

Regulation of Modified Credit agreements: a consultation

November 2007



HM TREASURY

BERR | Department for Business
Enterprise & Regulatory Reform



Regulation of Modified Credit Agreements: a consultation

November 2007

© Crown copyright 2007

The text in this document (excluding the Royal Coat of Arms and departmental logos) may be reproduced free of charge in any format or medium providing that it is reproduced accurately and not used in a misleading context. The material must be acknowledged as Crown copyright and the title of the document specified.

Any enquiries relating to the copyright in this document should be sent to:

Office of Public Sector Information
Information Policy Team
St Clements House
2-16 Colegate
Norwich
NR3 1BQ

Fax: 01603 723000

e-mail: HMSOlicensing@opsi.x.gsi.gov.uk

HM Treasury contacts

This document can be found in full on our website at:

hm-treasury.gov.uk

If you require this information in another language, format or have general enquiries about HM Treasury and its work, contact:

Correspondence and Enquiry Unit
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

Tel: 020 7270 4558

Fax: 020 7270 4861

E-mail: public.enquiries@hm-treasury.gov.uk

Printed on at least 75% recycled paper.

When you have finished with it please recycle it again.

ISBN 978-1-84532-372-1

PU442

CONTENTS

		Page
Chapter 1	Introduction	3
Chapter 2	Legislation	5
Chapter 3	Next steps	9
Chapter 4	List of questions for the Impact Assessment	11
Chapter 5	How to respond to this consultation	13
Annex A	List of questions for consultation	15
Annex B	Impact Assessment	17
Annex C	Proposed legislation	23



INTRODUCTION

1.1 The UK's financial services regulatory framework is a key part of the success of the City and delivers important consumer benefits. The Government keeps this under continuous review. The Government is committed to reducing the administrative burdens on firms and enabling effective risk-based regulation of financial services, in line with the recommendations of the Hampton Review.¹

1.2 Consumer credit is regulated by the Consumer Credit Act 1974 (CCA), which is administered by the Office of Fair Trading (OFT). Following widespread consultation, the Government brought forward legislation to bring the sale of residential first charge mortgages within the scope of Financial Services Authority (FSA) regulation. The FSA's mortgages regime commenced in October 2004.

1.3 Stakeholders have recently identified circumstances where some firms could potentially find themselves having to comply with both regimes simultaneously for certain types of transaction. This paper sets out the issues and the Government's proposals for legislation to tackle these areas of potential dual regulation.

1.4 The Government proposes legislation to ensure that the regulatory regimes of the Financial Services Authority and Office of Fair Trading in relation to mortgages remain mutually exclusive. This consultation paper seeks views on this policy proposal.

1.5 In line with the Government's commitment to a risk-based approach to regulation, the proposals outlined here seek to minimise burdens on business and promote regulatory efficiency, while safeguarding important consumer protections in the area of consumer credit.

1.6 The Government is seeking views on these proposals and welcomes all responses to the questions outlined in this paper. Instructions for replying to this consultation may be found in chapter 5 of this paper. The closing date for response is 14th February 2008. The Government cannot guarantee to consider responses received after this date.

1.7 This paper has been produced by HM Treasury and the Department for Business, Enterprise and Regulatory Reform (BERR), following discussion with the Council of Mortgage Lenders (CML), FSA and OFT.

¹ Hampton Review on regulatory inspections and enforcement, March 2005 (<http://www.hm-treasury.gov.uk/media/7/F/bud05hamptonv1.pdf>)

2

LEGISLATION

BACKGROUND

2.1 There are two regimes that currently cover the consumer credit sector: the Consumer Credit Act 1974 (CCA) administered by the OFT, and the Financial Services and Markets Act (FSMA) which created the Financial Services Authority (FSA). The two regimes have different purposes and regulatory requirements.

Consumer Credit

2.2 The CCA has a wide scope requiring businesses that offer goods or services on credit, lend money, hire goods or collect debts to be licensed by the OFT. Engaging in licensable activities without a licence is a criminal offence, and any agreements made while firms are unlicensed are unenforceable. The rules governing consumer credit are derived from primary and secondary legislation. The OFT issues guidance on how to interpret the legislation and takes enforcement action where necessary.

