Summary of responses to the supplementary consultation on debt collection guidance - continuous payment authority

November 2012

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CONTENTS

Chapter/Annexe                  Page

1  Introduction                  4
2  Respondents’ views           5
3  Revisions to the Guidance    12
   A  Consultation questions     28
   B  List of respondents        29
1 INTRODUCTION

1.1 On 19 October 2011 the Office of Fair Trading (OFT) published revised guidance on debt collection (the guidance).1 The guidance included a section on misuse of continuous payment authority (CPA).2

1.2 The primary aim of the guidance is to provide clarity for licensed businesses engaging in the recovery of consumer credit debts as to the standards the OFT expects in relation to such activities.

1.3 On 16 December 2011 the OFT undertook a supplementary consultation on its position on the misuse of CPA and on the practice of debiting monies from an account in the absence of having the express authority to do so.3 The consultation questions are listed at Annexe A.

1.4 We received 33 responses from a range of interested parties, as listed in Annexe B. A summary of the main issues raised by respondents is in chapter 2 of this document.

1.5 In the light of consultation responses, and other relevant developments (including from the OFT’s payday compliance review), the OFT has decided to amend its position on the misuse of CPA. The reasons for this are summarised in chapter 3 of this document.

1.6 The OFT is therefore publishing revised guidance alongside this document. This incorporates a revised section on the misuse of CPA.4

1.7 The OFT is grateful to all who responded to the consultation.

1 ‘Debt collection’ – OFT guidance for all businesses engaged in the recovery of consumer credit debts (OFT664Rev), updated November 2011.

2 Paragraph 3.9(m) of the guidance.

3 ‘Debt collection’ – OFT guidance for all businesses engaged in the recovery of consumer credit debts – Supplementary Consultation (OFT1399con), December 2011.

2 RESPONDENTS’ VIEWS

2.1 Whilst there were some common requests for clarity across stakeholder groups, broadly speaking respondents’ views differed by type of respondent. This section therefore summarises the various views expressed by reference to different stakeholder groups.

Payday and short-term lenders and trade associations

2.2 This group included payday trade associations and individual businesses including those involved in the recovery of debts under payday loans or other short-term loans.

2.3 Some respondents argued that the OFT had not explained its purpose or rationale or put forward evidential support for its position. It was said that the OFT should consider the extent and beneficial use of CPA across a range of situations, and the implications of its proposed approach for consumer choice, cost and the potential to encourage illegal lending. Further, the OFT should not condemn as a ‘misuse’ of CPA practices which were not disproportionately intrusive, had not been shown to be harmful, but on the contrary were beneficial to borrowers and lenders.

2.4 It was said that CPA was an important feature of the operating model for short-term credit. Without it, firms would have no option but to restrict to whom they lend and stop offering small-value loans. The OFT’s position could be extensively ‘gamed’ by borrowers seeking to avoid their credit commitments, resulting in higher arrears and bad debts. This in turn would be likely to lead to higher costs generally, whether through interest rate increases or higher late payment fees.

2.5 It was suggested that lenders might need to modify their lending criteria and reduce lending as a consequence of the guidance. They might also need to resort to alternative means of collecting repayment on a more widespread basis. However, it would be impracticable and disproportionately expensive in most cases to rely on debt collection agencies and litigation. Some lenders might have no option but to leave the market or offer only larger loans.
2.6 Respondents accepted that CPA should be used only in a way that had been expressly spelled out and agreed with the borrower. However, there was no reason why an agreement could not properly include a range of amounts, rather than single recovery of the full amount, and a range of dates, rather than a single recovery date. It would not be possible to advise borrowers upfront of all the dates when payments might be debited or when part payments might need to be sought.

2.7 It was noted that many situations existed in which consumers were perfectly happy to enter into payment arrangements where, at the time these were made, they did not necessarily know the exact amount to be debited or the timing of the debit. For example, direct debit, utility bills, debit/credit card purchases abroad and Olympic ticket applications.

2.8 Similarly, it was noted that in the payday loan context, the use of CPA was a sensible, transparent, flexible and easy repayment method, designed to last only for a short period of time. Unlike agreements which ran for long periods of time, there was no concern that consumers were not or could not be made fully aware of their commitments, being agreed only a few weeks previously. Communication, transparency and the short-term nature of the loan avoided any question of there being ‘surprises’ for the borrower.

2.9 A number of respondents argued that part payment was a useful method for encouraging borrowers who ‘can’t pay’ to engage, and for identifying those who ‘won’t pay’ and ensuring that they repay their debts. One respondent suggested setting a minimum amount for part payments.

2.10 Respondents stated that a failed attempt to collect payment was not necessarily indicative of financial difficulties. In many cases an attempt failed because the borrower’s wages had not been paid into their bank on time or their pay date had changed. There might also be IT issues.

