

**CONSUMER CREDIT ACT 1974 (AS
AMENDED BY THE CONSUMER
CREDIT ACT 2006)**

Consultation on proposals
relating to:

- Buy-to-let lending
- Provision of
statements
- Definitions of
“payments”

DECEMBER 2007

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SUMMARY OF PROPOSALS

<p>What is being consulted on?</p>	<p>The proposals relate to:</p> <ul style="list-style-type: none"> • an exemption for buy-to-let lending from regulation under the Consumer Credit Act 1974 (the 1974 Act), as amended by the Consumer Credit Act 2006, thus ensuring that, following the removal of the £25,000 financial limit (above which credit agreements are currently unregulated) in April 2008, such lending does not become a regulated activity thus maintaining the current position. This was the original policy intention; • clarification that creditors, under fixed-sum credit agreements, need to give debtors consecutive statements each covering a period of not more than one year and to do so within 30 days of the end of the period to which they relate. This was the original policy intention, however, as currently presented the legislation defeats this intention; and • inclusion of definitions of “payments” for the purpose of issuing notices of sums in arrears. The absence of clear definitions could result in differing interpretations of what constitutes “payments” and risks defeating the original policy intention for issuing arrears notices. 	<p>Relevant paragraphs</p> <p>Chapter 1</p> <p>Chapter 2</p> <p>Chapter 3</p>
<p>How will these proposals be taken forward, and when will they be implemented?</p>	<p>We intend that the proposed changes to legislation are made through a Legislative Reform Order under the Legislative and Regulatory Reform Act 2006. Subject to the outcome of the consultation, we propose that the changes are implemented from 1 October 2008.</p>	<p>Para 3.10</p> <p>Para 4.9</p> <p>Para 5.6</p>
<p>Consultation</p>	<p>This consultation is being conducted in accordance with the requirements of the Legislative and Regulatory Reform Act 2006 and the terms of the Government’s Code of Practice on Written Consultations. The deadline for responses and the response address is at paragraph 1.28.</p>	<p>Para 1.9</p> <p>Annex D</p>
<p>Who should read this consultation paper</p>	<p>This consultation will be of interest to businesses involved in the buy-to-let market. The proposals relating to statements and notices will be of interest to all businesses with licences issued by the Office of Fair Trading under the 1974 Act and anyone thinking of starting a consumer credit business.</p> <p>It will also be of interest to consumers and consumer groups who will be able to more clearly understand the obligations on lenders with respect to the giving of statements and notices. It will be of particular interest to consumers who are involved in, or are thinking of entering, the buy-to-let market.</p>	

Glossary

These terms have the following meanings when used in this consultation document.

“the 1974 Act” means the Consumer Credit Act 1974

“the 2006 Act” means the Consumer Credit Act 2006

“LRO” means the Legislative Reform Order

“LRRRA” means the Legislative and Regulatory Reform Act 2006

“FSMA” means the Financial Services and Markets Act 2000

“FSMA Order” means the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001

“creditor” means the person providing the credit under a consumer credit agreement*

“debtor” means the person receiving credit under a consumer credit agreement*

“running account credit agreement” means a facility under a consumer credit agreement whereby the debtor can receive from time to time from the creditor or a third party cash, goods or services to an amount or value such that, taking into account payments made by or to the credit of the debtor, the credit limit (if any) is not at any time exceeded. Examples include bank overdrafts and credit card accounts*

“fixed-sum credit agreement” means any other facility (other than under running account credit agreements) whereby the debtor can receive credit whether in one amount or in instalments. The most common example is a single loan advance*

“RMC” means a regulated mortgage contract. This is defined in article 61 of the FSMA Order as a first charge on a property in the UK at least 40% of which is used, or intended to be used, as or in connection with a dwelling by the borrower or (in the case of credit provided to trustees) by an individual who is a beneficiary of the trust, or by a related person

“deposit taker” has the meaning given by section 16(10) of the 1974 Act

* For full definitions please see section 189(1) of the 1974 Act

LIST OF KEY DOCUMENTS REFERRED TO IN THE CONSULTATION DOCUMENT

The Consumer Credit Act 1974
(not available in electronic form)

The Consumer Credit Act 2006
http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060014_en.pdf

The Consumer Credit (Information Requirements and Duration of Licences And Charges) Regulations 2007 (SI 2007/1167)
<http://www.opsi.gov.uk/si/si2007/20071167.htm>

The Consumer Credit (Exempt Agreements) Order 1989 (SI 1989/869)
http://www.opsi.gov.uk/si/si1989/Uksi_19890869_en_1.htm

The Consumer Credit (Exempt Agreements) Order 2007 (SI 2007/1168)
http://www.opsi.gov.uk/si/si2007/uksi_20071168_en.pdf

The Legislative and Regulatory Reform Act 2006
http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060051_en.pdf

The Financial Services and Markets Act 2000
http://www.opsi.gov.uk/Acts/acts2000/ukpga_20000008_en_1.htm

The Financial Services and Markets Act (Regulated Activities) Order 2001 (SI 2001/544)
<http://www.opsi.gov.uk/si/si2001/20010544.htm>

CHAPTER 1: INTRODUCTION

1.1 This consultation paper sets out in detail the Government's proposals for reforming certain aspects of the legislation governing consumer credit agreements.

Why is change needed?

Buy-to-let loans – exemption from regulation under the Consumer Credit Act 1974

1.2 At present buy-to-let lending over £25,000 – in effect all buy-to-let lending - is unregulated. However, the Consumer Credit Act 2006 (the 2006 Act) removes the threshold of £25,000 below which consumer credit agreements are currently regulated (unless specifically exempted) and above which they are not. When this provision comes into force on 6 April 2008 all consumer credit agreements, regardless of value, will be regulated unless specifically exempt. As a consequence buy-to-let agreements that are not for business purposes or exempted elsewhere will come within the scope of the Consumer Credit Act 1974 (the 1974 Act) as amended by the 2006 Act. This is an unintended consequence of the 2006 Act and inconsistent with the stated policy intention. This is expanded on in Chapter 3.

Clarification on the giving of statements for fixed-sum credit agreements

1.3 The policy intention under the 2006 Act was that a creditor, under a regulated agreement for fixed-sum credit, must give a debtor regular statements each covering a period of up to one year. These should be given within 30 days of the end of the period to which they relate and should run consecutively. However, the 2006 Act, when taken together with regulation 11 of the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 defeats this policy intention as the current wording in the 2006 Act does not allow for the provision in the Regulations which allows the lender 30 days to send the statements. This is expanded on in Chapter 4.

Inclusion of a definition of “payments” for the purpose of issuing notices of sums in arrears

1.4 The 2006 Act provides for a creditor to give notices of sums in arrears to the debtor under fixed-sum and running-account credit agreements and certain regulated consumer hire agreements. Certain conditions have to be satisfied before this obligation arises and ceases, two of which include the word “payments”. The policy intention was that “payments” would cover regular instalments/repayment sums, hire payments and regular interest but not other sums such as default sums that may be applied as a consequence of a missed payment. However, in the absence of a clear definition of what the word “payments” is supposed to mean, it could be construed more widely as including any sums falling due under the agreement including default sums. As a result first notices of sums in arrears (due after two missed

payments) could be triggered far more quickly than would otherwise be the case if it were clear what the word “payments” was intended to cover. This is expanded on in Chapter 5.

Who will be affected by the proposals?

1.5 The proposals set out in this consultation paper will remove administrative burdens on credit and hire businesses arising from the unintended consequences of changes introduced into the 1974 Act by the 2006 Act as outlined above. In particular they will, in all cases, avoid unintended compliance costs as a consequence of removing the need to make significant amendments to internal systems to accommodate the new requirements introduced by the 2006 Act. An independent review by PricewaterhouseCoopers (PwC) in 2006 identified additional transitional costs to business of around £100 million with annual ongoing costs of around 0.5 million thereafter if buy-to-let lending was not exempted from regulation under the 1974 Act.

1.6 In addition the proposal to exempt buy-to-let lending from regulation under the 1974 Act will create a level playing field for lenders in this market. As things stand a small group of around 80 lenders who do not fall under the exemptions¹ in the Consumer Credit (Exempt Agreements) Order 1989 would be the only players in the market whose agreements would potentially be regulated.

1.7 The proposal will also affect consumers who are either involved in, or thinking of entering, the buy-to-let market. The implications for such consumers of not exempting buy-to-let loans from regulation under the 1974 Act would be likely disruption to the buy-to-let market and the possibility of some lenders withdrawing from the market thus affecting the availability of finance for consumers.

1.8 Consumers will also be affected by the proposals for statements and notices. For example, if lenders have to vary the dates on which statements are sent year on year to accommodate the requirement as currently worded, this could cause confusion and inconvenience. Similarly, if notices of sums in arrears are generated sooner than would be the case if it were clear what “payments” means, this could cause confusion as well as irritation and annoyance on the part of consumers. In both cases the extra amount of work for lenders involved in complying with these requirements as currently worded would, as mentioned previously, lead to additional costs which would ultimately be passed on to their customers.

How will these proposals be taken forward?

1.9 We propose to introduce the reforms by means of a Legislative Reform Order (LRO) under section 1 of the Legislative and Regulatory Reform Act 2006 (LRRRA). This consultation is being conducted in accordance with the

¹ These would include most banks, building societies and deposit takers

provisions of section 13 of the LRRRA. **Views are invited on all aspects of the consultation paper with specific questions inserted throughout the document.**

LEGISLATIVE REFORM ORDER-MAKING POWERS

What can be delivered by Legislative Reform Order?

Section 1

1.10 Under section 1 of the LRRRA a Minister can make an LRO for the purpose of 'removing or reducing any burden, or overall burdens, resulting directly or indirectly for any person from any legislation'.

1.11 Section 1(3) of the LRRRA defines a 'burden' as:

- a financial cost;
- an administrative inconvenience;
- an obstacle to efficiency, productivity or profitability; or
- a sanction, criminal or otherwise, which affects the carrying on of any lawful activity

Preconditions

1.12 Each proposal for an LRO must satisfy the preconditions set out in section 3 of the LRRRA. The questions in the rest of this document are designed to elicit the information that the Minister will need in order to satisfy the Parliamentary Scrutiny Committees that, among other things, the proposal satisfies these preconditions.

1.13 For this reason, **we would particularly welcome your views on whether and how each aspect of the proposed changes in this consultation document meets the following preconditions:**

- **Non-Legislative Solutions** – An LRO may not be made if there are non-legislative solutions which will satisfactorily remedy the difficulty which the LRO is intended to address. An example of a non-legislative solution might be issuing guidance about a particular legislative regime.
- **Proportionality** – The effect of a provision made by an LRO must be proportionate to its policy objective. A policy objective might be achieved in a number of different ways, one of which may be more onerous than others and may be considered to be a disproportionate means of securing the desired outcome. Before making an LRO the Minister must consider that this is not the case and that there is an appropriate relationship between the policy aim and the means chosen to achieve it.
- **Fair Balance** – Before making a LRO, the Minister must be of the opinion that a fair balance is being struck between the public interest and the interests of any person adversely affected by the LRO. It is possible to make an LRO which will have an adverse effect on the interests of one or more persons only if the Minister is satisfied that

there will be beneficial effects which are in the public interest.

- **Necessary protection** - A Minister may not make an LRO if he considers that the proposals would remove any necessary protection. The notion of necessary protection can extend to economic protection, health and safety protection, and the protection of civil liberties, the environment and national heritage.
- **Rights and freedoms** - An LRO cannot be made unless the Minister is satisfied that it will not prevent any person from continuing to exercise any right or freedom which they might reasonably expect to continue to exercise. This condition recognises that there are certain rights that it would not be fair to take away from people using an LRO.
- **Constitutional Significance**– A Minister may not make an LRO if he considers that the provision made by the LRO is of constitutional significance.

1.14 It should be noted that even where the preconditions of section 3 of the LRRRA are met, an LRO cannot:

- deliver ‘highly controversial’ proposals;
- remove burdens which fall solely on Ministers or Government departments, except where the burden affects the Minister or Government department in the exercise of regulatory functions;
- confer or transfer any function of legislating on anyone other than a Minister; persons that have statutory functions conferred on or transferred to them by an enactment; a body or office which has been created by the LRO itself;
- impose, abolish or vary taxation;
- create a new criminal offence or increase the penalty for an existing offence so that it is punishable above certain limits;
- provide authorisation for forcible entry, search or seizure, or compel the giving of evidence;
- amend or repeal any provision of Part 1 of the LRRRA;
- amend or repeal any provision of the Human Rights Act 1998;
- remove burdens arising solely from common law.

Devolution

1.15 The LRRRA imposes certain restrictions regarding LROs and the devolution agreements:

- Scotland – A Minister cannot make an LRO under Part 1 of the LRRRA which would be within the legislative competence of the Scottish Parliament. This does not affect the powers to make consequential, supplementary, incidental or transitional provisions.
- Northern Ireland – A Minister cannot make an LRO under Part 1 of the LRRRA that amends or repeals any Northern Ireland legislation, unless it is to make consequential, supplementary, incidental or transitional provisions.
- Wales – The agreement of the Welsh Ministers is required for any provision in an LRO which confers a function upon the Welsh Ministers, modifies or removes a function of the Welsh Ministers, or restates a

provision conferring a function upon the Welsh Ministers. The agreement of the National Assembly for Wales is required for any provision in an LRO which is within the legislative competence of the Assembly.

1.16 Consumer Credit is a matter reserved to the UK Parliament in relation to Scotland and Wales and the 1974 and 2006 Acts apply to the whole of the UK.

1.17 Consumer credit is a devolved (transferred) matter in Northern Ireland as it has not been excepted or reserved under the Northern Ireland Act 1998 (NI Act). Devolution was restored to the Northern Ireland Assembly on 8th May 2007. Despite the fact that consumer credit lies within their competence the Westminster Parliament can still legislate for Northern Ireland (section 5(6) of the NI Act) in relation to consumer credit with their consent. Ministers agreed that the 2006 Act would apply to Northern Ireland.

CONSULTATION

1.18 The LRRRA requires departments to consult widely on all LRO proposals. The list of consultees, including the devolved administrations, to which this document has been sent is at [Annex A](#).

