final decision	
complaint by:	Mrs M
complaint about:	Lender B
complaint reference:	
date of decision:	23 August 2018

complaint

Mrs M has complained about a series of payday loans she took out with Lender B. She says she was sold these loans when she couldn't realistically afford to pay them back which resulted in her rolling them over taking new loans out time after time. Mrs M says that she's needed to keep taking loans of increasing amounts as a result.

background

I attach my provisional decision of 6 August 2018, which forms part of this final decision and should be read in conjunction with it. In my provisional decision I explained why I intended to uphold Mrs M's complaint. I invited both parties to provide any further comments they may have had, by 20 August 2018, before I reached a final decision.

Lender B didn't provide anything further for me to consider or ask me for any further time to do so either. Mrs M also provided nothing further for me to think about.

my findings

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

As neither party has provided any further information or arguments for me to consider, I see no reason to alter the conclusions I reached in my provisional decision of 6 August 2018.

my final decision

For the reasons set out above and in my provisional decision of 6 August 2018, I'm upholding Mrs M's complaint. Lender B should pay Mrs M compensation as set out in my provisional decision of 6 August 2018.

Under the rules of the Financial Ombudsman Service, I am required to ask Mrs M to accept or reject my decision before 23 September 2018.

Jeshen Narayanan
ombudsman

COPY OF PROVISIONAL DECISION

complaint

Mrs M has complained about a series of payday loans she took out with Lender B. She says she was sold these loans when she couldn't realistically afford to pay them back which resulted in her rolling them over taking new loans out time after time. Mrs M says that she's needed to keep taking loans of increasing amounts as a result.

The Statement of Account provided shows that Mrs M's first loan was taken in April 2010 and the lending then continued, without any significant gaps, until July 2014. It looks like Lender B gave Mrs M 24 loans over this period. And there were also 18 'deferrals' where Mrs M paid the interest due on the loan but delayed repaying the capital and additional interest due until the following month.

In its response to this provisional decision, I ask Lender B to confirm that there is no other lending to Mrs M other than what I have set out here. I also ask Mrs M to confirm that she agrees with this summary of the lending history – or to provide evidence of other lending.

background

In its final response, Lender B refused to look at Mrs M's complaint about her first 5 loans. In terms of the remaining loans, Lender B said that for loans 5 to 13 it could have taken steps to re-establish Mrs M's financial circumstances to ensure that the loans were affordable.

So Lender B upheld Mrs M's complaints about these loans and offered to refund all the interest and charges she paid, plus interest, in order to put things right. But Lender B also thought that it carried out regular income and expenditure assessments from loan 14 onwards. So it thought its checks for these loans were proportionate and it wasn't wrong for it to have given them to Mrs M. Mrs M was dissatisfied with Lender B's response and referred her complaint to us.

Since referring her complaint to us, Mrs M has told us she's no longer complaining about loans 1 to 5 and she only wants us to look at the remainder of her complaint.

One of adjudicators looked at Mrs M's complaint and concluded that Mrs M shouldn't have been given loans 14 to 24 as well as loans 6 to 13. Lender B disagreed with our assessment on loans 14 to 24 and asked for an ombudsman to look at the complaint.

In reaching my decision, I have taken into account the relevant law and regulations; relevant regulators' rules, guidance and standards; relevant codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

the legal and regulatory framework

regulation by the Office of Fair Trading (up to 31 March 2014)

Lender B gave Mrs M her first 22 loans in the period up to the end of March 2014. During this time it needed a standard licence from the Office of Fair Trading ("OFT"), in order to carry out consumer credit activities.

Section 25(2) of the Consumer Credit Act 1974 set out the factors the OFT had to consider when deciding whether to grant a consumer credit licence to a lender. It said:

> *(1) In determining whether an applicant for a licence is a fit person for the purposes of this section the OFT shall have regard to any matters appearing to it to be relevant including (amongst other things)—*
>
> > *(a) the applicant's skills, knowledge and experience in relation to consumer credit businesses, consumer hire businesses or ancillary credit businesses;*
> >
> > *(b) such skills, knowledge and experience of other persons who the applicant proposes will participate in any business that would be carried on by him under the licence;*
> >
> > *(c) practices and procedures that the applicant proposes to implement in connection with any such business;*
> >
> > *(d) evidence of the kind mentioned in subsection (2A)*
>
> (2A) *That evidence is evidence tending to show that the applicant, or any of the applicant's employees, agents or associates (whether past or present) or, where the applicant is a body corporate, any person appearing to the OFT to be a controller of the body corporate or an associate of any such person, has—*
>
> > *(a) committed any offence involving fraud or other dishonesty or violence;*
> >
> > *(b) contravened any provision made by or under—*
> >
> > *(i) this Act;*
> >
> > *(ii) Part 16 of the Financial Services and Markets Act 2000 so far as it relates to the consumer credit jurisdiction under that Part;*
> >
> > *(iii) any other enactment regulating the provision of credit to individuals or other transactions with individuals;*
> >
> > *(c) contravened any provision in force in an EEA State which corresponds to a provision of the kind mentioned in paragraph (b);*
> >
> > *(d) practised discrimination on grounds of sex, colour, race or ethnic or national origins in, or in connection with, the carrying on of any business; or*
> >
> > ***(e) engaged in business practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper (whether unlawful or not)*** *[my emphasis]**.***

Section 25(2B) set out a direct example of the type of practice referred to in Section 25(2A(e)) and said:

*For the purposes of subsection (2A)(e), the business practices which the OFT may consider to be deceitful or oppressive or otherwise unfair or improper include practices in the carrying on of a consumer credit business that appear to the **OFT to involve irresponsible lending** [my emphasis].*

In March 2010, the OFT sought to produce clear guidance on the test for irresponsible lending for the purposes of section 25(2B) of the Consumer Credit Act 1974. And so it issued its guidance on irresponsible lending ("ILG").