2.11 One respondent said that, in most cases, when the lender attempted to collect later the same day, this was successful and no charges were imposed. Another suggested that a subsequent attempt a day or so later would often result in the anticipated repayment being made.
2.12 It was noted that direct debits and cheques could be re-presented on a number of occasions, and (unlike CPA) could incur bank charges. Respondents suggested that CPA minimised the financial impact on the borrower should the payment fail for any reason, and the borrower did not have to take any additional actions to clear the debt.

2.13 A number of respondents argued that the key issue was transparency about how CPA would be used and how borrowers could cancel. Many lenders already explained in detail how CPA worked, and the amount due and when it was due, and the proposed changes to industry codes of practice would enhance transparency to borrowers.

2.14 It was suggested that borrowers had a high degree of control over the process. They could contact the lender if they were in financial difficulty and unable to repay, and seek alternative repayment arrangements. They could also cancel a CPA (and the OFT’s previous position on this was incorrect, a point also made by other respondents to the consultation).

2.15 One respondent argued that it should only be considered an irresponsible practice if a lender continued to debit funds after having been put on notice that a customer was experiencing financial difficulty.

2.16 Another said that, where an initial payment attempt failed, many lenders would contact the borrower to establish why funds were not available and agree an alternative repayment arrangement. Further attempts to collect payment would be made only if the borrower refused to engage.

2.17 One respondent stated that lenders should be allowed multiple collection attempts, on the due date and subsequently, provided that they advised the borrower that collection had failed (but would continue daily), advising them to call if they had difficulties making payment.

2.18 Another argued that it was legitimate for CPA to authorise the lender to repeat the attempt to recover payment on a specific subsequent date or within a defined period (for example, five-10 business days).
2.19 One respondent stated that a third party might legitimately agree to
make a payment on behalf of a borrower and authorise the use of their
debit card. Provided that the third party was fully aware of the use of
CPA, this should not be regarded as an unfair/improper practice. If it
turned out subsequently that the third party had not authorised use of
the card, the lender would immediately refund the payment.

2.20 A number of respondents suggested that any guidance on CPA should
be included in the OFT’s Irresponsible Lending Guidance, rather than the
debt collection guidance, as CPA was merely a repayment method. A
number emphasised the need for clarity on what was meant by CPA.

Other industry bodies

2.21 This group included other trade associations (not representing payday
lenders) and other industry bodies.

2.22 Respondents in this group generally supported OFT guidance covering
the issue, but suggested that there might be practical reasons why
subsequent attempts to collect payment might be needed in respect of a
single payment due.

2.23 One respondent suggested that it would be improper to make repeated
attempts on different dates without contacting the borrower to arrange
recovery. However, it might be necessary to debit the account on a later
day if the agreed date was a bank holiday or other public holiday.

2.24 Another stated that lenders should be permitted one attempt to re-
represent provided that they had made the borrower aware of this upfront.
The borrower might wish to agree a secondary payment date if there
was a risk that funds might not be in the account. They might find it
inconvenient, or harassing, to be contacted each time payment was not
fully made and might prefer an automatic second attempt on a set date.

2.25 Two respondents argued that it was unreasonable to expect a lender to
conclude that non-payment automatically indicated financial difficulties
and that forbearance must be exercised. Borrowers should not however
be subjected to unexpected withdrawals from their accounts.
2.26 One respondent stated that it was inappropriate for sums to be taken from an account in circumstances where the borrower was broadly unaware that this was going to happen. Another argued that CPA should be limited to a payment date and amount agreed with the borrower.

2.27 Some respondents sought clarity about what was meant by CPA and whether the guidance covered direct debits, standing orders and similar payment mechanisms. They emphasised the importance of avoiding inadvertent consequences for the legitimate use of recurring transactions in other areas, for example magazine subscriptions.

2.28 One respondent stated that debiting third party accounts with express authority from the account holder (for example under the ‘right to set off’) might be acceptable in appropriate circumstances.

**Consumer groups and other respondents**

2.29 This group included consumer and money advice organisations and other (non-industry) respondents.

2.30 Most respondents in this group strongly supported the intentions of the guidance in limiting the number of times payment could be requested for a single payment due.

2.31 Concerns were expressed in particular about the use of part payments, which might lead to the ‘siphoning’ of funds from an account and might not leave sufficient funds for priority debts and other essential living expenses.

2.32 Respondents suggested that a failed payment attempt should be prima facie evidence of financial difficulty. No further requests should be made until the borrower had been contacted, offered free debt advice, had a chance to review and confirm all future payment dates and amounts, and given their express consent for payment transactions to resume.

2.33 One respondent suggested that lenders should warn customers each time they intended to take payment, making clear that the borrower
could cancel the CPA either with the lender or with their bank with immediate effect.

2.34 It was argued that continuing to seek to extract monies from an account by repeated use of CPA was an irresponsible lending practice as it failed to treat borrowers in default or arrears difficulties with forbearance. All the research suggested that in the vast majority of cases non-payment of debt was more a case of ‘can’t pay’ rather than ‘won’t pay’.

