ANNEXE B – REGULATORY FRAMEWORK

Introduction

B.1 Payday loans will generally be regulated consumer credit agreements under the Consumer Credit Act.

B.2 Such agreements must comply with statutory requirements set out in the CCA and its subordinate legislation. In addition, the creditor must hold a valid consumer credit licence and must comply with other consumer protection legislation.

B.3 The OFT has powers to take licensing action in cases of non-compliance. In addition, as with local authority trading standards services, the OFT has powers to take enforcement action in respect of breaches of the CCA and other relevant legislation. Action may, for example, be taken under Part 8 of the Enterprise Act 2002 where an act or omission by a business infringes specified legislation and harms the collective interests of consumers.¹

CCA and regulations

B.4 The CCA regulates most aspects of credit transactions including advertising, pre-contractual disclosure, the form and content of agreements, APR calculation, post-contractual information and default and enforcement. Key provisions are summarised below.

Advertising

B.5 A representative APR must be included if an advertisement indicates in any way that credit is available to persons who might otherwise consider their access to credit restricted or that any of the terms on which credit is available is more favourable than corresponding terms applied in any other case or by any other

¹ [Website Link](http://www.oft.gov.uk/about-the-oft/legal-powers/legal/enterprise-act/part8)
editor, or if it includes an incentive to apply for credit or to enter into an agreement under which credit is provided.

B.6 In such cases the representative APR must be displayed with greater prominence than the information which triggers it.

B.7 The representative APR must be an APR at or below which the advertiser reasonably expects that credit will be provided under at least 51 per cent of agreements resulting from the advertisement.

B.8 If an advertisement includes an interest rate or an amount relating to the cost of the credit, this triggers a ‘representative example’ including the representative APR, the annual rate of interest, other mandatory charges and the total amount payable (TAP).²

B.9 The items of information comprising the representative example must be clear and concise, presented together and with equal prominence, and the example must be displayed with greater prominence than any other cost information in the advertisement.

B.10 In addition, an advertisement must not indicate that a loan is ‘guaranteed’ or ‘pre-approved’ where the loan is subject to any conditions regarding the credit status of the borrower.

B.11 Advertising must also comply with the Consumer Protection from Unfair Trading Regulations (CPRs). These prohibit advertisements which are misleading, whether by inclusion or omission, and influence the average consumer’s transactional decisions.³

B.12 A creditor may include additional cost information in an advertisement, such as the total charge for credit (TCC) or the TCC per £100 borrowed, provided that this information is less prominent than the representative APR and the remainder of the representative example.

² Inclusion of a representative APR does not trigger a representative example in cases where the representative APR is itself triggered under the Advertising Regulations.

Marketing

B.13 The CCA prohibits circulars to minors (those aged under 18). It also prohibits canvassing of cash loans off trade premises, such as in the consumer’s home. Loans can be offered in the home only if the consumer has provided consent in writing to the visit on a previous occasion.

Pre-contractual information

B.14 Specified information must be disclosed to the borrower in good time before a credit agreement is made. This must be done using a prescribed form, the Pre-contract Credit Information (PCI) form. The information given must be clear and easily legible.

B.15 The required information includes the APR, the TAP, the annual rate of interest and any non-interest charges. The PCI form must also set out the consequences of missing payments, including any default charges. In addition, it must set out the borrower’s right to request a draft credit agreement, and to withdraw from the agreement within a 14-day period after it has been made (or within 14 days following receipt of a copy agreement if later).

B.16 Guidance issued by the Department for Business Innovation & Skills<sup>4</sup> makes clear that ‘in good time’ means that the consumer must be given an adequate opportunity to consider the PCI, to pause and reflect, and to shop around if he wishes, before signing the credit agreement. Consumers must not be subjected to pressure to sign, and must be able to take the PCI form away.

B.17 It is open to the creditor to provide additional information, provided that this is in a separate document from the PCI form.

Pre-contractual explanations

B.18 In addition, the creditor must provide an explanation, orally or in writing, before the credit agreement is entered into. This must be adequate to enable the borrower to assess whether the proposed agreement is suitable for his needs and financial situation.

B.19 The explanation must cover in particular any features of the agreement which may make the credit unsuitable for particular types of use, or which may have a significant adverse impact on the borrower in a way which he is unlikely to foresee. It must also explain how much the borrower will have to pay periodically and in total under the agreement, and the principal consequences for the borrower of failure to repay on time.

B.20 The borrower must also be advised to consider the PCI and that he can take the information away, and how to ask the creditor for further information or explanation.

B.21 If certain aspects of the explanation are given orally or in person to the borrower (for example in a high-street store), other aspects must also be explained orally.

