

**Guidance on sections
77/78/79 of the Consumer
Credit Act 1974 – the duty to give
information to debtors and the
consequences of non-compliance on the
enforceability of the agreement**

An OFT consultation

January 2010

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Scope of this consultation

Scope of this consultation	This consultation is focused on sections 77/78/79 of the Consumer Credit Act 1974 which cover the creditor's or owner's duty to give information to debtors or hirers under fixed-term, running account, and hire agreements. It clarifies the latest OFT and court understanding of these sections following a recent High Court judgment on the matters, and sets out the OFT's views of relevant practices which would be considered to be unfair under section 25 of the Consumer Credit Act 1974 – the 'fitness test'.
Geographical scope	UK-wide
Impact assessment	There is no impact assessment linked to this consultation. The OFT does not conduct impact assessments when producing explanatory guidance. We work closely with stakeholders in preparing guidance and consult fully on the content.

Basic information

To	This consultation is aimed at those with an interest in the relevant stages of the lending and hiring process as conducted by regulated consumer credit and consumer hire businesses. This includes creditors and debt collection companies, as well as claims management companies and consumer advisors. It also includes large and small businesses, trade associations, professional bodies, regulators, enforcement agencies, consumer organisations and borrower groups.
Duration	27 January 2010 to 21 April 2010
Enquiries	By telephone: Richard Kitley on 020 7211 8979 By email to: richard.kitley@oft.gsi.gov.uk By fax to: 020 7211 8238 By post to: Richard Kitley, Unsecured Lending Team, Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX.

<p>How to respond</p>	<p>We would welcome your comments on the content and clarity of this draft guidance document. Please respond to as many questions as you are able and provide any suggested changes or comments on the draft in writing (by email, or alternatively by letter or fax, as indicated above).</p> <p>When responding to this consultation, please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were collated.</p> <p>We are publishing this consultation on the OFT website and sending it to a range of stakeholders to invite comments.</p>
<p>Additional ways to become involved</p>	<p>If you would like to meet the team to discuss any issues raised by this consultation please contact Richard Kitley via the above contact details.</p>
<p>After the consultation</p>	<p>After the consultation we will publish our final guidance as well as a summary of responses received. Both documents will be available on our website at www.offt.gov.uk/publications.</p>
<p>Compliance with the <i>Code of Practice on Consultation</i></p>	<p>This consultation complies with HM Government's Code of Practice on Consultation. A list of the key criteria can be found at Annexe C along with a link to the full document.</p>

Background

Getting to this stage	<p>One of the largest areas of development under the Consumer Credit Act 1974 has been the rise of litigation relating to unenforceable agreements. There has been real concern from all stakeholders, including the OFT itself, about the lack of clarity of the law relating to these matters, by the actions of some claims management companies, and a belief that this is harming both consumers and businesses.</p> <p>Though the OFT can consider matters relating to unenforceable agreements as pertinent to its individual fitness assessments, decisions on the actual interpretation and meaning of the law in this area is a matter for the courts.</p> <p>Due the rise in court cases on these matters, Judge Waksman in the High Court Manchester, Mercantile List, decided to hear a number of preliminary issues together. The OFT submitted its draft guidance and made written representations in order to assist the Court in the hearings, which took place in November/December 2009. The publication of this guidance follows the judgment arising from the hearings.</p>
Previous engagement	<p>Prior to the Manchester cases, an earlier version of this document was circulated to members of the Consumer Finance Forum, a collection of parties with interests in consumer credit and debt issues which is convened by the Department of Business, Innovation and Skills.</p>

Feedback about this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

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A copy of the key criteria from the Better Regulation Executive's *Code of Practice on Consultation* can be found in Annexe C.

Data use statement for responses

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. All information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may choose to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

Please note that Information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000 (FOIA). In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

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1 INTRODUCTION TO THE CONSULTATION

- 1.1 In accordance with its function of giving information to the public set out at section 4 of the Consumer Credit Act 1974 (the Act), the OFT is publishing this guidance to business (with a simplified version for consumers), on the rights and obligations of creditors and debtors where requests for information are made under section 77(1) of the Act (in relation to fixed-sum credit agreements), section 78(1) (in relations to running-account credit agreements) and section 79(1) (in relation to hire agreements).
- 1.2 The OFT's decision to issue guidance at this time has primarily resulted from our concerns that debtors are being misled as to the meaning and impact of sections 77 to 79 and that some creditors appear not to understand the nature and extent of their obligations under these sections.
- 1.3 It is important to remember that the purpose of these sections is to provide information to the consumer, not to provide a method for consumers to avoid paying their debts. The OFT's view is confirmed by the recent decision in *Carey v HSBC Bank plc* [2009] EWHC 3417 (QB) that the requirement to provide information is not to establish whether or not there was a properly executed agreement in the first place. This approach informs the proper construction of the legislation.
- 1.4 The judgment in *Carey* gave important guidance on a number of aspects of compliance with information requests and these have been incorporated into the guidance.
- 1.5 The clarification of the legal position in *Carey* is a very helpful and important development, however the OFT's assessment of a person's fitness to hold a licence under the Act will take into account not only their compliance with the strict letter of their legal obligations as defined by the Courts but also any evidence of unfair or improper business

practices, whether unlawful or not.¹ This guidance therefore also constitutes the OFT's views on standards we expect of businesses when dealing with debtors and hirers in relation to requests for information under these sections.

- 1.6 The guidance is drafted in two parts – first the technical guidance aimed at clarifying the issues for industry and for consumer representatives; secondly a plain English version aimed at simplifying these complex matters for consumers who may be contemplating using the relevant sections of the Act. It is also intended that this consumer version of the guidance would be available to industry to send to debtors when responding to section 77/78/79 requests.
- 1.7 The OFT is consulting on both parts of the guidance in order to hear all relevant parties' views on the content and clarity. We are particularly interested to receive comments on the OFT's views of the unfair business practices associated with enforcement of agreements when sections 77/78/79 have not been complied with, and to hear views on whether the consumer version is clear and helpful for debtors or hirers themselves to be able to understand the extent and limits of their rights under these sections.