2.35 Respondents expressed concern that use of CPA may result in lenders not carrying out thorough affordability checks. This was because having the card details effectively ‘securitised’ the loan by allowing the lender instant access to any and all money paid into the account.

2.36 A number of respondents stated that the OFT guidance did not accurately reflect the consumer’s right to cancel a CPA or other recurring transaction under the Payment Services Regulations.

2.37 It was suggested that consumers were unfamiliar with their rights to cancel a CPA, in contrast to direct debits. It was still widely believed that a CPA could not be cancelled. The exact nature of the CPA and how borrowers could cancel should be laid out clearly in the terms and conditions and explained in writing and verbally. Lenders should also ensure that the process for cancellation was clear and transparent.

2.38 Respondents suggested that payday and short-term lenders did not follow the example of other lenders who had come to see failed direct debits as a sign of financial difficulties and a trigger for help. Lenders continued making CPA requests until they were paid, regardless of the borrower’s other financial commitments including essential living expenses. This exploited consumers’ lack of knowledge of their rights.

2.39 A number of respondents suggested that misuse of CPA had detrimental outcomes which disproportionately affected vulnerable and low-income consumers, and evidenced this through case examples. Continued use of CPA could cause significant hardship for consumers with debt problems who might not be left with enough money for priority bills such as rent.
or mortgage, heating and food. Some lenders ignored proposals by the borrower or a debt adviser for alternative repayment arrangements.

2.40 Several respondents noted that agreements were often made over the telephone or on the internet and there was no paper record of the transaction and what had been agreed or understood by the consumer. This made it difficult for consumers to prove what they had agreed to.

2.41 Unlike direct debits, CPA enabled lenders to retrieve sums other than those agreed (such as default charges) and on different dates from those agreed. There was also no guarantee scheme as with direct debit.

2.42 Evidence was submitted regarding a range of practices, including: continuing to present a CPA following issue of a default notice; taking larger or smaller sums than agreed or on different dates to those agreed; taking debit card details for a single payment but then using these to take further payments without permission; taking payment on a cancelled card; and ignoring requests to cancel a CPA.

2.43 One respondent suggested that there should be a ‘break-out’ clause whereby CPA had to be re-negotiated after a period.

2.44 Another suggested re-wording the proposed paragraph 3.9(n) to make clear that it was unfair to debit an account without express authority from the account holder. If a third party repaid a debt using a different debit/credit card, this should be treated as a single payment transaction rather than as authority to allow further sums to be debited.
3 REVISIONS TO THE GUIDANCE

3.1 The section of the guidance dealing with the misuse of CPA has been amended in the light of responses to the supplementary consultation and other relevant developments.

3.2 Account has also been taken of information and evidence received as part of the OFT’s ongoing review of compliance by payday lenders with the Consumer Credit Act (the Act) and the OFT’s Irresponsible Lending Guidance (ILG). A progress report on the payday compliance review is published alongside the revised guidance.5

Reasons for change

3.3 On reflection, and having regard to all the responses received, the OFT accepts that its previous position, as set out in the guidance (as updated November 2011), may have been unduly restrictive and risked adverse unintended consequences for borrowers.

3.4 First, we recognise the need for appropriate consistency with other payment mechanisms such as direct debit – accepting however that CPA is generally less well understood by consumers and is not subject to common rules and protections like direct debit.

- A failed direct debit can be re-presented by the trader, although only for the same amount and only for up to one month.

- A failed cheque can also be re-presented, for up to six months.

3.5 In view of this, we accept that it may be unreasonable to preclude altogether repeat attempts to collect a repayment due using CPA. However, such attempts should be reasonable and proportionate, and not excessive (in period or frequency), having regard to the possibility that the borrower may be in financial difficulties.

5 www.of.t.gov.uk/OFTwork/credit/payday-lenders-compliance-review/
3.6 It should be noted that the BACS direct debit scheme includes inherent safeguards for consumers, and these are not present (or not to the same extent) where CPA is used. In particular:

- The trader can obtain payment on the due date (as notified to the consumer) or up to three working days later. However, only one request may be made initially. If this fails, the direct debit will be returned unpaid to the trader, marked ‘refer to payer’.

- The trader can re-present the direct debit, but only if the trader can reasonably assume that the conditions necessary for collection will be met. The trader is expected to contact the consumer to establish the reason for non-payment and the likelihood of payment upon re-presentation.

- The scheme rules recommend that at least five working days’ notice is given to the consumer of the new collection date.

- The BACS processing cycle takes a minimum of three working days. If therefore the direct debit is re-presented, the collection date must be at least two working days later, to allow for processing.

- The trader is not permitted to seek a lower (or higher) amount and attempts must cease within one month of the initial attempt, with the trader making alternative arrangements with the consumer or giving advance notice of a new collection date/amount.

