DRN-5058787

The complaint

Mr W complains that Capital One (Europe) plc irresponsibly lent to him.

What happened

Mr W was approved for two Capital One credit cards which were opened in November 2008 ('card A') and November 2012 ('card B') respectively, both with an initial limit of £500.

Between January 2009 and July 2014, the credit limit on card A was increased five times until it reached £3,150. I've set out the details in the table below:

Credit limit change	Amount of increase	New credit limit
January 2009	£600	£1,100
July 2010	£300	£1,400
August 2011	£1,000	£2,400
July 2013	£500	£2,900
July 2014	£250	£3,150

The credit limit on card B was increased once:

Credit limit change	Amount of increase	New credit limit
September 2015	£250	£750

Mr W complained to Capital One in July 2023. He said the cards were unaffordable and he was in financial difficulties at the time of the credit limit increases (CLIs). And that this would've been evident from his credit file and bank statements. He asked Capital One to refund all interest and charges associated with the cards, as well as to remove all negative information from his credit file. When Capital One didn't reply to his complaint Mr W referred his complaint to our service.

Capital One later wrote to Mr W to apologise for not being able to respond to his complaint within eight weeks. They said they wouldn't investigate Mr W's complaint about their lending decisions because the complaint was brought outside the time limits set by the regulator, the Financial Conduct Authority (FCA). For this reason, Capital One said they'd not issue a refund or make changes to Mr W's credit file. And Capital One objected to our service investigating the merits of Mr W's complaint.

One of our investigators thought the complaint was brought in time. Capital One then consented to our investigation and provided additional information. Our investigator reviewed the evidence and upheld the complaint in part. She didn't think Capital One had treated Mr W unfairly in granting both cards. And she thought that the first four CLIs on card A and the CLI on card B were affordable. But she thought that proportionate checks would've shown the last CLI on card A wasn't sustainable.

Capital One agreed to pay redress as set out by the investigator, but Mr W didn't accept. He said Capital One didn't conduct appropriate checks when opening the accounts and increasing the credit limits. Had they done so, they'd have realised his income was significantly lower than what their records show. Mr W added that he had other debts at the time of all CLIs and any further borrowing would have been unsustainable. Mr W asked for an ombudsman's decision – and it came to me.

I issued a provisional decision on 18 September 2024 explaining why I was minded to partially uphold Mr W's complaint. I said:

> *"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I'm minded to reach a different conclusion to our investigator. I'll explain why below.*
>
> *In reaching this provisional decision I've considered the relevant law and regulations, any regulatory rules, guidance and standards and codes of practice in place at the time of each lending decision. I think it's helpful to set out that there was a change in regulation in between the cards being taken out and the last increases on each of them. Until April 2014 the relevant guidance was the Office of Fair Trading (OFT) guidance. In April 2014 the FCA became the regulator for consumer credit. I must apply the rules that were in place at the time – I can't hold Capital One to a higher standard than that which applied at the time of Mr W's applications and the subsequent CLIs.*
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> *There are two overarching questions I need to consider in order to decide what's fair and reasonable in all the circumstances of Mr W's complaint. These are:*
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> 1. *Did Capital One complete reasonable and proportionate checks to satisfy themselves that Mr W would be able to repay the credit in a sustainable way?*
>   a. *If so, did Capital One make a fair lending decision?*
>   b. *If not, would reasonable and proportionate checks have shown that Mr W could sustainably repay the borrowing?*
> 2. *Did Capital One act unfairly or unreasonably in some other way?*
>
> *<u>Did Capital One conduct reasonable and proportionate checks – pre-April 2014</u>*
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> *I'll start by considering the pre-April 2014 lending decisions which fall under OFT guidance. This includes Capital One's decision to grant Mr W both cards and CLIs 1 to 4 on card A.*
>
> *The OFT guidance required lenders to undertake "borrower-focussed" checks. In practice this meant that lenders had to take reasonable steps to assess a borrower's likely ability to be able to meet repayments under the credit agreement in a sustainable manner. The OFT regarded 'in a sustainable manner' as meaning credit that can be repaid by the borrower:*
>
> *• Without undue difficulty – in particular without incurring or increasing problem indebtedness*
> *• Over the life of the credit agreement within a reasonable period of time*
> *• Out of income and/or available savings, without having to realise security or assets.*
>
> *Capital One told us that they generally use data from the application form as well as information from Credit Reference Agencies (CRAs) to determine whether to lend to a prospective customer, including any CLI. Due to the time that's passed Capital One*

haven't been able to show what they learned from the credit checks they say they undertook before agreeing to open the accounts, and before CLIs 1 to 4 on card A. That's not unreasonable as lenders aren't required to keep records indefinitely. But it does mean that I can't say whether Capital One's checks before the card opening and CLIs 1 to 4 on card A were reasonable and proportionate.