So I consider the ILG to be of central importance in reaching a fair and reasonable outcome in Mrs M's case.

The foreword to the guidance set out its purpose and it said:

The primary purpose in producing this guidance is to provide greater clarity for businesses and consumer representatives as to the business practices that the Office of Fair Trading (OFT) considers may constitute irresponsible lending practices for the purposes of section 25(2B) of the Consumer Credit Act 1974. It indicates types of deceitful or oppressive or otherwise unfair or improper business practices which, if engaged in by a consumer credit business, could call into consideration its fitness to hold a consumer credit licence.

Whilst this guidance represents the OFT's view on irresponsible lending, it is not meant to represent an exhaustive list of behaviours and practices which might constitute irresponsible lending.

Section two of the guidance sets out the general principles of fair business practice. Section 2.1 says:

In the OFT's view there are a number of overarching principles of consumer protection and fair business practice which apply to all consumer credit lending.

Section 2.2 of the guidance says:

In general terms, creditors should:

- *not use misleading or oppressive behaviour when advertising, selling, or seeking to enforce a credit agreement*
- *make a reasonable assessment of whether a borrower can afford to meet repayments in a sustainable manner*
- *explain the key features of the credit agreement to enable the borrower to make an informed choice*
- *monitor the borrower's repayment record during the course of the agreement, offering assistance where borrowers appear to be experiencing difficulty and treat borrowers fairly and with forbearance if they experience difficulties*

Section 2.3 lists other expectations of lenders. Amongst other things, it says:

In addition to the above there should be:

- *fair treatment of borrowers. Borrowers should not be targeted with credit products that are clearly unsuitable for them, subjected to high pressure selling, aggressive or oppressive behaviour or inappropriate coercion, or conduct which is deceitful, oppressive, unfair or improper, whether unlawful or not*

Borrowers who may be particularly vulnerable by virtue of their current indebtedness, poor credit history, or by reason of age or health, or disability, or for any other reason, should, in particular, not be targeted or exploited.

Section four of the guidance is concerned with the assessment of affordability that lenders were required to carry out before granting credit. Section 4.1 says:

In the OFT's view, all assessments of affordability should involve a consideration of the potential for the credit commitment to adversely impact on the borrower's financial situation, taking account of information that the creditor is aware of at the time the credit is granted. The extent and scope of any assessment of affordability, in any particular circumstance, should be dependent upon – and proportionate to – a number of factors (see paragraph 4.10 of this guidance document).

'Assessing affordability', in the context of this guidance, is a 'borrower-focussed test' which involves a creditor assessing a borrower's ability to undertake a specific credit commitment, or specific additional credit commitment, in a sustainable manner, without the borrower incurring (further) financial difficulties and/or experiencing adverse consequences.

Section 4.2 of the OFT guidance says:

Whatever means and sources of information creditors employ as part of an assessment of affordability should be sufficient to make an assessment of the risk of the credit sought being unsustainable for the borrower in question. In our view this is likely to involve more than solely assessing the likelihood of the borrower being able to repay the credit in question.

We consider that before granting credit, significantly increasing the amount of credit, or significantly increasing the credit limit under an agreement for running account credit, creditors should take reasonable steps to assess a borrower's likely ability to be able to meet repayments under the credit agreement in a sustainable manner.

"In a sustainable manner" is defined in Section 4.3 of the OFT guidance. And Section 4.3 says:

The OFT regards 'in a sustainable manner' in this context 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 or, in the case of open-end agreements, within a reasonable period of time*

- *out of income and/or available savings, without having to realise security or assets.*

Section 4.4 goes on to describe “undue difficulty” and says:

The OFT would regard 'without undue difficulty' in this context as meaning the borrower being able to make repayments (in the absence of changes in personal circumstances that were not reasonably foreseeable at the time the credit was granted):

- *while also meeting other debt repayments and other normal/reasonable outgoings and*

- *without having to borrow further to meet these repayments.*

Building on the proportionality principle set out in section 4.1, section 4.10 deals with the issues that might influence how detailed the affordability assessment should be. It includes factors such as:

- *the type of credit product;*

- *the amount of credit to be provided and the associated cost and risk to the borrower;*

    - *the borrower’s financial situation at the time the credit is sought;*

    - *the borrower’s credit history, including any indications of the borrower experiencing (or having experienced) financial difficulty*

    - *the vulnerability of the borrower*

Section 4.12 is a non-exhaustive list of the types and sources of information that a lender might use to assess affordability, including:

- *evidence of income*

- *evidence of expenditure*

- *records of previous dealings with the borrower*

- *a credit score*

- *a credit report from a credit reference agency*

- *information obtained from the borrower through a form or a meeting*

Section 4.16 specifically touches on the issue of proportionality in the context of short-term credit. It says:

Whilst the OFT accepts, as a general principle from a proportionality perspective, that the level of scrutiny required for small sum and/or short-term credit may be somewhat less than for large sum and/or long term credit, we consider that creditors should also take account of the fact that the risk of the credit being unsustainable would be directly related to the amount *of credit granted (and associated interest / charges etc.) relative to the borrower's financial situation*

Sections 4.18 to 4.33 of the ILG set out some examples of "specific irresponsible lending practices" relating to how businesses assess affordability. Section 4.20 says this would include where a lender is:

Failing to undertake a reasonable assessment of affordability in an individual case or cases

Section 4.21 gives another example:

Failing to consider sufficient information to be able to reasonably assess affordability, prior to granting credit, significantly increasing the total amount of credit provided, or significantly increasing the credit limit (in the case of a running account credit agreement)

And Section 4.26 says a business would be acting irresponsibly if:

Granting an application for credit when, on the basis of an affordability assessment, it is known, or reasonably ought to be suspected, that the credit is likely to be unsustainable.