- The BACS scheme rules are set out in detail, and underpinned by the Direct Debit Guarantee setting out consumers’ rights.⁶

3.7 Second, if CPA were limited to one attempt (as originally proposed), this could have adverse unintended consequences for borrowers.

- A failed attempt to collect payment is not necessarily indicative of financial difficulties. It may simply be that the borrower’s wages have not been paid into their bank by the time the CPA request is made.

⁶ [www.bacs.co.uk/bacs/businesses/directdebit/collecting/pages/customersrights.aspx](http://www.bacs.co.uk/bacs/businesses/directdebit/collecting/pages/customersrights.aspx)
(for example, due to the nature of their employment or the means of payment or because their pay date has changed). The bank may also encounter IT problems which may delay funds.

- We understand that, in many cases, where collection is attempted later the same day, or the next working day, this is successful and that it is unusual for funds to reach the account more than one working day after the due date (it would be open to the parties to agree a ‘fallback’ date to cover such eventuality). It may be reasonable therefore for the lender to assume that failure to collect within this period may indicate financial difficulties.

- If lenders were limited to one attempt, or to attempts on the due date, this could result in more borrowers incurring default charges. Some borrowers may prefer the security of knowing that further attempts will be made to collect payment once funds are in the account, and that this will not register as a default.

- It should however be noted that default charges should be applied only where this is reasonable and cost-reflective (and in accordance with the credit agreement). In addition, a ‘default’ should be registered with a credit reference agency only once the relationship between the parties has broken down.7

- If lenders were unable to make repeat attempts to collect, this could increase the number of bad debts. This may be a particular problem for small short-term loans where alternative collection mechanisms may be disproportionately expensive.

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7 The Information Commissioner’s Office has published Data Protection Technical Guidance on filing defaults with credit reference agencies, available on its website at www.ico.gov.uk. This sets out indicators of a default, such as the account having been referred to a collection agency or in-house debt collection department (or for legal action) or the customer having failed to make satisfactory proposals in response to a demand for repayment. The guidance also states that accounts should not be routinely filed as being in default where payments are fewer than three consecutive months in arrears.
• It could also impact on lending decisions, and lead to reduced availability of credit and/or increased cost. Smaller lenders could exit the market, reducing competition. We recognise though that it is difficult to predict how lenders might react.

3.8 We accept that CPA is not inherently unfair, and is used outside payday lending by a variety of organisations. However, it is important that there is adequate transparency, and that CPA is used in a way which is fair and reasonable, having due regard to the interests of the consumer. The Act provides a number of protections for borrowers who are in arrears or default, including via the courts, and it is important that these are not circumvented by the use of CPA.

3.9 In developing our revised position on CPA, we have also taken account of the wider context insofar as it may impact on the use of CPA:

• The Financial Services Authority (FSA) has published guidance to firms on its approach to enforcement of the Payment Services Regulations (PSRs), including in relation to the consumer’s right to cancel a CPA and what this involves.\(^8\) The FSA has also published information for consumers alerting them to their rights.\(^9\)

• The four trade associations representing payday lenders have amended their codes of practice to give customers enhanced protections when taking out a payday or other short-term loan. The changes are due to be implemented by 26 November 2012 and include provisions dealing with the use of CPA.\(^10\)

• Industry initiatives led by UK Cards are aimed at reviewing and updating processes around recurring payments, potentially involving changes to Visa and MasterCard scheme rules which may limit the number or frequency of CPA attempts.

\(^8\) [www.fsa.gov.uk/doing/regulated/banking/psd/publications](http://www.fsa.gov.uk/doing/regulated/banking/psd/publications)

\(^9\) [www.fsa.gov.uk/pubs/consumer_info/know_your_rights_guide.pdf](http://www.fsa.gov.uk/pubs/consumer_info/know_your_rights_guide.pdf)

\(^10\) [www.cfa-uk.co.uk/codeofpractice.asp](http://www.cfa-uk.co.uk/codeofpractice.asp)
The OFT hosted a round table with interested organisations on the wider use of CPAs earlier this year. A consumer alert on ‘subscription traps’ was published on the website in July 2012.11

The OFT is reviewing compliance by payday lenders with the Act and ILG, and has published a progress report with interim findings. We aim to publish a final report in the New Year.

The revised approach

3.10 The OFT’s revised approach to the misuse of CPA is set out in paragraph 3.9(m) of the revised guidance.

3.11 We consider that this provides appropriate protections for borrowers, particularly those in financial difficulties, whilst not imposing undue burdens on lenders or risking adverse consequences for consumers generally.

3.12 It does not confine lenders to a single use of CPA (as before), but allows a reasonable number of attempts over a reasonable period, subject to appropriate transparency and forbearance. It reaffirms our expectation that lenders will suspend the use of CPA if there is evidence suggesting that the borrower may be in financial difficulty and unable to repay.