Capital One were able to send us the applications as well as statements going back to the account opening for both cards. Mr W also sent us information including tax records, bank statements and credit card statements from other lenders. I've used the information provided by both sides to consider what proportionate checks would most likely have shown to determine whether Capital One made fair lending decisions.

What would proportionate checks have shown – pre-April 2014?

Initial card application (card A) – November 2008

Capital One provided us with a copy of the application Mr W completed. This showed Mr W had an annual income of £14,000 and other income of £50,000 although it's not clear what that other income is. Mr W told us he couldn't recall providing the figures on the application form and said his salary was significantly lower. He said he'd only just become self-employed and provided us with a P60 for the tax year 2008/09. This does show an annual income of around £2,000. But I'm mindful here that this wouldn't have been available at the time of Mr W's application. And Capital One weren't required to verify income for every application. Here, the initial credit limit of £500 was modest in relation to Mr W's declared income, so I don't think Capital One needed to ask for proof of income at this stage – they could fairly rely on the information Mr W provided in his application alongside his credit report.

Mr W couldn't provide us with a credit report showing information prior to 2017. But he sent us information he got from another lender as part of a data subject access request. He says this shows he had adverse information on his credit file at the time of his application. I've reviewed the document carefully. It shows a list of closed accounts, including the date they were closed and the worst status. I can see two accounts showing as in arrears as their worst status. Both were closed with a nil balance in the latter half of 2009. While the document shows Mr W was in arrears at some point, it doesn't show when those arrears were recorded. I haven't seen enough to conclude that Mr W was in financial difficulties at the time of his application.

Mr W told us he was living at home at the time and had little to no fixed outgoings. I reviewed the credit card statements Mr W sent us, but it doesn't appear that he had any credit commitments at the time of his application to Capital One. So I'm inclined to say that if Capital One had carried out proportionate checks they'd have been able to fairly conclude the lending was affordable.

First CLI (card A) – January 2009

As only around three months had passed between the initial account opening and Mr W's application, I think it would have been reasonable for Capital One to have assumed Mr W's circumstances hadn't changed significantly since he'd applied for card A. But the proposed increase would bring Mr W's credit limit to £1,100. This was *a much higher proportion of the income Mr W had previously declared so I'd expect Capital One to have undertaken more than just a credit check.*

Mr W said he was living at home with little to no fixed outgoings. I've reviewed his Capital One statements and could see Mr W repaid the card balances in full each month. The payments ranged from around £200 to over £450. I think this would have given Capital One some confidence that Mr W was able to manage his credit limit comfortably. It also appears from the credit card statements Mr W sent me that he'd not opened new lines of credit since November 2008. In summary, I've not seen anything to suggest that Capital One should have reached a different decision had they conducted additional checks, or that their lending decision was unfair.

Second CLI (card A) – July 2009

I haven't seen anything to suggest Capital One asked Mr W about his salary before agreeing the second CLI. So, it's reasonable to assume they relied on his salary remaining at £14,000 in line with his initial application. I reviewed statements Capital One provided to see how Mr W managed his account. I could see he incurred three over limit charges since his last CLI. But he also made his payments regularly and on time, although I'd note that Mr W stopped paying the full balance each month. Although the second CLI was a modest increase of £300, the new proposed limit in relation to Mr W's salary would be at a level where I'd expect Capital One to have undertaken more thorough checks to get a better understanding of Mr W's circumstances before agreeing to increase the credit limit to £1,400.

Mr W sent us his P60 and a tax calculation for the tax year 2009/10. The tax calculation shows Mr W's income was around £6,800 after allowable expenses. It also shows Mr W received around £6,793 in dividends, bringing his total annual income to around £13,593. That equates to a net monthly income of around £942.

Mr W told us he was living at home and that he'd started paying rent of £100 per week and had other committed expenditure of around £70 per month. He sent us credit card statements from other lenders to show he had credit commitments at the time the second CLI was agreed. He owed around £1,151 across two other cards. Mr W had monthly disposable income of around £472 after taking into consideration the rent he paid his parents and his fixed outgoings. This would have been enough to allow Mr W to meet his credit commitments.

Based on what I've seen I'm inclined to say the information Capital One would likely have found had they undertaken proportionate checks would have shown that Mr W could make the required repayments sustainably. For that reason, I don't think Capital One made an unfair lending decision in relation to the second CLI.

Third CLI (card A) – August 2011

The next increase was agreed just over a year later. When reviewing Mr W's Capital One statements I couldn't see any missed or late payments, and the balance remained in the agreed limit. Mr W repaid the balance in full shortly before the third CLI was agreed. So, there was nothing in the way Mr W was managing his account that ought to have given Capital One cause for concern. That said, the proposed new limit of £2,400 was a substantial proportion of the salary Mr W had declared in November 2008. And nearly three years had passed since then. So, I'd expect Capital One to have done more than just check Mr W's credit report.