Sections 4.29 and 4.31 deal with a lender's treatment of information disclosed by the customer. 4.29 says it would be an unsatisfactory business practice where a lender:

fail[s] to take adequate steps, so far as is reasonable and practicable, to ensure that information on a credit application relevant to an assessment of affordability is complete and correct.

And section 4.31 says it would be unsatisfactory for a lender to:

[Accept] an application for credit under circumstances in which it is known, or reasonably ought to be suspected, that the borrower has not been truthful in completing the application for credit with regards to the information supplied relevant to inform an assessment of affordability

Section 6 of the ILG sets out other "specific irresponsible lending practices" relating to lender behaviour once loan(s) have been agreed. Section 6.2 says it would be an unsatisfactory practice where a business is:

Failing to monitor a borrower's repayment record

Section 6.2 goes on to say:

The OFT considers that creditors should take appropriate action…when/if there are signs of apparent / possible repayment difficulties.

Section 6.25 focuses specifically on short-term credit products and says that it would be a "deceptive and/or unfair practice" where a lender is:

Repeatedly refinancing (or 'rolling over') a borrower's existing credit commitment for a short-term credit product in a way that is unsustainable or otherwise harmful.

Section 6.25 then goes on to say:

The OFT considers that this would include a creditor allowing a borrower to sequentially enter into a number of separate agreements for short-term loan products, one after another, where the overall effect is to increase the borrower's indebtedness in an unsustainable manner.

The general purpose of short-term loans, such as 'payday loans', is to provide borrowers with a cash advance until their next pay day and they are usually about 30 days, or just over, in duration. However, in certain circumstances, the borrower can elect to 'renew' the loan for a fee and delay payment for a further agreed period of time.

The purpose of payday loans is to act as a short-term solution to temporary cash flow problems experienced by consumers. They are not appropriate for supporting sustained borrowing over longer periods, for which other products are likely to be more suitable.

Section 55B of the Consumer Credit Act 1974

On 1 February 2011 the majority of the legislation implementing the provisions of the Consumer Credit Directive 2008 came into force. At this point the ILG was amended to reflect any changes required by the Consumer Credit Directive and an additional requirement on a lender to carry out an "Assessment of creditworthiness" was set out in section 55B of the Consumer Credit Act.

It's important to note that both section 25 and section 55 remained in force until regulation of Consumer Credit providers passed to the FCA in April 2014.

Section 55B said:

Assessment of creditworthiness

55B *(1) Before making a regulated consumer credit agreement, other than an excluded agreement, the creditor must undertake an assessment of the creditworthiness of the debtor.*

(2) Before significantly increasing—

(a) the amount of credit to be provided under a regulated consumer credit agreement, other than an excluded agreement, or

(b) a credit limit for running-account credit under a regulated consumer credit agreement, other than an excluded agreement, the creditor must undertake an assessment of the debtor's creditworthiness.

(3) A creditworthiness assessment must be based on sufficient information obtained from—

(a) the debtor, where appropriate, and

(b) a credit reference agency, where necessary.

(4) For the purposes of this section an agreement is an excluded agreement if it is—

(a) an agreement secured on land, or

(b) an agreement under which a person takes an article in pawn.”.

By the time of loan 22 and for all of Mrs M’s subsequent loans (1 April 2014 onwards) this requirement to assess creditworthiness moved from S55B of the Consumer Credit Act, to the rules of the new regulator the Financial Conduct Authority.

regulation by the Financial Conduct Authority (from 1 April 2014)

Lender B gave Mrs M loans 22 to 24 after regulation of Consumer Credit Licensees had transferred from the OFT to the Financial Conduct Authority (“FCA”) on 1 April 2014. Lender B initially obtained interim permission to provide consumer credit before it went on to successfully apply for authorisation as a high-cost short-term credit provider.

Lender B’s interim permission to provide consumer credit and its eventual authorisation to do so meant that it was subject to the FCA rules and regulations from 1 April 2014.

- *the FCA Principles for Business (“PRIN”)*

The FCA’s Principles for Business set out the overarching requirements which all authorised firms are required to comply with.

PRIN 1.1.1G, says

The Principles apply in whole or in part to every firm.

The Principles themselves are set out in PRIN 2.1.1R. And the most relevant principle here is PRIN 2.1.1 R (6) which says:

A firm must pay due regard to the interests of its customers and treat them fairly.

- *the Consumer Credit sourcebook (“CONC”)*

This sets out the rules which apply to providers of consumer credit like Lender B. CONC also replaced the requirements set out in Section 55B CONC 5 sets out a firm’s obligations in relation to responsible lending. And CONC 6 sets out a firm’s obligations after a consumer has entered into a regulated agreement.

It’s clear there is a high degree of alignment between the OFT’s Irresponsible Lending Guidance and the rules set out in CONC 5 and CONC 6. As is evident from the following extracts, the FCA’s CONC rules specifically note and refer back to sections of the OFT’s *Irresponsible Lending Guidance* on many occasions.

Section 5.2.1R(2) of CONC sets out what a lender needs to do before agreeing to give a consumer a loan of this type. It says a firm must consider:

(a) the potential for the commitments under the regulated credit agreement to adversely impact the customer’s financial situation, taking into account the information of which the firm is aware at the time the regulated credit agreement is to be made; and

*[**Note**: paragraph 4.1 of ILG]*

(b) the ability of the customer to make repayments as they fall due over the life of the regulated credit agreement, or for such an agreement which is an open-end agreement, to make repayments within a reasonable period.

*[**Note**: paragraph 4.3 of ILG]*

CONC also includes guidance about 'proportionality of assessments'. CONC 5.2.4G(2) says:

A firm should consider what is appropriate in any particular circumstances dependent on, for example, the type and amount of credit being sought and the potential risks to the customer. The risk of credit not being sustainable directly relates to the amount of credit granted and the total charge for credit relative to the customer's financial situation.