2.3 The regulation of consumer credit is currently undergoing extensive changes, following the Consumer Credit Act 2006, which received Royal Assent last year and will be implemented by BERR by October 2008. The new legislation improves the regulation of consumer credit business, and updates the current framework in order to reflect developments in the market. The changes will enhance consumer protections, provide consumers with access to alternative dispute resolution via the Financial Ombudsman Service, strengthen the consumer credit licensing regime, and abolish the £25,000 limit on regulated agreements.

Mortgage Regulation

2.4 Under FSMA, the FSA has held responsibility for regulating the selling and administration of first charge residential mortgages since 2004. Buying a mortgage is one of the biggest financial decisions that individuals will make in their lifetimes. The Government brought mortgages within the scope of FSA regulation in order to ensure that consumers receive appropriate information and have access to suitable advice about mortgage products, and are afforded a means of redress if things go wrong. In order to avoid regulatory duplication FSA regulated mortgage contracts are carved out of the CCA.

2.5 A further technical amendment was made to FSMA in 2005 to maintain the boundary between the two regimes (see below for detail). Stakeholders have recently raised a further concern about the legal uncertainty that may exist after the financial limit is abolished for consumer credit regulation. It is clearly undesirable for legislation to be subject to different regulatory interpretations. The interpretation of the legislation is for the courts. However, the Government is keen to avoid the potential for dual regulation, which could ultimately make credit contracts unenforceable.

Legislative Detail

2.6 The CCA contains provisions (in section 82) for dealing with situations where an existing agreement (either regulated under the CCA or not) is varied or supplemented by a new agreement. The effect of these provisions as originally enacted was broadly speaking, that:

- the new agreement (the “modifying agreement”) would be treated as revoking the earlier agreement and containing provisions which reproduced the combined effects of both agreements (section 82(2));
- if the earlier agreement was regulated under the CCA, then the combined agreement was also to be treated as a regulated agreement (section 82(3)); and
- if the earlier agreement was not regulated under the CCA, then the combined agreement would be considered afresh to determine whether the combined effect of the earlier agreement and the modification created an agreement which met the criteria for regulation under the CCA.

2.7 Before the commencement of FSA mortgage regulation, amendments were made to section 16 of the CCA (exempt agreements) by the Regulated Activities Order 2001¹ to avoid dual regulation of first charge mortgages on residential property. A new section 16(6C) was inserted which provided that the CCA does not regulate a consumer credit agreement if it is secured by a land mortgage and entering into that agreement as lender is a regulated activity for the purposes of FSMA.²

The 2005 Amendments

2.8 Following these amendments it was drawn to the Government’s attention that there remained circumstances in which lenders might be subject to dual regulation under FSMA and the CCA as a result of the operation of section 82 of the CCA. Concern focused on the cases where a CCA regulated agreement was varied by an FSA-regulated mortgage contract (RMC), or where an unregulated agreement was varied by an RMC.

2.9 In order to address these concerns the Government introduced legislation so as to disapply section 82(2) and section 82(3) wherever the modifying agreement was an RMC³. In effect, this meant that the first agreement and the modifying agreement were treated as separate agreements for the purposes of the CCA. The RMC would be regulated only by the FSA and the first agreement would be subject to the CCA, where applicable.

2.10 FSA regulated home purchase plans (HPPs) are also exempt from the CCA, under section 16(6C). FSA regulation of these products took effect in April 2007 after legislation in 2006 carved them out of the CCA. HPPs include Ijara and Diminishing Musharaka products, which are sharia’a compliant products that have the same effect as regulated mortgages.

The Case for Legislation

2.11 Since these amendments to section 82 were made in 2005, the Council for Mortgage Lenders (CML) has brought to the Government’s attention a further dual regulation concern. This relates to the situation where an RMC is modified by a later

¹ Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544). The Regulated Activities Order was amended by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2001 (SI 2001/3544) and the Financial Services and Markets Act 2000 (Commencement of Mortgage Regulation)(Amendment) Order 2002 (2002/1777). Section 16(6C) of the CCA has since been amended by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment)(No.2) Order 2006 (SI 2006/2383) to exempt FSA-regulated home purchase plans.

