensure that any lending decisions (including rejecting applications for credit), **made on the basis of such views**, are made on an 'objectively justifiable basis'.⁶³

Creditors need to be careful to avoid engaging in 'discrimination by perception' whereby they treat a borrower 'less favourably'⁶⁴ (for example, denying his application for credit) **solely** on the basis of, for example, a perception that the borrower **must** lack the capacity to contract as he has, or appears as if he may have, one of the conditions as set out in paragraph 2.9 of this guidance document.⁶⁵

- 4.25 There are a number of irresponsible lending practices which we have identified in respect of the provision of pre-contract (adequate) explanations by creditors to borrowers. We consider that amongst the **most pertinent** elements of the ILG,⁶⁶ so far as the subject matter of **this** guidance document is concerned are:

⁶³ See paragraphs 5.3 to 5.7 of this guidance document under sub-heading 'Evidence of compliance'.

⁶⁴ 'Less favourably' in this context means placing the borrower concerned at a clear disadvantage relative to other borrowers, under the same or similar circumstances, purely on the basis of the perception. The OFT would not consider, for example, subjecting a borrower's credit application to a particularly high level of scrutiny for the purposes of better informing an affordability assessment, to constitute treating that borrower 'less favourably'.

⁶⁵ See also paragraphs 2.10 to 2.12.

⁶⁶ **All** elements of the ILG are 'relevant', subject to any caveats contained within the ILG itself.

Paragraph 3.3 of the ILG:

The OFT expects creditors to adopt a **proportionate** approach to the provision of explanations of credit products to borrowers. Nevertheless, the law requires that the explanation provided should be adequate to place the borrower in a position enabling him to assess whether the agreement is adapted to his needs and his financial situation.

In the OFT's view, the explanation should enable the borrower to make a reasonable assessment as to whether he can afford the credit and to understand the key associated risks.

Paragraph 3.4 of the ILG:

In our view, in deciding on the level and extent of the explanation to be provided, the creditor, his representatives, agents or 'relevant third parties' should consider, to the extent that it is appropriate to do so and having regard to the relevant legal requirements, a number of factors, including:

- **the apparent level of understanding of the borrower of the explanation provided (to the extent that this is evident and discernable)** – some borrowers are likely to need different levels of, and types of, explanation.

Paragraph 3.6 of the ILG:

The OFT would not consider an explanation to be 'adequate' where the creditor had not made reasonable provision to ensure that borrowers were likely to understand the explanation of the matters specified in section 55A(2) of the Act and/or where the creditor had clear grounds to suspect that the borrower did not understand key aspects of the explanation.

Under circumstances in which the creditor has clear grounds to suspect that the explanation provided has not placed the borrower in a position whereby he is enabled to assess whether the agreement is suited to his needs and his financial situation, we would expect further explanation to be provided.

It is accepted that the use of remote channels, such as the internet, by their nature, limit the creditor's ability to take a view on the borrower's level of understanding of explanations provided.

Given that creditors employing the use of such channels will need to advise borrowers how they can ask for further information and explanation (in accordance with the requirement of section 55A(1)(d) of the Act),⁶⁷ they **might**, for example, wish to consider providing (local rate) telephone contact details for those borrowers who may wish to seek further information and explanation.

⁶⁷The requirement under section 55A(1)(d) of the Act does not apply to a regulated agreement under which a creditor takes an article in 'pawn'.

Paragraph 3.10 of the ILG:

The fact that a borrower might state or imply that he does not require an explanation of the credit product does not absolve the creditor from the legal responsibility of providing an adequate explanation. The creditor should not encourage the borrower to waive his right to a full explanation.

Paragraph 3.18 of the ILG identifies as a specific irresponsible lending practice:

Failing to provide a borrower with an explanation which is adequate within the meaning of section 55A(1) of the Act.

Paragraph 3.30 of the ILG identifies as a specific irresponsible lending practice:

Pressurising or requiring a borrower to acknowledge, in writing or by any other means, that he has been provided with an **adequate** explanation.