*[**Note**: paragraph 4.11 and part of 4.16 of ILG]*

CONC 5.3 contains further guidance on what a lender should bear in mind when thinking about affordability. And CONC 5.3.1G(1) says:

In making the creditworthiness assessment or the assessment required by CONC 5.2.2R (1), a firm should take into account more than assessing the customer's ability to repay the credit.

*[**Note**: paragraph 4.2 of ILG]*

CONC 5.3.1G(2) then says:

The creditworthiness assessment and the assessment required by CONC 5.2.2R (1) should include the firm taking reasonable steps to assess the customer's ability to meet repayments under a regulated credit agreement in a sustainable manner without the customer incurring financial difficulties or experiencing significant adverse consequences.

*[**Note**: paragraph 4.1 (box) and 4.2 of ILG]*

In respect of the need to double-check information disclosed by applicants, CONC 5.3.1G(4) has a reference to paragraphs 4.13, 4.14, and 4.15 of ILG and states:

(b) it is not generally sufficient for a firm to rely solely for its assessment of the customer's income and expenditure on a statement of those matters made by the customer.

And CONC 5.3.7R says that:

A firm must not accept an application for credit under a regulated credit agreement where the firm knows or ought reasonably to suspect that the customer has not been truthful in completing the application in relation to information supplied by the customer relevant to the creditworthiness assessment or the assessment required by CONC 5.2.2R (1).

*[**Note**: paragraph 4.31 of ILG]*

CONC 6.7 sets out a firm's obligations in relation to its post contract business practices. CONC 6.7.21G, CONC 6.7.22G and CONC 6.7.23R contained specific obligations for high-cost short-term credit providers like Lender B.

CONC 6.7.21G says:

A firm should not refinance high-cost short-term credit where to do so is unsustainable or otherwise harmful.

*[**Note**: paragraph 6.25 of ILG]*

CONC 6.7.22G says:

A firm should not allow a customer to enter into consecutive agreements with the firm for high-cost short-term credit if the cumulative effect of the agreements would be that the total amount payable by the customer is unsustainable.

*[**Note**: paragraph 6.25 (box) of ILG]*

Section 6.25 of the ILG is set out on pages four and five of this decision and is concerned with what the OFT referred to as 'deceptive and/or unfair practices'.

CONC 6.7.23R (which applied from 1 July 2014) says:

A firm must not refinance high-cost short-term credit (other than by exercising forbearance) on more than two occasions.

CONC 6.7.17R defines refinancing and says:

(1) In CONC 6.7.18 R to CONC 6.7.23 R "refinance" means to extend, or purport to extend, the period over which one or more repayment is to be made by a customer whether by:

  (a) agreeing with the customer to replace, vary or supplement an existing regulated credit agreement;

  (b) exercising a contractual power contained in an existing regulated credit agreement; or

  (c) other means, for example, granting an indulgence or waiver to the customer.

(2) "Exercise forbearance" means to refinance a regulated credit agreement where the result is that no interest accrues at any time in relation to that agreement or any which replaces, varies or supplements it from the date of the refinancing and either:

  (a) there is no charge in connection with the refinancing; or

  (b) the only additional charge is a reasonable estimate of the actual and necessary cost of the additional administration required in connection with the refinancing.

(3) *The term "refinance" within paragraph (1) does not include where under a regulated credit agreement repayable in instalments a customer requests a change in the regular payment date and as a result there is no charge or additional interest in connection with the change.*

<u>*Section 140 of the Consumer Credit Act 1974*</u>

All of Mrs M's loans were given to her after Section 140 of the Consumer Credit Act came into force on 6 April 2007. Section 140A sets out circumstances where the court may determine that the relationship between a creditor and a debtor is unfair to the debtor. Section 140A says:

140A Unfair relationships between creditors and debtors

(1) *The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following-*

(a) *any of the terms of the agreement or of any related agreement;*

(b) *the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;*

(c) *any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).*

(2) *In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).*

(3) *For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor.*

(4) *A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.*

(5) *An order under section 140B shall not be made in connection with a credit agreement which is an exempt agreement [for the purposes of Chapter 14A of Part 2 of the Regulated Activities Order by virtue of article 60C(2) of that Order (regulated mortgage contracts and regulated home purchase plans)]*

Section 140B sets out the types of order the court could make should it determine that the relationship between the creditor and debtor is unfair to the debtor. Section 140B says:

140B Powers of court in relation to unfair relationships

(2) *An order under this section in connection with a credit agreement may do one or more of the following—*

(a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);]

(b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;

(c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;

(d) direct the return to a surety of any property provided by him for the purposes of a security;

(e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;

(f) alter the terms of the agreement or of any related agreement;

(g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.

the law

I've also taken account of the Consumer Credit Act (including the provisions I haven't set out above), and other relevant legislation, including the law relating to negligence, misrepresentation and contract; as well as the law relating to causation and remoteness.

other relevant publications and good industry practice

The ILG and CONC set out the regulatory framework that regulated/authorised consumer credit providers have to adhere to. But they represent a minimum standard for firms. And as I've explained, I'm also required to take into account any other guidance, standards, relevant codes of practice, and, where appropriate, what I consider to have been good industry practice.

the OFT's Payday Lending Compliance Review Final Report

The OFT published its "Payday Lending Compliance Review Final Report" in March 2013, by which time Lender B had already lent to Mrs M on 16 separate occasions and would go on to lend another 8 times.

The purpose of the review was "…to establish the extent to which payday lenders [were] complying with the Consumer Credit Act, other legislation and [were] meeting the standards set out in the ILG."

The review sought to highlight examples of what the OFT considered poor practice and evidence of non-compliance with the relevant law and failure to meet the minimum standards expected. The analysis was also put together to help the FCA's work on payday lending ahead of it assuming responsibility for regulating the sector from April 2014.