Mr W sent us a tax calculation for the tax year 2011/12. The tax calculation shows

Mr W's income was around £7,200 and he received £27,203 in dividends, bringing his total annual income to around £34,403. That equates to a net monthly income of around £2,146. Mr W said his living situation hadn't changed since the last CLI. He was living with his parents, paying rent of £100 per week and had around £70 in other outgoings. He sent us credit card statements from other lenders to show he had credit commitments at the time CLI 3 was agreed. These show Mr W owed around £2,919 across three other cards.

So, if Capital One had done proportionate checks, it's likely they'd have estimated Mr W had disposable income of around £1,676 after taking into consideration the rent he paid his parents and his fixed outgoings. This would have been sufficient to allow Mr W to meet his credit commitments. For that reason, I don't think Capital One made an unfair lending decision in relation to the third CLI.

<u>*Initial card application (card B) – November 2012*</u>

Capital One provided us with a copy of the application Mr W completed. This showed Mr W had an annual income of £24,000 and other income of £19,500, although it's not clear what that other income is. He'd moved into rented accommodation with his partner, so his monthly fixed costs had increased to include rent and utilities.

There are signs in the information both parties sent us that indicate Mr W's financial situation had worsened. Mr W's statements from other lenders show he had three rejected direct debits and a late payment on a credit card with a different lender in the twelve months running up to his application. I think it's likely that the late payment would have shown up in Capital One's credit check so they would have been aware of it.

Mr W's overall indebtedness had also increased. He'd taken out a new loan with repayments of around £266 per month and he owed around £4,433 across five credit cards. Capital One had access to the statements for card A, so they could review how Mr W was managing this card. Since the last CLI, Mr W had gone over the agreed limit three times and had three direct debits returned unpaid. He'd incurred fees for this, as well as late payment and over the limit fees. He'd also used the card to take out cash in five of the fifteen months, ranging from £200 to £1,250 per month.

So, I think Capital One ought to have been aware that Mr W was likely struggling financially. I'm currently minded to say Capital One shouldn't have agreed to open card B, and it follows that any CLI on this card should also not have happened.

<u>*Fourth CLI (card A) – July 2013*</u>

The fourth increase on card A was agreed around eight months after card B was opened. I've provisionally decided Capital One shouldn't have agreed to lend further to Mr W in November 2012. But it doesn't automatically follow that Capital One were wrong to increase the limit on card A eight months later – for example, Mr W's circumstances might've changed in the meantime. But I'd have expected more thorough checks before the fourth CLI. As I can't be sure what checks Capital One undertook, I reviewed the information both parties sent me, including the statements for cards A and B. Mr W hadn't incurred further charges on card A, but continued to use it to withdraw cash. He was managing card B well.

Mr W sent us bank statements for April, May and June 2013. I'm not saying Capital One ought to have requested his statements, but in the absence of anything else the bank statements allow me to get a better understanding of Mr W's circumstances at

the time. The bank statements show that in April and May 2013 Mr W was almost consistently overdrawn. This changed in late May 2013, but it appears that this was due to a lump sum being paid into the account. Mr W explained that this was a loan from a family member to pay for the deposit on a house and fees associated with the house purchase.
In terms of other credit commitments, Mr W had a loan with monthly repayments of £266. And he owed £4,086 across his credit cards. OFT guidance required lenders to assume credit would be repaid within a reasonable period of time. I'm inclined to say that Capital One ought to have calculated repayments on Mr W's credit card at 5% of the outstanding balance to allow for this, so around £204 per month.

Mr W sent me a copy of his tax calculation for the year 2013/14. This shows that his total income including dividends was £10,592, giving a net monthly income of around £835. After paying his credit cards and loan, this would have left Mr W with only £365 per month to cover his mortgage and all other living expenses.

Based on the evidence I currently hold I'm inclined to say that if Capital One had undertaken proportionate checks they'd have found Mr W couldn't sustainably afford any further lending. It follows that they couldn't have fairly decided to agree the fourth CLI.

<u>Did Capital One conduct reasonable and proportionate checks – post-April 2014</u>

I've only considered the fifth CLI on card A here as I've already provisionally decided that card B shouldn't have been granted – and therefore any increases on that card would also not have happened.

The FCA had taken over regulation of consumer credit. It sets out in a part of its handbook known as CONC what lenders must do when deciding whether to lend to a consumer. In summary, a firm must consider a customer's ability to make repayments under the agreement without having to borrow further to meet repayments or default on other obligations, and without the repayments having a significant adverse impact on the customer's financial situation. CONC says a firm must carry out checks which are proportionate to the individual circumstances of each case.