This would include requiring the borrower to 'tick a box' or take some other form of action which has the same effect in terms of providing an 'acknowledgement'. However, this would not preclude the creditor from simply asking the borrower if he has understood the explanation provided.

In the OFT's view, it is acceptable for borrowers to be required to acknowledge in writing that they have been provided with **an explanation** of the credit product by the creditor or his representative (provided that this was the case) – and/or that they have been provided with a copy of written information which constituted all or part of any such explanation.

However, the borrower should not be required to provide a formal acknowledgement that any such explanation was **adequate** since the borrower may not be in a position to know with any certainty at that stage whether the explanation provided is adequate or not.

Allowing the borrower sufficient time to make a decision

- 4.26 A further suggestion in the Mental Capacity Act Code of Practice as to steps a person might take which could assist an individual who may have a capacity limitation that might constrain his ability to make a particular decision at a particular time includes:
- allowing an individual (the borrower) time to make a decision.
- 4.27 If a borrower has some form of mental capacity limitation, subject to the nature of that limitation, he may **particularly** benefit from being given time to weigh-up information and explanations provided to him to inform his borrowing decision – and we expect creditors to allow borrowers reasonable time to do so.
- 4.28 It is also very important, particularly given that capacity limitations may be temporary, that creditors should provide borrowers with the option of deferring the making of their borrowing decisions until a later date.

With regards to transactions carried out over the telephone, creditors should give borrowers the option of calling back with their decisions at a later date.

4.29 Paragraph 3.29 of the ILG identifies as a specific irresponsible lending practice:

Pressurising a borrower to sign up to a credit agreement without affording him a reasonable opportunity to do the following:

- **ask questions about the agreement**
- **consider the information provided by the creditor about the agreement and, where applicable and appropriate, to take the information away and**
- **ask for and obtain further information and explanation.**

Borrowers should be permitted to take the information provided away to further consider it and/or the explanations provided should they wish to do so. They should similarly be permitted to make further enquiries (for example to see what other creditors are offering or to seek guidance from a money advisor or another independent third party) should they wish to do so.

Creditors should not actively discourage a borrower from doing any of the above - in particular under circumstances in which the borrower has indicated to the creditor that he wishes to do one or more of the above before entering into the credit agreement.

4.30 As stated in paragraph 3.13 of the ILG:

The creditor should inform the borrower of the effect of the exercise of any right of withdrawal from the agreement and how and when this right may be exercised.

The right of withdrawal under section 66A of the Act applies to all regulated consumer credit agreements except where the agreement is:

- a) for credit which exceeds £60,260
- b) a credit agreement secured on land
- c) a restricted-use credit agreement to finance the purchase of land
- d) an agreement for a bridging loan in connection with the purchase of land or
- e) an overdraft agreement (except for overdrafts for non-business purposes where the credit is not repayable on demand or within three months).

Borrowers have a period of 14 calendar days (from the date calculated in accordance with section 66A(3) of the Act) in which to withdraw from a credit agreement without giving any reason.⁶⁸

Assessing affordability

4.31 As with all other applications for, or offers of, credit, creditors need to consider (amongst other matters) whether a borrower who it is understood or suspected has, or may have, some form of mental capacity limitation, is likely to be able to meet repayments under a credit

⁶⁸ Where this right of withdrawal does not apply, the borrower may have a separate right of cancellation either under the Act or under the Financial Services (Distance Marketing) Regulations 2004 (which continue to apply to distance contracts not covered by the right of withdrawal – subject to their own exclusions).

agreement in a sustainable manner without an adverse impact on his financial circumstances.