The report began with an overview section setting out the OFT's concerns. Page two of the report says that the OFT:

…is particularly concerned by the evidence of irresponsible lending; too many people are given loans they cannot afford, and when they can't repay are encouraged to extend them, exacerbating their financial difficulties This is causing real misery and hardship for a significant number of payday users

Page three of the report says:

Our evidence paints a concerning picture of the payday lending market. It appears that irresponsible lending is not a problem confined to a few rogue traders, but it has its roots in the way competition works in this market. The evidence suggests that many consumers are in a weak bargaining position, and that firms compete on speed of approval rather than price

It then goes on to say:

Additionally, firms describe and market their product to consumers as one-off short term loans (costing on average £25 per £100 borrowed for 30 days), but in practice around half the revenue comes from loans which last longer and cost a lot more because they are rolled over or refinanced. Lenders do not need to compete hard for this source of revenue because by this time they have a captive market. This, and the misuse of continuous payment authorities to reclaim monies owed, may distort incentives for lenders, encouraging them to make loans to people who cannot afford to repay them first time.

<u>the Consumer Finance Association Lending Code for Small Cash Advances</u>

The principal trade association representing the interests of short-term lending businesses operating in the United Kingdom is the Consumer Finance Association ("CFA"). The CFA published its Lending Code for Small Cash Advances ("the code") in July 2012.

I accept that Lender B wasn't a member of the CFA at the time – although it is now a member. But as the code was published by the main trade association representing short-term lenders, I consider it to be indicative of the standards of good industry practice expected of lenders such as Lender B at the time.

What's more, most of the relevant parts of this code went on to be included in the 'Good Practice Customer Charter Payday and Short-term Loans' which members of all the relevant trade associations signed up to just four months later, in November 2012.

Section 1 of the code sets out its purpose. Section 1b says:

Members of the Consumer Finance Association offer small cash loans predominantly from high street outlets or online

Section 1c says:

This type of loan allows customers to borrow a relatively small amount of money, (usually between £50 and £1000) which they repay over a short period (typically one or two months). The loan is not designed for longer term borrowing, but to improve short term personal cash flow

And Section 1d says:

The purpose of this Code is to ensure compliance by members with the minimum standards set by the Association, as specified in the Code, and accordingly protects and benefit consumers

Section 3 sets out the general obligations expected of lenders. Amongst other things Section 3 says members shall:

> *b) trade honestly, responsibly and treat customers with respect.*
>
> *l) ensure fairness in all dealings with customers including, but not limited to, their dealings with customers both before and after the making of the agreement and the manner in which those agreements are enforced.*

Section 4 of the code sets out a lender's specific lending obligations. Part (a) of this section is concerned with advertising and marketing and amongst other things, it says:

> *iii) members shall ensure all advertising is truthful and not misleading and raise awareness to the short term nature of the loan.*

Part (d) of section 4 is concerned with pre-contractual information. And it, amongst other things, says:

> *v) members shall provide explanations to the customer, to enable them to assess whether the proposed credit agreement is appropriate to their circumstances by explaining…:*

- *that small cash loans are intended to improve short term cash flow, and therefore not suitable for longer term borrowing.*

my findings

I have read and considered all the evidence and arguments available to me from the outset, in order to decide what is, in my opinion, fair and reasonable in all the circumstances of the case.

Taking into account the relevant rules, guidance, good industry practice and law, I think the overarching questions I need to consider in deciding what's fair and reasonable in the circumstances of this complaint are:

- Did Lender B, each time it lent, complete reasonable and proportionate checks to satisfy itself that Mrs M would be able to repay in a sustainable way?
    - If not, would those checks have shown that Mrs M would've been able to do so?
- Taking into account the short-term purpose of the loans provided, did the overall pattern of lending increase Mrs M's indebtedness in a way that was unsustainable or otherwise harmful?
- Did Lender B act unfairly or unreasonably in some other way?

If I determine that Lender B did not act fairly and reasonably in its dealings with Mrs M and that she has lost out as a result, I will go on to consider what is fair compensation.

In cases such as these, where there are a large number of loans and top-ups to consider, it can be useful to look for 'blocks' or 'chains' of loans. In this case, the biggest gap in lending is of around five months between loan 19 and loan 20. I've thought about the length of this gap and about the point in this lending relationship at which it occurred. But, in the circumstances of this complaint, I don't think this gap is long enough to represent a clean break in lending. And so I intend to look at all of Mrs M's loans as one continuous chain.

Did Lender B, each time it lent from loan 14 onwards, complete reasonable and proportionate checks to satisfy itself that Mrs M would be able to repay in a sustainable way?

Regulations in place throughout the period when Lender B was lending to Mrs M required it to carry out a reasonable assessment of whether Mrs M could afford to repay her loans in a sustainable manner. This is sometimes referred to as an "affordability assessment" or "affordability check".

The affordability checks should've been "borrower-focused" – so Lender B had to think about whether repaying the loan sustainably would cause difficulties or adverse consequences *for Mrs M*. In other words, it wasn't enough for Lender B to think only about the likelihood that it would get its money back without considering the impact of repayment on Mrs M herself.

Checks also had to be "proportionate" to the specific circumstances of the loan application. In general, what constitutes a proportionate affordability check will be dependent upon a number of factors including – but not limited to – the particular circumstances of the borrower (e.g. their financial history, current situation and outlook, and any indications of vulnerability or financial difficulty) and the amount / type / cost of credit they are seeking. Even for the same customer, a proportionate check could look different for different loan applications.

In the light of this, I think that a reasonable and proportionate check ought generally to have been *more* thorough:

- the *lower* a customer's income (reflecting that it could be more difficult to repay a given loan amount from a lower level of income);
- the *higher* the amount due to be repaid (reflecting that it could be more difficult to meet a higher repayment from a particular level of income); and
- the *greater* the number and frequency of loans, and the *longer* the period of time during which a customer has been given loans (reflecting the risk that ongoing use of these loans may signal that the borrowing had become, or was becoming, unsustainable).