¹ As per section 25 CCA74, 'the fitness test'

**PART 1 - THE TECHNICAL GUIDANCE
ON SECTIONS 77/78/79 OF THE ACT**

1 INTRODUCTION

- 1.8 This guidance note, published pursuant to Section 4 of the Consumer Credit Act 1974 ('the Act'), provides guidance to businesses in relation to their duties (under regulated consumer credit and consumer hire agreements) to give debtors and hirers copy documents and statements of account on request under Sections 77(1), 78(1) and 79(1) of the Act.² The Act refers to the duty of the creditor and owner under these sections as being one to give information and this guidance will refer to requests made under these sections as 'information requests'.
- 1.9 The sanction under the Act for non-compliance with an information request is unenforceability of the credit or hire agreement for so long as the creditor or owner fails to comply with his duty.³ Where there is such a failure, the courts have no discretion to allow enforcement.
- 1.10 For a variety of reasons, there has been a substantial increase in consumer requests under these sections. Unfortunately, consumers have often been given an exaggerated expectation of what the creditor or owner must do in order to comply with an information request, as a result of misleading claims by claims management companies and inaccurate information on the internet. At the same time, however, a number of creditors appear not to understand their obligations under the sections. As a result, numerous disputes have been generated over whether a request has properly been made, whether the duties have been complied with and whether as a consequence the agreement can

² Similar provisions apply to requests by sureties under consumer credit and consumer hire agreements (see sections 107 to 109 of the Act). Since these provisions mirror sections 77(1), 78(1) and 79(1), they are not dealt with separately in this guidance.

³ A declaration under section 142(1) of the Act (with the consequent application of section 106 (rendering securities ineffective) is not available, as section 142(1) does not apply to unenforceability consequent upon sections 77(1), 78(1) and 79(1). The criminal offences for non-compliance under section 77(4)(b), 78(6)(b) and 79(3)(b) have been repealed by the Consumer Protection from Unfair Trading Regulations 2008. For potential sanctions that may arise under separate legislation, see Part 5 of this guidance (Sanctions for Non-compliance).

be enforced. Given the high level of information requests that are currently being made, the OFT considers that it is helpful that guidance should be given so that businesses can understand what steps they should take to comply with their obligations under the Act. This guidance is intended to clarify the position so that unnecessary disputes can be avoided.

- 1.11 Exactly what are the consequences if an agreement is unenforceable is a wider issue that arises not only in relation to these sections, but in relation to other sections of the Act. The exact meaning and full scope of enforcement is not defined in the Act.⁴ Guidance on the consequences of an agreement being unenforceable as a result of a non-compliance with an information request is given in Part 5 below, but this guidance note will be reviewed in the light of any further clarification of the consequences of an agreement being unenforceable that may result from future cases.
- 1.12 Further, in so far as creditors, debt collectors and owners of hired goods are required by the Act to hold a licence issued by the OFT, their fitness to hold such a licence will take into consideration their compliance not only with their legal obligations but also any evidence of unfair or improper business practices, whether unlawful or not. The OFT takes into account the general integrity and specific competence in the field of the relevant regulated business of the trader and of its employees and of its associates, which includes business associates. It should be remembered that where the OFT considers that the business is engaged in high risk credit activities, a higher level of regulatory scrutiny will be applied.
- 1.13 This guidance therefore also constitutes the OFT's views on standards to be expected when dealing with debtors and hirers in relation to requests

⁴ Whether certain specific activities amount to enforcement was considered in the High Court case of *McGuffick –v- The Royal Bank of Scotland plc* [2009] EWHC 2386 (Comm).

for information under these sections. The OFT will consider taking action under the licensing provisions of the Act⁵ where it becomes aware of evidence that businesses are not adhering to this guidance.

- 1.14 When giving this guidance, the OFT has borne in mind that the purpose of the sections is to provide the debtor or hirer with the relevant information about his or her contract, in particular the contract terms and the current state of the account. Parliament appears to have recognised that consumers may lose documentation, or may not keep clear records of payments, and may be unable to ascertain accurately what their contractual rights and obligations are or how much has been paid and what is still owed. This is particularly important if there is a dispute over what is owed, or an alleged default. In those cases, preventing a creditor or owner from enforcing the contract until clarification is provided is an important and reasonable protection for the consumer.
- 1.15 At the same time, it is important to remember that the purpose of these sections is to provide information to the consumer, not to provide a method for consumers to avoid paying their debts. Unenforceability is merely the sanction where there is a failure to provide the information. The OFT takes the view that the sections should be read in a way that allows the consumer to obtain the information he or she needs in order to be properly informed without imposing unnecessary burden on business. The OFT's view is confirmed by the recent decision in *Carey v HSBC Bank plc* [2009] EWHC 3417 (QB) that the requirement to provide information under section 78 is not to establish whether or not there was a properly executed agreement in the first place and that, given the small fee and short timescale, the copy should be relatively straightforward and cheap to create.

⁵ The OFT will also consider taking action under other consumer protection legislation if appropriate, including the Consumer Protection from Unfair Trading Regulations 2008.

1.16 The judgment in *Carey* gave important guidance on a number of aspects of compliance with information requests and these have been incorporated into the guidance.