- 4.32 If a borrower does not have the capacity to make the required borrowing decision at the time that it needs to be made, the risk of the borrower inappropriately taking on an unsustainable credit commitment is increased.
- 4.33 If a creditor suspects that such circumstances **might** exist, we would expect the creditor to mitigate such a risk by applying a particularly **high level of scrutiny** to the borrower's credit application.
- 4.34 While seeking to balance the need to protect such borrowers from being provided with unsustainable credit against the need not to unnecessarily deny them access to credit may not always be a simple task, the undertaking of **appropriate and effective** affordability assessments, should significantly mitigate the risk to such borrowers.
- 4.35 In particular, we would expect the creditor to undertake a stringent affordability assessment of the borrower to facilitate the creditor being better enabled to make an informed and appropriate lending decision. We do not consider that the creditor should need to change the 'financial threshold' (for example, in terms of the borrower's credit rating) for granting the credit to the borrower. However, it would certainly be appropriate for the creditor not to place over-reliance on information provided by the borrower to inform an affordability assessment (in an application form or otherwise) in the absence of having taken sufficient steps to **verify the accuracy and veracity of any self-declared information** provided by the borrower to inform the creditor's lending decision.

If a borrower is understood to have, or suspected of having, some form of mental capacity limitation, the borrower's self-declared information **might** be a particularly unreliable source of information to inform a creditor's affordability assessment.

- 4.36 As stated in paragraph 4.29 of the ILG, we consider that the following might constitute an irresponsible lending practice:

Failing to take adequate steps, so far as is reasonable and practicable, to ensure that information on a credit application relevant to an assessment of affordability is complete and correct.

This includes all/any information supplied by the borrower.

Mr F asked for both an advance of credit and an overdraft from a bank where he had held an account for a number of years. He has a diagnosis of schizophrenia (a fluctuating condition) and often has no concept of money or the fact that debts have to be repaid from income.

On the loan application he put an amount down for 'earnings' which far exceeded his only true source of income - which was money he received as state benefits - benefits which were paid into the account he held with the same bank.

His only reason for wanting the loan was to have money to facilitate his consumption of various (non-essential) goods.

Despite evidence being provided to the bank by his family regarding his condition which identified that his capacity to understand financial matters was limited, his loan request was granted. The repayment amounts were not affordable and Mr F quickly fell into arrears.

- 4.37 There are a number of different sources of information that a creditor might wish to consider as a means of better informing his affordability assessment.

4.38 As stated in paragraph 4.12 of the ILG:

Creditors may employ the use of a variety of types and sources of information to assess affordability which **might**, depending on the circumstances, include some or all of the following examples (this is a non-exhaustive list):

- record of previous dealings with the borrower
- evidence of income
- evidence of expenditure
- a credit score
- a credit report from a credit reference agency
- information obtained from the borrower, whether on an application form or separately (this would include information derived from 'personal contact' with the borrower. For example, during a meeting with a potential borrower at his home).

Paragraph 4.12 (of the ILG) is not a **checklist** of sources of information that we consider creditors **must** use – but a list of examples of the types and sources of information that **might** be appropriate. In our view, creditors may apply their own discretion (acting reasonably) in deciding the types and sources of information they employ to assess affordability.

However, it may subsequently be incumbent on them to provide to the OFT such documents and information as the OFT requests relating to the practices and procedures that they employ for assessing affordability (for example where the OFT requests documents pursuant to sections 36B or 36C of the Act) to enable the OFT to form a view as to whether the practices and procedures that they employ for assessing affordability are effective.

4.39 As stated in paragraph 4.21 of the ILG, we consider that the following constitutes an irresponsible lending practice:

Failing to consider sufficient information to be able to reasonably assess affordability, prior to granting credit, significantly increasing the total amount of credit provided, or significantly increasing the credit limit (in the case of a running account credit agreement).

This **could** (but not necessarily) include, for example:

- failing to take proper account of relevant information contained in databases when these are referenced. Relevant information could include, for example, information on credit reference files such as notices of correction
- **where applicable, appropriate and proportionate**, failing to verify details of current income and/or expenditure by, for example, checking hard copies of payslips/contract of employment (when a borrower is in employment), accountant's letters (when a borrower is self-employed) or benefit statements (when a borrower is not in employment).