² A mortgage is an RMC (i.e. it is regulated by the FSA) if 1) credit is provided to an individual or a trustee; 2) the borrowing is secured by a first legal mortgage on land; and 3) at least 40% of the land is used as a dwelling by the borrower or a close relative (or, where the borrower is a trustee, by the beneficiary).

³ The Financial Services and Markets Act 2000 (Consequential Amendments) Order 2005 (SI 2005/2967)

agreement, but where no new credit is provided, for example where a consumer wishes to switch interest rates and repayment period but receives no extra credit. A common example would be where a consumer with a fixed-rate mortgage that switches to a base rate tracker after a certain length of time agrees with the lender to switch to a new fixed-rate deal. Stakeholders have expressed a concern that dual regulation may arise in this circumstance due to the way in which the exemption in section 16(6C) is drafted.

2.12 The Government accepts that there is a risk that the notional combined agreement which arises under section 82(2) will not qualify for the exemption in section 16(6C) because the lender is not in fact entering into an agreement which is a regulated activity under FSMA. (The combined agreement is notionally created, rather than actively entered into.) If the section 16(6C) exemption did not apply to the combined agreement, then it would be regulated under the CCA with the original RMC continuing to be regulated by the FSA. This RMC could therefore be simultaneously subject to both regulatory regimes.

2.13 The industry has expressed concerns that this issue would become more acute once the financial limit of £25,000 for the application of the CCA to a credit agreement is removed in April 2008 as a result of changes in the Consumer Credit Act 2006.

Policy Principles

2.14 The Government's approach to this issue rests on one key policy principle:

- there should be no dual regulation of credit agreements: any agreement that falls within the scope of FSMA should be excluded from the scope of the CCA.

2.15 In practice, this means that:

- first charge residential mortgage arrangements should be solely regulated by the FSA. Any agreement in the form of a first charge residential mortgage arrangement comprising new borrowing, or additional borrowing, should be regulated by the FSA. The same risks of consumer detriment which exist in respect of first charge residential mortgages, exist in relation to any additional borrowing of this kind and should be regulated in the same way as the original mortgage;
- all other credit arrangements within scope of CCA should be regulated by the OFT; and
- some credit arrangements may involve parallel regulation where the arrangements are treated as being made up of two separate agreements for the purposes of the CCA (one regulated by the FSA and the other under the CCA). These elements should be kept separate and distinct so that lenders are able to administer them efficiently and to minimise the scope for consumer confusion.

2.16 The same principles apply to HPPs, which are also exempt from the CCA under section 16(6C).

PROPOSED SOLUTION

2.17 The Government recognises that lending institutions are keen to avoid the possibility of dual regulation. When the financial limit on CCA regulation is lifted in

April 2008 there may be more cases where uncertainty arises as to whether both regimes apply. Some lenders have suggested that agreements that are incorrectly documented may be unenforceable, and that they are considering strategies to mitigate these risks, for example by re-writing any affected agreement. They suggest that this would result in administrative costs that may be passed on to the consumer. Additionally, those lenders that rely on wholesale funding arrangements like securitisation suggest that they may incur further costs if they refinance contracts which have been sold on as part of a bundled package.

2.18 In the light of representations received on this issue the Treasury and BERR are proposing legislation to ensure that RMCs are regulated only under FSMA. This will be achieved by amending section 82(2A) of the CCA so that, in addition to being disapplied where the modifying agreement is a RMC, section 82(2) is disapplied where the existing agreement is a RMC. It is proposed that these amendments would be made by an Order under section 426 of FSMA, a draft copy of which is included in Appendix C.