1.19 Comments are invited from all interested parties, and not just from those to whom the document has been sent. Please feel free to pass this consultation document to any other interested party. **Please respond using the form at [Annex B](#). This includes all the questions on which we would welcome your views as well as those specific questions highlighted in the body of the consultation paper.**

1.20 A note explaining the Parliamentary process for LROs to be made under the LRRRA can be found at [Annex C](#).

1.21 This consultation document follows the format recommended by the Better Regulation Executive (BRE) for such proposals. The criteria applicable to all UK public consultations under the BRE Code of Practice on Consultation are set out in [Annex D](#). If you wish to make a complaint about, or comment on, the way in which this consultation has been conducted, please contact:

Vanessa Singhateh
Departmental Consultation Co-ordinator
Department for Business, Enterprise and Regulatory Reform
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 2293
Email: Vanessa.Singhateh@berr.gsi.gov.uk

1.22 A partial Impact Assessment (IA) for the specific provisions in this consultation document is included at [Annex E](#). BERR would welcome your response to the specific questions in this IA.

1.23 The draft Legislative Reform Order (LRO) is at [Annex F](#) and the draft Consumer Credit (Form of Declaration) Order 2007 is at [Annex G](#). These set out the proposals in this consultation document in legislative form.

DISCLOSURE

1.24 Normal practice will be for details of representations received in response to this consultation document to be disclosed, and for respondents to be identified. While the LRRRA provides for non-disclosure of representations, the Minister will include the names of all respondents in the list submitted to Parliament alongside the draft LRO. The Minister is also obliged to disclose any representations that are requested by, or made to, the relevant Parliamentary Scrutiny Committees. This is a safeguard against attempts to bring improper influence to bear on the Minister. We envisage that, in the normal course of events, this provision will be used rarely and only in exceptional circumstances.

1.25 You should note that:

- If you request that your representation is not disclosed, the Minister will not be able to disclose the contents of your representation without your express consent and, if the representation concerns a third party, their consent too. Alternatively, the Minister may disclose the content of your representation but only in such a way as to anonymise it.
- In all cases where your representation concerns information on a third party, the Minister is not obliged to pass it on to Parliament if he considers that disclosure could adversely affect the interests of that third party and he is unable to obtain the consent of the third party.

1.26 Please identify any information which you or any other person involved do not wish to be disclosed. You should note that many facsimile and e-mail messages carry, as a matter of course, a statement that the contents are for the eyes only of the intended recipient. In the context of this consultation such appended statements will not be construed as being requests for non-inclusion in the post consultation review unless accompanied by an additional specific request for confidentiality, such as an indication in the tick-box provided for that purpose in the response form at Annex B.

CONFIDENTIALITY AND FREEDOM OF INFORMATION

1.27 It is possible that requests for information contained in consultation responses may be made in accordance with access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004). If you do not want your response to be disclosed in response to such requests for

information, you should identify the information you wish to be withheld and explain why confidentiality is necessary. Your request will only be acceded to if it is appropriate in all the circumstances. ***An automatic confidentiality disclaimer generated by your IT system will not of itself be regarded as binding on the Department.***

1.28 If we receive a request for disclosure we will take full account of your explanation but we cannot give an assurance that confidentiality will be maintained in all circumstances.

RESPONDING TO THE CONSULTATION DOCUMENT

1.29 Any comments on the proposals in this consultation document should be sent by 12 March 2008 at the latest to:

Jacqui Entwistle
Consumer Credit Act 2006 Implementation Team
Department for Business, Enterprise and Regulatory Reform
Bay 428
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 3970
Fax: 020 7215 0357
Email: Jacqui.Entwistle@berr.gsi.gov.uk

1.30 Further copies of this consultation document may be obtained from:

BERR Publications Orderline
Admail 528
London SW1W 8YT
Tel: 0845-015-0010
Fax: 0845-015-0020
Minicom: 0845-015-0030

An electronic version of this consultation document and the response form (in Word format) can be downloaded from the Department's website at:

- <http://www.berr.gov.uk/consultations/>
- <http://www.berr.gov.uk/consumers/consumer-finance/credit-act-2006/Consultations/page29764.html>

NEXT STEPS

1.31 BERR will consider the responses received to this consultation and publish a summary of them. If necessary we will revise the draft LRO included in this consultation document to take account of those views. We do not intend to conduct a further formal consultation on the revised LRO although we may informally discuss aspects of it with stakeholders before it is laid before Parliament.

CHAPTER 2: BACKGROUND TO THE POLICY AND LEGISLATION AT ISSUE

Introduction

2.1 The Consumer Credit Act 1974 (the 1974 Act) set up, for the protection of consumers, a new system administered by the Director General of Fair Trading (now the Office of Fair Trading) for licensing and other control of traders concerned with the provision of credit or the supply of goods on hire or hire-purchase. The Consumer Credit Act 2006 (the 2006 Act) amends and updates the 1974 Act.

2.2 In its 2003 White Paper “Fair, clear and competitive – the Consumer Credit Market in the 21st Century”, the Government committed to creating a fair, clear and competitive consumer credit market in the United Kingdom. The 2006 Act, which received Royal Assent on 30 March 2006, marks one of the key stages in this programme by laying the foundations for a new legislative framework.

2.3 The 2006 Act is based around three main changes:

- ensuring consumers are provided with clear information about the state of their credit accounts;
- improving consumers’ rights and access to redress; and
- establishing a more targeted licensing regime for the regulation of consumer credit businesses.

2.4 Much of the detail under the 2006 Act, in particular that relating to the provision of information to consumers, will be added by secondary legislation as follows:

- The Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007:
 - prescribe the form and content of the various statements and notices that lenders will be required to provide to all consumers about their regulated agreements to keep them informed about the state of their account thus enabling them to stay in control. These provisions come into force on 1 October 2008; and
 - set the maximum duration of limited licences and the period within which periodic fees for indefinite licences must be paid. These provisions come into force on 6 April 2008; and
- The Consumer Credit (Exempt Agreements) Order 2007 comes into force on 6 April 2008 and deals with exemptions from the provisions of the 1974 Act that will exempt from regulation all business lending above £25,000 (lending to businesses below this figure will remain regulated) and allow

an opt-out from regulation for credit lending to very wealthy (“high net worth”) people.

2.4 The Department consulted on these Statutory Instruments in August 2006² and published its response in March 2007³.

² Available at <http://www.berr.gov.uk/files/file32773.pdf>

³ Available at http://www.uk-legislation.hmso.gov.uk/si/em2007/ukciem_20071168_en.pdf

CHAPTER 3 – BUY-TO-LET LOANS – PROPOSED EXEMPTION FROM REGULATION UNDER THE CONSUMER CREDIT ACT 1974

WHY IS CHANGE NEEDED?

3.1 The policy intention of the 2006 Act was to remove the current financial limit (other than for business lending) but to leave untouched the boundary between the 1974 Act and the Financial Services and Markets Act 2000 (FSMA). Broadly, the latter regulates first charge mortgage lending (principally house purchase mortgages and remortgages) leaving second charge secured loans to be regulated under the 1974 Act unless specifically exempt or above the current financial limit.

3.2 Section 16(6C) exempts from regulation under the 1974 Act any loan which is a regulated mortgage contract (RMC) under FSMA. However, this does not extend to most buy-to-let mortgages. The FSMA (Regulated Activities) Order 2001 defines a “regulated mortgage contract” as a first charge loan on property in the UK where 40% or more (by area) of that property is used or intended to be used as, or in connection with, a dwelling by the debtor or a related person. As a consequence, buy-to-let loans which are secured on the property but which do not satisfy the 40% occupancy test are not regulated under FSMA.

3.3 FSMA does, however, regulate buy-to-let loans secured as a first charge on the borrower’s principal place of residence, since the borrower’s own home is at risk in the event that they get into difficulty with repaying the loan. FSMA also regulates loans secured on the buy-to-let property if the borrower or a “related person” intends to occupy the property at any time, provided that the 40% test is satisfied. This reflects the risk to the borrower in cases where the buy-to-let property is for future occupancy, for example by a member of the armed forces serving overseas on return to the UK, or to be occupied for part of the year, for example as student accommodation while the borrower’s son or daughter is at university.

3.4 Where a buy-to-let loan is secured on the borrower’s principal place of residence as a first legal charge, it is regulated under FSMA as above. Where it is secured as second charge on the borrower’s home, it is potentially subject to regulation under the 1974 Act.

3.5 It was never the Government’s intention to regulate under the 1974 Act buy-to-let loans which are secured by a first charge on the buy-to-let property. Such loans should either be regulated under FSMA (if more than 40% is occupied by the borrower or a related person) or unregulated (if the borrower or a related person does not intend to occupy more than 39% of the property at any stage). In the latter case the loan is for investment purposes and the risk to the borrower is less severe i.e the borrower’s home is not at risk in the event that they have difficulty repaying the loan. At the present time there is no evidence to suggest that regulation is needed in such cases.

3.6 If, however, the loan is secured as a second charge on the buy-to-let property, and the borrower or a connected person intends to occupy at least 40% of the property at any stage, the loan should be regulated under the 1974 Act (unless otherwise exempt). Such cases are, however, likely to be rare, as most buy-to-let loans secured on the property will be first charge.

3.7 At the moment the 1974 Act provides that an agreement is a consumer credit agreement if, amongst other things, the credit provided to the debtor under the agreement does not exceed £25,000. Section 2 of the 2006 Act, which comes into force on 6 April 2008, removes this financial limit for consumer credit agreements which are regulated by the 1974 Act.

3.8 Section 16 of the 1974 Act makes provision for exempt agreements which are not regulated by the 1974 Act. For example section 16(6C)(a) provides that the 1974 Act does not regulate a consumer credit agreement if it is secured by a land mortgage and entering into the agreement as a lender is a regulated activity for the purposes of FSMA (see paragraph 3.2). This is to avoid dual regulation of RMCs under both FSMA and the 1974 Act. The Consumer Credit (Exempt Agreements) Order 1989 includes exemptions for certain consumer credit agreements secured on land for certain categories of creditors, for example building societies or deposit takers. The 2006 Act amended the 1974 Act to add further exemptions for very wealthy (“high net worth”) debtors and hirers and for businesses.

3.9 When the Consumer Credit Bill was being drafted it was thought that the exemption for buy-to-let loans could be achieved through the new business exemption which comes into force on 6 April 2008. Under this exemption the 1974 Act will not regulate consumer credit agreements where the credit provided exceeds £25,000 and the agreement is entered into by the debtor “wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by him”. However this section does not achieve a comprehensive exemption for buy-to-let loans as it can never be said that a credit agreement financing a one-off purchase of a buy-to-let property is an agreement entered into “wholly or predominantly for the purposes of a business”. In reality, where the purchase is for one or a small number of such properties it is a transaction entered into for investment purposes. The definition of ‘business’ in section 189(1) includes profession or trade, and references to business apply subject to section 189(2). This provides that a person is not to be treated as carrying on a particular type of business merely because occasionally he enters into transactions belonging to a business of that type. This would effectively exclude from the business exemption those investors who buy just a small number of buy-to-let properties.

3.10 During the consultation on the Consumer Credit (Exempt Agreements) Order 2007 lenders expressed their concern about the practical implications of this approach and pressed the Department to look again at this issue with a view to achieving the original underlying policy aim of exempting buy-to-let credit agreements from regulation under the 1974 Act (other than when secured on the borrower’s own home). In its response to the consultation the Department stated publicly that it would address this unintended consequence

of the 2006 Act through a Legislative Reform Order to provide a specific exemption for buy-to-let loans.

WHO WILL BE AFFECTED BY THE PROPOSALS?

3.11 The effect of exempting buy-to-let loans from regulation under the 1974 Act will be to remove the unintended financial cost to lenders of regulatory compliance. An independent review by PricewaterhouseCoopers (PwC) carried out for the Department in 2006⁴ identified that there would be one-off compliance costs of around £100 million spread over around 80 lenders if buy-to-let lending was brought into regulation. This figure is supported by the Council of Mortgage Lenders who further estimate ongoing annual compliance costs to these businesses of around £500,000. These costs cover IT development, staff training and adjustments to forms to ensure they are compliant.

3.12 On the whole lenders are significantly less well prepared for implementing the provisions of the 2006 Act for buy-to-let credit agreements than for other types of credit agreement (indeed some businesses specialising in buy-to-let lending are largely unfamiliar with the requirements of consumer credit regulation). Until now, such lending has not been regulated where it has exceeded the £25,000 threshold or has otherwise been exempt. As a result, the systems changes needed are more severe than for other products because there is no system capability to fall back on. Industry estimates needing between 18 months to 3 years to deliver such changes.

3.13 Consequently the impact on consumers from this product is potentially much larger than for other products. Some lenders have indicated that they would almost certainly have to temporarily withdraw some of their products from the market until they had made systems changes to comply with the 2006 Act. Others would seriously consider a complete withdrawal given the cost of making non-consumer credit act systems compliant. Similarly some of their products offering more flexibility and attractive repayment schedules would be completely withdrawn as they would not be profitable under the 2006 Act. Furthermore consumers would suffer as a consequence of lenders passing on to their customers the cost of the significant systems modifications that would be required.

3.14 There are also potentially wider ramifications for the rental market. If the supply of buy-to-let mortgages decreases so will the supply of rental accommodation which in turn could drive up rents.

PROPOSALS

The form of the proposed exemption

3.15 We propose to insert a new section 16C into the 1974 Act creating an exemption for all buy-to-let lending, regardless of value, (other than where

⁴ A copy of the PwC report is available at <http://www.berr.gov.uk/files/file38292.pdf>

secured on the borrower's home or where the borrower or a "connected" person intends to occupy the property). This will be achieved by modelling the exemption on the FSMA provisions as follows:

- 1) *This Act does not regulate a consumer credit agreement if any sums due under it are secured by a land mortgage on land outside the UK;*
- 2) *This Act does not regulate a consumer credit agreement if any sums due under it are secured by a land mortgage on land in the UK where the condition in subsection (3) is satisfied;*
- 3) *The condition is that less than 40% of the land is used, or intended to be used, as or in connection with a dwelling -*
 - a. *by the debtor or a person connected with the debtor, or*
 - b. *in the case of credit provided to trustees, by an individual who is the beneficiary of the trust or a person connected with such an individual.*

3.16 We are proposing to apply the new exemption to loans of any value rather than restricting it to loans over £25,000 as now. The rationale here is that, in today's housing market, there is little if any property available to buy at less than £25,000 and the policy intention is that buy-to-let lending, as set out above, should be exempt from regulation.

3.17 The reason that we are applying the condition relating to land in the UK is to ensure consistency with the FSMA Order (see paragraph 3.2). This Order only applies to land in the UK thus, entering into an agreement which is secured on property outside the UK cannot be a regulated activity under the FSMA regime.

3.18 The intention behind the occupancy test follows that used in article 61 of the FSMA Order (see paragraph 3.2) although it approaches the matter from the other way in that the FSMA Order deals with what is regulated and the proposed new section 16C deals with what is exempt.