3.13 To provide further clarity about what this means in practice, and in response to issues raised during the consultation, the revised guidance lists examples of unfair/improper practices in relation to CPA, in four categories as set out below.

3.14 The guidance notes that, in determining fitness, the OFT will also have regard to whether contractual terms or practices relating to CPA may contravene consumer protection legislation such as the Unfair Terms in Consumer Contracts Regulations (UTCCRs) or the Consumer Protection from Unfair Trading Regulations (CPRs).

11 www.oft.gov.uk/consumer-advice/consumer-alerts/subscription-traps
3.15 The OFT is aware that compliance with the revised guidance may require changes to lenders’ systems and procedures. As with OFT guidance generally, there is no ‘implementation date’ for the new guidance – we expect lenders to comply with it as soon as reasonably practicable. Whether or not they do so would be a relevant factor in considering the fitness of an individual licensee during any intervening period.

3.16 It was suggested that revised CPA guidance should appear in the ILG rather than the debt collection guidance. However, as noted in the OFT’s summary of responses to the original consultation on updating the debt collection guidance, that guidance now covers all aspects of the process to recover monies owed, whether overdue or not, including the routine collection of payments under an agreement.12

(i) Using the CPA other than as set out in the credit agreement or without the informed consent of the debtor or a relevant third party

3.17 This clarifies the extent of the authority needed for a transaction to be authorised for the purposes of the PSRs, and to ensure fairness and transparency to the borrower. In particular, it confirms our view that the scope of a CPA should be specifically agreed with the borrower, and documented as part of the credit agreement. It should also be explained adequately as part of a pre-contractual explanation.

3.18 We explain what we mean in this context by ‘specifically agreed’ and that this includes the relevant account (and card details), the amount to be debited, the basis on which part payments or default fees may be taken (where applicable), the date on which payment is due, and the period and frequency of subsequent attempts. The agreement should stipulate a specific due date for repayment (or in the case of running-account credit the basis on which this will be determined).13


13 In the case of instalment loans, each due date for repayment should be specified.
3.19 It would be open to the parties to agree that the due date will be later than the borrower’s expected payday (to allow for the possibility of a delay in funds reaching the account). Alternatively, the agreement could specify a ‘fallback’ date on which the lender will seek payment if the full amount was not in the borrower’s account on the due date.\textsuperscript{14}

3.20 A CPA may provide for lesser amounts to be collected, if the full amount is not available or if the parties have agreed a repayment plan (or the lender is exercising forbearance). However, this should be specifically agreed with the debtor when the CPA is set up, and the mechanism should also be agreed, with the borrower giving informed consent.

3.21 Default charges may be included in the amount claimed only if this has been specifically agreed. As noted in paragraph 7.15 of the ILG, any default or other charges should be transparent and limited to what is reasonable, doing no more than covering reasonable costs.\textsuperscript{15} They should be applied only if this is reasonable in the circumstances, having regard to whether the borrower is or may be in financial difficulties.

3.22 The borrower must also specifically agree to the account to be debited. If there is a change of account, or of the debit card to be used, this should be reflected in a change to the CPA.

3.23 In the case of third party accounts, the lender must be satisfied that informed consent has been obtained from the relevant account holder. The lender should satisfy itself, before using the CPA, that the third party has authorised use of their account. This might involve requiring the borrower to confirm that this is the case.

3.24 As an example, a parent may, on one occasion, offer to pay an amount outstanding on behalf of their son or daughter, but that in itself may not confer authority to deduct future payments from their account. The

\textsuperscript{14} For example, the parties may agree that, if the lender is unable to collect in full on the due date, it will try again on day 5 (but not on any intervening day).

\textsuperscript{15} See also paragraph 3.11 of the debt collection guidance.
lender should not use CPA unless it is satisfied that authority exists and that the third party has given informed consent to such use.

3.25 If monies are taken from an account without informed consent, or otherwise in breach of an agreed authority, the transaction will be unauthorised for the purposes of the PSRs, and the payment service provider must refund the payment and any ancillary charges (and may reclaim the money from the trader using ‘chargeback’).

3.26 The supplementary consultation proposed a new paragraph 3.9(n) in respect of the practice of debiting monies from an account in the absence of having the express authority to do so. On reflection, we consider that this should feature as part of paragraph 3.9(m) as it applies in particular where CPA is used – although the same point would also apply to other relevant payment mechanisms.

(ii) Using the CPA in a manner which is unreasonable or disproportionate or excessive in failing to have proper regard to the possibility that a debtor is in financial difficulties and the consequent need for forbearance

3.27 It is not sufficient that the borrower has agreed to the CPA. We would expect the lender to operate it in a way which is fair and reasonable.

3.28 Whether use of CPA is reasonable and proportionate will depend upon the circumstances, including whether there may be evidence of actual or potential financial difficulties and whether the borrower has been notified of the failure to collect and has responded to contact from the lender.