2.19 This proposed solution seeks to safeguard the policy principles set out above. In addition, in formulating this proposal, Government has had regard to a number of further concerns:

- any legislation must be proportionate to the degree of risk and the scale of the perceived problems and must have regard to better regulation principles;
- any changes should be durable and provide long-term certainty for firms and consumers alike. This consultation seeks to avoid the possibility of further changes in the future;
- the Government is proposing only de-regulatory measures at this time to avoid dual regulation. It is not the Government's intention to alter the treatment of agreements that are exempt from regulation under the CCA regime except in relation to the risk of dual regulation of RMC agreements; and
- if a loan is currently regulated by FSA or under the CCA it will continue to be regulated.

2.20 This consultation document is focused specifically on the issue of potential dual regulation. A wider review of section 82 of the CCA was considered and rejected during the Consumer Credit Review in advance of the enactment of CCA 2006.

2.21 Separately, BERR propose to introduce a Legislative Reform Order (LRO) to create a new exemption from CCA regulation for Buy-to-Let mortgages. This LRO will also provide that Buy-to-Let mortgages are not brought into CCA regulation through the operation of s82.

Questions:

- How often do firms encounter the contractual variations outlined above? What are the practical implications for firms and consumers?
- What options are open to firms to mitigate any potential difficulties in relation to these scenarios?
- Does the proposed legislation meet its desired objective?

3

NEXT STEPS

- 3.1** The Government will consult for 12 weeks from publication until 14th February 2008. Following consultation, a summary of replies will be published on the internet at: www.hm-treasury.gov.uk
- 3.2** The Government plans, subject to this consultation, to bring forward legislation to amend section 82 of the CCA. A draft copy of the proposed legislation is included in Appendix C. It is proposed that the legislation will take effect on 6th April 2008.
- 3.3** The £25,000 limit on lending agreements regulated by the CCA will be lifted on 6th April 2008.

4

LIST OF QUESTIONS FOR THE IMPACT ASSESSMENT

4.1 An impact assessment is attached to this consultation document in Appendix B and the Government welcomes views on the assumptions made. It would be helpful to receive comments on both the costs and benefits of the proposed scheme to financial institutions and borrowers.

Questions:

- What are your views on the assumptions in the impact assessment?
- What are the overall costs and benefits of these proposals? In particular:
 - costs incurred by financial institutions in absence of Government action; and
 - costs incurred by borrowers in absence of Government action.

5

HOW TO RESPOND TO THIS CONSULTATION

5.1 The Government welcomes all responses to the questions outlined in this paper. The consultation will run for 12 weeks from publication until 14th February 2008. Please ensure that responses to this document reach us by the closing date. We cannot guarantee to consider your response if it arrives after that date.

Responses should be sent to:

Michael Cornford
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ
Email: rmca@hm-treasury.x.gsi.gov.uk
Fax: 020 7270 4694

Telephone queries should be directed to:

Michael Cornford – 020 7270 5266

5.2 This paper is available on the Treasury's public website at: www.hm-treasury.gov.uk

5.3 When responding, please state whether you are responding on behalf of an individual or representing the views of an organisation. If responding on behalf of a larger organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

CONFIDENTIALITY

5.4 All written responses may be made public on the Treasury's website unless the author specifically requests otherwise in writing.

5.5 Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regime. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act (DPA) and the Environmental Information Regulations 2004. If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of information we will take full account of your explanation, but we cannot give an assurance that confidentiality will be maintained in all circumstances.

5.6 In the case of electronic responses, general confidentiality disclaimers that often appear at the bottom of emails will be disregarded for the purpose of publishing responses unless an explicit request for confidentiality is made in the body of the response.

5.7 Subject to the previous two paragraphs, if you wish part (but not all) of your response to remain confidential, please supply two versions – one for publication on

the website with the confidential information deleted, and another confidential version for use by the Treasury and BERR.