3.19 A new definition of a person "connected with" a debtor or a beneficiary of a trust is proposed for the purposes of the exemption. This mirrors that for a "related person" in the FSMA Order with the intention that the same agreements are kept out of regulation.

3.20 The proposed exemption avoids the need to set out the purpose of the loan and also enables refinancings to take place and for the exemption still to apply.

3.21 Looking at various scenarios this means that, for properties in the UK:

- Where a property is bought as an investment using a first charge mortgage on the property as security and the buyer has no intention of living there then the credit agreement will be exempt from regulation under the 1974 Act and the FSMA regime.

- Similarly if the property is a four storey house in the UK and the basement is occupied by a person related to the buyer (as now defined in the proposed new section 16C(5)) and the rest of the house is let out to strangers, the credit agreement will be exempt from regulation.
- If the property is a holiday home occupied by the owner for a few weeks each year and let out for the rest of the year, the credit agreement will not be exempt as there is a clear intention to occupy 100% of the property at various times (the occupancy test is based on the area occupied and not the amount of time occupied). However, if it is a first charge on the property it will be an RMC and therefore exempt from regulation under section 16(6C) of the 1974 Act.
- If, for example, an army officer living in army quarters or a vicar living in accommodation provided by the church buys a flat with a view to living in it in their retirement, the credit agreement will be an RMC under the FSMA regime and exempt under the 1974 Act as there is a clear intention to occupy 40% or more of the property at some point in the future.
- A borrower may secure a loan for a buy-to-let property on his own home. If this is a first charge then the loan will be an RMC and exempt from regulation under the 1974 Act as above. If, however, it is a second charge mortgage it will come within the scope of the 1974 Act unless otherwise exempt.

Question: Do you have any comments on the form of the proposed exemption for buy-to-let lending?

Declarations for the purpose of buy-to-let

3.22 We are proposing to allow for a declaration to be made for the purpose of UK buy-to-let property. This would be a declaration made by the debtor in the credit agreement about usage of the property and the effect of the exemption. This follows the precedent set for the new business exemption introduced by the 2006 Act.

3.23 A declaration made under the proposed new section 16C(6) gives rise to a presumption that the agreement satisfies the conditions for buy-to-let as set out in the proposed new section 16C(3). If the creditor or a person acting on his behalf knows, or has reasonable cause to suspect, that this is not the case then the presumption will not apply.

Question: Do you have any comments on our proposal to include a declaration for the purpose of buy-to-let lending?

The form of the declaration

3.24 A draft of the proposed Order and declaration are at [Annex G](#)

Question: Do you have any comments on the proposed form of a declaration for the purposes of buy-to-let lending?

Amendment of section 82 of the 1974 Act

3.25 In line with the policy intention to exempt buy-to-let loans from regulation under the 1974 Act and the insertion of the new section 16C, it will be necessary to make some consequential amendments to section 82 of the 1974 Act.

3.26 Section 82 deals with situations where an existing agreement (either regulated under the 1974 Act or not) is varied or supplemented by a new agreement. The effect of these provisions as originally enacted was broadly, that:

- the new agreement (the “modifying agreement”) would be treated for the purposes of the 1974 act as revoking the earlier agreement and containing provisions which reproduced the combined effects of both agreements (section 82(2));
- if the earlier agreement was regulated under the 1974 Act, then the combined agreement was also to be treated as a regulated agreement (section 82(3)); and
- if the earlier agreement was not regulated under the 1974 Act, then the combined agreement would be considered afresh to determine whether the combined effect of the earlier agreement and the modification created an agreement which met the criteria for regulation under the 1974 Act.

3.27 There is therefore a risk that, where either the first or second agreement is an exempt buy-to-let agreement, the application of section 82 may still bring that agreement into regulation.

3.28 We are therefore proposing to disapply section 82 where either the earlier or the later agreement is an exempt buy-to-let agreement under the new section 16C. The effect of this proposal would be as follows:

- If an exempt buy-to-let agreement is varied by a later agreement (whether to increase the amount of the loan or otherwise) then section 82 should not apply and the original buy-to-let agreement should not be treated for the purposes of the 1974 Act as revoked. The intention is that the exemption test should not have to be reapplied all over again in relation to this first agreement. This agreement should therefore remain as an exempt agreement as amended by the later agreement. The later agreement may or may not be a regulated agreement in its own right for the purposes of the 1974 Act.
- If an earlier agreement, whether regulated or exempt for whatever reason, is modified by a later buy-to-let exempt agreement then section 82 should not apply. The earlier agreement should not be revoked and, for the purposes of the 1974 Act, should continue to be a

regulated or exempt agreement as the case may be, and the later agreement an exempt buy-to-let agreement under section 16C.

3.29 We are also proposing to amend section 82(5) of the 1974 Act. The effect of this section at the moment is that, if a regulated credit agreement which is cancellable⁵ under section 67 was modified by a later buy-to-let exempt agreement during the “cooling off” period, the buy-to-let agreement would be treated as a cancellable agreement whether or not this would otherwise have been the case. This is inconsistent with section 67 which does not apply to agreements secured on land and is inconsistent with the treatment for exempt RMCs as specifically stated under section 86(5A) We are therefore proposing that section 82 is amended so that section 82(5) does not apply where the later agreement is a buy-to-let agreement. This would ensure that the buy-to-let agreement does not become a cancellable agreement.

3.30 HM Treasury and BERR are also currently consulting jointly on an amendment to section 82 using powers under FSMA which aims to rule out the possibility of dual regulation of RMCs under both FSMA and the 1974 Act.⁶ Their proposal is to amend section 82 such that sections 82(2) and 82(3) are disapplied when an RMC which is currently exempt under section 16(6C) is modified by a later agreement. This measure is intended to remove the risk of dual regulation in the particular case where an exempt RMC is modified by a second agreement involving no new credit, for example where a consumer wishes to change interest rates or their repayment period. As the law currently stands there is a risk that, in such circumstances, the full modified agreement could be brought into regulation under the 1974 Act with the original RMC still regulated under FSMA. The scale of this potential problem is currently very small. However, the lifting of the financial limit in April 2008 may put significantly more agreements at risk. HM Treasury and BERR therefore wish to ensure that their amending order will be in force by April 2008. The consultation was published on 22 November 2007. The closing date for responses is 14 February 2008.

Question: Do you have any comments on our proposal to amend section 82 of the 1974 Act to ensure that buy-to-let lending is not inadvertently brought into regulation?

LEGAL ANALYSIS AGAINST REQUIREMENTS OF THE LEGISLATIVE AND REGULATORY REFORM ACT 2006

Non-Legislative Solutions

3.31 We considered providing guidance to define the circumstances when buy-to-let lending would or would not be considered business lending and therefore an exempt or regulated activity under the new business exemption

⁵ Subject to the agreement containing a notice of the customer's cancellation rights, a customer may cancel the agreement by completing and returning the statutory cancellation form within the “cooling off” period.

⁶ A copy of this consultation is available at http://www.hm-treasury.gov.uk/media/4/5/consult_modifiedcreditagreements211107.pdf

which comes into force on 6th April 2008. This would have enabled creditors to choose to avoid entering into lending for regulated agreements and therefore to avoid the burden of regulatory compliance. It would also have enabled us to carve out a transitional arrangement for buy-to-let lending to allow a longer implementation period for business to comply with the unanticipated burden of regulatory compliance for regulated buy-to-let agreements (see paragraphs 3.11 – 3.12). However we are constrained by the existing definition of business in the 1974 Act which means that relying on the business exemption to deliver the policy objective in relation to buy-to-let lending does not work (see paragraph 3.9).

3.32 We also considered the alternative route of using the power that HM Treasury used to amend section 16 of the 1974 Act in relation to RMCs via the consequential provisions in their FSMA (Regulated Activities) Order 2001. However RMCs are a specified 'investment' under the Order whereas buy-to-let mortgages are not. Consequently it is not possible to use this power to make consequential amendments to the 1974 Act related to buy-to-let mortgages.

Proportionality

3.33 We believe that the proposals set out above are proportionate to the policy objective to exempt buy-to-let lending from regulation under the 1974 Act as set out above. Our proposals are designed to maintain the status quo and ensure consistency with HM Treasury policy on mortgage regulation. Buy-to-let loans are currently exempt from regulation by virtue of the £25,000 threshold above which credit agreements are not currently regulated. The proposals in this consultation document will maintain this position and create a level playing field for lenders in the buy-to-let market.

Fair Balance

3.34 We believe that the proposals in the LRO strike a fair balance between the public interest and the interest of any person who might be adversely affected by them.

3.35 The impact of the proposals is restricted to those lenders and borrowers involved in the buy-to-let market who will both benefit from the proposal to exempt buy-to-let lending from regulation under the 1974 Act. We do not believe that the proposals will impact adversely on any particular group.

3.36 Lenders will benefit from the removal of unintended compliance costs as a consequence of not having to make expensive systems changes to accommodate the requirements of the 1974 Act. The proposals will also ensure a level playing field for lenders in this market (see paragraphs 3.11 – 3.12).

3.37 Borrowers will benefit as the market will not suffer any temporary disruption as a consequence of lenders needing to withdraw their products until such time as their systems are compliant. They will be able to continue

to benefit from flexible packages on offer from lenders which could be completely withdrawn as they would no longer be profitable if buy-to-let loans were brought into regulation. They will also benefit as a consequence of lenders not passing on to their customers the costs of significant systems changes (see paragraph 3.13).

3.38 More widely the rental market would benefit. If the supply of buy-to-let mortgages decreases so will the supply of rental accommodation which in turn could drive up rents.

Necessary protection

3.39 No necessary protections are being removed as we are looking to maintain the status quo and ensure that buy-to-let lending is not inadvertently brought into regulation following the removal of the £25,000 financial limit in April 2008.

3.40 An exemption for buy-to-let lending does not, however, mean that borrowers are unprotected under the 1974 Act. Even though the agreements are exempt from regulation (and therefore do not benefit from, in particular, the new post-contract transparency requirements) they still fall within the definition of a consumer credit agreement in the 1974 Act. As such, borrowers can challenge credit agreements in the Courts on the grounds that the relationship is unfair (the “unfair relationships” test was introduced by the 2006 Act and applies to new agreements from April 2007 and for existing agreements from April 2008). Also where a lender (who holds a consumer credit licence) acts unreasonably or irresponsibly the borrower can complain to the Office of Fair Trading who can investigate and, as appropriate, revoke the licence or place conditions on it. We have also introduced a declaration which makes clear what borrowers are giving up by entering a non-regulated buy-to-let credit agreement in relation to a UK property.

Rights and Freedoms

3.41 As the changes we propose are purely beneficial we do not believe that they would prevent anyone from exercising an existing right or freedom.

Constitutional Significance

3.42 The proposals are not of constitutional significance. They are amendments to the 1974 Act to avoid unintentional consequences of the provisions introduced by the 2006 Act and ensure that the original policy intention to exempt buy-to-let lending from the scope of the 1974 Act is achieved.

CHAPTER 4 - CLARIFICATION ON THE GIVING OF STATEMENTS FOR FIXED-SUM CREDIT AGREEMENTS

WHY IS CHANGE NEEDED?

4.1 The post-contract transparency requirements introduced by the 2006 Act require lenders to provide specific information about credit agreements to customers at required points in time. In this way it is expected that the 2006 Act will deliver important improvements to transparency in the consumer credit market and so offer consumers greater protection.

4.2 Section 77A of the 1974 Act (statements to be provided in relation to fixed-sum credit agreements) was inserted by section 6 of the 2006 Act. Fixed-sum credit is defined in section 10(1)(b) of the 1974 Act to mean a facility under a consumer credit agreement (other than a running account credit facility such as an overdraft facility) under which the debtor is able to receive credit in one amount or in a number of instalments. The section was inserted as part of the drive for greater transparency in consumer credit transactions and to ensure that creditors are obliged to give debtors an increased amount of information about the state of their accounts to help them to manage their borrowing better.

4.3 Section 77A(1) currently provides that a creditor under a fixed-sum credit agreement has to give the debtor a statement within a period of one year beginning on the day after the day the agreement is made. Thereafter the creditor has to give to the debtor statements at intervals of not more than one year. The word 'give' is defined in section 189(1) to mean deliver or send by an appropriate method.

4.4 The Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 ("the 2007 Regulations") include requirements about the form and content of statements under section 77A(1). The effect of regulation 11 of the 2007 Regulations is that a statement has to be given within 30 days of the end of the period to which it relates and statements have to cover consecutive periods.

4.5 Section 77A(1) and regulation 11 of the 2007 Regulations will enter into force on 1 October 2008. There is a transitional provision about section 77A in paragraph 2 of Schedule 3 of the 2006 Act, which is also due to be brought into force on 1 October 2008. This provides that the section applies to agreements whenever made and, in the case of agreements made before the commencement of the section, the period in section 77A(1)(a) is one year from the date of commencement i.e 1 October 2009.

4.6 The original policy intention was that the first and subsequent statements should be able to cover a period of up to one year and that the creditor should have up to 30 days to give each statement, those 30 days commencing on the day after the last day of the statement period. The latter was aimed at ensuring that statements are given within a reasonable time of the period they cover.

4.7 The effect of section 77A(1) and regulation 11, when taken together, is that this underlying policy intention has been defeated. The wording in section 77A(1) causes a problem because it focuses on the date the statement is given rather than the period it covers. Thus, under this section, the first statement must be given within the period of one year beginning with the day after the day on which the agreement is made with subsequent statements given at intervals of not more than one year. However, regulation 11 provides for statements to be given within 30 days of the last day of the statement period.

4.8 Consequently, the creditor could, in theory, send a statement covering a period of one year on the last day of the period set out in section 77A(1)(a) but may not be able to do so because the last day might fall at a weekend or over a public holiday. If he sends it on the last day he will be sending it on the first day of the 30 day period he should have had to send it according to regulation 11. However, he is prevented from doing this if he is to comply with section 77A(1) and give the statement within a period of one year.

4.9 This inconsistency in the legislation therefore requires amendment through a Legislative Reform Order.

WHO WILL BE AFFECTED BY THE PROPOSALS?

4.10 To comply with the post-contract transparency requirements lenders will need to adapt their business systems to provide the new information to their customers. As such it is inevitable that these changes will give rise to additional one-off as well as recurring costs for those businesses which are obliged to comply with the new provisions. In developing the 2007 Regulations the Department endeavored to strike the right balance between ensuring that consumers were given the information they need without imposing undue burdens on lenders by keeping the level of prescription and detail to a minimum.

