The voice of banking & financial services

Charlotte Matthews
Consumer Credit
Financial Conduct Authority
25 The North Colonnade
Canary Wharf
London E14 5H

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BBA response to CP13/10: Detailed proposals for the FCA regime for consumer credit

1. The BBA welcomes the opportunity to respond to this important consultation. The British Bankers' Association (the "BBA") is the leading trade association for the UK banking and financial services sector. We represent over 200 banking members, which are headquartered in 50 countries and have operations in 180 countries worldwide. These member banks collectively provide the full range of banking and financial services and make up the world's largest international banking centre.
2. The BBA believes it sensible to have a single statutory regulator for retail financial services and we have been supportive of the transfer of consumer credit regulation to the FCA. However, and as expressed in our response to FSA CP13/7, we do have concerns about the consequences of transposing elements of the current regime into FCA rules and guidance and about the accelerated timetable under which the FCA is attempting to create and impose a fundamentally new regulatory regime for a crucial financial sector.
3. This submission provides observations on the consultation process and the timetable for implementing the new regime, feedback to each of the consultation questions and an annex of detailed comments on the Consumer Credit Sourcebook (CONC). Our response to each consultation question should be read in conjunction with our detailed comments on each relevant rule(s) and guidance in the annex to fully appreciate and contextualise the BBA's position.

General Observations

The consultation process

4. The BBA is concerned that this important and complex regulatory change – with over 600 pages of consultative text – has been subject only to a limited consultation period of 8 weeks. Although we appreciate that the FCA is working towards an April 1st 2014 deadline for introducing the new regime, we do not believe that the loss of 4 weeks consultative time is justified by the benefit of stakeholders and creditors seeing the final rules in February rather than March.
5. To fully understand the implications of the draft CONC and respond to the consultation appropriately it is necessary to study each rule and piece of guidance closely and cross refer each to relevant provisions of the Regulatory Activities Orders and existing provisions of the Consumer Credit Act and/or OFT Guidance. Comparison is also needed against the Consumer Credit Directive and the Lending Code. Equally important is considering what elements of the current regulatory framework are not being carried across to the new regime and the implications thereof.
6. We therefore believe that instead of shortening the consultation period it should have run for 12 weeks with the final rules published in March. The grace period could then have been extended to 7 months (at a minimum) so that creditors had at least the same amount of time as currently scheduled to adapt to the new rulebook.

7. The BBA notes that the consultation paper was issued on the 3rd October with 27 questions. This was subsequently changed to include an additional question specific to the regulator's cost/benefit analysis, without any stakeholder communication taking place to alert interested parties. We assume that no further amendments were made to the consultation paper and not reported over the consultation period and our responses have been developed based on the paper's content as at the 3rd October (with the additional question).

The transitional process

8. The BBA's response to this consultation has been shaped by our members' analysis of where and how the elevation of OFT guidance into FCA rules will impact on current business models. This analysis is highlighting that FCA's proposed changes are not simply a 'steady state' transposition of the regime. Instead, it shows that a combination of a large number of minor conduct changes together with a lesser number of fundamental changes to practice will be required in response to the draft rules. This has important implications for the transitional process.

9. In a number of places CONC introduces new regulatory requirements that differ from the current CCA and OFT Guidance regimes. These are identified in the annex to this response and some were highlighted in a letter from the BBA to FCA Director Clive Adamson on the 15th November. We believe the FCA should adopt a more pragmatic and realistic approach to transition. By way of example, when implementing the changes required by the CCA 2006 the DTI commissioned an independent study by PWC[1] which reported that a proposed implementation period of 18 months posed real risks – including to the integrity of creditors' systems. As a result of this study the implementation period for CCA 2006 was pushed back to over 2 years.

10. The BBA and its members believe it is vital that the FCA maintains an on-going dialogue with the credit industry over this next crucial period so that wherever it is possible creditors can enter the new regime without any unintentional non-compliance caused by lack of clarity about what is required or lack of opportunity to achieve compliance in the transitional period provided.

Implementation of the new regime

11. Neither the consultation paper nor the Transitional Provisions (TP1) is clear as to what behaviour may or may not be subject to enforcement action during the grace period. At paragraph 5.30 of CP13/10 the FCA states that during the grace period it will not take enforcement action based on the new rules, as long as a creditor can demonstrate compliance with the corresponding CCA requirement or OFT guidance. However, at paragraph 2.3 of the paper the FCA states that it will not take action in this scenario where the old CCA requirement and/or OFT guidance are substantially the same as the new regime's requirements.

12. The subtle difference in meaning between paragraph 2.3 and paragraph 5.30 is important because paragraph 2.3 potentially opens creditors up for enforcement action during the grace period against any new requirement introduced by the FCA and any substantially different meaning that has been given to a CCA or OFT guidance requirement in the way it has been transposed by the FCA.

13. For example, CONC 4.3.15R(1)(a) will require that an adequate explanation for a credit card must disclose the different rates of interest and different charges that may apply to different elements of the credit, whereas the relevant OFT guidance only requires that an adequate explanation informs the customer that different rates and charges may apply. Whilst paragraph 5.30 of CP13/10 would suggest that a creditor following the OFT guidance during the grace period is safe from enforcement action, paragraph 2.3 would suggest that enforcement action is possible.

[1] http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/files/file38292.pdf

14. If the FCA's intention is that any new sourcebook requirement which is substantially different from the existing regime (e.g. CONC 4.3.15R(1)) is enforceable from April 1st this does not seem appropriate, achievable or fair. We would welcome further clarification of the FCA's intent.

15. Additionally, we would appreciate clarification of whether the FCA's stated position:

    i. Acknowledges that creditors' obligations under the current regime are to comply with the CCA and this does not necessarily equate to following each stated or advised position of OFT guidance;

    ii. Precludes it from taking enforcement action after October 1st 2014 based on non-compliance with the new rules during the grace period where the creditor can demonstrate compliance with the CCA or OFT Guidance during that period? And;

    iii. Precludes it from taking action based on the FCA Principles for Business against creditor actions during the grace period where the creditor can demonstrate compliance with the CCA or OFT Guidance?

Post-implementation actions

16. The consultation paper reiterates CP13/7 by making reference to FCA reviewing the retained provisions of the CCA regime by 2019. However, no further detail is provided as to when that review may take place. In the BBA's response to the HM Treasury and BIS consultation on transferring credit regulation to the FCA we suggested that the review should take place more quickly so that the on-going period of regulatory uncertainty is reduced and creditors and customers are no longer subject to legislative requirements which are unnecessary in a FSMA based regime. We would like the FCA to accelerate its review process and set out a more definitive timetable under which the review will take place.

17. Additionally we note that the government's commitment[2] to carry out a post-legislative review of the CCA 2006 has not been undertaken and request clarification as to whether this is still accepted by the government as a requirement under its on-going commitment to post-legislative scrutiny.

Regulatory Status Disclosure

18. The BBA's members welcome the FCA's decision to require that the status disclosure requirement will be the same during the interim permission regime as following full authorisation. Members are however concerned that they have not been given sufficient notice of the status disclosure requirements that will apply from April 1st 2014 in order for the necessary systems and communications changes to be incorporated and implemented before the deadline.

19. Our concerns about achieving the deadline for changes to status disclosure are magnified by realisation that any non-credit communications that currently state that consumer credit is not regulated by the FCA will also need to be amended within this period.

20. We understand that the Consumer Credit Directive compels the FCA to ensure that the regulations are compliant with the April deadline and we believe this could be achieved by making an interim allowance, via Statutory Instrument, for all paper references to the OFT to mean the FCA for a limited period of time (e.g. 3 months). This would allow for a more orderly and realistic amendment of documents and would mitigate the risks of documents and agreements issued prior to April 1st but completed after that date from being non-compliant and potentially unenforceable because they include reference to the OFT as regulator. We previously raised these concerns in our response to question 14 of CP13/7.

21. Alternatively, the FCA could allow creditors to carry a status disclosure for a period before and after the April implementation that refers to OFT being the relevant regulator until the 31st March and FCA being the regulator from April 1st onwards. This could be announced ahead

[2] http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/files/file24434.pdf - section 19.1

of the final rules being published and would allow creditors to make and implement amended documents over a period before the April deadline to be used until print runs allow introduction of the new FCA disclosure. This avoids the risk of documents crossing the April 1st deadline and allows a more manageable timetable for change. This option would of course require creditors to make 2 changes to their documentation and should only be considered if a more pragmatic and less costly approach is not feasible.

1. Do you have any comments on the way our threshold conditions are being applied to consumer credit firms and/or the updates to our Handbook rules?

22. The majority of BBA members are already authorised by the FCA and subject to existing threshold conditions. We have no comments on the FCA's proposed approach or the draft amendments to COND.

2. Do you agree with the updates to our draft Handbook rules for approved persons for consumer credit firms?

23. The BBA would encourage the FCA to make appropriate allowances in applying the administrative aspects of approved persons regime to creditors who are already subject to the FCA approved persons regime for other regulated activities.