There may also be other factors which could influence how detailed a proportionate check should be for a given loan application – including (but not limited to) any indications of borrower vulnerability, any foreseeable changes in future circumstances, or any substantial time gaps between loans. I've thought about all the relevant factors in this case.

As Mrs M isn't complaining about her first five loans and Lender B accepts that it shouldn't have given loans 6 to 13, I've not looked into any checks that Lender B may have carried out for them. I've only looked at whether it was reasonable and proportionate for Lender B to have given Mrs M loans 14 to 24.

Before I look in more detail at whether the checks that Lender B completed before providing loans 14 to 24, I have a couple of observations about what Lender B says it did.

In its final response to Mrs M, Lender B said that it used its own bespoke credit scoring logic when assessing whether to give Mrs M her loans. There is very little detail on what went into this credit scoring logic or what sits behind it. Lender B simply said that during this scoring assessment it used comparable information to determine the accuracy of the information provided to it. It didn't use credit reference agency data (as this wasn't a regulatory requirement) and the assessment was completed based on the self-declared information provided.

The final response also went on to say that a deferral option was available to Mrs M. But that this option was available to allow customers a degree of flexibility on the repayment of their loans and it was monitored to ensure that loans were not taken for great lengths of time. I'll explain why I think that this paragraph is significant further on in this provisional decision.

I now turn to the checks Lender B says it carried out before providing loans 14 to 24.

Having considered the content of Lender B's final response, it seems to me that Lender B's reason for not upholding Mrs M's complaint about loans 14 to 24 is that it took regular income and expenditure assessments from this point onwards. Lender B hasn't provided any detail on the questions it asked Mrs M or what answers Mrs M gave.

But Lender B's arguments appear to suggest that it completed broadly the same checks (and applied broadly the same lending criteria) to Mrs M's loan applications, irrespective of where in the lending chain those individual applications sat. In other words, it looks like Lender B kept asking the same questions (and possibly kept receiving the same answers) from loan 14 onwards and it kept relying on this all the way up to and including loan 24.

This suggests to me that Lender B's checks doesn't adapt in circumstances where it is continually lending to someone. Indeed the content of its final response appears suggest that its checks were always proportionate, from loan 14 onwards, irrespective of the circumstances and considerations of Mrs M's individual loan applications. I don't think that doing the same thing over and over again – irrespective of the circumstances – can be considered to be proportionate as proportionality by its very nature requires a degree of flexibility and adaptability.

Lender B carrying out the same checks over and over again also ignores the fact that it ought to have been alert to the possibility Mrs M might've been struggling to repay her borrowing from disposable income. And that is why she might've kept coming back for further loans. In these circumstances, rather than simply continuing to rely on what it says it had been told by Mrs M about her income and expenditure, I think that it would've been fair, reasonable and proportionate for Lender B to have taken steps to verify Mrs M's actual financial position.

Lender B could've done this by asking for evidence and information about her outgoings. Or it might have asked Mrs M to provide proof that her income was what she'd declared. Whatever it chose to do, I think that it would've been fair, reasonable and proportionate for Lender B to get an understanding of, and also get to the crux of, just why it was Mrs M kept asking it to lend to her. And as Lender B has said that it took no steps to verify the information provided, I don't think that its checks kept up with the evolving expectations of what a proportionate check requires in the different situations of Mrs M's respective loan applications.

For these reasons, having carefully considered what Lender B has told me about the checks it performed on Mrs M's loan applications, I don't agree that it conducted reasonable and proportionate affordability checks before providing Mrs M with loans 14 to 24.

Would proportionate checks on loans 14 to 24 have indicated to Lender B that Mrs M would have been unable to repay her loans in a sustainable manner?

As proportionate checks weren't carried out for these loans, I can't say for sure what they would've shown. In some circumstances, it would be appropriate to attempt to reconstruct proportionate checks to see what they would more likely than not have shown Lender B about the proposed lending.

I'd usually attempt to do this using the evidence and information Mrs M has provided us with about her financial circumstances at the time she applied for these loans. But I haven't recreated individual, proportionate affordability checks for loans 14 to 24. And I don't think that it necessary for me to do this, in this case, for two reasons.

Firstly, by upholding Mrs M's complaint about loans 6 to 13, Lender B accepts those loans were unaffordable for her. And the information I've seen from Mrs M doesn't suggest any sort of material change in her financial circumstances such that loan 14 would've been affordable, when she only settled loan 13 (after deferring it on two occasions) the day before.

I'll explain the second, and more important, reason why I think recreating individual, proportionate checks for loans 14 to 24, isn't necessary in this case in the section below.

Taking into account the short-term purpose of the loans provided, did the overall pattern of lending increase Mrs M's indebtedness in a way that was unsustainable or otherwise harmful?

In addition to assessing the affordability of each *individual* loan provided to Mrs M by Lender B, I also think it's fair and reasonable to look at the *overall pattern* of lending. I'm mindful here of the short-term purpose of this type of credit and of the relevant rules, guidance and good industry practice at the time – as summarised in the earlier part of this decision.

It seems to me that there may come a point at which a responsible lender ought fairly and reasonably to question whether continuing to offer further short-term loans to a customer who appears to be persistently reliant upon them was unsustainable or otherwise harmful. And I've considered whether that point was reached in this case.

I think that it would be useful for me to start by setting out some examples of the kind of indicators that I think are particularly important when deciding this matter. Some examples of the kind of indicators would include:

- the number of times that Lender B had lent to Mrs M in total
- the time period over which it had provided those loans
- the amounts that Lender B was lending to Mrs M, including any general trends

- the time between Mrs M repaying one loan and Lender B providing the next

loans 6 to 13

Even though Lender B upheld Mrs M's complaint about loans 6 to 13, I still think it would be helpful for me to look at the pattern of lending during this time in order to inform my decision on whether and when there were indications that Mrs M's loans had become (or were becoming unsustainable).