Creditworthiness and affordability

B.22 Before making a new credit agreement, or increasing significantly the amount of credit provided under an existing agreement, the creditor is required to assess the borrower’s creditworthiness. This assessment must be based on sufficient information, obtained from the borrower where appropriate and from a credit reference agency where necessary.

B.23 In addition, as part of its statutory power to assess whether lending is irresponsible, the OFT expects creditors to assess affordability – that is, the individual borrower’s ability to repay the proposed credit commitment in a sustainable manner: on time, out of income and/or available savings (without having to realise security or assets) and without incurring (or increasing) financial difficulty or experiencing adverse consequences.
Credit agreement

B.24 The credit agreement must contain prescribed information (broadly equivalent to the information required in the PCI form). This must be clear and concise and easily legible.

B.25 The agreement must be signed by both parties (electronic signatures are permissible if in accordance with statutory requirements). A copy of the agreement must be provided to the borrower, and the right of withdrawal period runs until 14 days after this has been done.

Modifying agreements

B.26 If a credit agreement is subsequently modified by agreement between the parties, the modifying agreement is deemed to revoke the previous credit agreement and to give rise to a new (modified) agreement for CCA purposes.

B.27 There are special rules regarding documentation of the modified agreement. As with any other new credit agreement, a new PCI form and explanation must be provided, and a fresh assessment of creditworthiness and affordability undertaken.

Improper execution

B.28 If pre-contractual information is not provided in the required form, or if the credit agreement does not comply with the relevant requirements (or is not signed by both parties), the creditor is precluded from enforcing the agreement without obtaining an order from the court permitting it to do so.

B.29 In considering whether to make an enforcement order, the court is required to have regard to the prejudice caused to any person by the contravention and the degree of culpability for it.

Post-contractual matters

B.30 The borrower is entitled to request a copy agreement at any time, together with a statement of account, upon payment of a £1 fee.
B.31 The borrower is also entitled to settle the loan early at any time, in full or in part, by giving notice to the creditor and repaying what is owed (less a statutory rebate). The borrower can request a settlement statement setting out the amount due.

B.32 A creditor can only terminate an agreement, or demand earlier payment of any sum, after giving advance notice of its intention to do so. In the case of a default notice, the borrower must be given at least 14 days’ notice together with a copy of the OFT default information sheet.

The licensing regime

B.33 The OFT is responsible for operating the licensing regime under the CCA. The aim is to ensure that licences are only given to, and retained by, those who are fit to hold them.

The fitness test

B.34 In determining fitness to hold a consumer credit licence, the OFT must have regard to any matters which appear to it to be relevant. This includes any evidence tending to show that the applicant or licensee, or any of its employees, agents or associates (including business associates), whether past or present, has:

- committed offences involving fraud or other dishonesty or violence
- failed to comply with the CCA or other relevant credit or consumer protection legislation
- failed to comply with requirements relating to the Financial Ombudsman Service jurisdiction
- practised discrimination in connection with the carrying on of a business, or
- engaged in business practices appearing to the OFT to be deceitful or oppressive, or otherwise unfair or improper, whether unlawful or not.
B.35 The CCA provides that the business practices that the OFT may consider to be deceitful or oppressive, or otherwise unfair or improper, include practices in the carrying on of a consumer credit business that appear to involve irresponsible lending.

B.36 The CCA also provides that, as part of the assessment of fitness, the OFT may have regard to the skills, knowledge and experience in relation to consumer credit business of any person who will participate in the licensed business, as well as the practices and procedures to be implemented in connection with the business. The OFT may therefore have regard to the overall competence of the applicant or licensee to run a compliant business.

B.37 When considering fitness, the OFT is not solely restricted to considering practices which relate to regulated consumer credit agreements. We can also have regard to practices relating to unregulated credit business, or any other business activity, where carried out by an applicant or licensee or an associate.

Licensing powers and sanctions

B.38 The CCA places a duty on licensees to notify the OFT of certain information. In addition, the OFT has powers to require the provision of information and documents. The OFT can also require access to the premises of licensed businesses to observe the carrying on of the business and to inspect documents. If necessary, we can enter premises under warrant.

B.39 The OFT can revoke a licence if we consider that the licensee is no longer fit to hold it. We also have powers to compulsorily vary a licence, for example to limit its scope.

B.40 Since 19 February 2013, the OFT has had the power to suspend a licence, with immediate effect or from a specified date, where urgently necessary for the protection of consumers. We published
draft guidance in October 2012, setting out how we will exercise this power, and final guidance was published on 22 February.\textsuperscript{5}

B.41 In addition, the OFT can impose requirements on a licensee where we are dissatisfied with any matter in connection with a licensed business. Failure to comply with requirements can lead to the imposition of a financial penalty of up to £50,000.

B.42 The OFT can also take informal action where appropriate, including writing to firms warning them of the need to improve their practices or procedures.