2 THE DUTY TO GIVE THE DEBTOR OR HIRER A COPY OF THE AGREEMENT AND OTHER DOCUMENTS

- 2.1 Section 77(1) of the Act deals with fixed-sum credit agreements. It provides that the creditor under a regulated agreement for fixed-sum credit 'within the prescribed period after receiving a request in writing to that effect from the debtor and the payment of a fee of £1, shall give the debtor a copy of the executed agreement (if any) and of any other document referred to in it'. Under Section 78(1), an identical duty applies in respect of running-account credit agreements.
- 2.2 In relation to hire agreements under section 79(1), the wording is also identical but for the omission of the words 'if any'. The OFT does not consider that this omission makes any difference of substance to the duty.
- 2.3 This duty raises a number of detailed points, which are dealt with below.

The creditor or owner

- 2.4 For there to be a valid request, it must be made to the 'creditor' or the 'owner', and it is on the 'creditor' or the 'owner' that the duty to comply with the request lies. The definition of these terms is to be found in section 189(1) of the Act. It clearly includes the creditor or owner who enters into the agreement and also anyone to whom the rights and duties under that agreement have passed by operation of law. In the OFT's view, where there has been a novation (that is, the debtor or hirer has agreed that a new party will be substituted as creditor or owner for all purposes under the agreement) the new party is the creditor or the owner. It is further the OFT's view that, giving the definition of the terms a purposive construction and one which is most likely to assist the consumer, the 'creditor' or 'owner' includes an assignee of only the rights under the contract. Thus, the OFT considers that the 'creditor' in sections 77 and 78 and the 'owner' in section 79 includes a person who has merely bought the debts under the agreement. The OFT is however aware that the point has yet to be decided by the higher courts.

- 2.5 In any event, the OFT considers that it is an unfair business practice to seek to take advantage of any confusion, ignorance or difficulty on the part of the debtor as to whom he or she should send an information request where there has been a sale of the debt. The debtor has asked for information and if the recipient considers that another person is the creditor or owner, the recipient should either inform the debtor or hirer of who it considers is the correct recipient or pass the request on to that person for it to be dealt with by them. In that way the consumer can be assured that any request will be made or will have been made to someone who is prepared to accept responsibility for responding to it.
- 2.6 As the purpose of the sections is to provide the consumer with information, the OFT considers that, where there has been an assignment of the debt, it is good practice for assignee and assignor to ensure that their contractual arrangements allow for each of them to appropriately respond to information requests. Although the OFT would normally expect the primary responsibility for providing the requested information to rest with the assignee (which has become the creditor by virtue of the assignment), given that in commercial agreements for the sale of debts there is often a 'put-back' clause under which unrecovered debts for example may be returned to the assignor, it will usually be in both parties' interests to ensure that the agreement is enforceable. Thus, as well as assignees ensuring that they are able to obtain from the assignor copies of agreements and documents and historical information on the account, the original creditor should also ensure that, if necessary and appropriate, it is able to readily obtain from assignees any necessary information on the most recent state of the account.
- 2.7 The OFT considers that failure to arrange matters in any contract of assignment so as to ensure that information requests can be properly answered is not an answer to criticism by the OFT for non-compliance with requests. It should also be remembered by businesses that if, rather than providing the information requested, the response to a request is merely to place the obligation of responding onto a third party, there is a risk that that third party will not respond adequately or at all and the agreement may be unenforceable as a consequence.

A request from the debtor or hirer

- 2.8 Commonly, the request for information is not made directly by the debtor or hirer but by someone acting on their behalf. This may be a friend or relation, a solicitor or a claims management company. In the OFT's view, such a request is still one 'from' the debtor or hirer. Under the Data Protection Act 1998 and the Data Protection Principles, the creditor or owner is not allowed to reveal such information to a third party without the authority of the debtor or hirer. It should therefore satisfy itself that the writer of the request has proper authority to obtain the information. If a copy of such authority is not enclosed with the request, the creditor is entitled to reply by asking to see the authority.
- 2.9 Where there are two or more debtors or hirers and the request comes from one only, it must be nevertheless complied with, and the response must be given to both (or all) debtors or hirers.⁶

The fee of £1

- 2.10 The fee is set at £1 by the Consumer Credit (Further Increase of Monetary Amounts) Order 1998 [SI 1998/997]. Even though this fee may be inadequate to cover the administrative costs of responding, the creditor or owner is not entitled to ask for more than the fee in order to comply with the information request.

Give the copy to the debtor or hirer

- 2.11 'Give' is defined by section 189(1) of the Act as 'deliver or send by an appropriate method'. The method may have been pre-agreed in the agreement. The OFT considers that, since the fee is only £1, sending a copy of the documents by ordinary second class post would satisfy this requirement. The address to which the response is sent should normally be the address given in the request.

⁶ See section 185(1) of the Act. The dispensing power under section 185(2), allowing statements to be given to one debtor or hirer only, does not apply.

- 2.12 It is wise to retain some record of posting to avoid future disputes as to whether the request was responded to in time or at all.
- 2.13 The OFT is aware that some creditors refuse to deal with claims management companies which do not hold a licence under the Act and which would be committing an offence if the request under these sections was made as part of an unlicensed debt adjusting or credit information business. Where a request is received from a debtor or hirer through such an unlicensed business (or, similarly, through a claims management business which should be authorised as such by the Ministry of Justice but is not), it should nevertheless be responded to as it is a request by the debtor or hirer. However, a response sent directly to the debtor or hirer is acceptable. Under such circumstances, the OFT would expect the creditor to inform the debtor/hirer why the information is being sent to him directly and to notify the OFT and Ministry of Justice that it has been approached by an unlicensed business.

The prescribed period

- 2.14 The period within which the duty must be complied with is 12 working days after the request is received. This is set by the Consumer Credit (Prescribed Period for Giving Information) Regulations 1983 [SI 1983/1569]. Since the period of 12 working days runs from 'after' the receipt of the request, when calculating the period the day the request is received is not included. However, the information must be given 'within' the period, so that the calculation of the period will include the day the information is sent.
- 2.15 By section 189(1) of the Act, 'working day' means any day other than a Saturday or a Sunday, Christmas Day or Good Friday or a bank holiday.