4.40 As stated in paragraph 4.10 of the ILG (as revised in October 2011):

In the OFT's view, the extent and scope of any assessment of affordability, in any particular circumstance, should be dependent upon- and proportionate to- a number of factors - which may include some or all of the following as appropriate:

- the vulnerability of the borrower: for example, if it is suspected that the borrower might not have the mental capacity to be able to understand information and explanations provided to him and make informed borrowing decisions at the time the information and

explanations are provided.

- 4.41 As stated in paragraph 4.23 of the ILG, we consider that the following constitutes an irresponsible lending practice:

Failing to take reasonable steps to assess (on the basis of information that the creditor is aware of at the time the credit is granted) whether a borrower is likely to be able to meet repayments in a sustainable manner.⁶⁹

The actual assessment undertaken should be subject to **proportionality** considerations in each case.

- 4.42 As stated in paragraph 4.8 of the ILG:

Where the assessment of affordability suggests that a borrower is unlikely to be able to meet repayments under a credit agreement in a sustainable manner over the life of the agreement, in our view, it should not be made available for that amount and duration. However, a smaller amount of credit, for example, may be sustainable (based on the assessment of affordability).

⁶⁹ See also paragraph 4.22 of the ILG and section 55B of the Consumer Credit Act 1974.

Unsuitability

- 4.43 We would also expect a creditor, when considering granting credit to a borrower, significantly increasing the amount of his credit, or increasing his credit limit under an agreement for running account credit, to take **particular**⁷⁰ care to ensure that where it understands or suspects that the borrower has, or may have, mental capacity limitations that might impact on his ability to make an informed borrowing decision, he is not provided with **clearly unsuitable**⁷¹ credit – even if it is otherwise **affordable**.
- 4.44 Paragraph 5.5 of the ILG states that the following might constitute an irresponsible lending practice:

Promoting the sale of a particular credit product to an individual borrower under circumstances in which the creditor has reason to believe that the product is clearly unsuitable for that borrower given his financial circumstances and/or his intended use of the credit (if known).

For example, advising a borrower to take out a secured loan, or to replace or convert an unsecured loan to a secured loan, when it is clearly not in the borrower's best interests to do so at that time.

Another example would be promoting a short-term loan product such as a payday loan, which would be expensive as a means of longer term borrowing, as being suitable for supporting sustained borrowing over longer periods.

⁷⁰ Particular care should be taken by the creditor under such circumstances since the borrower, dependent on the nature and the extent of his capacity limitation, may not himself be able to take an informed view as to the unsuitability or otherwise of the credit product.

⁷¹ See first text box in paragraph 3.13 of ILG (see footnote 1 for link to ILG).

⁷² See section 55A(2)(a) of the Act and paragraph 3.13 of the ILG.

In the OFT's view, considerations of the 'suitability of intended use' would not cover such matters as whether a borrower should or shouldn't seek credit to, for example, pay for a holiday (as opposed to seeking credit to pay for more obvious 'essentials') – subject to the type of credit being provided not being unsuitable for its intended use⁷² and an appropriate assessment of affordability being undertaken prior to granting the credit to the borrower.

- 4.45 **The OFT is aware of instances of clearly unsuitable credit being provided to borrowers under circumstances in which it must have been wholly apparent to the creditors both that there were at least reasonable grounds for suspecting that the borrowers might not have the capacity to make the required borrowing decisions and that the credit being provided to them was clearly unsuitable. We consider that such conduct is very likely to be considered an unfair or improper practice for the purposes of section 25 (2A) (e) of the Act.**

Mrs G was in her 80s and lived on her own. She struggled with short-term memory loss and found it difficult to understand complex issues. Her condition was such that it would have been apparent to any reasonable person, who engaged in conversation with her, that she was very easily confused and might not have the capacity to make an informed borrowing decision.

