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Dear Alison

RE: IRRESPONSIBLE LENDING – OFT GUIDANCE FOR CREDITORS

The UK Cards Association is the leading trade association for the cards industry in the UK. The Association is the industry body of financial institutions who act as card issuers and/or acquirers in the UK card payments market. It is responsible for formulating and implementing policy on non-competitive aspects of card payments. The UK Cards Association accounts for the majority of debit and credit cards issued in the UK, with members issuing in excess of 66m credit cards and 76m debit cards, and covers the whole of the plastic transactions acquiring market.

The UK Cards Association welcomes the engagement process adopted by the OFT and would encourage this participative approach as the OFT develop their thinking on the guidance.

Given the nature of the paper, The UK Cards Association has, as will other trade bodies, circulated the documentation to, and has consulted with, our Members. As the OFT will appreciate, card portfolios may differ between issuers and we have therefore been keen to encourage our Members to respond individually to the consultation

However, it is also appropriate for us to provide an industry-level response focusing on the comments that are common across the whole or a significant proportion of card products provided by our Members.

1. General Observations

The OFT will appreciate that the consumer credit market in the UK is very mature, highly-sophisticated and well regulated, with many tools at a lender's disposal to assist in making informed lending decisions. One of the features of such a developed market is the availability of a wide variety of products offered through a range of delivery channels to a number of sectors of the population who are able to access credit. With guidance seeking to address all types of credit through whichever channel on a one-size-fits-all basis, proportionality and flexibility of application are key.

Fundamentally, we are not clear what evidence the OFT has, and therefore the underlying justification, that has driven the content of the guidance – guidance which amounts to a new layer of regulation. The content appears to be largely subjective and reflect many of the opinions voiced by the OFT over recent years in the development of the Consumer Credit Act, the Consumer Credit Directive, the Payment Services Directive etc. Neither does the guidance seem to have been subject to an impact assessment. We therefore do not believe that the guidance comes close to passing the test of the Better Regulation principles.

As drafted the guidance could have a significant detrimental effect on the UK market particularly when viewed against the objectives of the Consumer Credit Directive (CCD). The more onerous lending requirements asked of UK lenders could place the UK credit market at a significant disadvantage when compared to its counterparts across Europe. It may also provide competitive advantage to overseas lenders targeting the UK who are not bound by the same requirements. We do not believe this is what the OFT intended and would welcome further consideration of proportionate requirements that ensure a responsible lending environment whilst not disadvantaging UK lenders.

Not only is there a risk of market distortion, but too onerous and prescriptive a set of guidance could restrict or limit lending to, or the withdrawal of products aimed at, certain sectors of the population, particularly those who might be regarded as a higher risk. Whilst not wishing to exclude consumers from accessing affordable credit, lenders will want to ensure that they are fully compliant with the guidance and thus may choose to focus on those consumer sectors where, as the guidance is currently proposed, this is most achievable.

As we have seen in recent years, overly-prescriptive guidance or that which is subject to manipulation of interpretation, increases the opportunity for vexatious and frivolous claims from consumers regarding the validity of their credit agreements (e.g. much of the activity we see from Claims Management Companies (CMCs) challenging lenders under sections 77 & 78 of the Consumer Credit Act). We are extremely concerned that, as written, the guidance could play into the hands of those who seek to abuse the system (and at the same time create false hope for vulnerable consumers). We would welcome an opportunity for the industry to meet with the OFT to consider the issue of CMCs in light of the proposed guidance

It is therefore vital that the guidance sets out the context in which it is being published i.e. that it is intended to inform lenders of those types of extreme, persistent behaviour that might make the OFT call into question a lender's fitness to hold a credit licence rather than being a list of isolated incidents that could be used to question individual agreements. This is currently missing from the document.

We would also highlight that, as a package, the guidance creates a significant change to lenders' operations that will not only require systems changes, but will also need to be reflected in processes and, in order to be implemented effectively, significant effort to be spent on staff training.

As the OFT will appreciate such developments require time to implement and we would ask for serious consideration to be given to timescales for implementation and flexibility with regards to the retrospective application of the guidance. In particular, we would encourage the OFT to look to align the guidance where appropriate to other concurrent areas of consumer credit activity – implementation of the CCD, Consumer Finance Forum, and the recent BIS White Paper entitled "*A Better Deal For Consumers*" – so that lenders (and consumers) are clear on what is being delivered and that systems changes, training, and communications can be managed in a coordinated rather than piecemeal approach. A staged implementation may be appropriate, the detail of which requires further work.