24. Our members are keen to avoid unnecessarily duplicating or repeating administrative tasks where the regulator is already aware of and has approved SIF positions. This position is reinforced by uncertainties surrounding the forthcoming Senior Persons Regime (SPR) and its likely impact on the approved persons regime.

3. Do you have any comments on the updates to our draft rules regarding appointed representatives of consumer credit firms?

25. The BBA supports the FCA's decision to extend the scope of the multi-principal arrangement to include debt collectors. This change of approach is beneficial to customers and creditors.

26. We note that the FCA has recognised our concerns about how the AR regime will operate during the interim permission regime when ability to act as a principal could be dependent upon the timetable for achieving full authorisation. We are pleased that firms which express an interest in becoming a principal will be allowed to apply early in the authorisation process.

4. Do you have any comments on the criteria that we are proposing a person would have to fulfil to be self-employed agent of a principal firm (as set out in Appendix 2)?

27. We have no comments in relation to self-employed agents.

5. Do you have any comments on our proposed regulatory reporting regime?

28. The BBA's members would appreciate clarification of two specific aspects related to the timing of reporting to the FCA under the new regime for consumer credit:

    i. Whether the first report required from creditors is intended to include data only from point of full authorisation or retrospectively to include data from the start of the reporting period? We would prefer the former and for the reporting period to begin from the next 6-monthly or annual period commencing after full authorisation is achieved.
    ii. Whether 30 days is sufficient time in which to collate and achieve appropriate internal sign off for the report to be submitted following the end of the reporting period? In the case of year end reporting a more pragmatic alternative might be to allow firms to time submission of their regulatory reporting to that of their accounting submissions, thereby potentially avoiding repeated collection and interrogation of data.

6. Do you agree with our proposals to collect product sales data on high-cost short-term lending and home collected credit?

29. The BBA does not oppose the FCA's intention to collect product sales data from high-cost short-term lenders and we support the rationale for collecting such data from this sector to identify irresponsible lending and other potential consumer detriments. We would appreciate clarification of whether SUP 16/11 requires data provided by the customer to be validated or simply reported as provided?

30. At paragraph 4.15 of the consultation paper the FCA states that it may expand the scope of its PSD requirements as understanding develops. In considering whether to expand PSD requirements to other areas of the credit market the BBA believes it is important that FCA considers the implications of asking customers for more detailed personal information (such as household income, car ownership etc) in terms of consumers' perceptions of whether a lender is justifiably entitled to ask for such information to make a relatively straightforward lending assessment for a mainstream credit product.

7. Do you have any comments on how we propose to carry across CCA and OFT standards, in particular in the areas highlighted above?

31. Annex A to this response provides our detailed comments on the draft CONC sourcebook and other amended Handbook provisions. These include observations specific to ways in which the CCA and OFT standards have been carried across to the new regime.

32. In our response to CP13/7 the BBA highlighted its concerns about the FCA's proposals to reposition OFT Guidance as FCA rules, bearing in mind that OFT guidance is non-binding and had the purpose of informing and advising how compliance with the CCA could be achieved (but not asserting that it was the only way to achieve that aim). The elevation of OFT guidance to the status of new rules which are binding represents a significant shift in the regulatory regime that deserves full consultation with the industry and should be supported by evidence justifying changes.

33. Our concerns have increased in sight of the draft CONC rules and guidance because in places these lift parts of OFT Guidance but lose any context provided by the OFT document. Thus new meanings and nuances are being given to terms that were previously understood to mean something else. Examples of these occurrences are included in the annex to this submission.

34. It is important that the FCA considers the implications of its approach to transposing OFT guidance in relation to its assertion that firms which are compliant with the current regime should be compliant with the new. We believe further thought should be given to whether the 6 month grace period is long enough bearing in mind that CONC will intentionally and perhaps unintentionally create new requirements through its treatment of the OFT guidance.

35. The BBA understands that any OFT guidance that is not taken across to the CONC handbook ceases to have any status or effect from the 1st April 2014 for agreements or events which follow that date. We would like the FCA to confirm this position in writing and for the Financial Ombudsman Service to be made sufficiently aware of this position.

8. Do you have any comments on our proposed approach to financial promotions?

36. The FCA states at paragraph 5.16 of the consultation paper that it is inevitable that the FCA's proposed rules include some differences to the requirements of the CCA regime. The BBA would question why transposing the CCA provisions – which implement the maximum harmonisation Directive – and overlaying the high-level Fair, Clear and not Mis-leading principle necessitates that the new rules cannot be equivalent to the current regime.

37. Of particular concern to our members is where OFT guidance – which goes further in places than the maximum harmonisation directive requires – is adopted as rules. Whilst currently creditors may determine whether adoption of the OFT view was necessary to achieve compliance with the relevant legislation, that discretion is now removed and creditors are

given short notice in which to adapt their approaches to demonstrate compliance with the OFT's view.

38. Further detailed comments on CONC 3 are included in Annex A and include our particular concerns about the FCA's decision to redefine an incentive to acquire credit as including the ease or speed of a credit application – a benefit that is as applicable to mainstream credit customers as it is to the payday lending sector to which this regulatory intervention is directed.

9. Do you agree with the definition of a high-cost short-term credit provider as set out at the start of this chapter?

39. Based on the FCA's policy intentions as outlined in CP13/10 the BBA does not oppose the definition of a high-cost short-term credit provider as included in the draft Handbook Glossary. However, as we believe it is the FCA's intention that the definition should not apply to credit card or charge card lending we think it would be appropriate to make this explicit within the definition by adding 'credit card' and 'charge card' to the exempted forms of credited included under the final bullet point of the definition or similarly applying an exclusion for 'borrower-lender-supplier' credit agreements.

40. In light of the government's announcement that an interest rate cap will be applied to payday lending via amendment to the Banking Reform Bill, the BBA believes it is imperative that the FCA reviews this definition – in light of the legislative change - to ensure that a cap cannot be inadvertently applied to products for which the legislation is not intended.

10. Do you have any comments on limiting rollover to two attempts?

41. The BBA supports the FCA's decision to limit rollovers on high-cost short-term credit to a maximum of two rollovers and we understand the regulator's rationale for doing so.

11. Do you have any comments on whether one rollover is a more appropriate cap?

42. As per our response to question 10, we believe that two rollovers is the appropriate cap. We believe that limiting a customer to only rolling over the loan on one occasion may potentially have the impact of inadvertently preventing a consumer from making a rational lending decision that is not predicated on financial difficulty, whereas after two rollovers there is less likelihood of inadvertently preventing a 'healthy' credit decision from being taken.

12. Do you have any comments on our proposal to introduce a limit of two unsuccessful attempts on the use of CPAs to pay off a loan?

43. The BBA supports the FCA's decision to limit unsuccessful attempts at a CPA to two attempts. We would appreciate the FCA's explicit confirmation that banks and credit card providers will not be held liable in any manner – beyond any imposed by the Payment Services Directive - should a high-cost short-term creditor seek to use and/or successfully use CPA on a third occasion to pay off a loan. For instance, we do not believe it would be appropriate for a bank or credit card provider to be instructed to reimburse the customer for funds taken from the account following a third or subsequent use of a CPA where the onus should be on the creditor to be held responsible for repatriating any funds inappropriately taken.

13. Do you have any comments on our proposal to ban the use of CPAs to take part payments?

44. The BBA supports the FCA's proposal to ban the use of CPAs to take part payments. Again, we request clarification that the bank would not be held liable – beyond any imposed by the PSD - for the actions of a creditor who did seek to take part payments and would not be expected to reimburse funds taken in this manner.

14. Do you have any comments on our risk warning?

45. The BBA believes that the FCA should more widely explore research and analysis that has been undertaken in the payday and other sectors (e.g. health warnings on cigarette packets) on the benefits and costs of risk warnings to better determine whether and how risk warnings may be provided. We also believe that rigorous consumer testing should take place to establish the real impacts on behaviour of different types of warning, rather than reliance on consumer views expressed in the limited focus group research that preceded the FCA's proposed risk warning text.

46. The BBA does not believe that it would be appropriate to extend the use of risk warnings to other (or all) credit products. There is a danger that such warnings become part of the "wallpaper" surrounding credit advertising if they are used widely and this could reduce their effectiveness in the places where they are needed most. We believe it is important that high-cost short-term lending, where consumers are at their greatest risk of detriment, is easily recognisable as a different and more risky type of lending. Applying risk warnings across the sector would negatively impact on this differentiation.

47. We would encourage the FCA to work with the MAS to consider whether there are more appropriate and direct signposts that can be given to consumers to get them to the relevant MAS information and advice on debt. Providing only a generic link to the MAS website may not be sufficient to get some consumers to the right place and could disengage some consumers who are not immediately presented with options that are relevant to their own circumstances. A link that takes web-users directly to the MAS debt pages would be more appropriate.

48. Additionally, we believe that consumers who do not have access to the internet should be helped to find advice and support. We therefore encourage the FCA to consider whether a central phone number from which customers can access appropriate forms of debt advice should be created and included on the risk warning.

15. Do you have any comments on our proposals to require high-cost short-term lenders to provide information on free debt advice before the point of rollover?