Following an extended presentation which was given to her at her home by a creditor, she entered into a high cost, long-term, finance agreement that the creditor must have known, or reasonably ought to have known, was clearly unsuitable for her given her personal circumstances. Although her financial circumstances were such that she could comfortably afford to meet the repayments on the credit agreement in a sustainable manner, she often forgot to make payments on time or at all and consequently accrued significant default charges.

5 REGULATORY COMPLIANCE AND ENFORCEMENT

Adherence to the guidance and compliance

- 5.1 The OFT expects creditors to take all reasonable steps (subject to proportionality considerations) to ensure they have suitable business practices and procedures in place to facilitate their own compliance and (as appropriate) that of any agents and associates (for example, through training, monitoring, record keeping, disciplinary policies/procedures, contractual requirements, or any other means necessary and appropriate to the business).
- 5.2 To the extent that it is appropriate to do so, we would expect creditors to have regard to both the letter and spirit of this guidance, other relevant OFT guidance and relevant legal obligations.

Evidence of compliance

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

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

- 5.5 If the OFT requires them to do so, it will be incumbent on creditors to be able to demonstrate, to the OFT's satisfaction, that their practices and procedures for dealing appropriately with borrowers who it is understood have, or suspected may have, some form of mental capacity limitation that might constrain their ability to make an informed borrowing decision:
- have been implemented in practice and are effective
 - are proactively monitored to assess their ongoing effectiveness
 - have been appropriately amended on the basis of the results of such monitoring as and when appropriate to do so.
- 5.6 Creditors should keep a record of the checks they undertake to assess adherence to this guidance.
- 5.7 Similar assessments may be made of applicants for licences.

Enforcement principles

- 5.8 The OFT is committed to fair, effective and proportionate enforcement. In practice this means that where we identify non-compliance with the law and/or non-adherence to relevant OFT guidance, we will decide on the appropriate regulatory response in the light of the facts and circumstances of the individual case.
- 5.9 The type of OFT action taken will be guided by the level of actual or potential harm to borrowers and by the scale or frequency of identified misconduct. In considering whether conduct is non-compliant, we will take account of the statutory requirements at the time the conduct occurred.
- 5.10 Where we wish to change conduct, we will use one of the appropriate 'tools' available to us. For example, we can impose 'requirements' on a business where we are dissatisfied with any matter in connection with the operation of the licensed business. Failure to comply with such a

requirement can lead to the imposition of a financial penalty of up to £50,000 per instance of non-compliance. We may also compulsorily vary a licence, for instance to limit the activities for which a trader is licensed, or limit the life of the licence.⁷³

- 5.11 In serious cases, where there is evidence tending to show that a person is unfit to hold a consumer credit licence, the OFT can take action with a view to refusing or revoking the credit licence of the person concerned. Similarly, if we consider a person is unfit to operate under cover of a group licence, we can take steps with a view to that person being excluded from the cover of the group licence.⁷⁴ Engaging in unfair or improper business practices would constitute grounds for the OFT to consider fitness to hold a licence.
- 5.12 Any action taken by the OFT with a view to refusing or revoking a licence, or excluding a person from the cover of a group licence, is subject to an independent decision making process. The licensee or applicant has a right to make representations to an independent adjudicator that the proposed action would be disproportionate or otherwise objectionable, prior to the adjudicator making a final

⁷³ The OFT can also take action under Part 8 of the Enterprise Act 2002 in respect of domestic or Community infringements falling within sections 211 or 212 of that Act. Our approach to the use of these powers is discussed in *Enforcement of consumer protection legislation – Guidance on Part 8 of the Enterprise Act* (OFT512). The OFT also co-ordinates such actions undertaken by other enforcers. www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft512.pdf

The OFT also has both civil and criminal enforcement powers under the Consumer Protection from Unfair Trading Regulations 2008
www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf

⁷⁴ The OFT has the power under section 28 of the Act to exclude any person from the cover of a group licence. However, we expect group licence holders themselves to take the lead in excluding unfit members from the group and notifying the OFT that they intend to do so and, where applicable, have done so. If a group licence holder fails to exclude unfit members of the group from operating under cover of its group licence, it would seriously call into consideration whether it remains in the public interest to continue to grant the group licence in question.

decision.⁷⁵ Following the final decision by the adjudicator, there is a right to appeal the decision (if there is an adverse determination) to the First Tier Tribunal (Consumer Credit)⁷⁶ provided that there are appropriate grounds to do so.