4.11 Not being able to send statements on a regular annual basis covering periods of up to one year will create additional cost burdens for industry when building and implementing their IT systems to accommodate a more complex requirement than was originally intended. For example, existing systems are not smart enough to cover a moving deadline for statements for individual debtors that compliance with the legislation as currently worded would generate. To do so would be a significant and onerous systems task. Where industry was unable to do this they would not be able to enforce the agreement during any period of non-compliance and could suffer significant financial loss as a consequence.

4.12 Some lenders felt that the requirement to issue statements within a year meant they would be required to issue statements that covered less than 12 months i.e issuing the statement at say week 50 rather than week 52. This is unlikely to meet consumer expectation, for example mortgage statements cover a 12 month period. One lender was considering issuing 6 monthly

statements as a way of meeting the requirement, however, this would double the running costs of the obligation. This approach could have a significant cost impact – it was estimated that each statement costs 30p to send.

4.13 In its review of the implementation timetable for the 2006 Act PwC estimated that the total costs to business of implementing the post-contract transparency requirements would be in the order of £500m. The majority of the lenders that PwC spoke to stressed that one of the major challenges they faced arising from the 2006 Act was that a wide range of systems required change. This reflects the large number of products which are in scope and also the fact that the requirements apply across the lifecycle of the product. Lenders indicated that the number of affected systems could range from 25 to well over 100. It is reasonable to assume, and it was stressed by most lenders who PwC spoke to, that some if not all of these costs would be passed on to customers through higher interest rates and/or fees rather than being absorbed by the lenders' shareholders.

4.14 Our proposals do not impose any new burdens to those previously identified for the 2006 Act and the 2007 Regulations. The amendments we propose should ensure that the costs of complying with these new post-contract transparency provisions introduced by the 2006 Act are kept to a minimum as industry will be clear about what is required. Such clarity will have a positive impact on lenders as it will reduce the regulatory compliance costs and ensure lenders adopt a common approach.

4.15 For consumers the proposals will provide clarity and, where annual statements are already provided by lenders, consistency thus avoiding any unnecessary confusion around the timing of statements. The benefits of lenders adopting a common approach will also make it easier for customers to make comparisons between lenders.

PROPOSALS

Provision of statements

4.16 We propose to amend section 77A of the 1974 Act and to revoke regulation 11 of the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 as follows:

- section 77A(1) is revised so that it imposes an obligation on the creditor under a regulated agreement for fixed-sum credit to give the debtor a statement covering a period of not more than one year beginning with the day on which the agreement is made or the day the first movement on the account occurs, and thereafter to give the debtor further statements under the section covering consecutive periods of not more than one year;
- a new subsection (1D) is inserted to provide that, if a period of one year would expire on a non-working day it may expire on the next working day. Working day is defined in section 189(1) of the 1974 Act.

This does not erode the 30 day period in subsection 1E which will begin on the day after the end of period covered.

- a new subsection (1E) is inserted in section 77A by the Order providing that a statement given under subsection (1) must be given within 30 days of the end of the period to which it relates; and

4.17 The effect of these proposals is to remove the ambiguity that exists between section 77A(1) and regulation 11. It will provide clarity to industry on the period to be covered by the statements and the time within which they can give the statements to their customers. The provision to allow for the statement period to be extended beyond a year when that period would normally end on a non-working day reflects lenders' current practice and avoids unnecessary and costly additional system changes to accommodate variable statement periods.

Question: Do you have any comments on our proposal to clarify the position on statements for fixed-sum credit agreements?

LEGAL ANALYSIS AGAINST REQUIREMENTS OF THE LEGISLATIVE AND REGULATORY REFORM ACT 2006

Non-Legislative Solutions

4.18 We considered whether it would be possible to resolve the issue through guidance. We concluded that, whilst it would be possible to issue guidance as to the policy intention behind this provision, this would clearly not be consistent with the wording in section 77A(1) and would not provide any legal certainty to industry that they were compliant when sending statements within 30 days of the period to which they relate. This could have serious financial consequences to industry as failure to comply with the requirements means that they cannot enforce the agreement and the borrower has no liability to pay interest for the period of non-compliance.

4.19 We also considered whether it would be possible to provide clarity on this issue in secondary legislation using existing powers in the 1974 Act. However, the vires in relation to statements that was introduced into the 1974 Act by the 2006 Act only provides for regulations to make provision about the form and content of statements under section 77A. It does not allow us to make provision for the period covered by statements.

Proportionality

4.20 We believe that the proposals set out above are proportionate to the policy objectives. The proposals are aimed at providing clarity to industry to ensure compliance and a common approach and to ensure that the original policy objective is achieved.

Fair Balance

4.21 We believe that the proposals strike a fair balance between the public interest and the interest of any person adversely affected by them.

4.22 Under the post-contract transparency requirements included in the 2006 Act lenders will, with effect from 1 October 2008, have an obligation to provide their customers with regular statements in relation to their fixed-sum credit agreements. This measure was designed to ensure that consumers are regularly kept aware of any activity on their account, including fees and charges, which will enable them to better manage their borrowing.

4.23 The proposals in this consultation document simply aim to ensure that the original policy intention in terms of the period covered by the statements (up to one year) and the time within which lenders should give the statements to customers (30 days after the end of the period to which they relate) is achieved. These proposals do not impact adversely on any particular group. They will, however, benefit both lenders, by providing clarity on what is required, and consumers who will have continuity and clarity on what to expect.

Necessary protection

4.24 The purpose of the provisions in the proposed LRO is to ensure that the original policy intention is achieved. In doing so no necessary protections are being removed.

Rights and Freedoms

4.25 As the changes we propose are purely beneficial we do not believe that they would prevent anyone from exercising an existing right or freedom.

Constitutional Significance

4.26 The proposals are not of constitutional significance.

CHAPTER 5 - INCLUSION OF DEFINITIONS OF “PAYMENTS” FOR THE PURPOSE OF ISSUING NOTICES OF SUMS IN ARREARS

WHY IS CHANGE NEEDED?

5.1 The post-contract transparency requirements introduced by the 2006 Act require lenders to provide specific information about credit agreements to customers at required points in time. In this way it is expected that the 2006 Act will deliver important improvements to transparency in the consumer credit market and so offer consumers greater protection

5.2 Section 86B (notice of sums in arrears under fixed-sum credit agreements) also provides for greater transparency and ensures that the debtor or hirer receives more information from the creditor or owner about the state of their account. It sets out the obligations of the creditor or owner to give notices of sums in arrears to the debtor under certain fixed-sum credit agreements or the hirer under certain regulated consumer hire agreements (a consumer hire agreement is defined in section 15). Certain conditions have to be satisfied before the obligation arises and ceases. Two of the conditions which have to be satisfied before a notice has to be issued include the word “payments” -

"(1)(a) that the debtor or hirer under an applicable agreement is required to have made at least two payments under the agreement before that time;

.....

(c) that the amount of the shortfall is no less than the sum of the last two payments which he is required to have made before that time;"

5.3 A similar issue arises in relation to section 86C (notice of sums in arrears under running-account credit agreements). This section sets out the obligations of the creditor to give such a notice and the conditions which have to be satisfied for the section to apply. Two of the conditions which have to be satisfied contain the word 'payments' -

(1)(a) that the debtor under an applicable agreement is required to have made at least two payments under the agreement before that time;

(b) that the last two payments which he is required to have made before that time have not been made.

5.4 The original policy intention was that 'payments' would cover only regular instalments/repayment sums and regular interest. These would consist of the repayment of the whole or any part of the credit and payments of the whole or any part of the total charge for credit determined at the date of the agreement in accordance with the Consumer Credit (Total Charge for Credit) Regulations 1980⁷ or a combination of the two. It is not meant to cover other sums such

⁷ http://www.opsi.gov.uk/si/si1989/Uksi_19890596_en_1.htm

as default sums. Default sums are defined in section 187A to mean a sum (other than interest) payable by the debtor/hirer under a regulated agreement in connection with a breach of the agreement excluding any amount the debtor is required to pay early as a result of the breach. In relation to regulated consumer hire agreements the policy intention was that payments meant the regular hire payments and any sums payable for insurance and maintenance in relation to any period in consideration of the bailment or hiring of the good.

5.5 However, in the absence of clear definitions in the Act, industry is concerned that 'payments' might be construed more widely than intended and could include any payments of any sums falling due under the agreement, for example default sums. As a result first notices of sums in arrears could be triggered far more quickly than would otherwise be the case if it were clear that "payments" covered regular instalments/repayment sums and regular interest. For example, one missed regular payment may lead to a notice as a default sum may become payable when the payment is missed and form the second payment for the purposes of the section rather than a notice issuing only after two missed regular payments.

5.6 This ambiguity has serious financial consequences for industry as set out below and therefore requires amendment through a Legislative Reform Order.

WHO WILL BE AFFECTED BY THE PROPOSALS?

5.7 In the absence of clear definitions of "payments", whichever approach creditors use as the basis for their systems, they run the risk of adverse financial consequences if a Court decides against them. Under section 86D of the 1974 Act the debtor will have no liability to pay interest or default sums in relation to the period of non-compliance and the creditor will be unable to enforce the agreement during this period.

5.8 One stakeholder association estimates that, if the wider (unintended) definition of payments is adopted, twice as many first notices of sums in arrears could be issued as a result. This will involve considerable expenditure on IT system development changes and increased administrative costs involved with the issuing and sending out of double the number of notices. There will also be considerable expenditure on systems changes based on the definition of payments adopted without any benefits to consumers.

5.9 Our proposals do not impose any new burdens on industry to those previously identified for the 2006 Act and the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007. The amendments we propose will ensure that the costs of complying with these new post-contract transparency provisions introduced by the 2006 Act are kept to a minimum as industry will be clear what is required.

5.10 For consumers the proposal will provide clarity on what to expect in relation to arrears notices. It will reduce any confusion around when such notices will be issued and ensure consistency in approach from lenders. It will

also reduce irritation or unnecessary worry or stress that could arise if lenders were to adopt a wide definition of payments resulting in arrears notices being sent out earlier and more frequently than might otherwise be the case.

PROPOSALS

5.11 We therefore propose to define 'payments' for the purposes of section 86B (notice of sums in arrears under fixed-sum credit agreements) and section 86C (notice of sums in arrears under running-account credit agreements) of the 1974 Act. The proposed definition is at paragraph 6 of the draft LRO at [Annex F](#).

5.12 We also propose to change the word 'sum' to 'payment' in section 86B(5)(a). This is another point of clarity to ensure that "payments" as defined are distinguished from default sums and interest payments which are covered separately in sections 86B(5)(b) and 86B(5)(c) respectively.

Question: Do you have any comments on our proposal to define "payments" for the purpose of issuing arrears notices?

LEGAL ANALYSIS AGAINST REQUIREMENTS OF THE LEGISLATIVE AND REGULATORY REFORM ACT 2006

Non-Legislative Solutions

5.12 We considered issuing guidance to industry to clarify the definition of "payments" for the purpose of issuing notices of sums in arrears. In the absence of clear definitions there is a risk that the policy intention will not be achieved across the board if industry adopts, and the Courts rule, on different interpretations. Legal certainty is needed on the definitions in order to mitigate this risk. Guidance alone would not be sufficient as it is not binding and industry or the Courts could still take a different view. We do not, therefore, think that it would be an appropriate use of guidance to clarify the ambiguity in this legislation.

5.13 We considered whether it would be possible to provide clarity on this issue in secondary legislation using existing powers in the 1974 Act. However, as for statements, the vires in relation to notices of sums in arrears that was introduced into the 1974 Act by the 2006 Act only provides for regulations to make provision about the form and content of such notices under sections 86B and 86C. It would therefore not be possible to use secondary legislation to define a term laid down in primary legislation.

Proportionality

5.14 We believe that the proposals set out above are proportionate to the policy objectives. Providing definition of "payments" will provide clarity and legal certainty for industry thus ensuring the original policy intention is achieved.

Fair Balance

5.15 We believe that the proposals strike a fair balance between the public interest and the interest of any person adversely affected by them.

5.16 Under the post-contract transparency requirements included in the 2006 Act lenders will, with effect from 1 October 2008, have an obligation to provide their customers with notices of sums in arrears when those customers fall behind with their payments. This measure was designed to ensure that borrowers are provided with information about how to resolve problems at a much earlier stage.

5.17 The proposal to provide clear definitions of “payments” simply aims to ensure that the original policy intention in terms of when notices become due is achieved. These proposals do not impact adversely on anyone, however, they do benefit both lenders, in providing clarity on what is required, and to consumers who will not be irritated or needlessly worried to receive arrears notices at an earlier stage or more frequently than would otherwise be the case.

Necessary protection

5.17 The purpose of the provisions in the proposed order is to ensure that the original policy intention in each case is achieved. In doing so no necessary protections are being removed.

Rights and Freedoms

5.18 As the changes we propose are purely beneficial we do not believe that they would prevent anyone from exercising an existing right or freedom.

Constitutional Significance

5.19 The proposals are not of constitutional significance.

CHAPTER 6 - POSSIBLE PARLIAMENTARY PROCEDURE

6.1 The Minister can recommend one of three alternative procedures for Parliamentary scrutiny dependent on the size and importance of the LRO. The negative resolution procedure is the least onerous and therefore may be suitable for LROs delivering small regulatory reform. The super-affirmative procedure is the most onerous involving the most in-depth Parliamentary scrutiny. Although the Minister can make the recommendation, Parliamentary Scrutiny Committees have the final say about which procedure will apply.

Negative Resolution Procedure – This allows Parliament 40 days to scrutinise a draft LRO after which the Minister can make the LRO if neither House of Parliament has resolved during that period that the LRO should not be made.

Affirmative Resolution Procedure – This allows Parliament 40 days to scrutinise a draft LRO after which the Minister can make the LRO if it is approved by a resolution of each House of Parliament.

Super-Affirmative Resolution Procedure – This is a two-stage procedure during which there is opportunity for the draft LRO to be revised by the Minister.

This allows Parliament 60 days of initial scrutiny, when the Parliamentary Committees may report on the draft LRO, or either House may make a resolution with regard to the draft LRO.

If, after the expiry of the 60 day period, the Minister wishes to make the LRO with no changes, he must lay a statement. After 15 days, the Minister may then make an LRO in the terms of the draft, but only if it is approved by a resolution of each House of Parliament.

If the Minister wishes to make material changes to the draft LRO he must lay the revised draft LRO and a statement giving details of any representations made during the scrutiny period and of the revised proposal before Parliament. After 25 days, the Minister may only make the LRO if it is approved by a resolution of each House of Parliament.