A copy of the executed agreement

- 2.16 The meaning of 'copy' is dealt with in section 180 of the Act and in the regulations made under that section, the Consumer Credit (Cancellation Notices and Copies of Documents) Regulations 1983 ('the Copies of Documents Regulations').

- 2.17 The copy of the executed agreement must be a 'true copy' of the original. However, as confirmed in the recent case of *Carey v HSBC Bank plc*,⁷ the term 'true copy' does not mean a carbon, photocopy, microfiche copy or other exact copy of the signed credit agreement.
- 2.18 Further, section 180(1)(b) and regulation 3(2) of the Copies of Documents Regulations expressly allow certain matters to be omitted from the copy. There may be excluded from the copy of the executed agreement to be provided under these sections:
- any information relating to the debtor, hirer or surety, or information included for the use of the hirer or creditor only, which is not required to be included by the Act or any regulations made under the Act as to the form and content of the agreement
 - any signature box, signature or date of signature
 - in the case of pawn agreements, any description of the article taken in pawn.
- 2.19 Often consumers and their advisors assume that if a signed copy is not provided by the creditor or owner, this necessarily means that the agreement cannot be enforced: either on the basis that section 77(1), 78(1) or 79(1) (as the case may be) has not been complied with, or in reliance on section 127(3) (in the case of agreements to which that subsection still applies). This overlooks the fact that there is no obligation on an information request to provide a copy which includes a copy of the signature. It also overlooks the fact that section 127(3) does not apply merely because a signed document is not available at the court hearing; the section requires that a document containing the prescribed terms 'was' signed by the debtor or hirer. The creditor or owner may be able to provide evidence that its practice was always to require a signature to its agreements and that its agreements always complied

⁷ [2009] EWHC 3417 (QB).

with section 61(1)(a) of the Act and the debtor or hirer may be unable to satisfy the court that he or she did not sign an agreement.

- 2.20 The creditor or owner may not have preserved a copy of the executed agreement. Since the requirement is not to provide an exact copy, let alone a carbon, photocopy or microfiche copy, it can reconstitute a copy. It can do this, for example, by re-populating a template of the relevant agreement form with the details of the specific agreement taken from its records, a method approved in *Carey v HSBC Bank plc*.⁸ This will provide the information that the debtor or hirer may require as to the terms of the agreement. If the creditor or owner does provide a reconstituted copy, it should explain that that is what it has done, to avoid misleading the consumer that this is a contemporaneous copy. It can explain that this procedure is satisfactory under the Act.
- 2.21 However, the reconstituted copy must be a 'true copy' of the executed agreement. It must therefore contain any terms and conditions which were contained in the original, together with all the prescribed information and statements of protection and remedies required by the Consumer Credit (Agreements) Regulations 1983 that were set out in the executed agreement. The creditor or owner must ensure that it gives the terms and conditions applicable at the time the contract was executed. It was held in *Carey v HSBC Bank plc*⁹ that, subject to spelling mistakes and similar discrepancies (described as 'low level omissions'), only those matters listed in regulation 3(2) could be omitted. The name and address at the time of execution must therefore be included, although, as *Carey* explains, that can be taken from any source available to the creditor or owner.¹⁰

⁸ [2009] EWHC 3417 (QB), at paragraph 53(12).

⁹ [2009] EWHC 3417 (QB) at paragraph 60(4).

¹⁰ [2009] EWHC 3417 (QB) at paragraph 61.

2.22 Where the agreement was executed before 19 May 1985 and due to an accident or some other reason beyond its control, the creditor or owner does not have in its possession the executed agreement or any copy of it, the copy to be given may comprise an easily legible statement of the current terms of the agreement insofar as they are known to the creditor or owner.¹¹

'If any'

2.23 Some creditors rely on the words 'if any' in sections 77(1) and 78(1) to say that the obligation to provide a copy only extends to the situation where an extant copy actually exists. Thus if the creditor has not preserved a copy, no copy need be provided. The relevant words are 'shall give the debtor a copy of the executed agreement (if any) and of any other document referred to in it'. While recognising the possibility of such a construction, the OFT considers that the words 'if any' refer to whether there was an executed agreement in the first place. An executed agreement is defined as 'a document, signed by or on behalf of the parties embodying the terms of a regulated agreement, or such of them as have been reduced to writing'.¹³ The words 'if any' therefore merely reinforce the fact that, if there has never been an executed agreement, then no copy can be produced.

2.24 The OFT's view is not only consistent with the approach that a reconstructed copy can be provided, it also means the owners under hire agreements are not under a more onerous duty than creditors. The words 'if any' do not appear in section 79(1) and therefore it would not be open to owners to argue that, if no copy of the executed agreement has been preserved, they are released from any obligation to provide a copy to the hirer. There would not appear to be any policy reason to

¹¹ Regulation 9 of the Copies of Documents Regulations.

¹³ Section 189(1) of the Act.

support such a distinction. In the case of both creditors and owners, therefore, the duty to provide a copy exists whenever there was originally an executed agreement and whether or not a copy has been preserved.

- 2.25 In a case where there never was an executed agreement, unenforceability would not arise as a result of non-compliance with a request under sections 77(1), 78(1) or 79(1), but the absence of such a document may mean¹⁴ that, by reason of sections 61 and 65(1) of the Act, the agreement is unenforceable without an order of the court, and, if section 127(3) applies,¹⁵ may be wholly unenforceable.
- 2.26 If the creditor or owner is aware that there was never an executed agreement and one was required, it would be misleading and an unfair business practice to try and conceal that fact, either by suggesting that the agreement cannot now be found or by creating a copy agreement purporting to be a true copy. If the reason why no copy is given to a request under these sections is that there never was an executed agreement, the creditor or owner should acknowledge this in its response.