3.29 We are aware that some lenders notify the borrower if the initial attempt to collect using CPA fails. This alerts the borrower to the situation and enables them to contact the lender if they are in financial difficulty or wish to cancel the CPA. However, some borrowers may be reluctant to do so, or may not appreciate the importance of contacting the lender. Failure to respond, although a relevant factor, should not therefore be taken as proof that the borrower is not in financial difficulty.

3.30 We would expect the lender to be proactive in contacting the borrower, either following the initial failure or within a reasonable period thereafter, and to make reasonable efforts to establish the reason for the payment
failure in order to determine whether forbearance should be exercised. It is not sufficient in our view to rely on the borrower coming forward with relevant evidence.

3.31 It is also not sufficient to rely on the fact that the borrower can cancel the CPA. Many consumers may be unaware of their rights in this regard or uncertain how to exercise them, and may be concerned that if they cancel the CPA this will automatically register as a default. They need to understand that they can repay by other means, or can seek alternative repayment arrangements where appropriate.

3.32 The guidance lists examples of where use of CPA may not be reasonable or proportionate, depending upon the facts and circumstances.

3.33 First, businesses should not seek payment before income or other funds may reasonably be expected to reach the account.

3.34 For example, the lender may be aware that funds are unlikely to arrive before midday on the due date. If so, it would be unfair/improper in our view to seek payment before that time, as the request is more likely to fail or (if met) leave insufficient funds in the account for other purposes.

3.35 This also extends to a situation where a lender seeks pre-authorisation for the full amount due (known as ‘earmarking of funds’).¹⁶ In doing so, the lender is seeking to guarantee repayment irrespective of whether this may cause financial difficulties for the borrower.

3.36 The timing of receipts into the account may be a relevant factor in the choice of a payment date. As above, if there is uncertainty as to when funds may reach the account, the borrower may wish to stipulate a later date as the due date for payment, to allow for this. The borrower may also wish to agree a ‘fallback’ date when the lender may make further attempts to collect, to allow for possible delays in funds.

3.37 Second, lenders should not make requests for payment (in full or in part) where there is reason to believe that there are insufficient funds in the

¹⁶ See the FSA approach document at footnote 8 above.
account or that this would leave insufficient funds for essential living expenses. We include examples of these in a footnote.

3.38 The issue here is not merely whether there are sufficient funds in the account to meet the CPA request, but whether – if CPA is used – this would leave enough for the borrower to meet priority debts and other essential living expenses. The payment may also cause the borrower to go into unauthorised overdraft, incurring bank charges.

3.39 We are not expecting businesses to establish proactively how much is in the borrower’s account at any given time, or what the borrower’s outgoings are likely to be. We are merely saying that the lender should not use CPA if there is ‘reason to believe’ that there are insufficient funds. This might, for example, be as a result of information provided by the borrower or a family member, or by a debt adviser. It may also be clear from the initial affordability assessment.

3.40 We would expect the lender, if challenged, to be able to show that it had acted reasonably on the basis of what it knew at the time, and that it had not ignored relevant information.

3.41 **Third,** lenders should suspend the use of CPA if the borrower informs the lender that they are in financial difficulties, or if the lender otherwise becomes aware of this – for example, from a family member or debt adviser.

3.42 Again, this is a question of whether the lender has become aware – by whatever means – that the borrower is or may be in financial difficulties. The lender should not ignore relevant information.

3.43 **Fourth,** lenders should not continue to use CPA for an unreasonable period after the due date without taking steps to establish the reason for the payment failure and whether therefore there may be a need to exercise forbearance.

3.44 Although failure to repay on the due date is not always indicative of financial difficulty, that does not relieve lenders of the responsibility to be proactive in identifying actual or potential financial difficulties. Paragraph 6.2 of the ILG makes clear that lenders should monitor a
borrower’s repayment record and take appropriate action when/if there
are signs of apparent/possible financial difficulties, and chapter 7 refers
to the need for forbearance where borrowers are in arrears or default.

3.45 As above, it is not sufficient to rely on the borrower contacting the
lender if they are in financial difficulty and unable to repay. The lender
also in our view has a responsibility to initiate contact with a view to
reassessing the position where there may be financial difficulties.
Unsuccessful attempts to seek payment are an indication as to the
possibility of such difficulties.

3.46 In general, we would expect lenders – if they are unable to recover the
whole of the due amount17 by the end of the next business day after the
due date – to take this as indicating the possibility of financial
difficulties. In such cases we would generally expect the lender to
suspend the use of CPA, pending attempts to contact the borrower to
establish whether this is the case.

3.47 If the lender has already notified the borrower of the initial payment
failure, and established the reason for this, it may not be necessary to
suspend collection at this point. The lender should however keep the
situation under review and make further contact as appropriate.