6.2 Under each procedure, the Parliamentary Scrutiny Committees have the power to recommend that the Minister not make the LRO. If one of the Parliamentary Committees makes such a recommendation, a Minister may only proceed with it if the recommendation is overturned by a resolution of the relevant House.

6.3 The Department for Business, Enterprise and Regulatory Reform believes that the affirmative resolution procedure should apply to this LRO. The Order is unlikely to be controversial as its primary aim is to remedy some unintended consequences of the 2006 Act to ensure that the original policy intention is achieved when the relevant provisions come into force.

6.4 The LRO contains some relatively significant changes to the 1974 Act including a power to sub-delegate responsibility to the Secretary of State to make provision about the form, content and signing of the declaration for the purposes of buy-to-let. We do not therefore believe that this would be suitable for the negative resolution procedure. At the same time we do not believe that the changes are so significant or likely to be so controversial as to merit the super-affirmative procedure.

Question: On the basis of the information provided on each of the LRO procedures do you agree with our view that the affirmative procedure is appropriate for this LRO? If not please state your reasons.

ANNEX A: LIST OF CONSULTEES

Abbey
Addleshaw Goddard
Advice UK
Alliance & Leicester Commercial Bank
American Express
APACS - the UK payments association
Argos
ARVAL
Association of Chartered Certified Accountants
Association of Finance Brokers
Association of Mortgage Intermediaries
Bank of East Asia
Bank of Ireland
Bank of Ireland UK Financial Services
Barclaycard
Barclays
Beadles Group Ltd
Berwin Leighton Paisner
Bradford & Bingley
British Banker's Association
British Cheque Cashers Association
British Retail Consortium
Capital One
Cattles plc
Chartered Institute of Public Finance & Accountancy
Church Action on Poverty
Citizens Advice
Citizens Advice Scotland
City of Edinburgh Council
Clifford Chance LLP
Clydesdale Financial Services
Competition Commission
Consumer Council for Northern Ireland
Consumer Credit Association
Consumer Credit Licensing Appeals Panel
Consumer Credit Trade Association of the UK
Co-operative Bank (The)
Co-operative Financial Services
Council of Mortgage Lenders
Council on Tribunals
Debt Buyers & Sellers Group
Debt on our Doorstep
Department of Enterprise, Trade & Investment, Northern Ireland
Egg
Ernst & Young
Eversheds LLP
Fidelity National Financial
Finance and Leasing Association
Finance Industry Standards Association
Financial Ombudsman Service
Financial Services Authority

General Electric
Gough Square Chambers
Halifax
Haydock Finance
HBOS plc
Her Majesty's Courts Service
Her Majesty's Treasury
HFC Bank
Hitachi Capital
HSBC
igroup
Institute of Chartered Accountants in England and Wales
Institute of Chartered Accountants in Ireland
Institute of Chartered Accountants of Scotland
Institute of Money Advisers
Jackson Cohen Associates
Kent County Council
Law Commission
Law Society of England & Wales
Law Society of Northern Ireland
Lester Aldridge Solicitors
Law Society of Scotland
Liverpool Victoria
LloydsTSB
Lobby and Law
Local Authorities Coordinators of Regulatory Services (LACORS)
Lovells
M&S Money
Macfarlanes
Ministry of Justice
Money Advice Association
Money Advice Scotland
National Consumer Council
National Pawnbrokers Association (UK)
Nationwide Trust
Northern Ireland Court Service
Northern Rock
Office of Fair Trading
Olympian Financial Ltd
Picture Financial
Provident Financial
Royal Bank of Scotland
Scottish Consumer Council
Scottish Executive
Scottish Trading Standards Institute
Society of Motor Manufacturers and Traders
Swift
The Chartered Institute of Management Accountants
Trading Standards Institute
Welsh assembly Government
Welsh Consumer Council
Which?

ANNEX B: RESPONSE FORM FOR THE CONSULTATION PAPER ON AMENDMENTS TO THE CONSUMER CREDIT ACT 2006

Respondent Details

Name:

Organisation:

Address:

Town/City:

County/Postcode:

Telephone:

Fax:

E-mail:

Please return by 12 March to:

Jacqui Entwistle
Consumer Credit Act 2006
Implementation Team
Department for Business, Enterprise
and Regulatory reform
Bay 428
1 Victoria Street
London SW1H 0ET

Email:
Jacqui.Entwistle@berr.gsi.gov.uk

Tel: 020 7215 3970
Fax: 020 7215 0357

Tick this box if you are requesting non-disclosure of your response.

1) Do you think the proposals will remove or reduce burdens as set out in this consultation paper?

Comments:

a) Buy-to-let – Proposed exemption from regulation under the Consumer Credit Act 1974 (paragraphs 3.11 – 3.14)

b) Clarification on the giving of statements for fixed-sum credit agreements (paragraphs 4.10 – 4.15)

c) Inclusion of a definition of “payments” for the purpose of issuing notices of sums in arrears (paragraphs 5.7 – 5.10)

2) Do you have views regarding the expected benefits of the proposals as set out in this consultation paper and addressed in the partial Impact Assessment at [Annex E](#)?

Comments:

a) Buy-to-let – Proposed exemption from regulation under the Consumer Credit Act 1974

b) Clarification on the giving of statements for fixed-sum credit agreements

c) Inclusion of a definition of “payments” for the purpose of issuing notices of sums in arrears

3) If there is any further empirical evidence that you are aware of that supports the need for these reforms, please provide details here? (See also the specific questions on costs in the partial impact assessment at [Annex E](#))

Comments:

a) Buy-to-let – Proposed exemption from regulation under the Consumer Credit Act 1974

b) Clarification on the giving of statements for fixed-sum credit agreements

c) Inclusion of a definition of “payments” for the purpose of issuing notices of sums in arrears

4) Do you have any comments on the form of the proposed exemption for buy-to-let lending (paragraphs 3.15 – 3.21)?

Comments:

5) Do you have any comments on our proposal to include a declaration for the purpose of buy-to-let lending (paragraphs 3.22 - 3.23)?

Comments:

6) Do you have any comments on the proposed form of a declaration for the purposes of buy-to-let lending (paragraphs 3.24)?

Comments:

7) Do you have any comments on our proposal to amend section 82 of the 1974 Act to ensure that buy-to-let lending is not inadvertently brought into regulation (paragraphs 3.25 – 3.30)?

Comments:

8) Do you have any comments on our proposals to clarify the position on statements for fixed-sum credit agreements (paragraphs 4.16 – 4.17)?

Comments:

9) Do you have any comments on our proposals to define “payments” for the purpose of issuing arrears notices (paragraphs 5.11 – 5.12)?

Comments:

Preconditions in the Legislative and Regulatory Reform Act 2006 (see paragraphs 1.12 – 1.13)

10) Are there any non-legislative means that would satisfactorily remedy the difficulties that the proposals in this consultation paper intend to address?

Comments:

a) Buy-to-let – Proposed exemption from regulation under the Consumer Credit Act 1974 (paragraphs 3.31 – 3.32)

b) Clarification on the giving of statements for fixed-sum credit agreements

(paragraphs 4.18 - 4.19)

c) Inclusion of a definition of “payments” for the purpose of issuing notices of sums in arrears (paragraph 5.12 – 5.13)

11) Are the proposals put forward in this consultation document proportionate to the policy objectives?

Comments:

a) Buy-to-let – Proposed exemption from regulation under the Consumer Credit Act 1974 (paragraph 3.33)

b) Clarification on the giving of statements for fixed-sum credit agreements (paragraph 4.20)

c) Inclusion of a definition of “payments” for the purpose of issuing notices of sums in arrears (paragraph 5.14)

12) Do the proposals put forward in this consultation document taken as a whole provide a fair balance between the public interest and any person adversely affected by them?

Comments:

a) Buy-to-let – Proposed exemption from regulation under the Consumer Credit Act 1974 (paragraphs 3.34 – 3.38)

b) Clarification on the giving of statements for fixed-sum credit agreements (paragraphs 4.21 – 4.23)

c) Inclusion of a definition of “payments” for the purpose of issuing notices of sums in arrears (paragraphs 5.15 - 5.17)

13) Do the proposals put forward in this consultation document remove any necessary protections?

Comments:

a) Buy-to-let – Proposed exemption from regulation under the Consumer Credit Act 1974 (paragraphs 3.39 – 3.40)

b) Clarification on the giving of statements for fixed-sum credit agreements (paragraph 4.24)

c) Inclusion of a definition of “payments” for the purpose of issuing notices of sums in arrears (paragraph 5.17)

14) Do the proposals put forward in this consultation prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise? If so, please provide details.

Comments:

a) Buy-to-let – Proposed exemption from regulation under the Consumer Credit Act 1974 (paragraph 3.41)

b) Clarification on the giving of statements for fixed-sum credit agreements (paragraph 4.25)

c) Inclusion of a definition of “payments” for the purpose of issuing notices of sums in arrears (paragraph 5.18)

15) Do you consider the provisions of the proposals to be constitutionally significant?

Comments:

a) Buy-to-let – Proposed exemption from regulation under the Consumer Credit Act 1974 (paragraph 3.42)

b) Clarification on the giving of statements for fixed-sum credit agreements (paragraph 4.26)

c) Inclusion of a definition of “payments” for the purpose of issuing notices of sums in arrears (paragraph 5.19)

Comments:

16) On the basis of the information provided on each of the LRO procedures in Chapter 6 do you agree with our view that the affirmative procedure should apply to the scrutiny of this proposal (paragraphs 6.3 – 6.4)? If not, please state your reasons

Comments:

17) Are there any further comments you would like to make in relation to any aspect of this consultation not specifically covered in the questions here?

Comments:

ANNEX C: LEGISLATIVE REFORM ORDERS-PARLIAMENTARY CONSIDERATION

Introduction

1. These reform proposals in relation to amendments to the Consumer Credit Act 1974 (the 1974 Act) will require changes to primary legislation in order to give effect to them. The Minister could achieve these changes by making a Legislative Reform Order (LRO) under the Legislative and Regulatory Reform Act 2006 (LRA). LROs are subject to preliminary consultation and to rigorous Parliamentary scrutiny by Committees in each House of Parliament. On that basis, the Minister invites comments on these reform proposals in relation to the 1974 Act as measures that might be carried forward by a LRO.

Legislative Reform Proposals

2. This consultation document on proposed amendments to the 1974 Act has been produced because the starting point for LRO proposals is thorough and effective consultation with interested parties. In undertaking this preliminary consultation, the Minister is expected to seek out actively the views of those concerned, including those who may be adversely affected, and then to demonstrate to the Scrutiny Committees that he or she has addressed those concerns.

3. Following the consultation exercise, when the Minister lays proposals before Parliament under section 14 of the Legislative and Regulatory Reform Act 2006, he or she must lay before Parliament an Explanatory Document which must:

- i) Explain under which power or powers in the LRA the provisions contained in the order are being made;
- ii) Introduce and give reasons for the provisions in the Order;
- iii) Explain why the Minister considers that:
 - There is no non-legislative solutions which will satisfactorily remedy the difficulty which the provisions of the LRO are intended to address;
 - The effect of the provisions are proportionate to the policy objective;
 - The provisions made in the order strikes a fair balance between the public interest and the interests of any person adversely affected by it;
 - The provisions do not remove any necessary protection;
 - The provisions do not prevent anyone from continuing to exercise any right or freedom which they might reasonably expect to continue to exercise;

- The provisions in the proposal are not constitutionally significant; and
- Where the proposals will restate an enactment, it makes the law more accessible or more easily understood.

iv) Include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens;

v) Identify and give reasons for any functions of legislating conferred by the order and the procedural requirements attaching to the exercise of those functions; and

vi) Give details of any consultation undertaken, any representations received as a result of the consultation and the changes (if any) made as a result of those representations.

3. On the day the Minister lays the proposals and explanatory document, the period for Parliamentary consideration begins. This lasts 40 days under negative and affirmative resolution procedure and 60 days under super-affirmative resolution procedure. If you want a copy of the proposals and the Minister's explanatory document laid before Parliament, you will be able to get them either from the Government department concerned or by visiting the BRE's website at:

<http://bre.berr.gov.uk/regulation/reform/orders/proposals.asp>

Parliamentary Scrutiny

5. Both Houses of Parliament scrutinise legislative reform proposals and draft LROs. This is done by the Regulatory Reform Committee in the House of Commons and the Delegated Powers and Regulatory Reform Committee in the House of Lords.

6. Standing Orders for the Regulatory Reform Committee in the Commons stipulate that the Committee considers whether proposals:

- (a) appear to make an inappropriate use of delegated legislation;
- (b) serve the purpose of removing or reducing a burden, or the overall burdens, resulting directly or indirectly for any person from any legislation (in respect of a draft Order under section 1 of the Act);
- (c) serve the purpose of securing that regulatory functions are exercised so as to comply with the regulatory principles, as set out in section 2(3) of the Act (in respect of a draft Order under section 2 of the Act);

(d) secure a policy objective which could not be satisfactorily secured by non-legislative means;

(e) have an effect which is proportionate to the policy objective;

(f) strike a fair balance between the public interest and the interests of any person adversely affected by it;

(g) do not remove any necessary protection;

(h) do not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;

(i) are not of constitutional significance;

(j) make the law more accessible or more easily understood (in the case of provisions restating enactments);

(k) have been the subject of, and takes appropriate account of, adequate consultation;

(l) give rise to an issue under such criteria for consideration of statutory instruments laid down in paragraph (1) of Standing Order No 151 (Statutory Instruments (Joint Committee)) as are relevant, such as defective drafting or failure of the department to provide information where it was required for elucidation;

(m) appear to be incompatible with any obligation resulting from membership of the European Union;

7. The Committee in the House of Lords will consider each proposal in terms of similar criteria, although these are not laid down in Standing Orders.

8. Each Committee might take oral or written evidence to help it decide these matters, and each Committee would then be expected to report.

9. Copies of Committee Reports, as Parliamentary papers, can be obtained through HMSO. They are also made available on the Parliament website at

- [Regulatory Reform Committee](#) in the Commons; and
- [Delegated Powers and Regulatory Reform Committee](#) in the Lords.

10. Under negative resolution procedure, each of the Scrutiny Committees is given 40 days to scrutinise an LRO, after which the Minister can make the order if neither House of Parliament has resolved during that period that the order should not be made or to veto the LRO.

11. Under affirmative resolution procedure, each of the Scrutiny Committees is given 40 days to scrutinise an LRO, after which the Minister can make the order if it is not vetoed by either or both of the Committees and it is approved by a resolution of each House of Parliament.