5.8 A summary of responses will be published at: www.hm-treasury.gov.uk

Any Freedom of Information Act queries should be directed to:

Correspondence and Enquiry Unit
Freedom of Information Section
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ
Telephone: 020 7270 4558
Fax: 020 7270 4681
Email: public.enquiries@hm-treasury.gov.uk

Code of practice for written consultation

5.9 This consultation is being conducted in line with the Code of Practice for written consultation (a full version can be found at www.cabinet-office.gov.uk/regulation/code.htm), which sets down the following criteria:

- Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy;
- Be clear about what the proposals are, who may be affected, what questions are being asked, and the timescale for responses;
- Ensure the consultation is clear, concise and widely accessible;
- Give feedback regarding the responses received and how the consultation process influenced the policy;
- Monitor the department's effectiveness at consultation, including through the use of a designated consultation coordinator; and
- Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

5.10 If you feel that this consultation does not fulfil these criteria, please contact:

Sowdamini Kadambari
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ
Telephone: 020 7270 4867
Email: Sowdamini.Kadambari@hm-treasury.gov.uk

A

LIST OF QUESTIONS FOR CONSULTATION

- Are the principles underpinning the scheme the right ones?
- How often do firms encounter the contractual variations outlined above? What are the practical implications for firms and consumers?
- What options are open to firms to mitigate any potential difficulties in relation to these scenarios?
- Does the legislation proposed meet its desired objective?
- What are your views on the assumptions in the impact assessment?
- What are the overall costs of these proposals? In particular:
 - costs incurred by financial institutions in absence of government action; and
 - costs incurred by borrowers in absence of government action.

B

IMPACT ASSESSMENT

Summary: Intervention & Options

Department /Agency: HM Treasury & BERR	Title: Impact Assessment of The Financial Services and Markets Act 2000 (Consequential Amendments) Order 2008	
Stage: Consultation	Version: Final	Date: 16 November 2007
Related Publications: Regulation of Modified Credit Agreements: a consultation		

Available to view or download at:

<http://www.hm-treasury.gov.uk>

Contact for enquiries: Michael Cornford

Telephone: 020 7270 5266

What is the problem under consideration? Why is government intervention necessary?

When parties to a Financial Services Authority (FSA) regulated mortgage contract (RMC) agree to vary the contract without the provision of further finance (for example where a consumer wants to switch interest rates and repayment period but receives no extra credit) there is a risk that in addition to FSA regulation, the RMC would be caught by Office of Fair Trading (OFT) consumer credit regulation. The two regimes should be kept distinct. Legal uncertainty could lead to a lack of clarity for consumers, and lenders would run the risk that their agreements are not legally enforceable.

What are the policy objectives and the intended effects?

The purpose of the Statutory Instrument (SI) is to remove the scope for dual regulation of lending agreements under the Consumer Credit Act 1974 (CCA 1974) and the Financial Services and Markets Act 2000 (FSMA).

Where an existing RMC is varied by a new agreement that is not an RMC, the SI will have the effect of ensuring that the two agreements will be treated as separate and distinct, with the RMC subject only to FSMA rules and the other agreement subject to the CCA 1974 (where applicable).

What policy options have been considered? Please justify any preferred option.

Option 1 - Do nothing. This leaves open the possibility of dual regulation.

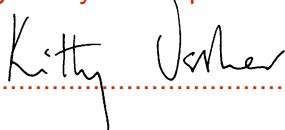
Option 2 - Consult on proposed legislation to remove the scope for dual regulation of lending agreements, and then bring forward legislation to come into force on 6th April 2008. This is the preferred option because it removes legal uncertainty.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? The Government keeps all legislation under review, and in line with good practice would expect to review the policy within three years.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:



Date: 16 November 2007

Regulation of Modified Credit agreements: a consultation

Summary: Analysis & Evidence

Policy Option: 1

Description: Do nothing

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' Both one-off and average annual costs represent the total cost to lenders within the mortgage industry.
	One-off (Transition)	Yrs	
	£ Nil - 550m	1	
	Average Annual Cost (excluding one-off)		
	£ Nil		Total Cost (PV) £ Nil - 550m
Other key non-monetised costs by 'main affected groups' Legal uncertainty caused by possible dual regulation. Unenforceability of incorrectly documented agreements.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups'
	One-off	Yrs	
	£ Nil	0	
	Average Annual Benefit (excluding one-off)		
	£ Nil		Total Benefit (PV) £ Nil
Other key non-monetised benefits by 'main affected groups'			

Key Assumptions/Sensitivities/Risks The above costs assume that, in the face of uncertainty as to whether both regimes apply, firms will attempt to mitigate this risk by re-writing the agreements affected. The explanation of the costs above are provided in the evidence base section of this impact assessment.