Where there has been a variation of the terms and conditions of the agreement

- 2.27 Where an agreement has been varied in accordance with section 82(1) of the Act, the OFT considers that, by virtue of Regulation 7 of the Copies of Documents Regulations, the duty is to provide not only a copy of the agreement as originally executed but also either

¹⁴ There are cases where no executed agreement is required by the Act, for example, certain bank overdrafts.

¹⁵ Section 127(3) continues to apply to agreements made before 6 April 2007.

- a copy of the latest variation given in accordance with section 82(1) of the Act relating to each discrete term of the agreement which has been varied, or
- a clear statement of the terms of the agreement as varied in accordance with section 82(1) of the Act.

2.28 Although some creditors have apparently considered it is sufficient to provide a copy of the current terms and conditions (that is, 'a statement of the terms of the agreement as varied'), that does not comply with the requirements of Regulation 7. In *Carey v HSBC Bank plc*¹⁶ there was detailed analysis of this issue and it was confirmed that 'include' meant that the documents showing the variations were to be supplied **in addition to** a copy of the original agreement.

Legibility of any copy

2.29 Any copy must be easily legible, as must any copy of notices of variation or statement of the terms of the agreement as varied.¹⁷ If the creditor or owner has a poor quality photocopy or microfiche, it should retype it or repopulate a template of the relevant agreement form with the details of the specific agreement, so that the copy sent can be easily read.

2.30 In these circumstances, it would be advisable to send a copy of the photocopy or microfiche as well: although not strictly required, it may assist in avoiding disputes.

Any other document referred to in the executed agreement

2.31 As well as a copy of the executed agreement, sections 77(1), 78(1) and 79(1) require that a copy of any document referred to in it be given to

¹⁶ [2009] EWHC 3417 (QB) at paragraphs 77 and 78.

¹⁷ Regulations 2 and 7 of the Copies of Documents Regulations.

the debtor or hirer. Commonly terms and conditions are contained in a separate document to the executed agreement and that document is incorporated by reference.¹⁸

2.32 The reference must be to a 'document'. Reference to a transaction which may or may not be in documentary form does not trigger an obligation to give a copy of any document that may evidence or contain the transaction. For example, a mere reference in contract terms and conditions to an 'agreement' is not, without more, a reference to a document.

2.33 Even if the following documents are referred to in the executed agreement, copies do not have to be given to the debtor or hirer:¹⁹

- a document obtained by the debtor or hirer from a person other than the creditor or owner and supplied by the debtor or hirer to the creditor or owner
- in the case of an agreement of the description specified in the Schedule to the Consumer Credit (Notices of Cancellation Rights) (Exemptions) Regulations 1983 and terms of which are contained in a catalogue which is at all reasonable times during the agreement readily available for inspection by the debtor, a copy of the catalogue in question
- a document, not being a security, which constitutes, evidences or relates to title to property of any kind or relates to the rights or duties of the debtor or hirer in respect of such property
- a document kept, or to be kept, by the debtor or hirer under the terms of, or in consequence of, the agreement

¹⁸ By section 61(1)(b) of the Act, the executed agreement must 'embody' all the express terms of the agreement, and section 189(4) provides that a document embodies a provision if the provision is set out in the document itself 'or in another document referred to in it'.

¹⁹ Regulation 11 of the Copies of Documents Regulations 1983.

- an official or certified copy of any entry in a register maintained by, or on behalf of, a government department or other body charged with a public administrative or statutory function and open to public inspection (whether in the United Kingdom or elsewhere)
- an enactment, other than Schedule 3 to the Conveyancing and Feudal Reform (Scotland) Act 1970
- a document, other than an enactment, published by, or on behalf of, a government department or other body charged with a public administrative or statutory function (whether in the United Kingdom or elsewhere)
- where the regulated agreement is secured on land, any document referred to in the executed agreement where the debtor or hirer has earlier been supplied with a copy of that document in an identical form by virtue of any requirement of the Act.

3 DUTY TO GIVE STATEMENTS OF ACCOUNT

General

- 3.1 Together with the copy documents dealt with above, the creditor or owner is obliged to give the debtor or hirer a statement of account. The form of that statement differs depending on whether the agreement is a fixed-sum credit agreement, a running-account credit agreement or a hire agreement.
- 3.2 In all cases, the statement is to be prepared only according to the information to which it is 'practicable' for the creditor or owner to refer. This means practicable at the time of the request and in the OFT's view includes information which can be obtained from third parties. Information may not be available because of earlier failure to take proper steps to preserve information or, if the debt has been assigned, as a result of making insufficient provision in the contract of assignment to ensure the information will be available in order to respond to a request. While this may mean that it is not practicable to refer to the information for the purposes of these sections, it may constitute an unfair business practice not to take steps to ensure that information is preserved and kept available to be used to give information to the consumer.
- 3.3 The statement must be signed by or on behalf of the creditor or owner.
- 3.4 By section 172(1) of the Act, a statement provided under sections 77(1), 78(1), 79(1) is binding on the creditor or owner. By virtue of section 113(1), a surety will also be able to rely on the binding nature of the statement as between the creditor or owner and the debtor or hirer. However, if in court proceedings it is sought to rely on the statement and the statement is shown to be incorrect, the court may direct such relief (if any) is given to the creditor or owner from the operation of section 172(1) as appears to be just.²⁰

²⁰ Section 172(3) of the Act.