12. Under super-affirmative procedure each of the Scrutiny Committees is given 60 days to scrutinise the LRO. If, after the 60 day period, the Minister wishes to make the order with no changes, he may do so only after he has laid a statement in Parliament giving details of any representations made and the LRO is approved by a resolution of each House of Parliament. If the Minister wishes to make changes to the draft LRO he must lay the revised LRO and as well as a statement giving details of any representations made during the scrutiny period and of the proposed revisions to the order, before Parliament. The Minister may only make the order if it is approved by a resolution of each House of Parliament and has not been vetoed by either or both relevant Committees.

How to Make Your Views Known

13. Responding to this consultation document is your first and main opportunity to make your views known to the relevant department as part of the consultation process. You should send your views to the person named in the consultation document, in this case Jacqui Entwistle at BERR. When the Minister lays proposals before Parliament you are welcome to put your views before either or both of the Scrutiny Committees.

14. In the first instance, this should be in writing. The Committees will normally decide on the basis of written submissions whether to take oral evidence.

15. Your submission should be as concise as possible, and should focus on one or more of the criteria listed in paragraph 6 above.

16. The Scrutiny Committees appointed to scrutinise Legislative Reform Orders can be contacted at:

Delegated Powers and
Regulatory Reform Committee
House of Lords
London
SW1A 0PW
Tel: 0207 219 3103
Fax: 0207 219 2571
[mailto: DPDC@parliament.uk](mailto:DPDC@parliament.uk)

Regulatory Reform Committee
House of Commons
7 Millbank
London
SW1P 3JA
Tel: 020 7219 2830/2833/2837
Fax: 020 7219 2509
[mailto: regrefcom@parliament.uk](mailto:regrefcom@parliament.uk)

Non-disclosure of responses

17. Section 14(3) of the LRRRA provides what should happen when someone responding to the consultation exercise on a proposed LRO requests that their response should not be disclosed.

18. The name of the person who has made representations will always be disclosed to Parliament. If you ask for your representation not to be disclosed, the Minister should not disclose the content of that representation without your express consent and, if the representation relates to a third party, their consent too. Alternatively, the Minister may disclose the content of the representation in such a way as to preserve your anonymity and that of any third party involved.

Information about Third Parties

19. If you give information about a third party which the Minister believes may be damaging to the interests of that third party, the Minister does not have to pass on such information to Parliament if he does not believe it is true or he is unable to obtain the consent of the third party to disclosure. This applies whether or not you ask for your representation not to be disclosed.

20. The Scrutiny Committees may, however, be given access on request to all representations as originally submitted, as a safeguard against improper influence being brought to bear on Ministers in their formulation of legislative reform orders.

Better Regulation Executive
Department for Business, Enterprise and Regulatory Reform

ANNEX D: CONSULTATION CRITERIA

The criteria in the "[Code of Practice on Written Consultation](#)" published by the BRE apply to all UK national public consultations on the basis of a document in electronic or printed form. They will often be relevant to other sorts of consultation.

Though they have no legal force, and cannot prevail over statutory or other mandatory or external requirements (e.g. under European Community law) they should otherwise generally be regarded as binding on UK Departments and their agencies unless Ministers conclude that exceptional circumstances require a departure.

The criteria should be reproduced in consultation documents with an explanation of any departure, and confirmation that they have otherwise been followed.

1. Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.
2. It should be clear who is being consulted, about what questions, in what timescale and for what purpose.
3. A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.
4. Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others), and effectively drawn to the attention of all interested groups and individuals.
5. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation.
6. Responses should be carefully and open-mindedly analysed, and reasons for decisions finally taken.
7. Designating a consultation co-ordinator who will ensure the lessons are disseminated.

Annex E Summary: Intervention & Options

Department /Agency:
**Business, Enterprise and
Regulatory Reform (BERR)**

Title:
**Impact Assessment of the Legislative Reform
(Consumer Credit) Order 2008**

Stage: Consultation

Version: 1.0

Date: 21 November 2007

Related Publications: Consultation on proposals to amend the Consumer Credit Act 1974 for buy-to-let lending, the provision of statements and definitions of "payments"

Available to view or download at:

<http://www.berr.gov.uk/consultations/index.html>

Contact for enquiries: Jacqui Entwistle

Telephone: 020 7215 3970

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

The Consumer Credit Act 1974 (the 1974 Act), as currently worded, does not achieve the original policy intentions for exempting buy-to-let lending from its scope, the giving of statements for fixed-sum credit agreements and the issuing of arrears notices. Corrective action is therefore required to provide clarity and legal certainty to industry and consumers.

What are the policy objectives and the intended effects?

To exempt buy-to-let lending from regulation under the 1974 Act when the £25,000 financial limit (above which credit agreements are currently unregulated) is removed in April 2008. This will maintain the current position and ensure consistency with government policy on mortgages.

To provide clarity on the giving of statements for fixed-sum credit agreements and the intended definitions of "payments" for the purposes of arrears notices. This will resolve the current ambiguities that exist in both cases and avoid significant, unintended regulatory compliance costs.

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

1. Providing clarification through guidance
2. Providing clarification through secondary legislation
3. Amending the Consumer Credit Act 1974 - this is our preferred option. In all cases the changes needed cannot be achieved through guidance and the vires does not exist to make amendments through secondary legislation. Amendment to the primary legislation is therefore needed to provide legal certainty to ensure the original policy objectives are achieved and a common approach is adopted by industry and, as relevant, the courts.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The policy will be reviewed 3 years on from the date of implementation i.e 2011.

Ministerial Sign-off For consultation stage Impact Assessments:

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

Signed by the responsible Minister:

.....Date:

Summary: Analysis & Evidence

Policy Option: 3

Description: Amend the Consumer Credit Act 1974 to exempt buy-to-let lending

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups'
	One-off (Transition)	Yrs	
	£ 0		
	Average Annual Cost (excluding one-off)		
	£ 0		Total Cost (PV) £ 0
Other key non-monetised costs by 'main affected groups'			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' Buy-to-let lending meeting the new definition will be exempt from regulation under the 1974 Act. As a consequence the unintended administrative burden on those lenders particularly affected (around 80) will be removed as they will not be required to make their non-compliant systems compliant.
	One-off	Yrs	
	£ 100 million	7	
	Average Annual Benefit (excluding one-off)		
	£ 500,000		Total Benefit (PV) £ 103.2 million
Other key non-monetised benefits by 'main affected groups' Consumers will benefit as buy-to-let finance will continue to be available from lenders who might otherwise withdraw from the market if it were to become regulated, and the cost of such borrowing will be kept down as compliance costs will not be passed on.			

Key Assumptions/Sensitivities/Risks

Price Base Year 2006	Time Period Years 7	Net Benefit Range (NPV) £ 103.2 million	NET BENEFIT (NPV Best estimate) £ 103.2 million
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What is the geographic coverage of the policy/option?	UK			
On what date will the policy be implemented?	1 October 2008			
Which organisation(s) will enforce the policy?	OFT			
What is the total annual cost of enforcement for these organisations?	£ Minimal			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	Yes/No			
What is the value of the proposed offsetting measure per year?	£ 0			
What is the value of changes in greenhouse gas emissions?	£ 0			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro 0	Small 0	Medium ?	Large ?
Are any of these organisations exempt?	Yes	Yes	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)	
Increase of	£ 0	Decrease of	£ 0
		Net Impact	£ 0

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

Summary: Analysis & Evidence

Policy Option: -3

Description: Amend the Consumer Credit Act 1974 to provide clarification on the provision of statements and definitions of "payments"

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups'
	One-off (Transition)	Yrs	
	£ 0		
	Average Annual Cost (excluding one-off)		
	£ 0		Total Cost (PV) £ 0
Other key non-monetised costs by 'main affected groups'			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups'
	One-off	Yrs	
	£ ?	7	
	Average Annual Benefit (excluding one-off)		
	£ ?		Total Benefit (PV) £ ?
Other key non-monetised benefits by 'main affected groups'			
Consumers will benefit from a common approach being adopted by lenders, making it easier to make comparisons, and from clarity about what to expect and when.			

Key Assumptions/Sensitivities/Risks

Price Base Year 2007	Time Period Years 7	Net Benefit Range (NPV) £ ?	NET BENEFIT (NPV Best estimate) £ ?
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What is the geographic coverage of the policy/option?	UK			
On what date will the policy be implemented?	1 October 2008			
Which organisation(s) will enforce the policy?	OFT			
What is the total annual cost of enforcement for these organisations?	£ ?			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	N/A			
What is the value of the proposed offsetting measure per year?	£ 0			
What is the value of changes in greenhouse gas emissions?	£ 0			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro 0	Small 0	Medium ?	Large ?
Are any of these organisations exempt?	Yes	Yes	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)	
Increase of	£ 0	Decrease of	£ 0
		Net Impact	£ 0

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

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

The Legislative Reform (Consumer Credit) Order 2008

1. Purpose

1.1 This impact assessment (IA) examines the implications of exempting buy-to-let lending from regulation under the Consumer Credit Act 1974 (the 1974 Act).

1.2 It also considers the implications of proposals to ensure that the original policy intentions of the Consumer Credit Act 2006 (the 2006 Act) in relation to the giving of statements for fixed-sum credit agreements and the issuing of notices of sums in arrears are achieved.

2. Objectives

2.1 The proposals are intended to ensure that the policy intentions behind some of the measures introduced into the 1974 Act by the Consumer Credit Act 2006 (the 2006 Act) are achieved by:

- providing an exemption from regulation under the 1974 Act for buy-to-let lending meeting the new definition thus ensuring that, following the removal of the £25,000 financial limit (above which credit agreements are currently unregulated) in April 2008, such lending does not become a regulated activity. This will maintain the current position;
- clarifying that creditors, under fixed-sum credit agreements, need to give debtors consecutive statements each covering a period of not more than one year and to do so within 30 days of the end of the period to which they relate; and
- including definitions of “payments” for the purpose of issuing notices of sums in arrears.

3. Background

3.1 The 2006 Act received Royal Assent on 30 March 2006. It is based around three main changes:

- ensuring consumers are provided with clear information about the state of their credit accounts;
- improving consumers’ rights and access to redress; and
- establishing a more targeted licensing regime for the regulation of consumer credit businesses.

3.2 The post-contract transparency requirements introduced by the 2006 Act require lenders to provide specific information about credit agreements to customers at required points in time. They are aimed at providing more information to customers about their credit agreements to enable them to better manage their borrowing and stay in control. They include sending regular statements so that customers are kept up-to-date on their accounts (in particular where any additional interest, fees or charges might have been added) and sending notices of sums in arrears to customers when they fall behind with their payments.

3.3 The full regulatory impact assessment (RIA) for the Consumer Credit Bill¹ provided the evidence base to support these provisions.

3.4 Much of the detail under the 2006 Act will be added by secondary legislation. The Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 (SI 2007/1167)² prescribe the form and content of the various statements and notices that lenders will be required to provide to all consumers about their regulated agreements. These provisions come into force on 1 October 2008.

3.5 The Consumer Credit (Exempt Agreements) Order 2007 (S.I 2007/1168)³ comes into force on 6 April 2008 and deals with exemptions from the provisions of the 1974 Act that will exempt from regulation all business lending above £25,000 (lending to business below this level will remain unregulated) and allow an opt-out from regulation for credit lending to very wealthy people.

3.6 It was during the consultation on this Order that lenders expressed their concern about the practical implications of relying on the business exemption to fully achieve the policy objective to exempt buy-to-let lending from regulation and pressed the Department to look again at this issue. In its response to the consultation the Department stated publicly that it would address this unintended consequence of the 2006 Act through a Legislative Reform Order (LRO) to provide a specific exemption for buy-to-let loans.

3.7 During the pre-consultation discussions with industry on the proposed buy-to-let exemption two further issues were identified where the legislation was not fulfilling the original policy intention. These related to the post-contract transparency requirements, in particular the provision of statements and a definition of “payments” for the purposes of issuing notices of sums in arrears. We acknowledged these and agreed that proposals to remedy these two issues would also be included in the LRO.

4. Exemption for buy-to-let lending from regulation under the 1974 Act

Rationale for government intervention

4.1 It was never the Government's intention to regulate under the 1974 Act buy-to-let loans which are secured by a first charge on the buy-to-let property. Such loans should either be regulated under the Financial Services and Markets Act (FSMA) 2000⁴ (if more than 40% of the property is occupied by the borrower or a related person) or should be unregulated (if the borrower or a related person does not intend to occupy more than 39% of the property at any time). In the latter case the loan is for investment purposes and the risk to the borrower is less severe in the event that they have difficulty repaying the loan.

4.2 At present buy-to-let lending over £25,000 – in effect all buy-to-let lending - is unregulated. However, the 2006 Act removes the threshold of £25,000 below which consumer credit agreements are currently regulated (unless specifically exempted) and above which they are not. When this provision comes into force on 6 April 2008 all consumer credit agreements, regardless of value, will be regulated unless specifically exempt. As a consequence buy-to-let agreements that are not for business purposes (and therefore exempt under the new business exemption) or are exempted elsewhere will come within the scope of the 1974 Act as amended by the 2006 Act. This is an unintended consequence of the 2006 Act and inconsistent with the original policy intention.

4.3 The effect of exempting buy-to-let loans from regulation under the 1974 Act will be to remove the unintended financial cost to lenders of regulatory compliance. An independent review by PricewaterhouseCoopers (PwC) carried out for the Department in 2006⁵ identified that there would be one-off compliance costs of around £100 million spread over about 80 lenders if buy-to-let lending was brought into regulation. This figure is supported by the Council of Mortgage Lenders (CML) who further estimate ongoing annual compliance costs to these businesses of around £500,000. These costs cover IT development, staff training and adjustments to forms to ensure they are compliant.

4.4 On the whole lenders are significantly less well prepared for implementing the provisions of the 2006 Act for buy-to-let credit agreements than for other types of credit agreement (indeed some businesses specialising in buy-to-let lending are largely unfamiliar with the requirements of consumer credit regulation). Until now, such lending has not been regulated where it has exceeded the £25,000 threshold or has otherwise been exempt. As a result, the systems changes needed are more severe than for other products because there is no system capability to fall back on. Industry estimates needing between 18 months to 3 years to deliver such changes.