In our view the guidance goes beyond the scope of that provided by s25 powers and is more stringent than that outlined in the relevant articles of the CCD e.g. the guidance calls for oral explanations in certain scenarios where this is not the case in the CCD, and the corresponding (draft) Consumer Credit Regulations, effectively amounting to gold-plating.

What we feel might help readers of the guidance is to focus more on the use of examples of unacceptable practice rather than broad principles. This would provide clarity over what lenders should be aspiring to and would perhaps assist OFT's own caseworkers in their assessment of lending practice.

2. General Principles of Lending

In our view, the way in which the guidance has been drafted creates a significant obligation on a lender's staff, in effect placing them in the role of a financial advisor.

Financial advice is a specialist role and while we understand the need for a certain level of knowledge as part of the delivery of responsible lending, front line staff (e.g. at calls centres) are not trained financial advisers. To require staff to have the requisite level of understanding and expertise would require significant additional training and cost.

There appears to be significant overlap between some of the requirements outlined in the guidance and both the existing CCA Advertising Regulations and imminent CCD requirements. We would be concerned that, if looked at in isolation, our Members could find themselves (and their customers) confused as to which requirements to adopt and running the risk of being non-compliant with at least one regulatory regime. . As such we re-iterate our request made verbally that the OFT map the requirements of the guidance against the CCD, the FSA's TCF requirements and the Lending Code. There is a serious risk that even based on the general principles of lending, credit card issuers' business models could be adversely affected. Ultimately this could lead to a reduction in available products in the market, stifle innovation and creativity and therefore reduce consumer choice.

What does not appear to be reflected at present in the documentation is the balance between the duty to lend responsibly and the obligation on the consumer to borrow responsibly (including providing accurate and up-to-date information and informing the lender of any change in circumstances). We would welcome a clear acknowledgement of this balance of responsibilities in the guidance.

In many cases lending is a process that is undertaken and completed through distance marketing channels, credit cards being a good example where most sales are conducted either on-line or via direct mail. We are concerned that the guidance does not appear to sufficiently recognise this reality of consumer credit and therefore introduces requirements that may be difficult to achieve. In so doing there is a risk that the guidance creates an unintended consequence, i.e. that some lenders will be put in a position of competitive advantage over others.

While we fully support the need for informed consumers who make decisions based on appropriate levels of information, ultimately it must be the consumer themselves that makes the decision whether to borrow using a particular borrowing product and not the lender making the decision for the borrower which goes well beyond the duty of care.

3. Explanations of Credit Products

As we have already highlighted, the guidance relating to explanations of credit products appears to go well beyond that set out in the CCD (Article 5.6) and the corresponding draft Consumer Credit Regulations. We are unclear as to the need for further, more comprehensive and prescriptive, guidance when the requirements of the CCD (which we understand to be a maximum harmonisation Directive) and the intent of BIS seems to be clearly articulated in the draft regulations. We are also unclear as to whether, given the specific nature of the regulations, lenders can legally go beyond these.

We must also question the extent of the explanations considered as necessary as these exacerbate our existing concerns over information overload. Too much information will result in vital information being overlooked and, for the more financially astute consumer, could be seen as patronising and offensive.

We would welcome the OFT's clarification on some of the specific evidential requirements. In particular, what is the expectation in terms of the lender's assessment of the customer's level of understanding? And, more generally, given that a variety of distribution channels are used, what is deemed to be suitable demonstration that the guidance has been complied with?

With regard to specific elements of this section of the guidance, we would argue that the majority of requirements placed on credit cards issuers are already satisfied by the information contained within the Summary Box which is available to consumers at the marketing stage.

We are not clear on what the purpose that an explanation of section 75 would serve to a prospective customer – this is not a feature that will differ between products as it is a statutory obligation. We do not see what providing information on statutory consumer protection has to do with assessing the responsibility or otherwise of a lenders' lending decisions and would expect to see this removed from the guidance.

Additionally, alluding to a product feature (such as credit card cheques – in terms of 'opt-out') when such a feature may not be available to that consumer will only seek to confuse the customer and could be construed as misleading advertising.