B.43 Information on the credit licensing regime can be found on the OFT website, together with a link to the public register which includes details of licences held and formal actions taken against licensees.\textsuperscript{6}

Fitness guidance

B.44 The OFT is required to publish guidance on how we propose to determine whether persons are fit to hold a consumer credit licence.

B.45 We have published a variety of fitness guidance, including the Irresponsible Lending Guidance and the Debt Collection Guidance. Creditors are expected to have regard to both the letter and the spirit of the guidance, and a failure to do so is a matter that the OFT will take into account in assessing fitness.

The Irresponsible Lending Guidance

B.46 The ILG was first published in March 2010 and updated in February 2011.\textsuperscript{7}

\textsuperscript{5} www.oft.gov.uk/news-and-updates/press/2013/17-13

\textsuperscript{6} www.oft.gov.uk/OFTwork/credit-licensing

\textsuperscript{7} www.oft.gov.uk/about-the-oft/legal-powers/legal/cca/irresponsible
The ILG covers all stages of the lending process, from advertising and marketing through to arrears and default. The guidance sets out illustrative but non-exhaustive examples of business practices at each stage of the process that the OFT may consider are unsatisfactory or may constitute irresponsible lending.

Chapter 2 of the ILG sets out a number of overarching principles of consumer protection and fair business practice, including:

- not using misleading or oppressive behaviour when advertising, selling or seeking to enforce an agreement
- making a reasonable assessment of whether a borrower can afford to meet repayments in a sustainable manner
- explaining the key features of the agreement to enable the borrower to make an informed choice
- monitoring the borrower’s repayment record and offering assistance where borrowers are experiencing difficulty
- treating borrowers fairly, and with forbearance and consideration, if they do experience difficulties.

This chapter also highlights the importance of:

- transparency in dealings between creditors and borrowers, including disclosure of key terms and conditions in a way that is clear and likely to be understandable by borrowers
- fair treatment of borrowers, including not subjecting them to high-pressure selling or aggressive or oppressive behaviour
- not exploiting borrowers in any way.

Chapter 3 of the ILG deals with explanations of credit agreements. These must be adequate to enable the borrower to make a reasonable assessment of whether the proposed credit agreement is suitable for his needs and financial situation, and whether he can afford to repay the credit. The explanation must also cover
the key associated risks, particularly the consequences arising from a failure to repay on time.

B.51 The extent of the explanation that must be provided will depend, for example, on the type and amount of credit being sought and the associated cost and risk to the borrower. The higher the total costs of the credit relative to the borrower’s financial situation, the greater the associated cost and risk.

B.52 The borrower should therefore be informed if the credit being sought is a short-term loan product, unsuitable for supporting sustained borrowing over longer periods, and would be expensive as a means of longer-term borrowing. In the case of payday loans, the explanation should cover in particular the effect of extending the life of the agreement or ‘rolling over’ loans.

B.53 The explanation must cover the principal consequences to the borrower of not repaying on time. Where applicable, this should include the total cost of the debt growing, or the borrower incurring default charges and interest (with approximate amounts given). It should also include the potential for an impaired credit rating (making credit more difficult or more expensive to obtain in future) in cases where the creditor reports information to a credit reference agency.

B.54 Creditors should take reasonable steps to ensure that borrowers understand the explanation given, and there should be an opportunity for interactivity between the borrower and creditor.

B.55 In the case of online applications, it should not be possible to enter into an agreement online without having first passed through screens clearly drawing the consumer’s attention to the PCI form and adequate explanation.
B.56 An adequate explanation must be given in respect of every new regulated consumer credit agreement before it is made, including any modifying agreement.8

B.57 Chapter 4 deals with assessment of affordability. The borrower should be able to repay the credit without undue difficulty (in particular without incurring or increasing problem indebtedness), over the life of the agreement and out of income and/or available savings. He should be able to do so whilst also meeting other debt repayments and normal/reasonable outgoings and without having to borrow further to meet such commitments.

B.58 The ILG does not specify particular factors that must be considered as part of an affordability assessment, or what types or sources of information should be used to make the assessment. The creditor should take a view on what is appropriate in any particular circumstance, taking into account the type and amount of the credit and the potential risks to the individual borrower.

B.59 A creditor may be required to justify the robustness of its assessments of affordability in the event of a regulatory challenge. This is so that the OFT, when undertaking assessments of fitness, can be satisfied that the creditor is not lending irresponsibly.

B.60 Where appropriate, account should be taken of the borrower’s financial position and credit history, including existing and future financial commitments which may impact on ability to repay.

B.61 Where an assessment of affordability suggests that a borrower is unlikely to be able to meet repayments in a sustainable manner, the credit should not be made available for that amount and/or duration. This may particularly be the case where the borrower is unable to meet existing credit commitments.