Mrs M was given loan six the day after she eventually managed to repay loan five. I say eventually managed to repay loan five because she'd deferred repaying that loan on eight occasions. So she ended up settling this loan eight months after it was initially due for repayment. And even then Mrs M didn't properly settle loan five because she ended up having to apply for a further loan a day later to cover the hole repaying loan five left in her finances.

Lender B upheld loan six (as well as loans 7 to 13) and I think it was right for it to do this because it ought fairly and reasonably to have regarded what (the number of applications, pattern of applying for new loans shortly after repaying previous one and loan amounts for Mrs M's first five loans suggested) up until that point had been an emerging pattern of Mrs M persistently taking out new loans because she wasn't completely freeing herself from the effect of settling previous ones – as being established.

And by this point, I think that Lender B ought fairly and reasonably to have realised that giving Mrs M further loans, in these circumstances, would more likely than not unfairly perpetuate what was unsustainable cycle of debt for her. This pattern of borrowing continued right through the period of lending that Lender B has upheld the complaint about.

So while I've not looked at the circumstances of the individual loan applications for loans 6 to 13, I'm satisfied that I would also have upheld the complaint about these loans. I would have done this because I would have reached the conclusion that the overall pattern of lending increased Mrs M's lending in a way that was unsustainable or otherwise harmful.

loans 14 to 24

Mrs M was given loan 14 the day after she repaid the loan balance 13. And much like the position when taking out loan 6, Mrs M was applying for a new loan the after she'd paid a loan she had to defer (on two occasions) because, it appears as though, she couldn't afford to make the repayment due. So I think that the pattern established through loans 6 to 13 continued into loan 14.

I also think that this pattern pretty much continued throughout the lending period encompassing loans 14 to 24. I accept that there were occasions were the amount Mrs M was lent was less than the amount of her previous loan. But this was usually followed by a loan for a higher amount. And from loan 19 onwards the amount lent never decreased. Mrs M also deferred repayment on three separate occasions during this period too.

I've also thought about the roughly five month break between loan 19 being repaid and loan 20 being taken. But I think that this needs to be considered in the overall context of Lender B's almost four and a half year lending relationship with Mrs M. And the time between loan 19 being repaid and loan 20 being given was only the period approaching anywhere near long enough, in the four and a half year period being looked at, where it could be argued there might've been a break in lending. Equally, as I've already explained the amount Mrs M was lent from loan 19 onwards kept increasing.

I'm also mindful that even the most basic of enquiries into Mrs M's circumstances during the approaching five month period she wasn't borrowing from Lender B (which, in this case, I think would've been proportionate given the number of loans taken previously) would've shown that, rather than it being a case of her having got her finances back on an even keel and so she could sustainably repay this type of lending again, she was simply borrowing from other short-term lenders during this period.

Having carefully considered all of the above, I don't think that the length of time between loan 19 being repaid and loan 20 being given means that Lender B could fairly and reasonably have disregarded its previous pattern of lending to Mrs M. I think that Lender B ought fairly and reasonably to have realised that providing loans 20 to 24 continued to increase Mrs M's indebtedness in a way that was unsustainable or otherwise harmful for her.

I say all of this being particularly mindful that Lender B itself appears to be aware of the unfairness of continuing to lend to borrowers who were proving unable to sustainably repay their loans. That's presumably why its final response said *"we agree that payday loans are a short term, high interest product".* And it also said deferrals were *"monitored to ensure that loans are not taken for great lengths of time".*

With this statement, Lender B showed that it knew excessive re-lending and indebtedness for prolonged periods wasn't fair to borrowers like Mrs M. So I can't see how Lender B can say that it's wrong to defer a loan, or loans, for an extended period of time, yet also argue that it was fair and reasonable to provide this series of loans when the net effect on Mrs M's financial position was the same. And I now find it very hard to see how and why Lender B thinks it was fair and reasonable to provide so many loans and deferrals over such an extended period of time – or why it maintains that this was fair.

So given all of Lender B's obligations, the short-term purpose of this kind of high-cost credit, and what I think is fair and reasonable taking into account the circumstances and everything I've covered in this section, I think that Lender B acted unfairly in providing Mrs M with loans 14 to 24.

Did Mrs M lose out as a result of Lender B's shortcomings in relation to loans 14 to 24?

I think that Mrs M did suffer adverse consequences as a result of Lender B unfairly giving her loans 14 to 24. I think this is the case for two key reasons.

Firstly, these loans had the effect of unfairly prolonging Mrs M's indebtedness to Lender B by allowing her to take expensive credit – which the rules and guidance made clear was only intended for short-term use – over an extended period of time.

These loans were very expensive. For regular and prolonged access to an average of around £250, Mrs M paid many multiples in interest, fees and charges – around twelve times. And I think that the overall cost of these loans unfairly prolonged what was already an adverse and precarious financial position for Mrs M.

Secondly, the sheer number of loans and deferrals (even those successfully repaid) is likely to have had implications for Mrs M's ability to access mainstream credit. The greater the presence of short-term loans on Mrs M's credit file the less likely Mrs M was able to rehabilitate her finances and regain access to mainstream credit.

In my view, Lender B giving Mrs M such a large number of loans (which it shouldn't have done) over such an extended period of time, unfairly placed her in a position where she was trapped into taking very expensive high-cost loans over an extended period as no-one else (other than similar providers) would lend to her.

I think that, in these circumstances, Mrs M had little choice other than to keep turning to Lender B for further loans, because it, as well other similar providers, was the only one prepared to lend to her bearing in mind everything that had gone on previously.