4.5 Consequently the impact on consumers from this product is potentially much larger than for other products. Some lenders have indicated that they would almost certainly have to temporarily withdraw some of their products from the market until they had made systems changes to comply with the 2006 Act. Others would seriously consider a complete withdrawal given the cost of making non-consumer credit act systems compliant. Similarly some of their products offering more flexibility and attractive repayment schedules would be completely withdrawn as they would not be profitable under the 2006 Act. Furthermore consumers would suffer as a consequence of lenders passing on to their customers the cost of the significant systems modifications that would be required.

4.6 There are also potentially wider ramifications for the rental market. If the supply of buy-to-let mortgages decreases so will the supply of rental accommodation which in turn could drive up rents.

Options

4.7 Options 1 and 2 are included here to show the alternative options considered to address this problem. However, as it is not possible to pursue either option to address this issue, we have not provided an assessment of the costs and benefits of each of these options.

Option 1: Provide clarity through guidance

4.8 We considered providing guidance to define the circumstances when buy-to-let lending would or would not be considered business lending and therefore an exempt or regulated activity under the new business exemption which comes into force on 6 April 2008. However, we are constrained by the existing definition of business in the 1974 Act which means that relying on the business exemption to deliver the policy objective in relation to buy-to-let lending does not work. It is not therefore possible to use guidance to achieve a comprehensive exemption for buy-to-let lending as some such lending would properly fall within regulation (when the £25,000 financial limit was removed in April 2008) without a specific exemption.

Option 2: Provide clarification through secondary legislation

4.9 We considered using the power that HM Treasury used to amend section 16 of the 1974 Act in relation to regulated mortgage contracts (RMCs) via the consequential provisions in their FSMA (Regulated Activities) Order 2001. However RMCs are a specified 'investment' under the

Order whereas buy-to-let mortgages are not. Consequently it is not possible to use this power to make consequential amendments to the 1974 Act related to buy-to-let mortgages.

Option 3: Provide clarification through changes to primary legislation

4.10 Our preferred option is to amend the 1974 Act to provide for a specific exemption for buy-to-let lending meeting the new definition.

Benefits

4.11 This option achieves the original policy intention by ensuring that buy-to-let loans which are secured by a charge on the buy-to-let property and meet the new definition will be exempt from regulation under the 1974 Act. This will maintain the current position for buy-to-let lending and create a level playing field for lenders in this market.

4.12 Lenders will benefit from the removal of unintended compliance costs(see paragraph 4.3) as a consequence of not having to make expensive systems changes to accommodate the requirements of the 1974 Act.

4.13 Borrowers will benefit from no disruption (temporary or otherwise) of the market as a consequence of lenders needing to withdraw their products until such time as their systems are compliant. They will continue to benefit from flexible packages on offer from lenders which could be completely withdrawn if they proved no longer profitable if buy-to-let loans were brought into regulation. They will also benefit as a consequence of lenders not passing on to their customers the costs of significant systems changes

4.14 More widely the rental market would benefit. If the supply of buy-to-let mortgages decreases so will the supply of rental accommodation which in turn could drive up rents.

Question: Can you provide any further evidence of the benefits of providing a specific exemption for buy-to-let loans from regulation under the 1974 Act?

Costs

4.15 This approach does not impose any administrative burdens on industry as it maintains the current position for buy-to-let lending. However, failure to act would impose additional administrative burdens on industry of £100 million transitional costs plus £0.5 million per annum ongoing costs.

4.16 There might, however, be some small additional administrative costs associated with the proposal to introduce a declaration for the purpose of buy-to-let lending. We anticipate that this should be minimal and restricted to adjustments to forms. Lenders have been largely supportive of the declaration which is not a mandatory requirement but will provide protection for them when agreeing a loan for the purpose of buy-to-let and customers will be clear about what it is they are signing away by agreeing to the loan.

Question: Can you provide any further evidence (quantified if possible) of the likely impact on costs of i) not exempting buy-to-let lending and ii) the proposed declaration? It would helpful if you could distinguish between one-off transitional costs and annual ongoing costs.

Risks

4.17 After April 2008 when the £25,000 financial limit is removed, a large amount of buy-to-let lending will be exempt from regulation under the 1974 Act by virtue of other exemptions. For example, some agreements will fall within the new business exemption or high net worth

exemption or within an exemption in the Consumer Credit (Exempt Agreements) Order 1989. This leaves around 80 lenders who will be the only players in the market whose agreements would potentially be regulated. In 2006 these lenders' share of the market was estimated to be worth around £7 billion *[to be verified]*. This carries the risk that some of these businesses might choose to withdraw from the buy-to-let market thus affecting the availability of finance for consumers.

5. Clarification on the giving of statements for fixed-sum credit agreements

Rationale for Government intervention

5.1 The policy intention under the 2006 Act was that a creditor, under a regulated agreement for fixed-sum credit, must give a debtor regular statements each covering a period of up to one year. These should be given within 30 days of the end of the period to which they relate and should run consecutively. However, the 2006 Act, when taken together with regulation 11 of the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 defeats the policy intention to allow 30 days within which to give the statement.

5.2 To comply with the post-contract transparency requirements lenders will need to adapt their business systems to provide the new information to their customers. As such it is inevitable that these changes will give rise to additional one-off as well as recurring costs for those businesses which are obliged to comply with the new provisions. In developing the 2007 Regulations the Department endeavored to strike the right balance between ensuring that consumers were given the information they need without imposing undue burdens on lenders by keeping the level of prescription and detail to a minimum.

5.3 Not being able to send statements on a regular annual basis covering periods of up to one year will create additional cost burdens for industry when building and implementing their IT systems to accommodate a more complex requirement than was originally intended. For example, existing systems are not smart enough to cover a moving deadline for statements for individual debtors that compliance with the legislation as currently worded would generate. To do so would be a significant and onerous systems task. Where industry was unable to do this they would not be able to enforce the agreement during any period of non-compliance and could suffer significant financial loss as a consequence.

5.4 Some lenders felt that the requirement to issue statements within a year meant they would be required to issue statements that covered less than 12 months i.e issuing the statement at say week 50 rather than week 52. This is unlikely to meet consumer expectation, for example mortgage statements cover a 12 month period. One lender was considering issuing 6 monthly statements as a way of meeting the requirement, however, this would double the running costs of the obligation. This approach could have a significant cost impact – it was estimated that each statement costs 30p to send.

5.5 In its review of the implementation timetable for the 2006 Act PwC estimated that the total costs to business of implementing the post-contract transparency requirements would be in the order of £500m. The majority of the lenders that PwC spoke to stressed that one of the major challenges they faced arising from the 2006 Act was that a wide range of systems required change. This reflects the large number of products which are in scope and also the fact that the requirements apply across the lifecycle of the product. Lenders indicated that the number of affected systems could range from 25 to well over 100. It is reasonable to assume, and it was stressed by most lenders who PwC spoke to, that some if not all of these costs would be passed on to customers through higher interest rates and/or fees rather than being absorbed by the lenders' shareholders.

Options

5.6 Options 1 and 2 are included here to show the alternative options considered to address this problem. However, as it is not possible to pursue either option to address this issue, we have not provided an assessment of the costs and benefits of each of these options.

Option 1: Providing clarity through guidance

5.7 Whilst it would be possible to issue guidance as to the policy intention behind this provision, this would not be consistent with the wording of section 77A(1) and would not provide any legal certainty to industry that they were compliant when sending statements within 30 days of the period to which they relate.

Option 2: Provide clarification through secondary legislation

5.8 We considered whether it would be possible to provide clarity on this issue in secondary legislation using existing powers in the 1974 Act. However, the vires in relation to statements that was introduced into the 1974 Act by the 2006 Act only provides for regulations to make provision about the form and content of statements under section 77A. It does not allow us to make provision for the period covered by statements.

Option 3: Provide clarification through changes to primary legislation

5.9 This issue arises directly through an inconsistency in the legislation and therefore requires corrective action through amendment to the 1974 Act. This is our preferred option.

Benefits

5.10 This option provides both clarity and legal certainty to industry about the period to be covered by the statements (up to one year) and the time within which the statements need to be given (within 30 days after the end of the period to which they relate). These requirements would be set out clearly in the 1974 Act thus reducing the risk of non-compliance.

5.11 The proposals will ensure that the original policy objective is achieved and that, as far as is possible, a common approach is adopted by lenders which will make it easier for customers to make comparisons. They will also provide clarity to consumers who will benefit from continuity, where statements are already provided, and clarity about what to expect and when.

Question: Can you provide any further evidence of the likely benefits of providing clarity on the giving of statements for fixed-sum credit agreements?

Costs

5.12 The proposals will reduce the overall compliance cost burden for industry in complying with the post-contract transparency requirements estimated to be around £500 million in total. The full RIA for the Consumer Credit Bill recognised that the provision of annual statements would be an incremental cost to most businesses as many already provide this information to consumers in some form. These proposals will keep those costs to a minimum by providing clarity in the legislation thus avoiding unintended and unnecessarily complicated and expensive systems changes.

Question: Can you provide any further evidence (quantified if possible) on the likely impact on costs of having to comply with this requirement to give statements within a year as currently worded in the Act? It would be helpful if you could distinguish between one-off transitional costs and annual ongoing costs.

Risks

5.13 The legislation in this area is inconsistent and consequently if it is not amended there is a strong risk that there will be a high level of non-compliance because, as currently worded, it will be extremely difficult for industry to comply with section 77A of the 1974 Act which does not allow for statements to be given within 30 days of the period to which they relate.

5.14 The proposals will also reduce the serious financial risk to industry if they were found to be non-compliant with this requirement. During any period of non-compliance a lender is unable to enforce an agreement and a borrower has no liability to pay interest falling due during any period of non-compliance.

6. Inclusion of definitions of “payments” for the purpose of issuing notices of sums in arrears

Rationale for Government intervention

6.1 The 2006 Act provides for a creditor to give notices of sums in arrears to the debtor under fixed-sum and running-account credit agreements and certain regulated consumer hire agreements. Certain conditions have to be satisfied before this obligation arises and ceases, two of which include the word “payments”. The policy intention was that “payments” would cover regular instalments/repayment sums, hire payments and regular interest but not other sums such as default sums that may be applied as a consequence of a missed payment. However, in the absence of clear definitions of what the word “payments” is supposed to mean, it could be construed more widely as including any sums falling due under the agreement including default sums. As a result first notices of sums in arrears (due after two missed payments) could be triggered far more quickly than would otherwise be the case if it were clear what the word “payments” was intended to cover.

6.2 One stakeholder association estimates that, if the wider (unintended) definition of payments is adopted, twice as many first notices of sums in arrears could be issued as a result. This will involve considerable expenditure on IT system development changes and increased administrative costs involved with the issuing and sending out of up to double the number of notices. There will also be considerable expenditure on systems changes based on the definition of payments adopted without any benefits to consumers.

6.3 These proposals do not impose any new burdens on industry to those previously identified for the 2006 Act and the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007. The amendments we propose will ensure that the costs of complying with this provision are kept to a minimum by providing industry with clear definitions against which to make their systems changes.

Options

6.4 Options 1 and 2 are included here to show the alternative options considered to address this problem. However, as it is not possible to pursue either option to address this issue, we have not provided an assessment of the costs and benefits of each of these options.

Option 1: Providing clarity through guidance

6.5 In the absence of clear definitions of “payments” there is a risk that the policy intention will not be achieved across the board if industry adopts, and the Courts rule on, different interpretations of the definitions. Legal certainty is needed on the definitions in order to mitigate this risk. Guidance alone would not be sufficient as it is not binding and industry or the Courts could still take a different view. It would not, therefore, be an appropriate use of guidance to clarify the ambiguity in this legislation.

Option 2: Provide clarification through secondary legislation

6.6 We considered whether it would be possible to provide clarity on this issue in secondary legislation using existing powers in the 1974 Act. However, as for statements, the vires in relation to notices of sums in arrears that was introduced into the 1974 Act by the 2006 Act only provides for regulations to make provision about the form and content of such notices. It would, therefore, not be possible to use secondary legislation to define a term laid down in primary legislation.

Option 3: Provide clarification through changes to primary legislation

6.7 In view of the fact that the problem stems from the primary legislation, the only possible option is to amend the 1974 Act to provide clear definitions of the term “payments”. This is, therefore, our preferred option.

Benefits

6.8 This option will provide the clarity and legal certainty that stakeholders require and will ensure compliance with the 1974 Act as originally intended. It will also prevent unintended additional administrative burdens being imposed.

6.9 For consumers the proposal will provide clarity on what to expect in relation to arrears notices. It will reduce any confusion around when such notices will be issued and ensure consistency in approach from lenders. It will also reduce irritation or unnecessary worry or stress that could arise if lenders were to adopt a wide definition of payments resulting in arrears notices being sent out earlier and more frequently than might otherwise be the case.

Question: Can you provide any further evidence on the likely benefits resulting from provision of a clear definition of “payments” in the 1974 Act?

Costs

6.10 This option does not impose any additional administrative burdens on industry above those identified in the original RIA for the Consumer Credit Bill for this requirement. By providing clarity as to the definition of “payments” industry will be confident that the systems changes they make now will be compliant with the legislation and that further expenditure will not be needed later on if they opt for the wrong definition now in the absence of clarity.

Question: Can you provide any further evidence (quantified if possible) on the likely impact on costs of complying with this requirement in the absence of clear definitions of “payments” in the 1974 Act? It would helpful if you could distinguish between one-off transitional costs and annual ongoing costs.

Risks

6.11 In the absence of a clear definition of “payments” there is a high risk of non-compliance as industry adopts, and the Courts rule on, different interpretations. This risks defeating the original policy intention for the issue of arrears notices and has serious financial consequences for lenders as they will be unable to enforce the agreement during any period of non-compliance. Furthermore the borrower will have no liability to pay interest or default sums in relation to this period.

7. Who will be affected?

7.1 The proposals for buy-to-let lending will affect businesses involved in the buy-to-let market as well as consumers who are either involved in, or thinking of entering this market.

7.2 The proposals on the giving of statements for fixed-sum credit agreements and the definition of “payments” will affect lenders in view of the impact on regulatory compliance costs. They will also affect consumers who will have clarity about what to expect and when.

8. Issues of equity and fairness

8.1 The Government considers that these proposals will not bring disproportionate benefits or have a disproportionate affect on any particular group.

8.2 Although buy-to-let lending will be exempt from regulation under the 1974 Act such agreements will still fall within the definition of a consumer credit agreement. As such borrowers can challenge their agreements in the Courts on the grounds that the relationship is unfair or complain to the Office of Fair Trading if they feel their lender has acted unreasonably or irresponsibly.

9. Small firms impact test

9.1 There is no change in the nature or number of businesses affected by these provisions to that intended originally under the Consumer Credit Bill. The proposals are all corrective measures to ensure that the original policy intentions are achieved in each case.