49. The BBA supports the aims of the FCA in alerting consumers to the dangers of becoming and remaining over indebted. However it does appear a little incongruous that a consumer who has rolled over a payday loan only once would be presented with an information sheet suggesting that they have a problem and that doing nothing could make that problem worse. It may be more pertinent and effective for this communication to follow a second request for roll over and/or for a more refined communication to follow the first application for re-finance.

16. Do you have any comments on the effectiveness of price capping?

50. The BBA supported the Bristol University report on high cost credit that was published in March 2013 and found that a cap on the price of credit could reduce access to credit, reduce the supply of credit, weaken competition and could simply result in substitute charges being imposed outside of the cap. In response to that report the Government determined that a cap is not the best solution to the problems associated with high cost short term lending.

51. Although the government has since changed its position and will now legislate to introduce a total cost of credit cap for short term high cost lending, the BBA's position remains that a cap will reduce the availability of credit to low income, higher risk consumers. We expect that many consumers (including those with vulnerabilities) who use short term high cost lending will still want or need access to credit and are therefore likely to look to other sources of regulated or illegal sub-prime credit.

52. The BBA believes it is crucial that the introduction of the price cap applies only to the short term high cost sector to which it is intended and is not implemented to impact on the availability of mainstream credit products such as PCA overdrafts and credit cards. This is of

particular importance at the current stage of the economic recovery where the availability and use of unsecured credit is a key factor in economic growth.

17. Do you agree with our proposals on how to calculate our prudential requirement for debt management firms and some not-for-profit debt advice bodies? If not, what amendments would you suggest, and why?

53. The BBA supports the FCA's decision to extend its prudential requirement to include not-for-profit debt advice bodies that handle significant sums of client money. We have no comments on the quantum of the requirement.

18. Do you agree with our proposal to apply a transitional approach to prudential standards for debt management firms and some not-for-profit debt advice bodies?

54. The BBA agrees that a transitional period is appropriate for firms being subject to prudential requirements for the first time. However, allowing firms 3 years in which to organise their concerns and account for their prudential requirements appears generous. We expect that all impacted firms could achieve their obligations in a more accelerated fashion and believe it is in the best interests of consumers that they do so. We would therefore encourage the FCA to apply a significantly shorter period of transition e.g. 12 months.

19. Do you have any comments on our draft guidance on the debt counselling activity and our draft rules covering the provision of debt advice?

55. The BBA does not oppose the FCA's proposal to differentiate its approach to regulating debt advice between generic advice and regulated debt counselling. The challenge for the FCA will be in policing whether or not advice is being provided by firms in accordance with the relevant regulatory obligations.

56. We agree that where generic advice is provided by a regulated firm then it should be subject to the FCA Principles for business rather than conduct rules, although we would be concerned if in practice this allows debt advice/management firm offering debt remedies (e.g. DMPs, IVAs etc) to avoid the imposition of conduct rules by claiming that all advice given to consumers is generic and any remedy taken from the firm by the consumer is taken in the absence of any debt counselling activity.

57. To counter this risk we believe it would be appropriate to require that if a firm's regulated activities include tools for the liquidation of debt, then all debt advice given is to be regarded as regulated debt counselling. The BBA believes this approach would echo the FCA's intention at PERG 17.5 (question 5.1) where it raises the question of what an impartial observer would conclude if a consumer engages with a debt advisor and then takes a course of action to liquidate their debt via the advice giver, and at question 5.3 where it states that the circumstances in which advice is given can by implication give advice the force of a recommendation.

58. In PERG 17 it appears that a Q&A format of guidance has been adopted to appeal to readers who may not be familiar with the traditionally technical style of the Handbook (i.e. debt advisors). However, it could be argued that the language of PERG 17 is still overly complicated for the purpose it tries to fulfil. We would encourage the FCA to engage further with the advice community to determine whether the guidance can be simplified without losing its intended meaning.

59. With regard to question 5.5 on the use of decision trees as either unregulated advice or regulated debt counselling, the BBA believes that in reality it will be difficult for an advisor to use such a process without needing to perform a debt counselling service if it is to provide benefit to the consumer. Whilst a decision tree may simply be a factual exercise which narrows down the options available to the consumer the discussion will invariably follow as to which option is appropriate. If the advisor does not wish to stray into debt counselling territory they will need to inform the consumer that they can provide no further assistance – a position that credible advisors will not wish to take and which would not benefit the consumer.

20. Do you have any comments on the rules that we propose to apply to peer-to peer lending platforms to protect borrowers?

60. The BBA supports the approach outlined by the FCA regarding the proposed regulation of peer-to-peer lenders. However, we are aware that some sectors have expressed concern that Article 36 of the RAO may as currently drafted inadvertently capture activities unrelated to peer-to-peer lending. We believe representations have been made to government to rectify these legislative oversights and encourage the FCA to consider these in taking its approach forward.

21. Do you agree with our proposals for debt management firms and not-for-profit debt advice bodies that hold client money? If not, which aspects of the regime do you disagree with and why?

61. The BBA supports the FCA's decision to apply client asset rules to large and small debt management firms and to include not-for-profit debt advice bodies.

22. Do you agree with our proposed implementation timetable? If not, please give reasons.

62. The BBA agrees with the FCA's proposed implementation timetable for the client asset rules.

23. Do you agree with our suggested amendments to the reporting requirements for second charge loans?

63. The BBA has no comments on the FCA's suggested amendments to reporting requirements for second charge loans.

24. Do you agree with our proposal to allow all microenterprises to complain to the ombudsman service?

64. We support the FCA's position and believe it is appropriate that the scope of micro-enterprises being able to use the FOS is common for unsecured consumer credit as it is for other FSMA regulated financial services.

25. Do you agree with our proposal to include not-for-profit bodies providing debt advice in the Compulsory Jurisdiction?

65. The BBA supports the FCA's decision to include not-for-profit debt advice bodies within the Compulsory Jurisdiction. We believe all consumers accessing debt advice should have access to FOS on the same footing and not potentially be subject to less protection if they choose to engage with a not-for-profit advisor.

26. Do you agree with our proposals on recording, reporting and publishing complaints?

66. The BBA supports the FCA's decision to require all consumer credit firms to record, report and publish complaints data on the same basis. We support the FCA's decision to only apply these requirements when a firm has achieved full authorisation or a full variation of permission but seek FCA's confirmation that the 6-monthly reporting and publishing period will only begin at the start of the next reporting period following full authorisation (or full variation) – as per our response to question 5 on the regulatory reporting regime.

27. Do you agree with the costs and benefits identified?

67. The BBA does not believe that the cost benefit analysis presented by the FCA is an accurate description of the costs to the credit industry of the new regime because, as we have highlighted throughout our response to the consultation, we think the FCA has over-estimated the extent to which the draft CONC rules and guidance have the same effect or substantially the same effect as the current credit regime. Reliance therefore on the disapplication of CBA allowed by the Regulated Activities Order 2013/1881 means that many of the systems costs and practice changes required to achieve compliance with new conduct requirements are omitted from the CBA.

68. We therefore believe that Europe Economics' estimated costs for banks' retail conduct review activities at between £4m and £9m to be an underestimate. Importantly we also believe - based on the current draft CONC sourcebook – that the estimate of negligible costs for changes required by high-level principles and conduct standards to be incorrect due, for example, to the significant costs of making accelerated status disclosure changes, introducing quotation search facilities and changing the content of Adequate Explanations.

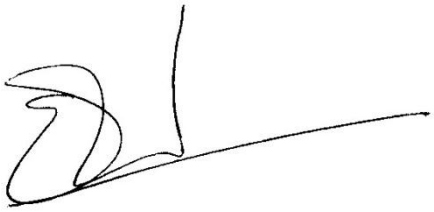
28. Do you agree with our assessment of the impacts of our proposals on the protected groups? Are there any others we should consider?

69. The FCA has assessed that overall the new regime should benefit all consumers who use unsecured credit, including those from protected groups. The BBA agrees that this general observation is correct but, as we highlighted in our response to CP13/7 we believe that some protected groups who may rely more on point of sale credit – such as those with limited mobility – are likely to feel a negative impact of the new regime due to exit from the market. This exit is acknowledged by the FCA in its cost/benefit analysis. We do not have any suggestions for additional impacts that should be considered.

The annex which follows provides detailed comments on the CONC draft rules and guidance. It should be read in conjunction with the relevant consultation question responses above.

If you have any questions in relation to this response please do not hesitate to contact paul.ross@bba.org.uk

Yours sincerely,



Eric Leenders
Executive Director
Retail Banking
British Bankers' Association

Annex: BBA's detailed comments on the Consumer Credit Sourcebook (CONC) and other Handbook amendments

1. This annex provides the BBA's detailed comments on the draft Handbook text set out in the Consumer Credit Sourcebook (CONC) and amendments proposed elsewhere in the Handbook and included as annexes to CP13/10.