<u>Fifth CLI – July 2014</u>

Capital One's records show that Mr W's income was still recorded as £14,000 per annum, giving a net monthly salary of around £1,040. They sent us the information they learned from the credit check they undertook prior to the fifth CLI. It didn't show any adverse information such as missed payments, defaults or County Court judgements. But it showed that Mr W had £9,450 in card debt, an unsecured loan of £24,800 and a mortgage of £158,000.

While the fifth CLI was for a modest £250, it increased the overall credit limit to £3,150. And the credit check showed Mr W's overall indebtedness in relation to the salary Capital One had recorded was high. So, I think it was important for Capital One to not only find out more about Mr W's committed expenditure but to verify that information. I haven't seen anything to suggest Capital One did this, so I'm inclined to say Capital One's checks weren't proportionate.

<u>What would proportionate checks have shown in July 2014?</u>

The information Capital One sent shows that they'd recorded Mr W's salary as £14,000 when considering the fifth CLI. Mr W sent me his tax calculation for the tax year 2014/15. This shows his total annual income was £17,870, giving a net monthly income of around £1,259. Again, I've reviewed Mr W's bank statements for the three months prior to the increase to gain an understanding of Mr W's outgoings and financial circumstances at the time.
Mr W's bank statements don't show payments towards his mortgage, council tax or utilities. But I can see he made regular payments of £750 to a joint account he held with his partner. I'm inclined to say Capital One would've found Mr W's share of bills was £750 and they'd have used this when calculating Mr W's committed expenditure. And Mr W was spending an average of around £162 per month on phone costs and around £52 on overdraft and bank charges.

Capital One's credit search showed Mr W owed around £9,450 on revolving credit. CONC requires a firm to assume that revolving credit is repaid over a reasonable term. I'm inclined to say Capital One should have used at least 5% of the outstanding amount (around £473) to reflect that. Mr W owed £24,800 on an unsecured loan. I can see from the bank statements that Mr W made monthly repayments of around £439 towards the loan. Overall, I think Capital One ought to have allowed £912 to meet Mr W's monthly credit commitments (excluding his mortgage and the proposed CLI).

So, Mr W's non-discretionary and committed expenditure was around £1,876 per month against a net monthly income of around £1,259. Based on what I've seen so far, I've concluded that if Capital One had undertaken proportionate checks they'd have realised Mr W couldn't afford any further borrowing. It follows that they couldn't have fairly decided to lend to Mr W.

<u>*Did Capital One act unfairly in any other way?*</u>

I've also considered whether Capital One acted unfairly or unreasonably in some other way given what Mr W has complained about, including whether their relationship with Mr W might have been unfair under s.140A Consumer Credit Act 1974.

However, I'm satisfied the redress I have directed below results in fair compensation for Mr W in the circumstances of his complaint. I'm satisfied, based on what I've seen, that no additional award would be appropriate in this case."

Neither Mr W nor Capital One responded to my provisional decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

As neither party has raised any additional arguments or provided further information for me to consider, I've got nothing further to add – my findings are unchanged from those set out above.

Putting things right

I've concluded that Capital One shouldn't have increased Mr W's credit limit on card A above £2,400 And they shouldn't have accepted Mr W's application for card B in November 2012. It's fair and reasonable for Capital One to refund any interest and charges incurred by

Mr W as a result of the credit unfairly extended to him. So, they should do the following to resolve the complaint:

For card A

- Rework the account to remove all interest, fees and charges that have been applied above the credit limit of £2,400
- If the reworking results in a credit balance, this should be paid to Mr W with the addition of simple interest at 8% per year from the date of each overpayment to the date of settlement.
- Or, if an outstanding balance remains, Capital One should look to arrange an affordable payment plan with Mr W for the outstanding amount. If any debt was sold to a third party, Capital One should either repurchase the debt or liaise with the third party to ensure the above steps are undertaken. Once Mr W has cleared the balance, any adverse information as a result of the unfair lending should be removed from the credit file.

For card B

- Remove all interest, fees and charges that have been applied and calculate the balance outstanding after the above adjustments
- If the reworking results in a credit balance, this should be paid to Mr W with the addition of simple interest at 8% per year from the date of each overpayment to the date of settlement.
- Or, if an outstanding balance remains, Capital One should look to arrange an affordable payment plan with Mr W for the outstanding amount. If any debt was sold to a third party, Capital One should either repurchase the debt or liaise with the third party to ensure the above steps are undertaken. Once Mr W has cleared the balance, any adverse information as a result of the unfair lending should be removed from the credit file.

HM Revenue & Customs (HMRC) requires Capital One to deduct tax from any award of interest. They must provide Mr W with a certificate showing how much tax has been deducted if he asks for one.

My final decision

For the reasons set out above, I'm upholding this complaint and I direct Capital One (Europe) plc to take the steps set out above. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 31 October 2024.

Anja Gill
Ombudsman