Price Base Year 2007	Time Period Years 1	Net Benefit Range (NPV) £ Nil	NET BENEFIT (NPV Best estimate) £ Nil
-------------------------	------------------------	---	---

What is the geographic coverage of the policy/option?		UK		
On what date will the policy be implemented?		N/A		
Which organisation(s) will enforce the policy?		N/A		
What is the total annual cost of enforcement for these organisations?		£ N/A		
Does enforcement comply with Hampton principles?		Yes		
Will implementation go beyond minimum EU requirements?		No		
What is the value of the proposed offsetting measure per year?		£ Nil		
What is the value of changes in greenhouse gas emissions?		£ Nil		
Will the proposal have a significant impact on competition?		No		
Annual cost (£-£) per organisation (excluding one-off)	Micro N/A	Small N/A	Medium N/A	Large N/A
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)	
Increase of	£ Nil	Decrease of	£ Nil
		Net Impact	£ Nil

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Summary: Analysis & Evidence

Policy Option: 2

Description: Legislation

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' As this is a deregulatory measure, we do not anticipate any additional costs to industry. We have consulted the FSA and the OFT and they do not believe they will incur any additional costs as a result of the proposed SI.
	One-off (Transition)	Yrs	
	£ Nil	0	
	Average Annual Cost (excluding one-off)		
	£ Nil		Total Cost (PV) £ Nil
Other key non-monetised costs by 'main affected groups'			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups'
	One-off	Yrs	
	£ Nil - 550m	0	
	Average Annual Benefit (excluding one-off)		
	£ Nil		Total Benefit (PV) £ Nil
Other key non-monetised benefits by 'main affected groups' Legal certainty for lenders and consumers, particularly regarding the enforceability of agreements for lenders. Avoidance of costs that would have been incurred in changing lender systems to avoid potential dual regulation.			

Key Assumptions/Sensitivities/Risks See assumptions in description and scale of monetary costs above and under the "Do Nothing" option.

Price Base Year 0	Time Period Years 0	Net Benefit Range (NPV) £ Nil	NET BENEFIT (NPV Best estimate) £ Nil
----------------------	------------------------	---	---

What is the geographic coverage of the policy/option?		UK		
On what date will the policy be implemented?		06/04/2008		
Which organisation(s) will enforce the policy?		FSA and OFT		
What is the total annual cost of enforcement for these organisations?		£ Nil additional		
Does enforcement comply with Hampton principles?		Yes		
Will implementation go beyond minimum EU requirements?		No		
What is the value of the proposed offsetting measure per year?		£ Nil		
What is the value of changes in greenhouse gas emissions?		£ Nil		
Will the proposal have a significant impact on competition?		No		
Annual cost (£-£) per organisation (excluding one-off)	Micro N/A	Small N/A	Medium N/A	Large N/A
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)	
Increase of	£ Nil	Decrease of	£ Nil
		Net Impact	£ Nil

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

Background to current proposal

When FSMA was enacted, the Government amended the CCA so that FSA regulated activities were carved out of the CCA. In 2005, following consultation, the Government introduced secondary legislation to amend one area of potential dual regulation of mortgages.

After the Council for Mortgage Lenders (CML) brought to the Government's attention the remaining circumstances in which lenders might be subject to dual regulation, the Government began policy discussions with industry. From this discussion, a shortlist of two policy options emerged, these being to do nothing, or to legislate to remove the scope for possible dual regulation. The Government has decided that the second option, to bring forward secondary legislation, is preferable, and decided to formally consult stakeholders on this proposal. As part of this consultation, the Government has set out its overarching policy principles, and is asking stakeholders to consider whether the policy proposal is consistent with these.

The analysis behind the decision that legislation is the preferred option may be found below. The costs and benefits of both options are presented, with reference to how these costs and benefits were derived.

Option 1 – Do nothing

Costs

The option not to legislate leaves open the possibility of dual regulation. This possibility will arise on 6th April 2008, when the cap of £25,000 for CCA regulated lending is removed.