Definitions

2. In a number of places the CONC seeks to define terms within the rules and guidance text rather than by means of a glossary. We do not believe this is an optimum way of effectively defining terms for users of the sourcebook. Additionally, some terms are defined within the text of the rules and guidance but then the term is also used elsewhere within the document without it being clear as to whether a definition applied elsewhere is still applicable. Use of the terms *financial difficulties*, *forbearance* and *refinance* are examples of this occurring.

3. The defined terms "Total Charge for Credit" & "Total Amount Payable" require firms to use assumptions taken from Total Charge for Credit (Amendment) Regulations 2012. However, firms who rely on the pre-CCD "opt-out" regime for lending to business customers, in the running-account credit space, are permitted to use the assumptions set out in the Schedule 7 of the Consumer Credit (Agreements) Regulations 1983. We assume that this is unintentional and business lenders can continue with current practices?

4. Rules and Guidance are sometimes complicated by the language being used. Banks, regulators and consumers are familiar with the terms "arranged overdraft" and "unarranged overdraft" yet these are not within the document. Instead the FCA uses longer and more legalistic terms which do not add clarity or certainty for users. We would encourage the FCA to simplify its language wherever it is possible and appropriate to do so.

5. The BBA believes that terms should be defined within the glossary where a definitive description is possible. Where it is not, we believe that terms should be described under one piece of guidance with references to each place within the CONC that the term is subsequently used.

6. There are a number of references within the sourcebook to different telephone call charges e.g. premium rate. However these different rates are not defined. We would encourage the FCA to either define the terms used or provide reference to where these terms are statutorily defined.

CONC 1 – Application and Purpose

7. **1.2.2R** – it is not clear whether this rule is intended to apply only with regard to Appointed Representatives (as the guidance at 1.2.4 would suggest) or more widely to any person who may act on a creditor's behalf. If it is the latter then we would disagree that a firm should assume liability for ensuring the compliance of parties that are not the firm's Appointed Representatives.

8. **1.2.6R(2)** – firms based in the Channel Islands or Isle of Man are treated as based in a non-EEA state and therefore do not have pass-porting rights within FSMA. Currently such firms will make a Part 4A application for permission. We would like to establish whether FCA intends that its requirement for "mind and management within the UK" is intended to apply to these firms and if so, what consideration it has given to such a requirement creating a barrier to those firms achieving a Part 4A permission.

9. **1.3** - It is unclear why this section of the document includes guidance on what may be considered indicators of financial difficulty. The relevant sections of the sourcebook using the terms financial difficulty and/or financial difficulties are CONC 5, 6, 7, 8. It might therefore be more appropriate to describe financial difficulties with cross-references to where the terms are used and (as suggested above) to place all "example-type" guidance in one place rather than throughout the document.

10. **1.3.1G(4)** – the BBA would question FCA's expectation that creditors would know (or ought reasonably to know) whether a consumer has recently been declined for credit. Although application searches are visible via a CRA the result of that application (accept/decline) is not.

CONC 2 – Conduct of business - general

11. **2.2.2G(2)** – the BBA believes this provision should be amended to read "inappropriate coercion" as per the OFT ILG section 2.3. An example of where this distinction in type of coercion is necessary might be where action is necessary (appropriate coercion) to tackle a customer who "won't pay" rather than "can't pay" a sum owed.

12. **2.3.2R** – we believe the cross-reference within this provision should be to 4.3.5R on pre-contractual explanations.

13. **2.4.3 and 2.5.7** – these sections of guidance are examples of where the format of the draft sourcebook results in duplication of provisions and unnecessarily lengthens the document. We believe that more effective use of signposting as to which rule or guidance applies to which sector would allow the document to be simplified and duplication avoided.

14. The BBA has a number of concerns about the clarity and intention of this guidance and the FCA's expectation that compliance could be achieved within the intended implementation period of the sourcebook.

15. The second sentence of the guidance appears straightforward in that creditors should treat customers fairly by not leaving evidence of an application search on a customer's credit file unless the customer is actually applying for the product. However, the first sentence is more problematic. It does not expand on what actions are necessary of a creditor or broker for a customer to compare offers of credit and it does not suggest that creditors need to provide quotations, although the subsequent ILG reference concerns the provision of quotation searches – a reference that BBA presumes will be removed in the final sourcebook.

16. The BBA believes that if the FCA's intention is that comparing "offers of credit" should be facilitated by creditor's providing quotes (without a recorded application search), then it should be made explicit within CONC. Further clarity will then be needed as to what exactly a quote must constitute in order for it to satisfy the regulator's view of what is suitable to allow the customer to compare offers of credit. For example, does a quote need to be the price at which the credit would be offered or simply an indication? And, should an offer indicate whether an application would be successful or is it fair to give the customer a price for a product that the customer would be declined for if they subsequently make an application (and incur an application search)?

17. Changing the basis on which application searches are made by creditors and/or requiring that quotation search facilities are offered by creditors cannot be achieved by October 2014. Systems changes have to be incorporated into a creditor's change programmes to complement or avoid other systems changes being made to comply with regulatory and business needs. Additionally a move towards using quotations would have ramifications for the way risk-priced products are developed, marketed and sold. It could even lead to a move away from risk-pricing for some. Such changes need to be developed and tested and are more likely to require years rather than months of implementation time.

18. The BBA believes that the FCA should work further with the industry to consider how best to achieve the outcomes envisaged by the regulator over a feasible timeframe.

19. **2.5.8 and 2.5.9** – we would question why these provisions are specific only to credit brokers and not to all firms that interact with customers.

20. **2.5.9G(7**) – transposition of this guidance from the OFT guidance has resulted in the omission of important references to 'sensitive' personal data and 'express' consent. We believe this guidance should be a copy-out of the relevant OFT guidance.

21. **2.7.2R(4)(c)(ii)** – the BBA assumes that reference to CONC 2.6.12R is an error and should be a reference to 2.7.12R

22. **2.7.3R** – we believe this rule does not need to include the phrase *'…such as minors'.* This reference is not relevant to consumer credit.

23. **2.7.10R(2)** – terms (a), (b) and (c) are used within recital 17 of the DMD as examples of activities that achieve the defined terms. We believe it should be made clearer that these provisions are not exhaustive and are only examples.

24. **2.8.3R** – we do not believe that this rule is relevant to consumer credit and question whether it should be included in CONC.

25. **2.10** – the BBA believes that CONC should not use the generic term 'vulnerable customers' when solely addressing mental capacity within the rules and guidance. Whilst consumers with limited mental capacity might be vulnerable, the term 'vulnerable customers' can apply in many other circumstances. The FCA Consumer and Markets Intelligence team is currently developing the FCA's approach to vulnerability across regulated financial services. We believe it may confuse issues to use this term within CONC where the relevant rules and guidance are limited in scope to only one facet of vulnerability.

26. **2.10.2G(1)** – the Mental Capacity Act 2010 does not apply in Scotland or Northern Ireland, this guidance should be amended accordingly.

CONC 3 – Financial promotions and communications with customers

27. **3.1** – the term 'communication' is italicised in places but not in others. There does not appear to be a defined term for 'communication' included in the handbook glossary. We believe the FCA should provide a definition of 'communication' for application in CONC 3 and that it should be sufficiently narrow so as not to extend the financial promotions regime beyond its current scope.

28. **3.1.7R(2)(d)** – this provision includes a reference to CONC rules that does not exist i.e. 3.5.4R and 3.5.6R.

29. **3.3.9G** – we encourage FCA to clarify that this guidance is only applicable to financial promotions that that include a premium rate telephone number.

30. **3.3.10G** – this piece of guidance lacks context and each part is only relevant for certain sectors of the credit industry e.g. we assume it is not the FCA's intention that all creditors must state within financial promotions that they are a commercial enterprise. We would encourage the FCA to amend the guidance to better reapply the context that was provided by the relevant OFT source material.

31. **3.5.6G(2)** – the BBA does not agree with the FCA's interpretation that an effective annual interest rate (EAR) should be used for a representative example for an agreement that provides for compounding. Although the OFT has supported the use of an effective annual interest rate since development of the 2004 Agreement Regulations, the government chose both in those regulations and in the regulations implementing the Directive not to require the use of an EAR.

32. The BBA believes that creditors should continue to be allowed to determine whether and when to use EAR or simple per annum interest rate. Simple interest rate can be more useful to consumers when establishing how much the credit will cost on a per day, week, month etc basis. The effective annual rate does not easily allow for such comparison and whilst it may provide a 'true' rate of interest it will mirror to a large extent the 'true' cost of credit indicated by the APR.

33. Article 11(2) of the Directive (and section 78A(2)) allows that a change to the borrowing rate (in this case the effective annual interest rate) does not need to be personally notified to the consumer where that change is linked to a change in a reference rate. Instead, it is sufficient for the changed reference rate to be publicly available e.g. in national

newspapers. If the borrowing rate is a simple interest rate, then a consumer may determine easily what the change in reference rate means for their borrowing rate. However, where that borrowing rate is expressed as an effective annual interest rate the consumer may not be able to calculate the impact of the reference rate change on their borrowing rate.

34. In summary then, we believe that creditors should continue to have the flexibility of determining when or whether to use an effective annual interest rate.