⁷⁵ Further information about the adjudication process can be found in our guidance document *Licensing – your right to make representations* (OFT661) – www.ofc.gov.uk/shared_ofc/business_leaflets/credit_licences/ofc661.pdf

⁷⁶ The First Tier Tribunal (Consumer Credit) is independently administered by the Tribunals Service, an agency of the Ministry of Justice. See '*First Tier Tribunal (Consumer Credit) – General Regulatory Chamber – Explanatory Leaflet*' www.justice.gov.uk/downloads/global/forms/tribunals/consumer-credit/consumer-credit-short-guide.pdf

ANNEXE(S)

A USEFUL CONTACTS

A.1 Office of the Public Guardian (England and Wales)

0300 456 0300

www.direct.gov.uk/en/DI1/Directories/DG_10012178

www.direct.gov.uk/en/Governmentcitizensandrights/Mentalcapacityandthelaw/Mentalcapacityandplanningahead/DG_186373

A.2 Office of the Public Guardian (Scotland)

01324 678300

www.publicguardian-scotland.gov.uk

A.3 Office of Care and Protection (Northern Ireland)

028 9072 4733

www.courtsni.gov.uk

A.4 The Money Advice Service⁷⁷

0300 500 5000

www.moneyadviceservice.org.uk

⁷⁷ The Money Advice Service produces guidance called 'Help with Managing Money' for people with mental capacity limitations and/or their carers.

www.moneyadviceservice.org.uk/assets/downloads/pdfs/your_money/a5_guides/help_with_managing_money.pdf

B POWERS OF ATTORNEY AND DEPUTYSHIP

B.1 The Mental Capacity Act 2005, with application in England and Wales, creates a power of attorney known as a lasting power of attorney (LPA). LPAs largely replaced enduring powers of attorney (EPA) in 2007, when the Mental Capacity Act came into effect - but EPAs may still be used if made and signed before October 2007. The Office of the Public Guardian deals with the registration of powers of attorney. An unregistered EPA can be used as long as the 'donor'⁷⁸ still has the capacity to make decisions. If the donor doesn't have the capacity to make certain decisions, the EPA will need to be registered in order to still be effective.

B.2 There are two types of LPA:

- **a property and affairs LPA** gives the attorney(s) the power to make decisions about **financial** and property matters, such as selling a house or managing a bank account
- **a personal welfare LPA** gives the attorney(s) the power to make decisions about health and personal welfare, such as day-to-day care, medical treatment, or where the person should live.

B.3 While a personal welfare LPA only takes effect from the point in time when the donor doesn't have the capacity to make certain decisions, a property and affairs LPA can take effect as soon as it is registered⁷⁹ with the Office of the Public Guardian, even if the donor still has the capacity to make certain decisions for himself, unless he specifies otherwise. The donor can, of course, specify that the attorney may only start managing

⁷⁸ The 'donor' is the person (in the context of this guidance, the borrower) who authorises another person (the attorney) to make certain types of decision on his behalf.

⁷⁹ The registration process usually takes at least six weeks.

his financial affairs at the point at which he doesn't have the capacity to make certain decisions.