- 3.5 If a default sum²¹ is payable, the statement may incorporate the notice of the default sum that is required under section 86E of the Act.²² Equally, if post-judgment interest is payable under the agreement, the statement may incorporate the notice that is required under section 130A.
- 3.6 The OFT considers that, so long as the creditor or owner provides a statement representing the state of the account as held by it, there will be compliance and the agreement will remain enforceable even if the account turns out to be inaccurate as judged against the terms of the agreement. The purpose of the obligation is to allow the debtor to understand what the creditor is stating is owed, a statement which the debtor can challenge, rather than requiring that the creditor or owner must provide a correct statement of the debt in fact due under the contract if the duty under these sections is to be satisfied. This is supported by the fact that the sections only require that the statement is made according to the information to which it is practicable for the creditor or owner to refer. Further, section 172(1) provides that a statement given under section 77 to 79 is binding on the creditor or owner. This provision would appear to be unnecessary if the duty under these sections required a statement correctly stating the amount contractually due, as opposed to a statement of what the creditor or owner considers is due. Section 172(3) provides that where in court proceedings it is sought to rely upon a statement so given and the statement is shown to be incorrect, the court may direct such relief (if any) to be given to the creditor from the operation of section 172(1) as appears to the court to be just. If the agreement is unenforceable unless the statement was correct, this provision would also appear to be unnecessary.

²¹ See section 187A of the Act.

²² Section 86E(3) of the Act.

Fixed-sum agreements

3.7 The statement must contain

- the total sum paid under the agreement by the debtor
- the total sum which has become payable under the agreement by the debtor, but which remains unpaid, and the various amounts comprised in that total sum, with the date when each became due
- the total sum which is to become payable under the agreement by the debtor, and the various amounts comprised in that total sum, with the date, or mode of determining the date, when each becomes due. If the creditor possesses insufficient information to enable it to ascertain these amounts and dates, it is sufficient if the statement gives the basis on which, under the agreement, they would fall to be ascertained. For example, this will cover variable charges based on an index.

Running-account agreements

3.8 The statement must show the state of the account and in addition must show

- the amount if any, currently payable under the agreement by the debtor to the creditor (this would not therefore include payments payable to third parties), and
- the amounts and due dates of any payments which, if the debtor does not draw further on the account, will later become payable under the agreement by the debtor to the creditor. If the creditor possesses insufficient information to enable it to ascertain these amounts and dates, it is sufficient if the statement gives the basis on which, under the agreement, they would fall to be ascertained. For example, this will cover variable charges based on an index.

Hire agreements

- 3.9 The statement must show the total sum which has become payable under the agreement by the hirer but remains unpaid, the various amounts comprised in that total sum and the date when each became due. The statement will therefore be a breakdown of any arrears.

4 WHEN THE DUTY DOES NOT APPLY

4.1 Sections 77 to 79 set out a limited number of situations where the duty to supply copies and statements does not apply.

- It does not apply to an agreement under which no sum is, or will or may become payable by the debtor or hirer. It will therefore not apply where the agreement has been paid off and terminated. It will also not apply where judgment has been obtained, unless there is an interest-after-judgment clause in the agreement which the creditor or owner has not expressly waived. Where, however, the agreement has merely been terminated, but monies are or will or may be payable under it by the debtor or hirer, the OFT considers that the duty will still apply.²³
- It does not apply when the request is made less than one month after a previous request relating to the same agreement, (regardless of whether the request was made by the debtor themselves or by someone else on their behalf).
- It does not apply where the agreement is a non-commercial agreement (that is, an agreement not made by the creditor or owner in the course of a business carried on by it.)

4.2 It should be noted that, while the obligation under section 78(4) to provide periodic statements in relation to running-account credit agreements does not apply to small agreements, no such exclusion applies in relation to the provision of copies and statements on a request under section 78(1).

²³ In *Rankine –v- American Express Services Europe Ltd* [2008] GCCR 7701 it was held that the prohibition on enforcement in section 78(6) did not apply to an agreement that 'was at an end'. However the finding was obiter as the Judge held there had been compliance with the section in any event. The question whether the duty to provide copies and statements where the agreement has been terminated but under which monies nevertheless are, will or may be payable was not an issue in that case.

5 SANCTIONS FOR NON-COMPLIANCE

- 5.1 If the creditor or owner fails to comply with the duty under section 77(1), 78(1) or 79(1), it is not entitled, while the failure to comply continues, to enforce the agreement.²⁴
- 5.2 In a recent judgment,²⁵ the Commercial Court held, in a case under section 77 of the Act, that passing details of a debt to a credit reference agency and related activities do not constitute enforcement. It also held that steps taken with a view to enforcement, including demanding payment from a claimant, issuing a default notice, threatening legal action and the actual bringing of proceedings, are not themselves 'enforcement'. On the other hand it confirmed that obtaining judgment against the debtor was enforcement, as were the actions listed under sections 76(1) and 87(1),²⁶ notwithstanding that some of the actions 'less obviously' amounted to enforcement. These actions are demanding earlier payment, recovering possession of goods or land, treating any right conferred on the debtor by the agreement as terminated, restricted or deferred, enforcing any security and terminating the agreement.
- 5.3 In drawing a distinction between actions which were and were not enforcement, no definition of enforcement was given the court, but it would appear that it was distinguishing between actions based on the exercise of contractual rights (which would be enforcement) and other actions intended to obtain payment which did not involve the exercise of a contractual right.

²⁴ Sections 77(4), 78(6) and 79(3). A declaration under section 142(1) of the Act (with the consequent application of section 106 (rendering securities ineffective) is not available, as section 142(1) does not apply to unenforceability consequent upon sections 77(1), 78(1) and 79(1).

²⁵ *McGuffick –v- The Royal Bank of Scotland plc* [2009] EWHC 2386 (Comm)

²⁶ Paragraph 74 of the judgment.