35. **3.5.6G(4)** – this guidance contradicts the European Commission's Guidelines on costs and APR[3] which states in section 3 that if it is not possible to ascertain the costs, or to estimate them with a reasonable degree of certainty in a specific situation, then they should not be included in the calculation of the total cost of credit. We believe that *a reasonable estimate of the charge* should be dropped from the CONC guidance to match the Commission's expectations.

36. **3.5.7R(1)(b)** – the BBA does not agree with FCA's proposal that the speed or ease of processing, considering or granting an application should be a trigger for requiring a representative APR.

37. The FCA's position rests on interpreting the speed and/or ease of applying for credit as equating to an incentive to apply for or enter into an agreement, as stated in section 6(1)(b) of the CCAR 2010. Whilst we might question that interpretation, our concerns lie more with the uncertainty and subjectivity about what might be considered to be statements about speed or ease of application. For instance, if a creditor was to state in a financial promotion that they have a "straightforward application process" would that trigger a representative APR?

38. The BBA believes the FCA's intention is to target the promotional activities of high cost short term lenders who are perceived to entice customers with promotions highlighting that cash can be in a consumer's account within a matter of minutes. We believe it would be more appropriate for FCA to consult on the creation of a rule specific to those activities rather than to reinterpret a CCAR provision and introduce an uncertainty about trigger points for use of the representative APR.

39. **3.8.2R(3)** – the relevant source OFT guidance uses the phrase "clearly unsuitable" and emboldens the term "clearly". We believe this rule should be redrafted in line with the more appropriate threshold of likely creditor awareness expressed by the OFT.

40. **3.11.2R** – We do not believe the intention of this provision is clear and it could be mis-interpreted to apply more widely than (what we believe to be) the FCA's intention. The BBA assumes that this provision hinges on "approval" as it is defined in the Handbook and is intended to restrict firms' abilities to approve 3rd parties from making promotions on the firm's behalf. However, as currently drafted this rule could be understood to prohibit any telephone-based marketing and the use of social media or internet banking where, for instance, a creditor may operate a tool allowing for real-time interaction between an advisor and a prospective customer. We would encourage the FCA to review the drafting of this provision and to provide appropriate guidance to illustrate its meaning.

CONC 4 – Pre-contractual disclosure

41. **4.1** – it is not clear why rules on the provision of credit card cheques are included in the CONC section for pre-contractual disclosure. The requirements of 4.1 do not require any specific disclosure of information between the provider and the customer and the provision of (or request for) credit card cheques may take place during the lifetime of the product. The BBA believes this section may be better located within CONC 5 on responsible lending.

42. **4.3.1R and 4.3.2R** – we question why these provisions have been positioned as rules but described as if they can be treated as guidance. If, as suggested at 4.3.3G, firms are able to determine the extent to which they ascribe to the rule, then it appears incongruous to place

[3] http://ec.europa.eu/consumers/rights/docs/guidelines_consumer_credit_directive_swd2012_128_en.pdf

creditors in a position where they will be non-compliant with a rule whilst acting in accordance with the rule's accommodations.

43. **4.3.2R** – the BBA does not agree with the FCA's proposal to apply adequate explanation requirements to excluded agreements for the reasons outlined below.

44. **4.3.2R(1)** - extension of the adequate explanation requirements to loans over £60,260 was consulted on by the government during transposition of the Directive. The government decided that it would not be appropriate to apply these provisions to such lending because such loans are unlikely to be offered to ordinary consumers and borrowers are more likely to have access to expert advice. We see no reason for FCA to change that position.

45. **4.3.2R(2)** - Agreements secured on land are covered mostly under the s58 advance notice and s61(2) consideration period requirements of the CCA. The government chose in 2010 not to add to these requirements by making such agreements subject to the adequate explanations requirements. This was understandable because these requirements are largely inimical to the 'consideration period' process where the lender cannot contact the prospective borrower without being requested to do so.

46. If the FCA wishes to impose a rule/guidance provision that requires lenders when sending the advance copy to the prospective borrower to provide, in writing, information normally covered in an adequate explanation dialogue our members would appreciate discussion about this before such an approach is adopted.

47. **4.3.2R(3)** – the CCD excludes arranged personal overdrafts from the adequate explanation requirement (Article 5.6). Recital 11 then expressly prohibits member states from over-riding this exclusion. The FCA does not therefore have any locus to require either explicitly via a rule or implicitly via guidance that creditors should provide an adequate explanation for this form of credit.

48. It is impractical to expect that an adequate explanation could be provided to a customer entering into an unarranged overdraft. By its very nature, such credit is entered into without any prior discourse with the current account provider.

49. **4.3.3G** - we do not agree with FCA's transposition of paragraph 3.1 of the ILG to change the emphasis that was intended by the OFT. Whereas the OFT asked creditors to consider the extent to which explanations <u>may</u> be provided, the FCA compels creditors to consider the extent to which explanations <u>can</u> be provided. The OFT guidance allowed creditors to decide whether they wish to provide the explanation but the FCA guidance removes that discretion.

50. The BBA strongly believes that any CONC guidance concerning the provision of adequate explanations to excluded agreements should be clearly stated as guidance (rather than a rule) and should allow the degree of flexibility that was provided by the OFT ILG. If however the FCA chooses to retain its current drafting then we believe the regulator should confirm that this constitutes a new requirement that is not substantially the same as the current regime.

51. **4.3.4R** – we question whether reference to the Disclosure Regulations within this provision is erroneous because it would imply that the SECCI should be tailored to the customer's preference rather than the adequate explanation. Additionally, the Disclosure Regulations allow a creditor not to disclose information according to the customer's preferences if in principle the creditor is not willing to lend according to the customer's terms. We believe this caveat should be provided for in CONC.

52. **4.3.5R(2)(d)(ii)** – although this provision has been lifted from the ILG – where it is described only as the OFT's view – we do not believe it is practical to require creditors to provide an "approximate level of charges or interest in the event of default" or that the provision of such an approximation would necessarily be useful to consumers. For instance, a creditor cannot know if or when a customer may enter default and how long they may remain in default. Therefore it is not necessarily possible to approximate what the creditor's charging structure

may be at the point the consumer might default or the number of charges or period of interest that they might incur during that default period.

53. **4.3.5R(2)(d)(v)** – this provision is far too broad to be practical to implement. The implications of insolvency could be felt in many ways, many of which it would be inappropriate for a creditor to attempt to cover during the course of an adequate explanation.

54. The CCA section 55A(2)(d) gives more succinct and practical examples of what should be described as the principal consequences of non-payment. We believe the FCA should revert to this approach.

55. **4.3.6R** – the BBA believes this provision gold-plates the adequate explanation provisions of the Consumer Credit Directive. The Directive requires that consumers are provided with

> *…the information needed to compare different offers in order to take an informed decision on whether to conclude a credit agreement.*

56. The CCD places the onus on the consumer to take an informed decision based on sufficient information to compare offers whereas, as currently drafted by the FCA, this provision prescribes that creditors must ensure that the customer can make a *reasonable assessment* of affordability and risks. We believe the CCD provision is clear and should be used by the FCA.

57. **4.3.7R** – The FCA has changed the context of the OFT ILG provision (3.4) that it seeks to replicate here. The OFT very clearly caveats the considerations that creditors should have in terms of requiring them to the

> *…extent that it is appropriate to do so and having regard to relevant legal requirements…*

58. The FCA transposition removes creditor discretion and requires specific considerations in all circumstances. We do not believe this is appropriate and request that the relevant and pragmatic OFT caveat is reinstated.

59. **4.3.15R** – It is unclear whether this rule takes precedence over 4.3.7R or is subservient to it i.e. are creditors to follow 4.3.7R and decide the level and extent of explanation to be provided in compliance with 4.3.5R (and thus 4.3.15R) or does the lender consideration offered by 4.3.7R fall away by the prescriptive nature of 4.3.15R?

60. If 4.3.15R is prescriptive then the BBA and its members believe this rule is an example of where an OFT view - which is non-binding and advises how compliance with the CCA might be achieved – is being re-interpreted as a prescriptive requirement with an assumption that all creditors should already subscribe to the OFT view.

61. The BBA is concerned that the information disclosure prescribed by this rule could, in conjunction with the provisions under 4.3.5R, create information overload for consumers. We do not believe that adequate explanations should seek to duplicate or repeat the SECCI but should act as a complement to the information provided by the SECCI.

62. We also believe there is a balance to be struck between providing the consumer with information in a prominent manner that is adequate to enable the consumer to make an informed decision to purchase and the fuller disclosure of information about the product and any associated services that is provided by the product's terms and conditions.

63. We would urge the FCA to also give careful thought to the likely implications of the draft Unfair Terms regulations currently being proposed within the draft Consumer Rights Bill. These will ensure that in order for terms and features of products and services to be considered fair they will need to be prominently and transparently communicated in all communications, notices and terms and conditions documents. Additionally firms may need to make conditions considered "onerous or unusual" even more prominent than others. The likelihood is therefore that creditors will need to make certain information more visible than

other information in order to achieve prominence and will have to take a view as to what elements of a product or service they wish to exclude from any potential assessment of fairness (under the regulations). This may have implications for the presentation of information that the FCA wishes to require to be presented as 'adequate explanation'.

