

Introduction

On 24 February 2012 the UK's consumer authority, the Office of Fair Trading (the "OFT"), announced its intention to review the payday lending sector. Given the OFT's approach and powers of enforcement, payday lenders should take proactive steps to prepare for the close scrutiny which will inevitably follow, not just from the OFT, but from consumer action groups and the UK press.

Payday Lending: the UK Climate

"We are concerned that some payday lenders are taking advantage of people in financial difficulty... This is unacceptable." - David Fisher, OFT

It will come as no surprise, given the OFT's views on payday lending, that the OFT announced its intention to carry out an extensive review of the UK's payday lending sector. The OFT will investigate payday lenders' compliance with the Consumer Credit Act 1974 (the "CCA 1974"), its irresponsible lending guidance (the "ILG") and compliance with all other relevant guidance and legal obligations. Evidence gained during the review will be used to "boost standards" across the sector and to "drive out" companies which are not fit to hold consumer credit licences.

The Review

The review will focus on:

- lenders giving loans without first adequately checking whether or not the borrower can repay them;
- inappropriate targeting of particular groups of people with clearly unsuitable or unaffordable credit;
- the practice of rolling over loans so that charges escalate and loans become unaffordable; and
- not treating borrowers who get into financial difficulties "fairly".

The review will also involve on-site inspections of 50 major payday lenders, compliance work with trade associations and a survey of industry and consumer organisations. The OFT's warning is, in our view, a clear message to payday lenders to ensure their procedures match not only the letter but the spirit of the law. After undertaking the review, it is expected that a report and details of any follow-up action will be announced later in 2012.

The OFT's Powers: Enforcement Action & Approach

"[We will] not hesitate to take enforcement action, including revoking firms' licences to operate where necessary." - David Fisher, OFT

The OFT has made it very clear that it is prepared to use the full extent of its enforcement powers to curtail any activities by payday lenders which it considers inconsistent with the CCA, the ILG or any of its guidance.

The OFT may take any of the following actions:

- imposing conditions on consumer credit licences;
- suspending consumer credit licences;
- revoking consumer credit licences;
- imposing civil penalties;
- investigating and bringing criminal prosecutions.

In our experience of dealing with the OFT, which includes representing a range of clients in the financial services sector against actions and prosecutions, we have found its approach to be intrusive and extremely aggressive. We do not anticipate this approach to change in the OFT's review of the payday lending sector. It is, of course, telling that during OFT's review of the debt collection guidance, it inserted (only after seeking comments on the draft and without prior notice) provisions on continuous payment authorities (which was particularly designed to combat alleged bad practices in the payday lending sector). The OFT has now decided to consult, for the first time, on that aspect of the final guidance but it is not expected that the guidance will change.

Experience in the US

In the US, the Consumer Financial Protection Bureau (CFPB), created in 2010 under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, has made payday lending a regulatory priority for 2012. In fact, earlier this Spring, the CFPB started to actively examine the businesses of pay lenders to determine whether or not they are currently compliant with US federal law on fair consumer lending practices. While payday lenders are currently regulated by the states in which they do business this examination process will likely result in new federal regulations under the CFPB and, more immediately, potential liability for those payday lenders who are not in compliance with other federally-regulated consumer protection laws.

Squire Sanders' payday clients, particularly those with US interests, should be aware that our US financial service litigating colleagues, who have extensive experience in the US payday market place, are actively monitoring the CFPB's progress and regularly advising payday clients. Please see our website for an overview of the CFPB's activities in the US: www.squiresanders.com

Next Steps for Payday Lenders in the UK

Every payday lender should, as a first step, consider the OFT's Questionnaire For Consumer Credit Licence Holders (which is available at http://www.of.gov.uk/shared_of/Credit/questionnaire.pdf) for an idea of the themes of the investigation and to gain an understanding of the OFT's particular areas of discontent. Next, we recommend lenders:

- review their lending practices and procedures ensuring compliance with the CCA 1974, the ILG and all other relevant legislation (including the spirit, not just the letter, of the guidance); and
- ensure their continuing compliance with all relevant legislation and regulatory guidance is clearly evidenced in a form ready to be shown to the OFT, paying particular attention to policies, procedures and training manuals.

In our experience, lenders facing a review can take a number of practical steps. These include:

- firstly, taking great care when receiving requests from the OFT to select, log and explain what is being sent. If a response does not provide a full explanation, the OFT may draw unintended (and unnecessary) adverse inferences from the response;
- secondly, identifying with the OFT whether the threatened enforcement action will be civil or criminal and adopting an appropriate strategy; and
- thirdly, seeking to negotiate with the OFT and securing a joint press release at the end of an investigation: if a negotiation cannot be achieved, ensuring you have your own press release.

If you need specific help in preparing for the review, or dealing with any visit or regulatory contact from the OFT, Squire Sanders has a global profile of helping consumer credit businesses, including a number of payday lending clients, in the preparation for, and resolution of, regulatory action.

In the UK, we have particular (and first hand) experience of dealing with the OFT and expert knowledge of consumer credit law. Our recent experience includes resolving with the OFT, on favourable terms, a very high profile investigation and challenging the OFT's decision to refuse a consumer credit licence. We author the most up to date textbook solely dealing with consumer credit law and regulation, *Consumer Credit: Law, Practice and Precedents*, which was published by the Law Society in January 2012.

Further Information

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