- 5.4 However, the OFT considers that in taking any such steps, a creditor should in no way, either by act or omission, mislead a debtor as to the enforceability of the agreement. To do so would be an unfair or improper business practice and would be highly relevant to a creditor's or owner's fitness to hold a licence under the Act. It may also be an unfair commercial practice under the Consumer Protection from Unfair Commercial Practices Regulations 2008 and attract enforcement proceedings under the Enterprise Act 2002. An obvious example of this would be threatening court proceedings when aware that a judgment could not be obtained because sections 77/78/79 cannot be complied with.
- 5.5 The principles of enforcement action in this area are judged by the OFT to be similar to those applying to statute barred debt. If sections 77/78/79 cannot be complied with so the debt cannot be enforced in the courts, this does not mean that the debt disappears, and it is perfectly acceptable for a creditor to seek to pursue the debt, and to register any arrears or default with a credit reference agency, but if they were to threaten court action, knowing that such action is not possible and that therefore court action will not actually be taken, this would be judged by the OFT to be misleading and oppressive.
- 5.6 In particular, the OFT's guidance to creditors or owners on this issue is as follows:
- Where an agreement is unenforceable because of non-compliance with an information request under sections 77-79, the OFT would firstly expect the creditor or owner to take steps to check that there was in fact an agreement with the debtor or hirer, and in particular whether there are in fact monies outstanding under it, and if so for how much. This should be capable of being demonstrated to the debtor or hirer.
 - Secondly, no communications or requests for payment should in any way threaten court action or other enforcement of the debt where the creditor or owner is aware that it cannot or will not be entitled so to enforce the agreement.

- Thirdly, the creditor or owner should make it clear in communications to the debtor that the debt is in fact unenforceable. Failure to do so, where the creditor or owner is aware of unenforceability, would in our view unfairly mislead the debtor by omission.²⁷
- 5.7 However, where a creditor or owner has satisfied itself that a debt does exist and is correctly described, the OFT's view is that it is acting fairly in registering a default with credit reference agencies and in informing the debtor or hirer that it intends to do so. The debtor or hirer should not be told this is the intention unless it is actually intended to register the debt with a credit reference agency.
- 5.8 As indicated above, unfair or improper business practices may form the basis for action by OFT under the Act including by licensing action or the imposition of formal requirements. In addition, to mislead debtors into making payment may in certain circumstances amount to an unfair commercial practice under the Consumer Protection from Unfair Trading Regulations 2008.
- 5.9 Finally, while non-compliance with an information request is no longer a criminal offence,²⁸ non-compliance with an information request remains a 'domestic infringement' under the Enterprise Act 2002, and enforcement

²⁷In *McGuffick*, the bank, knowing that, since it had not complied with section 77, it could not enforce payment of the loan, when writing to the debtor made it clear that it would not be able to enforce the loan, although they still thought he should pay since the contract was not void. It also made it clear that any continuing default would be reported to credit reference agencies.

²⁸ The criminal offences for non-compliance no longer apply as sections 77(4)(b), 78(6)(b) and 79(3)(b) have been repealed by the Consumer Protection from Unfair Trading Regulations 2008.

proceedings could be issued under that Act²⁹ if considered appropriate to do so taking account of the conduct of the creditor or owner.

CONSULTATION QUESTIONS

- Q1 Are the draft technical guidelines sufficiently clear?**
- Q2 Are there any substantive aspects of the draft guidelines with which you disagree?**
- Q3 Are there any significant omissions?**
- Q4 Do you have any other suggestions for improvement to this section?**

²⁹ By section 170(3), injunctive relief is available in respect of a breach of a requirement of the Act notwithstanding that section 170(1) states that such a breach shall incur no separate civil sanction.

PART 2 – THE PLAIN ENGLISH CONSUMER GUIDANCE

Need information about your credit or hire agreement?

Your consumer credit and consumer hire rights explained

Under the Consumer Credit Act 1974 you have the right to request certain information about your credit or hire agreement, from the lender or owner, for a fee of £1.

If you do want this information about your agreement, including terms and conditions and an account statement, you can request this from the lender (or owner, in the case of hire agreements). To do this you must apply in writing and pay the fee.

What information can you request and what should you expect to receive?

You can ask for a copy of your original contract and for information on the current state of your account. You can ask for this whether you have a fixed term loan, a running account loan such as a credit card, or a hire agreement.

The lender needs to provide you with an accurate *copy* of your contract. The copy they send you does not have to be the original document, or a photocopy of the one that you signed, and it can be recreated by the lender, but it should

- show you the original terms and conditions and any later variations
- contain all the information and statements of protection and remedies required by the Consumer Credit Act 1974
- be easy to read.

The lender should also give you a copy of any documents that are referred to in your agreement.

If you ask for details of the state of your account the lender must also provide this to you. Your statement must include the

- total amount that you have paid

- amount that you owe
- separate amounts that make up the total of what you owe and when each payment is due.

What if the lender does not comply with the request?

Your lender must provide you with the information within 12 working days of receiving your request. After the 12 days are up, if the lender has not provided the information then the agreement is unenforceable until they do provide the information.

'Unenforceable' does **not** mean that your debt is wiped out. Any outstanding debt is still owed, but there are some consequences for the lender's ability to enforce the debt.