It is possible that a court could decide that dual regulation did apply, setting an unfavourable precedent, as a result of which lenders would find their lending agreements were unenforceable.

In such an event, lenders would be obliged to redraft all their agreements in this category to avoid further legal challenges. From estimates presented by CML, this would lead to a one-off cost to the industry of £550m.

CML presented an estimate for the minimum additional sum for each remortgage of £250 and an estimate for the total number of transactions across the whole industry that could trigger a modifying agreement without creating a new RMC of 2.2m.

Without a legal challenge, it is possible that lenders may attempt to mitigate the risk by putting consumers through a full remortgage process as a pre-emptive measure. It is difficult to assess the probability of any legal challenge occurring, and what its outcome may be, and hence we present a range of potential costs (from nil - no challenge, to £550m - successful challenge requiring extensive action by lenders) in this Impact Assessment. However, possible dual-regulation has been identified by both the Treasury and industry as an important risk which has the potential to generate significant costs, and the Government believes that eliminating this risk through a new SI is the most effective mitigation strategy.

It is assumed that following this large one-off cost of redrafting existing agreements, the ongoing costs would be negligible, as lenders draft agreements in a way which avoids the possibility of dual regulation.

Benefits

If lenders take action to remortgage all existing agreements, consumers may experience a benefit as they would have a single contract and a single set of regulatory rules. However, the remortgaging process will present a cost to lenders, at least some of which they will likely pass on to the consumer. In addition, the sort of contractual variations which would lead to the uncertainty are likely to be easily understandable, and the clarity gain is likely to be marginal.

Option 2 – Legislation

Costs

As this is a deregulatory measure, the Government does not anticipate any additional costs to industry. None of the respondents to the informal consultation highlighted cost concerns in relation to the removal of the scope of dual regulation. When consulted, the FSA and OFT considered there would be no additional costs for them in terms of regulation.

Benefits

The main benefit from this legislation is the certainty for lenders that dual regulation is avoided. This would remove the risk of future costs. The legislation:

- gives clarity on the regulatory position and prevents compliance costs and burdens associated with dual regulation for lenders;

- retains the mutual exclusivity of the FSMA and CCA; and

- prevents liability for lenders due to complicated legal issues under dual regulation.

Note on Specific Impacts Test

The impact on competition is likely to be negligible. As the proposed policy is deregulatory, the legislative change may lower the barriers to entry faced by firms in the mortgage industry through reducing the complexity of the industry regulation. Therefore the policy may be pro-competitive.

The Treasury and BERR do not think there will be any disproportionate impact on business from the proposal to remove the scope for dual regulation. If anything, as the measure will reduce the administrative burden on business, small businesses, which may be less able to absorb the cost of additional administrative burden, will find this deregulatory measure beneficial.

The Government consider that the other specific impact tests are not relevant to this proposal.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	No	No
Small Firms Impact Test	No	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	No
Disability Equality	No	No
Gender Equality	No	No
Human Rights	No	No
Rural Proofing	No	No

2008 No.

FINANCIAL SERVICES AND MARKETS

The Financial Services and Markets Act 2000 (Consequential Amendments) Order 2008

Made - - - - - ***
Laid before Parliament - - - - - ***
Coming into force - - - - - April 2008

The Treasury, in exercise of the powers conferred on them by sections 426 and 428(3) of the Financial Services and Markets Act 2000⁽¹⁾, make the following Order:

Citation and commencement

1. This Order may be cited as the Financial Services and Markets Act 2000 (Consequential Amendments) Order 2008 and comes into force on 6th April 2008.

Variation of consumer credit regulated agreements

2. In section 82(2A) of the Consumer Credit Act 1974⁽²⁾ (variation of agreements) after “if” insert “the earlier agreement or”.

March 2008

Names
Two of the Lords Commissioners of Her Majesty's Treasury

⁽¹⁾ 2000 c.8.

⁽²⁾ 1974 c.39. Section 82 was amended by S.I. 2005/2967.

ISBN 978-1-84532-372-1



9 781845 323721 >