We also feel that some of the explanations required would appear more appropriate in the case of large scale lending (e.g. in the case of mortgage advances) and we would welcome the adoption of proportionality of requirements depending on the size and purpose of the lending being provided.

4. Assessment of Affordability

We believe that when it comes to affordability, there is a balance to be struck between the obligations of the lender and of the consumer who should themselves take some responsibility for the decision being taken.

As drafted the guidance is far too subjective and it will prove difficult for a lender to know whether they are compliant or not with all the requirements in respect of affordability.

It is unreasonable to expect a lender to foresee a series of economic, personal and employment changes that might adversely impact on a consumer's ability to borrow and we would therefore request that the OFT remove any such obligation. A lender can only act on what it knows. However, we do accept that should the customer reveal such information that alludes to a known and imminent change in their circumstances, then it would seem reasonable to expect such information to be factored into any lending decision, i.e. it becomes more about the lender's obligation to record and use such information.

Concern has been expressed with regards to the obligations surrounding a consumer's mental health. In our view there is a danger of lenders being put in a position where they could be in breach of other legislative requirements, most obviously the Disability Discrimination Act (DDA). The OFT needs to be clear about how they see this operating in practice in terms of who could make a judgment over the customer's mental capability and how should they go about doing so in a legally compliant way? Arguably it is the most obvious examples where a consumer displays mental health issues where it is easiest to fall foul of the DDA.

Market distortion may arise from some of the requirements placed on lenders, for example, the level of scrutiny deemed appropriate depending on the longevity or otherwise of the financial relationship with a consumer. For those organisations who hold the customer's primary bank account, the likelihood is that there will be a history of financial relationship that is unlikely to exist with some other credit card providers. These providers, and any new entrants to the market, would potentially be placed at a competitive disadvantage as they may be obliged to undertake a more time-consuming and costly affordability assessment. The unintended consequence is to increase the potential for consumer detriment as less product offerings are as easily available to the consumer i.e. the market becomes less competitive.

5. Pre-contractual Issues

We note the OFT's comments regarding the prominence requirements of risks in pre-contract advertising. Our concern is that this will create impractical and lengthy advertising material. We would welcome the opportunity to understand the evidence base that supports this additional requirement and for the OFT to present examples of how this might work in practice.

As we have already highlighted, the credit market is diverse with a range of products to suit different consumer requirements. We would therefore welcome a better understanding of the specific issues behind the OFT's comment about "...advertising that 'trivialises' the decision to borrow."

6. Post-contractual Issues

The OFT will be aware of the ongoing work being taken forward by BIS to deliver the objectives of the consumer credit White Paper (announced in July 2009). In light of this we would suggest that it is premature for the guidance to pre-empt the outcome of this work and the consultation process that the government has committed to. We fully support a partnership and consultative approach to addressing the various issues raised in the White Paper and are working closely with our members and with BIS to achieve an effective and proportionate outcome for all stakeholders.

7. Handling of Default and Arrears

Our Members subscribe to the Banking Code and are committed to acting sympathetically and positively when dealing with customers in financial difficulties. In the case of credit cards, the 'breathing space' commitment that was adopted following the Credit Card Summit in November 2008 takes this a step further and as an industry we have and continue to work closely with the debt advice agencies to ensure that the commitment is effective and works to the benefit of all stakeholders. However, we must stress that the commitment was developed as industry best practice rather than being seen as forming part of the regulatory landscape.

We would ask that the OFT recognise that there is a balance between those customers who are genuinely in financial difficulty (the 'can't pay's') and those who, for whatever reason, decide not to honour their debts (the 'won't pay's'). Every effort will be made to support those who find themselves going through financially difficult periods; this same level of understanding and tolerance should not be facilitated through guidance to those who have decided that they shouldn't pay.

8. Regulatory Compliance and Enforcement

In considering regulatory compliance and enforcement, we would reiterate an earlier comment regarding evidential base. We note that the OFT indicates that lenders must be able to "...positively demonstrate to the OFT's satisfaction ...". However, given the multiple channels used for lending in today's technological environment it is unclear what would be considered acceptable. Is it a case of documented procedures being in place?

The UK Cards Association would welcome the opportunity for ongoing dialogue and engagement with the OFT as the guidance proposals are firmed up and implementation timescales confirmed.

Yours sincerely

Jacqui Tribe
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