If you do not make payments when your debt is 'unenforceable' it means that:

- Your lender **cannot**
 - demand earlier payments of your debt
 - threaten court action
 - take possession of anything that you bought on credit, or which you used as security when you took out the agreement.
- Your lender **can**
 - request payment from you
 - issue a default notice
 - pass details of your default to a credit reference agency

- pass your information onto a debt collector

Other things you need to know

- If your lender does have to recreate the agreement for you, for example if they fill in an application template with the specific details of your agreement, they must tell you that the copy they have sent you has been created this way.
- If your agreement was created before 19 May 1985 or the lender can't provide you with a copy due to uncontrollable factors, they can provide you with a copy of what they think are the current terms of your agreement. If they do this they should tell you.
- If your debt has been sold on to another business the lender should either tell you who to contact or advise the business that purchased the debt of your request.
- The lender does not have to provide you with copies of the documents if you have already paid off the debt.
- The lender does not have to provide you with documents if you are asking for information that you asked for less than one month before.
- Your lender can't ask you for more than a £1 to provide you with the information you request.

If you are facing difficulties with your debts

Do not be misled into thinking that information requests are a way to make your debts go away. If you are having debt problems seek independent financial advice. For more help and advice you can contact the following not-for-profit organisations for free, confidential and impartial advice, or for details of where to get advice in your area:

- **Citizens Advice**

For advice and information on debt and other topics, visit your local Citizens Advice Bureau (address in the phone book) or go to www.adviceguide.org.uk (England and Wales), www.cas.org.uk (Scotland) or www.citizensadvice.co.uk (Northern Ireland).

- **National Debtline**
If you live in **England, Wales or Scotland** phone **0808 808 4000** or visit www.nationaldebtline.co.uk for debt advice and information.
- **Advice4DebtNI**
If you live in **Northern Ireland** phone **0800 917 4607** or visit www.advice4debtNI.com for debt advice.
- **Money Advice Scotland**
If you live in **Scotland**, phone **0141 572 0237** or visit www.moneyadvicescotland.org.uk to find contact details for debt advice in your local council area.
- **Consumer Credit Counselling Service**
For debt advice throughout the **UK** phone **0800 138 1111** or visit www.cccs.co.uk
- **Consumer Direct**
For a **list of independent advice agencies**, and information about credit and hire agreements, phone **08454 04 05 06** or visit www.consumerdirect.gov.uk
- **Community Legal Advice**
If you qualify for legal aid phone **0845 345 4 345** for free advice or visit www.communitylegaladvice.org.uk
- **Financial Ombudsman Service**
If you have a complaint that you can't resolve with your lender, the Financial Ombudsman Service may be able to help – phone **0845 080 1800** or visit www.financial-ombudsman.org.uk

CONSULTATION QUESTIONS

- Q5** Are the draft plain English consumer guidelines sufficiently clear?
- Q6** Are there any substantive aspects of the draft guidelines with which you disagree?

Q7 Are there any significant omissions?

Q8 Do you have any other suggestions for improvement to this section?

ANNEXE(S)

A SUMMARY OF QUESTIONS

Q1 Are the draft technical guidelines sufficiently clear?

Q2 Are there any substantive aspects of the draft guidelines with which you disagree?

Q3 Are there any significant omissions?

Q4 Do you have any other suggestions for improvement to this section?

Q5 Are the draft plain English consumer guidelines sufficiently clear?

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Q7 Are there any significant omissions?

Q8 Do you have any other suggestions for improvement to this section?

B LIST OF CONSULTEES

The following organisations and individuals have been consulted. We would welcome suggestions of others who may wish to be involved in this consultation process.

Advice NI

Advice UK

Age Concern

Association of British Credit Unions Ltd

Association of Certified Chartered Accountants – ACCA

Association of Finance Brokers

Association of Independent Financial Advisers

Association of Mortgage Intermediaries

Association of Payment Clearing Services

Lending Code Standards Board

Better Regulation Executive

British Bankers' Association

British Chamber of Commerce

British Cheque Cashers Association

British Retail Consortium

Building Societies Association

Callcredit

Christians Against Poverty

Citizens Advice

Citizens Advice Northern Ireland

Citizens Advice Scotland

Citizens Advice Wales

Community Legal Advice

Confederation of British Industry

Consumer Council for Northern Ireland

Consumer Credit Association

Consumer Credit Counselling Service

Consumer Credit Trade Association

Consumer Finance Association

Consumer Focus

Consumer Focus Scotland

Consumer Focus Wales

Consumer Focus Post (Northern Ireland)

Council of Mortgage Lenders

Credit Action

Credit Services Association

Debt Buyers and Sellers Group

Debt Managers Standards Association

Debt on our Doorstep

Debt Resolution Forum

Department for Business Innovation and Skills (BIS)

Department for Communities and Local Government (DCLG)

Department of Enterprise, Trade and Investment (DETI)

Direct Marketing Association

Direct Selling Association

Enterprise Northern Ireland

Equifax

Experian

Federation of Small Business

Federation of Small Business Scotland

Finance and Leasing Association

Financial Ombudsman Service

Financial Services Authority

Financial Services Consumer Panel

General Consumer Council for Northern Ireland (GCC NI)

Her Majesty's Treasury

Information Commissioners Office

Insolvency Practitioners Association

Insolvency Service

Institute of Chartered Accountants in England and Wales (ICAEW)

Institute of Chartered Accountants in Ireland (ICAI)

Institute of Chartered Accountants in Scotland (ICAS)

Institute of Credit Management

Institute of Directors

Institute of Money Advisers

Joseph Rowntree Foundation

LACORS

Local Better Regulation Office

Ministry of Justice

Money Advice Liaison Group

Money Advice Scotland

Money Advice Trust

MoneySavingExpert.com

National Association of Citizens Advice Bureau (NACAB)

National Consumer Federation

National Debtline

National Federation of Enterprise Agencies

Northern Ireland Association of Citizens Advice Bureaux

National Pawnbrokers Association

Scottish Government

Shelter

Teletrack

The Association of Business Recovery Professionals - R3

The Law Society of England and Wales

The Law Society of Northern Ireland

The Law Society of Scotland

The National Pawnbrokers Association

Trading Standards Institute

UK Cards Association

Welsh Assembly Government

Which?