8 As noted above, a modifying agreement is deemed to give rise to a new credit agreement for CCA purposes.
B.62 Chapter 5 deals with pre-contractual issues including advertising and other promotional material and marketing.

B.63 A creditor should not promote a credit product to a borrower in circumstances where it has reason to believe that the product is clearly unsuitable for that borrower given his financial circumstances or the intended use of the credit.

B.64 Advertising should not suggest in any way that credit is available regardless of the borrower’s circumstances.

B.65 Creditors should not understate, mask or omit material information regarding key risks to the borrower, particularly where this might create a false or misleading impression to potential borrowers.

B.66 Creditors should not inappropriately encourage, induce or incentivise a borrower to sign up to an agreement quickly or for a higher amount than sought.

B.67 Chapter 6 deals with contractual and post-contractual issues.

B.68 A creditor should monitor a borrower’s repayment record and take appropriate action where there are signs of apparent or possible repayment difficulties. It should also provide clear information to borrowers on their rights under the agreement.

B.69 The guidance states that it is an unfair or deceptive business practice to repeatedly refinance or ‘roll over’ a short-term credit product in a way that is unsustainable or otherwise harmful to the borrower.

B.70 Chapter 7 deals with handling of default and arrears.

B.71 Creditors should treat borrowers in default or arrears difficulties with understanding and due consideration, and with forbearance.

B.72 Where appropriate, creditors should consider suspending interest and charges, or allowing deferment of arrears, to enable the borrower to repay the debt over a reasonable period.
B.73 Creditors should suspend, for a reasonable period, the active pursuit of recovery of a debt in circumstances where the borrower is clearly seeking to address the problem, for example using a debt adviser.

B.74 Default charges should be reasonable and transparent, and must be notified to the borrower in accordance with the statutory requirements.

B.75 Chapter 8 deals with regulatory compliance.

B.76 The OFT expects creditors to take reasonable steps to ensure they have suitable business practices and procedures in place to ensure compliance with the ILG, implementing changes as necessary.

The Debt Collection Guidance

B.77 The DCG was first published in July 2003 and updated in 2011 and again in November 2012.⁹

B.78 This guidance applies to all aspects of the recovery of consumer credit debts by creditors or debt collectors. It sets out examples of behaviours which the OFT considers may be unfair or improper.

B.79 Chapter 2 of the DCG sets out some overarching principles of fair business practice, including that creditors should:

- treat borrowers fairly and not subject them to aggressive practices or inappropriate coercion
- be transparent in their dealings with borrowers and others
- exercise forbearance and consideration, in particular towards borrowers experiencing difficulty
- act proportionately when seeking to recover debts, taking into account the borrower’s circumstances

• establish and implement clear, effective and appropriate policies and procedures for engaging with borrowers.

B.80 Chapter 3 includes examples of unfair/improper business practices in relation to communication, false representation of authority or legal position, physical or psychological harassment, deceptive or unfair collection methods, charges for debt recovery, debt collection visits, statute-barred debt and data accuracy.

B.81 For example, creditors should not contact borrowers at unreasonable times or unreasonable intervals, or in a way that fails to make clear the purpose of the contact. They should not pressurise borrowers to pay more than they can reasonably afford, and should allow for alternative, affordable, repayment arrangements where appropriate.

B.82 Paragraph 3.9(m) of the DCG comprises revised guidance on the misuse of continuous payment authority (CPA) including by:

• using the CPA other than as set out in the credit agreement or without the informed consent of the borrower

• using the CPA in a manner which is unreasonable or disproportionate or excessive in failing to have proper regard to the possibility that a borrower is in financial difficulties and the consequent need for forbearance

• failing to document the CPA appropriately or to explain it adequately before entering into the credit agreement

• seeking improperly or unfairly to inhibit or discourage the borrower from cancelling the CPA.

B.83 In particular, creditors should not use CPA to seek payment where there is reason to believe that there are insufficient funds in the account or that this would leave insufficient funds for priority debts or other essential living expenses.

B.84 In addition, creditors should not continue to use CPA for an unreasonable period after the due date without taking steps to
establish the reasons for the payment failure and whether the borrower is in financial difficulties.

Other relevant OFT guidance

B.85 The Mental Capacity Guidance (September 2011)\(^{10}\) sets out the approach that creditors should take in respect of offers of credit to or applications from borrowers who have, or are suspected of having, some form of mental capacity limitation that may constrain their ability to make an informed borrowing decision.

B.86 The Credit Brokers and Intermediaries Guidance (November 2011)\(^{11}\) sets out minimum standards for businesses engaged in credit brokerage and/or as credit intermediaries, and the responsibilities of creditors for the activities of brokers or intermediaries with which they do business.


\(^{11}\) [www.oft.gov.uk/OFTwork/credit/credit-brokers](http://www.oft.gov.uk/OFTwork/credit/credit-brokers)