- B.4 If a potential donor has not appointed an attorney and/or if he does not have the mental capacity to make such an appointment, there might be a need for the Court of Protection to appoint a deputy on the borrower's behalf. Deputies are appointed by the Court of Protection⁸⁰ to manage the properties and affairs and/or personal welfare of a person who does not have the capacity to make decisions for himself. The duties and responsibilities of a Court Appointed Deputy are similar to those imposed on the Donee⁸¹ of a LPA.
- B.5 In Scotland, a continuing power of attorney (CPA) grants the attorney the authority to make decisions about the donor's financial affairs. In Northern Ireland, an EPA authorises a third party to act on behalf of a donor.
- B.6 An attorney should be able to produce the original validated/registered⁸² LPA document or provide a certified copy.⁸³ A registered LPA will set out the types of decision which can be made on the donor's behalf, who is authorised to make these decisions, and how the decisions should be made.

⁸⁰ In Scotland, the equivalent of a 'deputy' is a 'guardian' and the court issues guardianship orders.

⁸¹ In the context of this guidance, a donee is likely to be a close relation, friend or carer.

⁸² With the relevant Office of the Public Guardian (England and Wales, Scotland) or the Office of Care and Protection (Northern Ireland).

⁸³ If originals cannot be produced a solicitor can certify a copy.

If a power of attorney or Deputyship Order is in operation, the OFT would expect creditors to recognise the authority of the attorney or deputy.⁸⁴

The OFT would be likely to consider any refusal/reluctance to do so, without any objective justification, to be an unfair or improper practice for the purposes of section 25 (2A) (e) of the Act.

- B.7 Where third parties may wish to make decisions on behalf of a borrower, but are not authorised to do so, we would expect creditors to indicate to the third parties that they can seek advice from the relevant Office of the Public Guardian or the Office of Care and Protection.

⁸⁴ An attorney or deputy should be presumed to be acting – and making decisions - in the best interests of the borrower that he represents - unless there is substantive evidence to the contrary.

C OTHER RELEVANT GUIDANCE AND LEGISLATION

- C.1 In drawing up this guidance, the OFT has had regard to relevant legislation and, to the extent that we consider that it is appropriate to do so, we have drawn upon **principles** set out in such legislation and accompanying codes of practice.
- C.2 Creditors should have regard to all relevant legislation and guidance. Evidence of non-compliance with relevant legislation and/or not having sufficient regard to relevant guidance are matters that may be taken into account by the OFT in considering 'fitness' to hold a consumer credit licence.
- C.3 Amongst the legislation and guidance that the OFT would expect creditors to have appropriate regard to includes:

The Equality Act 2010

- C.4 Where appropriate, creditors should make 'reasonable adjustments'⁸⁵ to their practices and procedures with a view to ensuring that borrowers whose mental capacity may be limited in a way that might impact on their ability to be able to make informed borrowing decisions, are not placed at a substantial disadvantage relative to other borrowers.
- C.5 Failure to make reasonable adjustments to any practice or procedure, where it may be necessary to do so in order to place borrowers who may have limited capacity on an equal footing with other borrowers,

⁸⁵ A number of (but not all) borrowers who may not be able to make an informed borrowing decision by virtue of some mental capacity limitation, will be classified as 'disabled' for the purposes of the Equality Act 2010 (EA). 'Disability' is a 'protected characteristic' for the purposes of the EA. This means that creditors may be required (as a matter of law) to take positive steps to place such borrowers on an equal footing with 'non-disabled' borrowers (with a view to better enabling them to access the creditor's products). For guidance on the definition of 'disability', see *Equality Act 2010 Guidance* issued by the Office for Disability Issues. www.odi.dwp.gov.uk/docs/wor/new/ea-guide.pdf

could amount to discrimination under the Equality Act 2010.⁸⁶ This includes where the sole aim of giving effect to practices and procedures in a particular way (rather than making reasonable adjustments as necessary) is to reduce costs.

- C.6 In making reasonable adjustments to their practices and procedures where appropriate to do so, creditors need to be careful to avoid engaging in discrimination by perception (see paragraph 4.24).