64. The FCA's proposals could be particularly challenging in the case of oral disclosure if the provision at 4.3.5R(4) is read to require that the information prescribed by 4.3.15R must also be disclosed orally if the information at 4.3.5R(4) has been disclosed orally. Further clarity of the FCA's intention would be welcome.

65. **4.3.15R(1)(a)** – this provision has changed meaning in its transposition from OFT guidance into FCA rule. Whereas the OFT guidance suggests that creditors should explain to the consumer that different rate or charges may apply, the FCA prescribes that the actual rates and charges that may be applied are disclosed. The former is possible, but the latter would require creditors either to maintain the same level of charges and interest throughout the contract or to anticipate and disclose when and at what level charges and interest will change during the contract. We believe the FCA should revert to using the OFT's wording for this provision.

66. **4.3.15R(1)(c)** – the BBA does not agree that this information should form part of an adequate explanation. It is not required by the SECCI and it is impractical (and of limited value to consumers) to expect that an exhaustive list of 'circumstances' could be covered within an adequate explanation.

67. **4.3.16G** – whilst the BBA supports the intention of this guidance we question whether creditors would be confident to adopt such an approach where it would not be clear that the customer is receiving the appropriate explanation nor that the reliance on using a friend or relative could be relied upon (or evidenced) should the customer later allege that they did not receive a compliant adequate explanation.

68. **4.3.17G** – as referenced in the introductory comments to this annex, we believe the FCA should provide definitions or a signpost to appropriate definitions for what constitutes a "local rate" call charge.

69. **4.6.1R(1)** – the reference within this rule to 4.6.2R is incorrect. 4.6.2 is drafted as guidance.

CONC 5 – Responsible Lending

70. **5.2.2R(2**) – BBA members believe that for clarity and transparency the FCA should work with the industry to create appropriate regulatory guidance (using examples or case studies) to illustrate what proportionate credit assessments might look like for a selection of scenarios. This approach could mitigate the potential for creditors only to understand what the regulator expects due to enforcement action or other reactive intervention that sheds light on the FCA's interpretation of the rule.

71. **5.3.1G(2)** – the BBA is concerned that this guidance to achieving the FCA's rules on creditworthiness and affordability does not lend itself to application in the case of High Net Worth (HNW) consumers. For instance, 5.3.1G(4)(c) implies that ability to repay should only be assessed based on income and savings. This would rule out making unsecured credit accessible to asset rich cash poor customers who are typically very wealthy individuals.

72. The CCA makes provision for such customers with an exemption for HNW consumers where a statement made by a specified person verifying the HNW status of the consumer is received. We believe the same exemption should be possible under CONC so that 5.2.2R would still apply.

73. **5.3.1G(3)** – the BBA would urge the FCA to give regard to the footnote[21] that accompanies the relevant ILG guidance to which this FCA guidance relates. This concerns the ability of creditors to lend to students and consumers pursuing post-graduate studies. Without acknowledging that lending within the student sector – where increased future income is expected but "*appropriate evidence"* may be limited, there is a danger that FCA's

approach may conflict with the government's key aims of supporting credit availability for under graduate and post graduate students.

74. **5.3.1G(5)** – we urge the FCA to revert to the wording used in the referenced section of the ILG which suggests that creditors' assessments should consider the likelihood of the consumer being able to pay off the maximum amount of credit available over a reasonable period of time. We think the OFT approach is more practical and beneficial than suggesting that creditors include in a credit assessment an assumption about how long the overdraft or credit card agreement may last.

75. **5.3.1G(6)** – we believe this guidance should more accurately reflect the corresponding paragraph of the OFT guidance, whereby the expectation is that creditors should consider the actions suggested at (a) and (b).

76. As currently drafted, this guidance would remove creditor discretion and prove problematic, for example, where a credit card provider does not offer unsecured personal loans and is unable to make the informed assumption suggested at (a).

77. **5.3.2R** – this rule appears to duplicate the requirements already set out by section 5.2. We do not believe it adds to the protections and suggest it is dropped.

78. **5.3.4R** – the BBA is concerned that this provision has been presented as a rule rather than guidance. 'Reasonable steps' is not a defined term and as such it is open to subjective determination. We therefore believe this provision would be better suited to guidance towards fulfilment of FCA's principles. Additionally we suggest that this provision is amended to better reflect the relevant OFT guidance by the inclusion of "reasonable and practicable"

79. **5.4.1R** – we question whether all of this section is applicable to all activities that are captured by the FCA's definition of credit broking. For instance, we do not believe it is practical or in all cases possible for an introducer to comply with 5.4.2R(2) where an introduction relates only to a provider of credit rather than a specific product or its price.

CONC 6 – Post contractual requirements

80. **6.2.1R** – based on the requirements of 6.2.2R, we have the same concerns with the requirements of 6.2.1R as we have with the relevant sections of CONC 5.

81. **6.3.2R** - to correctly transpose section 74A(5) of the CCA this rule should make reference to 6.3.3R instead of 6.3.1R.

82. **6.3.4R(1)** – this rule is derived from s74B of the CCA but unlike the Act requirement it does not prescribe that information must be presented in writing. We would appreciate clarification that this is intentional.

83. **6.7.5R** – the BBA is strongly concerned by the current drafting of this rule. Although the rule is based on paragraph 6.4 of the ILG, it neglects to carry over the crucial OFT guidance footnote that reflects the agreement reached between the credit card industry and government that the minimum repayment amount requirement applies only to card agreements made after the 1st April 2011.

84. Additionally, and to fully reflect the existing minimum payment requirement for agreements made from April 2011, this rule (or guidance to achieving the rule) should set out the detail provided by paragraph 160 of the Lending Code as to exactly what interest and charges provisions are captured by the minimum payment. This detail establishes the agreement reached between credit card providers and the government.

85. We have written separately to the FCA seeking confirmation (ahead of finalisation of the rules) that this is a drafting error that will be corrected. If the omission of the effective date is intentional then credit card providers will need significantly longer than the currently envisioned timetable to make systems changes and to provide suitable and appropriate notice to customers that their agreements and repayments are to change.

86. **6.7.7R** – we question whether this rule is necessary as it appears to duplicate CONC 6.2.

87. **6.7.9R** – the BBA is concerned that this rule appears to preclude a customer from receiving an immediate credit limit increase even where one is requested by the customer and an appropriate credit assessment is carried out. This will in effect mean that a customer cannot benefit from a requested limit increase for a month and would for example be deprived of access to credit in an emergency situation where funds are immediately required (such as boiler repair). This rule may therefore result in credit card customers having to take out an additional credit product, such as a payday loan.

88. We urge the FCA to incorporate a caveat to this rule, such as that provided under paragraph 157 of the Lending Code, so that notice is not required for a limit increase which is temporary in nature or made in emergency.

89. **6.7.11G** – it is unclear whether the indicators of risk of financial difficulty listed here are supplemental to those listed at CONC 1.3 or whether the guidance at CONC 1.3 does not apply to CONC 6.7.

90. It is also unclear how 6.7.11G and 6.7.16R are to be reconciled. Whilst an interest rate may be increased in response to a change in the risk presented by the customer, it appears that this risk cannot be related to the customer's propensity to make repayments when they are due. We would appreciate further guidance from the FCA on this potential mismatch.

91. **6.7.11G(1)** – subject to the points made and clarification sought above, this provision should be amended to clarify that it is a customer's failure to make 'consecutive repayments' or 'multiple repayments over a short period' that suggest a risk of financial difficulties, rather than missing one repayment – which may, for example, simply be an oversight by the customer.

92. **6.7.12R** – the BBA believes that explanatory guidance should be added to this rule, akin to that provided by paragraph 144 of the Lending Code, to clarify that 30 days' prenotification of a rate increase is not required where the rate tracks an external index or is the go-to rate following the end of a promotional period.

93. **6.7.14R** and **6.7.15G** – the BBA does not believe that the FCA has correctly interpreted the Unfair Terms in Consumer Contracts Regulations (UTCCR) within the CONC Handbook.

94. Schedule 2 (the "Grey List") of the UTCCR includes paragraph 1(j) which prohibits a firm from unilaterally altering the terms of a contract without a valid reason for doing so. However it includes the following caveat:

> *Paragraph 1(j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.*

95. Therefore, 6.7.14 and 6.7.15 should not apply to overdrafts, credit cards or store cards which are for indefinite duration and the borrower is free to end the relationship at any time. If however the intention is that these provisions apply to credit agreements of a fixed term, then we would suggest that they are labelled as such. An alternative, and one we would prefer, would be to delete these provisions in their entirety as creditors are already aware of their legal obligations under the UTCCR.

96. **6.7.16R** – The BBA opposes the inclusion of this rule within the Handbook. The rule does not reflect any established legislative approach and does not tackle any perceived consumer detriment. It is based on an OFT view which is not supported by evidence of a consumer protection need. Any explanation of a creditor's interpretation of risk - that is particular to a customer's circumstances - could potentially lead to gaming of a creditor's risk assessment processes and could lead to fraud, irresponsible borrowing and costs that are borne by a wider cohort of consumers.