10. Enforcement and sanctions

10.1 The existing provisions in the 1974 Act apply. There are no new burdens and hence no new enforcement implications in these proposals.

11. Consultation

11.1 This partial impact assessment forms part of the full public consultation on the proposals covered here. It will be updated in the light of comments and further evidence received from the consultation.

Endnotes

1. The Regulatory Impact assessment for the Consumer Credit Bill is available at <http://www.berr.gov.uk/files/file24434.pdf>
2. The Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 are available at http://www.opsi.gov.uk/SI/si2007/uksi_20071167_en.pdf
3. The Consumer Credit (Exempt Agreements) Order 2007 is available at http://www.opsi.gov.uk/SI/si2007/uksi_20071168_en.pdf
4. The Financial Services and Markets Act 2000 is available at http://www.opsi.gov.uk/Acts/acts2000/ukpga_20000008_en_1.htm
5. PwC review of implementation timetable for the Consumer Credit Act 2006 is available at <http://www.berr.gov.uk/files/file38292.pdf>

Specific Impact Tests: Checklist

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

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

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

Annexes

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ANNEX F: Draft Legislative Reform Order

Draft Order laid before Parliament under section 14(1) of the Legislative and Regulatory Reform Act 2006 for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2008 No.

REGULATORY REFORM

Legislative Reform (Consumer Credit) Order 2008

Made - - - - 2008

Coming into force - - 1st October 2008

The Secretary of State for Business, Enterprise & Regulatory Reform makes the following Order, in exercise of the powers conferred by section 1 of the Legislative and Regulatory Reform Act 2006⁽⁸⁾.

For the purposes of section 3(1) of that Act, he considers, where relevant, that the conditions under section 3(2) are satisfied.

He has consulted in accordance with section 13(1) of that Act.

He has laid a draft Order and an explanatory document before Parliament in accordance with section 14(1) of that Act.

Pursuant to section 15 of that Act, the affirmative resolution procedure (within the meaning of Part 1 of that Act) applies in relation to the making of the Order.

In accordance with section 17(2) of that Act, the draft has been approved by resolution of each House of Parliament after the expiry of the 40 day period referred to in that provision.

Citation and commencement

1. This Order may be cited as the Legislative Reform (Consumer Credit) Order 2008 and shall come into force on 1st October 2008.

Interpretation

2. In this Order “the 1974 Act” means the Consumer Credit Act 1974⁽⁹⁾.

⁽⁸⁾ 2006 c.51; see section 32 for the definition of “Minister of the Crown”.

Exemption relating to investment properties

3.—(1) After section 16B of the 1974 Act insert—

“16C Exemption relating to investment properties

(1) This Act does not regulate a consumer credit agreement if any sums due under it are secured by a land mortgage on land outside the United Kingdom.

(2) This Act does not regulate a consumer credit agreement if any sums due under it are secured by a land mortgage on land in the United Kingdom where the condition in subsection (3) is satisfied.

(3) The condition is that less than 40% of the land is used, or is intended to be used, as or in connection with a dwelling—

- (a) by the debtor or a person connected with the debtor, or
- (b) in the case of credit provided to trustees, by an individual who is the beneficiary of the trust or a person connected with such an individual.

(4) For the purposes of subsection (3) the area of any land which comprises a building or other structure containing two or more storeys is to be taken to be the aggregate of the floor areas of each of those storeys.

(5) For the purposes of subsection (3) a person is “connected with” the debtor or an individual who is the beneficiary of a trust if he is—

- (a) that person’s spouse or civil partner;
- (b) a person (whether or not of the opposite sex) whose relationship with that person has the characteristics of the relationship between husband and wife; or
- (c) that person’s parent, brother, sister, child, grandparent or grandchild.

(6) If an agreement includes a declaration made by the debtor to the effect that the agreement satisfies the condition set out in subsection (3), the agreement shall be presumed to have satisfied that condition.

(7) But that presumption does not apply if, when the agreement is entered into—

- (a) the creditor, or
- (b) any person who has acted on his behalf in connection with the entering into of the agreement,

knows, or has reasonable cause to suspect, that the agreement does not satisfy the condition set out in subsection (3).

(8) The Secretary of State may by order make provision about the form, content and signing of declarations for the purposes of subsection (6).

(9) Where an agreement has two or more creditors, in subsection (7) the reference to “the creditor” is a reference to any one or more of them.

(10) Section 126 (enforcement of land mortgages) applies to an agreement which would but for this section be a regulated agreement.

(11) Nothing in this section affects the application of sections 140A to 140C.”.

(2) In section 82 of the 1974 Act (variation of agreements)—

- (a) after subsection (2A) insert—

- “(2B) Subsection (2) does not apply if the earlier agreement or the modifying agreement is an exempt agreement as a result of section 16C.”;
- (b) in subsection (3)(b) after “section 16(6C)” insert “or 16C”;
 - (c) in subsection (5A) after “section 16(6C)” insert “or 16C”.

Statements to be provided in relation to fixed-sum credit agreements

4. In section 77A of the 1974 Act (statements to be provided in relation to fixed-sum credit agreements)—

- (a) for subsection (1) substitute—

“(1) The creditor under a regulated agreement for fixed-sum credit must give the debtor statements under this section.

(1A) The statements must relate to consecutive periods.

(1B) The first such period must begin with either—

- (a) the day on which the agreement is made, or
- (b) the day the first movement occurs on the debtor’s account with the creditor relating to the agreement.

(1C) No such period may exceed a year.

(1D) For the purposes of subsection (1C), a period of a year which expires on a non-working day may be regarded as expiring on the next working day.

(1E) Each statement under this section must be given to the debtor before the end of the period of thirty days beginning with the day after the end of the period to which the statement relates.”.

- (b) in subsection (5)—

- (i) substitute “(1E)” for “(1)(a)”; and
- (ii) paragraph (b) and the “or” immediately preceding it shall cease to have effect; and

- (c) in subsection (7) omit the words “paragraph (a) or (as the case may be) paragraph (b) of”.

5.—(1) Section 77A of the 1974 Act, as amended by this Order, applies to agreements whenever made.

(2) Section 77A of the 1974 Act, as amended by this Order, shall have effect in relation to agreements made before the commencement of section 6 of the Consumer Credit Act 2006⁽¹⁰⁾ as if the period mentioned in subsection (1B) were the period of one year beginning with the day of the commencement of section 6.

6. Paragraph 2 of Schedule 3 to the Consumer Credit Act 2006 is repealed.

7. Regulation 11 of the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007⁽¹¹⁾ is revoked.

Interpretation of s.86B of the 1974 Act

8. In section 86B of the 1974 Act (notice of sums in arrears under fixed-sum credit agreements etc.)—

- (a) in subsection (5)(a) for “sum” substitute “payments”, for “pay” substitute “make” and for “is” substitute “are”; and

- (b) after subsection (12) insert—

“(13) In this section—

⁽¹⁰⁾ 2006 c.14.

⁽¹¹⁾ S.I. 2007/1167.

- (a) “payments” in relation to an applicable agreement which is a regulated agreement for fixed-sum credit means—
 - (i) payments of the whole or any part of the credit;
 - (ii) payments of the whole or any part of the total charge for credit; or
 - (iii) a combination of the payments referred to in paragraphs (i) and (ii); and
- (b) “payments” in relation to an applicable agreement which is a regulated consumer hire agreement means any payments to be made by the hirer in relation to any period in consideration of the bailment or hiring to him of goods under a regulated consumer hire agreement.”.

Interpretation of s.86C of the 1974 Act

9. In section 86C of the 1974 Act (notice of sums in arrears under running-account credit agreements) after subsection (7) insert—

“(8) In this section—

“payments” means—

- (a) payments of the whole or any part of the credit;
- (b) payments of the whole or any part of the total charge for credit; or
- (c) a combination of the payments referred to in paragraphs (a) and (b).”.

_____2008

Name
Parliamentary Under Secretary of State for Trade and Consumer Affairs
Department for Business, Enterprise & Regulatory Reform

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Consumer Credit Act 1974 (“the 1974 Act”). Article 3 inserts a new section 16C into the 1974 Act. This creates a new exemption from regulation under the 1974 Act for certain consumer credit agreements. To qualify sums due under the agreement must be secured by a land mortgage. In addition where the land is situated in the United Kingdom less than 40% of the land must be used or intended to be used as or in connection with a dwelling by the debtor or a person connected with the debtor. Where the debtors are trustees less than 40% of the land must be used by the beneficiary of the trust or a person connected with that beneficiary.

Article 3 of the Order also makes consequential amendments to section 82 of the 1974 Act. That section now provides that if an agreement is exempt as a result of section 16C of the Act, section 82(2) will not apply if the agreement amends an earlier agreement or is amended by a later modifying agreement. Section 82(5A) is also amended to disapply subsection (5) where the modifying agreement is an exempt agreement as a result of section 16C. This means that if an earlier agreement, which is cancellable by virtue of section 67, is modified by an agreement which is exempt as a result of section 16C during the cooling off period provided by section 68, the exempt agreement will not be treated as a cancellable agreement.

Article 4 of the Order amends section 77A of the 1974 Act. Section 77A now provides that a creditor under a regulated agreement for fixed-sum credit has to give the debtor statements covering consecutive periods of not more than one year. The first statement has to cover the period commencing on the day the agreement is made or the day the first movement on the account occurs. Each statement must be given within thirty days of the end of the period to which it relates. Where a period of one year would expire on a non working day the period may expire on the next working day.

Article 5 makes a transitional provision in relation to section 77A of the 1974 Act. It provides that section 77A, as amended by the Order, applies to agreements whenever made and has effect in relation to agreements made before the commencement of section 6 of the Consumer Credit Act 2006 as if the period mentioned in section 77(1B) of the 1974 Act were the period of one year beginning on the day of the commencement of section 6.

Article 6 repeals paragraph 2 of Schedule 3 to the Consumer Credit Act 2006.

Article 7 revokes regulation 11 of the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 (S.I. 2007/1167).

Article 8 amends section 86B of the 1974 Act and defines “payments” for the purposes of that section.

Article 9 amends section 86C of the 1974 Act and defines “payments” for the purposes of that section.

An Impact Assessment has been prepared in respect of this Order and may be viewed at <http://www.berr.gov.uk/consumers/consumer-finance/??>

ANNEX G: Draft Consumer Credit (Form of Declaration) Order 2007

STATUTORY INSTRUMENTS

2008 No.

CONSUMER CREDIT

Consumer Credit (Form of Declaration) Order 2008

<i>Made</i>	- - - -	2008
<i>Laid before Parliament</i>		2008
<i>Coming into force</i>	- -	1st October 2008

The Secretary of State makes the following Order in exercise of the powers conferred by section 16C(8) of the Consumer Credit Act 1974⁽¹²⁾.

Citation and Commencement

10. This Order may be cited as the Consumer Credit (Form of Declaration) Order 2008 and shall come into force on 1st October 2008.

Declaration for exemption relating to investment properties

- 11.** A declaration for the purposes of section 16C(6) of the Consumer Credit Act 1974 shall—
- comply with the Schedule;
 - be set out in the consumer credit agreement no less prominently than other information in the agreement and be readily distinguishable from the background medium; and
 - be signed by the debtor or, where the debtor is a partnership or unincorporated body of persons, be signed by or on behalf of the debtor, unless the agreement is so signed.

2008

Name
Parliamentary Under Secretary of State for
Trade and Consumer Affairs
Department for Business, Enterprise & Regulatory Reform

⁽¹²⁾ 1974 c. 39. Section 16C was inserted by article 3 of the Legislative Reform (Consumer Credit) Order 2008 (S.I. 2008/).

SCHEDULE

Article 2

DECLARATION FOR EXEMPTION RELATING TO INVESTMENT PROPERTIES

A declaration for the purposes of article 2 must have the following form and content—

“Declaration for exemption relating to investment properties

(section 16C Consumer Credit Act 1974)

1. I am/We are* entering into this agreement, which is secured by a land mortgage on land in the United Kingdom.

2. I/We* confirm that at the time the agreement is entered into less than 40% of that land is used, or is intended to be used, as or in connection with a dwelling by me/us* as the debtor(s)* or by a person connected with me/us* or (in the case of credit provided to the debtors as trustees) by an individual who is the beneficiary of the trust or a person connected with such individual.

3. I/We* understand that I/we* will not have the benefit of the protection and remedies that would be available to me/us* under the Consumer Credit Act 1974 if this agreement were a regulated agreement under that Act.

4. I/We* understand that this declaration does not affect the powers of the court to make an order under section 140B of the Consumer Credit Act 1974 in relation to a credit agreement where it determines that the relationship between the creditor and the debtor is unfair to the debtor.

5. I am/We are* aware that, if I am/we are* in any doubt as to the consequences of the agreement not being regulated by the Consumer Credit Act 1974 I/we* should seek independent legal advice.

6. For the purposes of paragraph 2 of the declaration the area of any land which comprises a building or other structure containing two or more storeys is to be taken to be the aggregate of the floor areas of each of those storeys.

7. For the purposes of this declaration a person is “connected with” the debtor or a beneficiary of a trust if he is—

- (a) that person’s spouse or civil partner;
- (b) a person (whether or not of the opposite sex) whose relationship with that person has the characteristics of the relationship between husband and wife; or
- (c) that person’s parent, brother, sister, child, grandparent or grandchild.”.

**Delete as appropriate.*

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes provision about declarations where consumer credit agreements, secured on investment properties in the United Kingdom, are exempted from regulation under the Consumer Credit Act 1974.

Section 16C of the Consumer Credit Act 1974 provides for the exemption from regulation under that Act of consumer credit agreements secured by a land mortgage. Where the land is situated in the United Kingdom there is an additional condition that at the time the agreement is entered into less than 40% of the land is used or intended to be used as a dwelling by the debtor or a person connected with the debtor. Where credit is provided to trustees the condition is that less than 40% of the land is used, or intended to be used as a dwelling by the beneficiary of the trust or a person connected with him. Section 16C(6) of the Act provides that an agreement shall be presumed to have satisfied these conditions if the agreement includes a declaration by the debtor to that effect. The Order provides that a declaration for the purposes of section 16C(6) must comply with the requirements in article 2 and have the form and content set out in the Schedule.

An Impact Assessment in respect of this Order formed part of the Impact Assessment prepared in respect of the Legislative Reform (Consumer Credit) Order 2008 (S.I. 2008/.....), which may be viewed at <http://www.berr.gov.uk/consumers/consumer-finance/.....>

28.11.07 – 10.30.