3.48 As above, failure by the borrower to respond should not in itself be
taken to confirm an absence of financial difficulties – it may simply be
that the borrower was unaware of the attempts at contact or did not
appreciate the importance of responding to these.

3.49 Where an alternative (‘fallback’) payment date has been agreed, we
would expect the lender to seek repayment on the due date and then on
the alternative date (but not on any intervening day or the next business
day), and – if they are unable to recover the due amount by the end of
the alternative date – to suspend collection and make reasonable efforts
to contact the borrower, unless (as above) this has already been done.

17 Either by full or part payment (subject to the ‘fifth’ point below).
3.50 We would generally expect use of CPA to resume (or continue) after this initial period only if:

- reasonable attempts to contact the borrower are unsuccessful or the borrower refuses to engage, and there is otherwise no evidence of financial difficulty, or
- the borrower does engage but does not appear to be in financial difficulties. The borrower should not however be expected to prove that they are in financial difficulties – an oral or written statement to that effect should lead the lender to suspend collection attempts whilst further enquiries are made.

3.51 If there is evidence of financial difficulty, we would expect the lender to reassess the position with a view to agreeing a revised payment schedule or alternative repayment arrangements where appropriate. Collection of the debt using CPA should resume only once such further assessment has taken place and been concluded.

3.52 What constitutes ‘reasonable efforts’ to contact the borrower would depend upon the facts and circumstances. We are not stipulating a minimum period for this, or processes which the lender should go through as a minimum. In some cases it may be possible to conclude the reasonable efforts within a day. However, we would expect the lender to make more than one attempt, by appropriate means, if the initial attempt was unsuccessful, and to repeat the attempts at reasonable intervals and at times when it is likely that the borrower will be available, using relevant contact details of which the lender is aware.

3.53 We would expect a lender, in the event of a challenge, to be able to demonstrate that it had taken reasonable steps to contact the borrower.

3.54 Any subsequent use of the CPA should also be reasonable and proportionate, and not excessive, having regard to the possibility that a borrower who does not respond may nevertheless be in financial difficulties and that a borrower who was not in financial difficulties at the time of contact may subsequently be in financial difficulties.
3.55 We would expect the lender to make periodic further reasonable attempts to contact the borrower, at reasonable intervals, to establish whether this may be the case (and whether forbearance is needed).

3.56 The longer the period over which payment attempts are unsuccessful (or are met only in part), the greater the onus on the lender to consider whether this may evidence financial difficulty prompting a reassessment.

3.57 **Fifth**, lenders should not seek part payment before reasonable attempts to collect in full on the due date have been made.

3.58 We accept that, if the lender is able to collect in part on any given day, this may obviate the need for default charges. It may also encourage the borrower to engage with the lender. However, the primary purpose of CPA is to collect the full amount due, and lenders should not proceed too quickly to part payments. We are also aware that there is no scope for part payment in respect of direct debit or cheque.

3.59 More generally, part payments should be sought only if this is reasonable and appropriate. The OFT is aware of concerns regarding the practice of ‘siphoning’ of funds from accounts, by repeated requests for part payment, often at very short intervals and for varying amounts according to the success or failure of a previous attempt. This may not be in the borrower’s interests or be consistent with responsible lending.

3.60 In particular, a failure to obtain full payment is likely to indicate the possibility of financial difficulty, in which case – by taking a lesser sum – the lender may be leaving the borrower with nothing at all. As above, this may impact on a borrower’s ability to meet essential living expenses and may cause other payments to fail, incurring charges.

3.61 We would expect lenders using CPA to recover part payments to be able to justify their use, if challenged. For example, if a lender seeks a part payment in order to avoid having to impose a default charge, it may be difficult to justify taking more than one part payment on any one day (as opposed to making a number of attempts to secure such payment).

3.62 In any event, any possibility of part payments should be agreed specifically with the borrower upfront, and explained adequately. It
should also be made clear on what basis part payments may be taken and whether, for example, this is subject to a minimum amount.

(iii) **Failing to document the CPA appropriately or to explain it adequately before entering into the credit agreement**

3.63 As noted above, the scope of a CPA should be specifically agreed with the borrower and set out in the credit agreement, or in a document forming part of the credit agreement.

3.64 Any variation to the credit agreement, impacting on the CPA, should also be documented – either as a modifying agreement or as a unilateral variation under a clause in the agreement to which the borrower has previously consented. This does not preclude the lender from reducing or waiving payments unilaterally (for example under a repayment plan), but this must be explained to the borrower and documented appropriately.

3.65 The relevant contract terms should be expressed in plain intelligible language, so that they are likely to be understood, and should not be unfair within the meaning of the UTCCRs. A term may be unfair if it is unduly balanced in favour of the trader. The terms should also not be misleading, by inclusion or omission, contrary to the CPRs.

3.66 General guidance on the CPRs and UTCCRs, and other consumer protection legislation, can be found on the OFT website.18

3.67 In addition, lenders should not misrepresent the nature or status of a payment request to the borrower’s bank or card issuer.