97. **Rules on refinancing: general** – the BBA has concerns about the drafting of 6.7.17R, 6.7.18R and 6.7.19R. Our members believe the definitions applied by the FCA to "refinance" and "forbearance" are likely to cause confusion as they are inappropriate in places and do not reflect all circumstances under which the terms would currently be used by the consumer credit industry. The terms are also, it appears, used to mean different things in different places within the Handbook.

98. **6.7.17R(1)(b)** – this provision purports that changing the date of one or more repayments under an existing power of a credit agreement is regarded as refinance. However, creditors are often asked by customers to move their payment date(s) to better suit their financial circumstances (e.g. expected receipt of funds) and this can be for a number of reasons unconnected with financial difficulties or a reason for forbearance.

99. **6.7.19R** then suggests that even if the customer requests that the date of a repayment is moved, the creditor should not do so unless they believe it is in the customer's best interests to do so. In essence then creditors will be compelled to make a judgement as to whether to accede to a customer's request or to prevent them from controlling the date at which repayments are made. A routine administrative request has therefore become an unnecessary part of the credit process.

100. As most circumstances in which a customer changes their repayment date(s) do not require a replacement, variation or supplementary credit agreement we suggest that 6.7.17R is amended to exclude changes to arrangements which can be made under an existing contract.

101. **6.7.17R(2)** – the intention of this provision is unclear. It does not cover all actions that creditors would regard as exercising forbearance and if it is intended to describe the circumstances under which the term of a credit agreement is extended (either by amendment or otherwise) to provide more time for a customer to make their contractual payments, then we believe this could be drafted more succinctly and without as much room for misinterpretation. Moreover, the definition of forbearance provided by this rule does not reflect the commonly accepted legal meaning of forbearance and is therefore likely to cause confusion for firms and consumers. We would urge the FCA to review this provision and consider whether it adds anything to 6.7.19R which follows.

CONC 7 – Arrears, default and recovery

102. **7.3** – we would appreciate confirmation as to whether the term "forbearance" as applied in this section is intended to have the same meaning as that outlined in 6.7.17R(2).

103. **7.3.3G(1)** – we request that this guidance is clarified to confirm whether FCA expects customers to be allowed to make up unmade payments over the full course of the remaining term of the agreement or – as is currently the case – for the creditor and customer to agree an appropriate period in which repayments can be 'made up'. We note that it may not be in the consumer's interests to make up missed payments over the full remaining term of the agreement where interest is likely to be applied to the missing sum.

104. **7.3.5G** – the BBA would question whether this guidance is necessary or aids creditors to understand and comply with 7.3.4R. The guidance provides limited and non-exhaustive examples which will not be relevant to all circumstances where a form of forbearance is appropriate. The guidance provided by 7.3.6G appears to be sufficient and more appropriate to follow the rule and we suggest 7.3.5G is deleted.

105. If however this guidance is retained we suggest that 7.3.5G(4) is reworded and shortened to simply refer to the consumer's expenditure exceeding their income.

106. **7.3.11R** – the BBA believes it would be more appropriate (and in line with existing consumer understanding and established creditor good practice) to explicitly refer to a "breathing space" period instead of 'reasonable period' and to define that period as lasting initially for 30 days (with the opportunity for it to be extended under the appropriate

circumstances). This would also remove uncertainty and subjectivity about what is regarded as reasonable and would ensure a consistent approach across the industry.

107. We also believe that the FCA drafting should better reflect the relevant OFT guidance and the Lending Code and refer to the creditor having 'evidence' that the customer is developing a repayment plan, rather than being 'aware' of such planning. This maintains consistency with current practice and lessons the likelihood of the "breathing space" period being exploited by unscrupulous customers.

108. **7.3.12G** – we believe this guidance should be reworded to replace 'aware' with 'evidence'. Creditors should receive formal notification when an IVA, DRO, LAO or DAS is agreed so there should be no doubt that a formal insolvency procedure is in place. Using 'aware' opens the possibility that creditors would be expected to suspend enforcement when a customer dishonestly alleges that a formal procedure is in place but where no formal notice has been given.

109. **7.3.14R** and **7.3.15G** – the BBA is concerned that this rule is too ambiguous and may be interpreted subjectively by the FCA, the FOS, consumers and their representatives. For example, it could be argued that a posted letter, an email, a text message or a voicemail could be accessed by a 3rd part (e.g. family member) and if this interpretation was applied it would leave firms with few options by which to pursue a debt.

110. We would urge the FCA to redraft these provisions more tightly so they cannot be construed to apply to all forms of communication. For instance, section 176(3) of the CCA enables written communications (such as notices) to be sent to the last known address of the customer and we do not believe the FCA rules should inhibit that approach.

111. **7.4** – the "'status of a debt" is not a term that is widely used within financial services so we suggest this section includes an explanation as to what exactly this term refers to.

112. **7.5.2R** – the BBA believes this rule should be amended to better reflect its origin within the OFT Debt Collection Guidance (DCG). As currently drafted the rule could be mis-interpreted as applying to the pursuit of the customer for repayment where there could be an issue around the enforceability of the credit agreement. Whereas, section 3.5f of the DCG (and we believe the FCA's intention) is concerned with pursuing the wrong person for repayment (i.e. a 3rd party).

113. **7.5.4R** – we believe that as currently drafted this rule would prohibit many creditors' established practices of providing a mandate to a debt collection agent to make a decision on the creditor's behalf as to what constitutes an acceptable repayment offer. Such arrangements typically mandate that the 3rd party uses CFS trigger figures or similar to mirror the creditor's own approach.

114. The BBA suggests that 7.5.4R is amended to require that reasonable offers are referred to the creditor <u>unless</u> the 3rd party has been provided with a mandate by the creditor to consider repayment offers on the same terms as the creditor.

115. **7.5.5R** and **7.5.6G** – we do not believe these provisions are appropriate or necessarily reflect current best practices. Many creditors have arrangements with debt collection agents that allow for monthly payment files to be submitted by the DCA, to align with monthly reporting to CRAs. Each DCA will have systems designed to offer this service and to appropriately record and report payments received and passed on. BBA members do not believe these processes currently cause any consumer detriment and therefore the costs of changing systems and processes to meet this rule are not justified.

116. **7.6** (and elsewhere that reference to continuous payment authority is made) – the BBA would appreciate confirmation within the Handbook that all references to obligations on a *firm* with respect to CPAs equate to the firm with whom the consumer has agreed the authority and not to the firm with whom the customer has the relevant account from which the CPA is exercised.

117. As outlined earlier in our response to the consultation paper, we would like the FCA's confirmation that banks and other card providers will not be held liable for the actions of a firm that does not comply with the FCA's rules on CPAs and non-compliantly takes funds from the customer's current account or credit card.

118. **7.7.5R** – the BBA believes the wording of this rule is unclear and should be amended. At present the rule could be interpreted to mean that firms cannot levy charges on any customers that default, whereas we presume that this is supposed to link to the phrase that follows it and mean "default or arrears difficulties". A customer can be in default but not be in financial difficulties and it could be entirely appropriate to continue to levy charges against the customer where they are not in difficulties. For example, if the customer went on an extended holiday and did not make arrangements to ensure that repayments are kept up to date.

119. We believe it would be more appropriate to remove references to arrears and default and instead to prohibit the levying of charges – beyond those necessary to cover reasonable costs when the customer has been identified by the creditor as being in financial difficulties.

120. **7.7.6G** – this guidance states that interest and charges should cease to apply if there is 'reasonable evidence' of financial difficulties. However, 7.3.5G states that a creditor should consider ceasing charges and interest when the customer 'provides evidence' of financial difficulties. We suggest that 7.7.6G is redrafted to better reflect 7.3.5G to avoid confusion and ensure that the existence of arrears or default cannot in isolation be argued to constitute 'reasonable evidence' of financial difficulties.

121. **7.9** – we do not believe it appropriate to include jurisdictional requirements within the CONC sourcebook. Such provisions are not repeated elsewhere in the FCA Handbook although they have relevance to many financial services. The BBA believes that CONC should state the FCA's rules and guidance and not matters of a legislative nature.

122. **7.10.2R** – the BBA questions whether the current wording of this requirement is appropriate as it appears to suggest that firms must be able to anticipate and ensure that a consumer cannot misunderstand information. Although the rule is clarified to some extent by the guidance at 7.10.3G, in isolation the rule could be interpreted to imply that a firm is always responsible for ensuring a consumer does not mis-understand a communication.

123. **7.10.5R** – as outlined at paragraph 6 of our response to the consultation paper, we request that the CONC document provides or signposts to definitions of what constitute each of the different telephone number pricing rates. This information will be important so that firms are clear as to what is required and under what circumstances e.g. where the consumers uses a mobile phone or dials from abroad etc.