Data Protection Act 1998

- C.7 Any creditor that handles personal data⁸⁷ is subject to a number of legal obligations under the Data Protection Act 1998 ('DPA').⁸⁸ Creditors should observe and adhere to the eight data protection principles.⁸⁹
- C.8 The DPA requires personal data to be processed⁹⁰ fairly and lawfully and kept for no longer than is necessary. The length of time that it is 'necessary' to retain personal data will need to be determined by individual creditors on a case by case basis taking account of 'business need'.

⁸⁶ In England, Wales and Scotland, the Disability Discrimination Act 1995 was repealed from 1 October 2010 by the Equality Act 2010. In Northern Ireland, the Disability Discrimination Act 1995 was amended by the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004.

⁸⁷ 'Personal data' is data relating to a living individual who can be identified from the data and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

⁸⁸ See the Information Commissioner's Office's '*Guide to data protection*' www.ico.gov.uk/for_organisations/data_protection/the_guide.aspx .

⁸⁹ www.ico.gov.uk/for_organisations/data_protection/the_guide/the_principles.aspx

⁹⁰ 'Processing' means obtaining, recording or holding the data, or carrying out any operation on the data including disclosing or disseminating the data.

C.9 In order for a creditor to be able to process any '**personal data**' pertaining to a borrower, at least one of the conditions set out in Schedule 2 to the DPA must be met. These include (this is a non-exhaustive list):

- Condition 1 – the data subject (the borrower) has given his consent
- Condition 2 – the processing is necessary for the performance of a contract to which the data subject (the borrower) is a party or for the taking of steps at the request of the data subject with a view to entering into a contract
- Condition 3 – the processing is necessary for compliance with any legal obligation to which the data controller (the creditor) is subject, other than an obligation imposed by contract

For example, this may be the case in respect of the legal obligation imposed on creditors by section 55A(1)(a) of the Consumer Credit Act to provide adequate pre-agreement explanations.

- Condition 6 – the processing is necessary for the purposes of legitimate interests pursued by the data controller (the creditor) - except where the processing is unwarranted by reason of prejudice to the rights and freedoms of legitimate interests of the data subject.

For example, for the purpose of better facilitating an informed lending/borrowing decision being reached.

C.10 In order for a creditor to be able to process any '**SENSITIVE personal data**' (this is defined in section 2 of the DPA and includes information about the data subject's 'mental health or condition') pertaining to a borrower, at least one of the conditions set out in Schedule 2 to the

DPA **and** one of the conditions set out in Schedule 3 to the DPA must be met. The Schedule 3 conditions include (this is a non-exhaustive list):

- Condition 1 - the data subject has given his explicit consent to the processing of the personal data
- Condition 6 (c) – the processing is necessary for the purposes of establishing, exercising or defending legal rights.

For example, the right afforded by the Mental Capacity Act 2005 for a person not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

Another example, which may be applicable in some instances, is the right of a 'disabled person', as defined by the Equality Act 2010, not to be treated less favourably than a person who is not disabled because of something arising as a consequence of the disabled person's disability. This would include a person being treated less favourably by virtue of a service provider failing to make 'reasonable adjustments'.

C.11 Where borrowers have attorneys acting on their behalf (including making decisions on their behalf), the Attorneys should be able to provide certified copies of LPA/CPA/EPA⁹¹ forms to prove that they have the appropriate authority.

C.12 Mental capacity can fluctuate over time. Consequently, a borrower might not have the capacity to make an informed borrowing decision at one point in time, but have the capacity to do so at some point in the future. Where this might be the case, the OFT would expect any sensitive personal data indicating that a borrower is understood to have not had

⁹¹ Depending on the jurisdiction.

the capacity to make an informed borrowing decision at some point in the past (retained and processed in accordance with the DPA), to act only as a trigger for creditors to give further **consideration** as to whether it appears as if he might or might not be able to make such a decision at a particular point in time in the future should he be applying for (further) credit.

Such considerations should be based on information obtained and assessments undertaken at the time that the further application for credit is made.