3.68 We are aware that payment service providers typically stipulate ‘category codes’ to be used for different types of payment transaction including CPA. It is important that lenders use the correct identifier and category code and do not seek to disguise the fact that it is a CPA, for example to undermine attempts by the borrower to cancel the CPA or by the bank or card issuer to chargeback an unauthorised transaction.

18 [www.oft.gov.uk/business-advice](http://www.oft.gov.uk/business-advice)
3.69 A key issue for many respondents was the need for increased transparency about CPA, in particular at the outset of an agreement before consumers agree to repayment by this method.

3.70 Lenders are required by section 55A of the Act to give an adequate pre-contractual explanation. This must be sufficient to enable the borrower to assess whether the agreement is suited to their needs and financial situation. The borrower must be able to ask questions about the agreement and to ask for further information or explanation.

3.71 Section 55A(2) makes clear that the explanation must include ‘the features of the agreement which may operate in a manner which would have a significant adverse effect on the debtor in a way which the debtor is unlikely to foresee’. It must also include ‘the principal consequences for the debtor arising from a failure to make payments under the agreement at the times required by the agreement’.

3.72 The obligations under section 55A are elaborated in the ILG by means of illustrative examples for different types of credit. The revised guidance has the effect of adding to these in respect of the use of CPA.

3.73 It should be noted that section 55A(4) requires certain aspects of the explanation to be given orally in certain circumstances, and that a section 55A explanation is also required where a credit agreement is modified within the meaning of section 82(2) of the Act.

(iv) Seeking improperly or unfairly to inhibit or discourage the debtor from cancelling the CPA

3.74 A number of respondents suggested that borrowers may be unaware of their rights to cancel a CPA and that the OFT guidance did not accurately reflect the legal position under the PSRs.

3.75 As noted above, the FSA has clarified its view on interpretation of the PSRs, including the consumer’s right to cancel, and has issued updated guidance and consumer information to reflect this.

3.76 Under the PSRs, consumers can cancel any future transaction at any time up to close of business on the preceding day. The transaction can
be cancelled either with the trader or with the payment service provider. It is good practice to notify the trader, given the underlying contractual liability, but this is not a pre-condition for cancellation.

3.77 We are aware of evidence suggesting that some lenders may seek to discourage borrowers from cancelling a CPA, for example by providing false or misleading information regarding cancellation rights or by putting obstacles in the way of the borrower cancelling. They may also seek to obstruct a cancellation initiated by the borrower with their bank or card issuer. These are clearly unfair/improper practices.

3.78 We recognise that, if a borrower cancels a CPA, this does not discharge their liability to repay the debt, and the lender can reasonably expect the borrower to make alternative repayment arrangements (where feasible). We also accept that it is reasonable for a lender to remind the borrower of this. However, this should not be done in a way which seeks to inhibit the borrower from exercising their statutory right to cancel the payment mechanism and pay by alternative means.

3.79 Lenders should in any event ensure that the process for amending or cancelling a CPA is not unduly complex or onerous, and that alternative repayment options are available (and made clear) to the borrower.

3.80 Lenders should not attempt to use CPA after having been notified, by either the borrower or their payment service provider, that consent for the transaction has been revoked. Where necessary, they should contact the borrower to explore the reasons for this and whether the borrower intends to pay by other means (or is in financial difficulty).
ANNEXE A – CONSULTATION QUESTIONS

The primary purpose of the supplementary consultation on 16 December 2011 was to obtain further views on the use of CPA as a means of recovering consumer credit debts.

The OFT was at the same time consulting on the specific practice of debiting monies from an account in the absence of having the express authority to do so, including under circumstances in which the lender may have the authority, under a CPA or otherwise, to recover monies from another account(s).

Questions

Q1 Are there any substantive aspects of the above paragraphs with which you disagree?

Q2 Do you consider that there are any significant omissions?

Q3 Do you have any other suggestions for improvement?
ANNEXE B – LIST OF RESPONDENTS

Anthony Sharp Associates
British Bankers Association
British Cheque & Credit Association
Cabot Financial (Europe) Ltd
Capquest Group Limited
Christians Against Poverty
Citizens Advice
Civil Court Users Association
Consumer Credit Counselling Service
Consumer Finance Association
Consumer Focus
Credit Action
Credit Services Association and Debt
Buyers and Sellers Group
David Aspin
Finance and Leasing Association
Fortress Group (UK) Ltd
Independent Advocacy
Information Commissioner’s Office
Law Society of Scotland

Lending Standards Board
Lincolnshire Trading Standards
Service
Michael Beer
Money Advice Service
Money Advice Trust
Nationwide Building Society
Regal Credit Consultants Limited
Richmond Group
Shergroup High Court Enforcement
Student Loans Company
Thomas Ralph
UK Cards Association
Which?
Wonga.com Limited