124. **7.10.8R** – we believe there may be circumstances when it is only by revealing details of a debt to an individual (such as outstanding balance, amount borrowed, date of application etc) that it is possible for the creditor and consumer to establish that the individual is liable in respect of the debt. The relevant paragraph of the OFT debt collection guidance provides a more useful nuance to this provision by clarifying that details of the debt should not be revealed without first establishing that the consumer is the debtor. This allows a distinction between first establishing (without revealing debt details) that the consumer is the borrower in question and then allowing details of the debt to be revealed to establish whether the consumer is still liable for the debt. We encourage FCA to better align the context of this provision to that of the OFT guidance.

125. **7.11** – the BBA is concerned by the FCA's use of the phrase 'vulnerable customers' for this section. Vulnerability can have many facets and these are currently being explored by the FCA in its supervisory and market intelligence work. As this section appears to address a specific instance of vulnerability and not vulnerability in general, we believe the section should be headed with regard to the specific and not the general.

126. This section repeats a conflation made in the OFT guidance confusing conditions related to mental capacity with those related to mental health. We believe the FCA's intention is to replicate the protections that the industry and stakeholders encourage via the MALG Mental Health and Debt Guidance and we encourage the FCA to redraft this section to clarify that it is seeking to address vulnerabilities associated with mental health rather than mental capacity.

127. **7.15.10R** – the BBA believes this provision should be guidance rather than a rule because its compliance or non-compliance rests on a subjective assertion by a consumer rather than on any evidence or practice that a firm is able to provide i.e. only a consumer can determine whether they feel that they have been intimidated.

128. For illustration, if a creditor rejects a payment offer because it is unacceptable and in the same communication informs the consumer as to what level of payment would be accepted by the creditor it might be regarded as transparent, informative behaviour or as a practice designed to intimidate the consumer into paying the increased amount. The latter would be non-compliant with the rule but determined only by the consumer and/or the regulator or ombudsman.

129. **7.15.12G** – as above, we believe this guidance should state that a counter-offer is not regarded as intimidation.

130. **7.16** – the BBA believes that under Scottish legislation the period under which a debt can be enforced is known as the "prescription period" rather than limitation period.

131. **7.17.2G** – the reference to a "customer's details" within this provision should be amended to clarify that it applies only to a customer's "personal data" as required under the Data Protection Act 1998 and included within the relevant OFT guidance. The current drafting allows for a wider (and incorrect) interpretation of what information sharing might be subject to consumer consent.

CONC 8 – Debt Advice

132. **8.1** – the BBA would appreciate clarification as to whether the exclusions provided for at section 39H of the Regulated Activities Order are sufficient to exclude a creditor – from being caught by the regulated activities of debt counselling and debt adjusting – where they are acting in relation to a consumer's debt resulting from a credit agreement taken out with another company within the creditor group.

133. **8.2.2G(1)** – we would encourage the FCA to amend the provision to clarify that the giving of appropriate advice to a customer would include signposting the customer to another regulated source of debt advice, where the initial advisor is unable to offer services that are suited to the consumer's jurisdiction.

134. **8.2.5R** – the BBA believes it is important that the FCA sets out the circumstances under which it believes it might be appropriate for a debt adjuster to withhold payments (in part or in whole) from creditors. Although CONC rules will require that consumers are told of the likely consequences of payments being withheld we would be concerned if debt adjusters feel that by providing such disclosure they are then given carte blanche to retain a consumer's payments.

135. The rule requires that customer's lenders are told for what period payments will not be made by the debt adjuster, when a decision is made to retain payments. We assume the FCA intends that creditors are provided with a definitive time period rather than a general statement such as "for the time being". We would appreciate confirmation that this requirement will apply when a debt adjuster is withholding payments in pursuit of a Full and Final settlement i.e. the debt adjuster cannot simply hold on to repayments for an undefined period in the hope that a later F+F settlement offer will be accepted.

136. **8.2.6R** and **8.2.7G** – as per our comments in relation to section 7.11, we are concerned that CONC will require creditors to address issues related to 'vulnerable customers' whilst the

FCA is still in the process of establishing what constitutes vulnerability and what its view is towards appropriate behaviour by regulated firms.

137. The BBA would question whether the wording of 8.2.6R is appropriate in requiring firms to have policies and procedures to identify particularly vulnerable customers. 8.2.7G implies that particularly vulnerable customers are likely to have characteristics beyond simply being in debt (examples used are mental health and mental capacity) thus the rule appears to require creditors to proactively seek to establish such vulnerabilities rather than to react to those vulnerabilities when they become apparent. If this is the FCA's intention then creditors would likely need to ask sensitive personal questions of all customers in debt to establish whether particular vulnerabilities are apparent and could potentially antagonise customers and/or breach protections provided by the Data Protection Act.

138. We believe it would be more appropriate for 8.2.6R to require creditors to have an appropriate policy or policies to deal with vulnerable customers if the vulnerability is volunteered to the creditor by the customer and/or their representative and, where appropriate, evidence of the vulnerability provided (e.g. the MALG Debt and Mental Health Evidence Form). Any such requirement should only be established on completion of the FCA's current policy work on vulnerability.

139. **8.6.5R** – the BBA is concerned that the FCA appears to be giving debt adjusters the green light to withhold debt repayments from creditors in the hope of forcing creditors to capitulate to the demands of the debt adjuster. The guidance at 8.6.6G provides an example of the debt adjuster withholding debt repayments expecting the creditor to suspend interest and charges. However, the implication of this is that the debt adjuster is either acting to provide the creditor with a dishonest assessment of the consumer's ability to repay the debt owed or is simply acting as a barrier between the creditor and the customer, in the hope of forcing the creditor to change the credit agreement.

140. The BBA does not believe that CONC should condone such behaviour or that debt adjusters could be said to be compliant with the FCA Principles.

CONC 11 – Cancellation

141. **11.1.1R** – this rule should exclude those agreements that continue to have CCA section 67 cancellation rights applied to them. This is not sufficiently achieved by 11.1.2R and as such, other provisions within CONC 11 (noticeably 11.1.12, 11.1.13 and 11.1.14) inadvertently capture agreements that should continue only to be covered by sections 68 to 73 of the Act.

142. **11.1.1R(1)** – the term 'consumer credit agreement' is italicised but there does not appear to be a definition of the term provided within CONC or its glossary. We assume this should read 'regulated credit agreement'.

143. **11.1.2R(1)(a)** – we believe this provision lacks clarity and should be redrafted to clarify which 'section' is being referred to within the parenthesised text.

144. **11.1.2R(1)(e)** – we do not believe the wording "or an existing building" is necessary. The definition of 'land' suffices to include an existing building when used in relation to consumer credit.

145. **11.1.3G** – this guidance repeats the provisions of a retained section of the CCA. We not believe its inclusion adds value.

146. **11.1.5R** – the parts of this section which concern distance marketing already appear to be prescribed by compliance CONC 2.7. We therefore question whether DMD cancellation rights need to be stated here.

147. **11.1.5R(2)** – the BBA requests that the wording of this provision is amended. Use of the term "from the day" is ambiguous and could be interpreted to mean either the day on which the contractual terms are received or the day after. We believe the wording of the Distance Marketing Regulations at section 10(3) is unequivocal and should be used.

148. **11.1.6R(2)** – we believe incorrect cross-references to other CONC sections are used here.

149. **11.1.9R** – we would appreciate additional clarity as to what constitutes an "adequate" record.

150. **11.1.14R** – the BBA would be keen to establish the origin of this rule.

CONC 13 – sections 77, 78 and 79 of the CCA

151. **13.1** – not all provisions within section 78 of the Act are relevant to the provisions within this section of CONC. For example, the requirements of section 78(4) of the Act would not be satisfied by 13.1.2G(2) of CONC. We believe this section of CONC should be redrafted to provide explicit guidance as to which parts of section 78 are relevant to each piece of CONC guidance given.

152. **13.1.4G(4)** – this guidance is incorrect. The heading of the reconstituted agreement will depend on what agreement it relates to (e.g. it may have to state "*Credit Card Agreement regulated by the Consumer Credit Act 1974*") and if the agreement included a right of withdrawal it would not also have included a cancellation notice.

153. **13.1.6G(1)** – we believe that the term "unenforceable" is used here with the meaning applied to it under the CCA rather than under FSMA. We request this is clarified within the guidance.

CONC 15 – second charge lending

154. **15.1.5R(2)** – the BBA believes the current wording is too broad in requiring the creditor to disclose all risks that entering a credit agreement may represent. This requirement is also inconsistent with the provisions within CONC 4 on adequate explanations. We urge the FCA to amend this provision so that it is proportionate and achievable.

155. **15.1.8R(2)** – the BBA does not believe it will be possible for a creditor to evidence their compliance with this rule as FCA regulations prohibit firms from relying on a customer's declaration of understanding. We would therefore appreciate further guidance on how compliance can be achieved or deletion of the provision.

156. **15.1.9G(1)** – there is currently no requirement for an adequate explanation to be provided for an agreement secured on land. As currently drafted this guidance allows creditors to consider the adequate explanation to provide but not the discretion to determine whether or not to provide an adequate explanation. We therefore suggest that this guidance is amended to reflect current requirements.

[Ends]