So overall and having carefully thought about everything provided and what's fair and reasonable in all the circumstances of this case, I'm intending to say that Mrs M lost out because Lender B unfairly gave her loans 14 to 24, which it ought to have realised were unsustainable and harmful for her – this is in addition to loans 6-13 which Lender B already accepts it shouldn't have given to her. And this means I'm intending to tell Lender B that it needs to put things right.

fair compensation – what I'm intending to say that Lender B needs to do to put things right for Mrs M

I've thought about what amounts to fair compensation in this case. Where I find that a business has done something wrong, I'd normally expect that business – in so far as is reasonably practicable – to put the consumer in the position they *would be in now* if that wrong hadn't taken place. In essence, in this case, this would mean Lender B putting Mrs M in the position she'd now be in if she hadn't been given the loans I'm upholding.

But when it comes to complaints about irresponsible lending this isn't straightforward. Mrs M *was* given the loans in question and she used the funds – albeit in reality what she's effectively done is repaid previous loans with the funds. So, in these circumstances, I can't undo what's already been done. And it's simply not possible to put Mrs M back in the position she would be in if she hadn't been given these loans in the first place.

As this is the case, I have to think about some other way of putting things right in a fair and reasonable way bearing in mind all the circumstances of the case. And I'd like to explain the reasons why I think that it would be fair and reasonable for Lender B to put things right in the following way.

interest and charges on the loans Mrs M shouldn't have been given

As I've explained throughout this decision, Lender B continually lending to Mrs M left her in a position where she wasn't able to properly settle her debt. This was because Mrs M kept having to find additional funds to pay the (increasing) interest and charges on her Lender B loans.

Mrs M then had to borrow again from Lender B to either repay others or cover the hole in her finances and she incurred more interest and charges when she did this. So to start with, I think that Lender B should refund the interest and charges Mrs M paid on loans 14 to 24 (as well as loans 6 to 13).

I'm also mindful that Mrs M lost the use of the funds she used to pay the interest and charges, I now think that Lender B needs to refund to her. As Mrs M lost the use of these funds, I think that she should be compensated for this.

We normally ask a business to pay 8% simple interest where a consumer hasn't had the use of funds because its actions resulted in something having gone wrong. Bearing in mind my conclusions in the paragraph above, I see no reason to depart from our usual approach here and I think awarding 8% per year simple interest, on the interest and charges that were paid (including any faster payment fees), is fair and reasonable in the circumstances of this case.

So Lender B should pay Mrs M 8% per year simple interest on the interest and charges she paid from the date those charges were paid to the date it settles Mrs M's complaint.

Mrs M's credit file

Generally speaking, I'd expect a lender to remove any adverse information recorded on a consumer's credit file as a result of the interest and charges on the loans they shouldn't have been given. After all it's the interest and charges that the consumer is being refunded and the expectation is they will have repaid, or they should repay what they owe.

But I'm upholding Mrs M's complaint about loans 14 to 24 because I think the overall pattern of lending increased Mrs M's indebtedness in a way that was unsustainable or harmful in some other way. And as I've explained earlier, I would've reached a similar conclusion on loans 6 to 13 if Lender B hadn't already agreed to do this.

I've also explained that there were two main adverse consequences of Lender B having given Mrs M so many loans. Firstly it caused her to pay an excessive amount of interest and charges. And I've already explained how Mrs M should be compensated for this.

I also explained that the number of loans and the period Lender B lent to Mrs M is likely to have had implications for her ability to access mainstream credit. The greater the presence of short-term loans on Mrs M's credit file (and the longer the period of time this spanned) the less likely Mrs M was able to rehabilitate her finances and regain access to mainstream credit. And I think my direction in relation to Mrs M's credit file needs to reflect this.

So while I recognise the importance of preserving an accurate picture of Mrs M's credit history and creditworthiness in order to enable a lender to make an informed decision on whether to lend to her, I think that the mere presence of this level of lending on Mrs M's credit file, in itself, constitutes adverse information.

I think that this many short term loans over the period of time they were taken appearing on Mrs M's credit file is likely to continue unfairly adversely affecting Mrs M going forwards. In these circumstances, I think that it is fair and reasonable for Lender B to remove all reference to loans 6 to 24 from Mrs M's credit file, as the number of loans (and the period of time they cover) in itself is adverse information.

All of this means that I think it would be fair and reasonable in all the circumstances of Mrs M's complaint for Lender B to put things right in the following way:

- refund all the interest, fees and charges for loans 14 to 24 (as well as loans 6 to 13 as it has already agreed to do); and

- add interest at 8% per year simple on the above interest and charges from the date they were paid by Mrs M to the date of settlement†;

- remove all reference to loans 6 to 24 from Mrs M's credit file.

† HM Revenue & Customs requires Lender B to take off tax from this interest. Lender B must give Mrs M a certificate showing how much tax it's taken off if she asks for one.

my provisional decision

For the reasons given above, I am intending to uphold Mrs M's complaint about Lender B and say it should pay Mrs M compensation as set out above.

So unless the comments and evidence I get by 20 August 2018 changes my mind, that's what I'll tell Lender B to do in my final decision.

Jeshen Narayanan
ombudsman

Mrs M's lending history with Lender B

Loan	Provided	Settled	Amount	Total charges	Deferrals
1	08 April 2010	29 April 2010	£200	£50.00	0
2	30 April 2010	27 May 2010	£200	£50.00	0
3	30 July 2010	26 August 2010	£200	£50.00	0
4	27 August 2010	25 November 2010	£280	£210.00	2
5	15 December 2010	29 September 2011	£330	£742.50	8
6	**30 September 2011**	**27 October 2011**	**£270**	**£67.50**	**0**
7	**31 October 2011**	**23 February 2012**	**£340**	**£340.00**	**3**
8	**27 February 2012**	**29 March 2012**	**£280**	**£70.00**	**0**
9	**03 April 2012**	**26 April 2012**	**£305**	**£76.25**	**0**
10	**27 April 2012**	**31 May 2012**	**£280**	**£70.00**	**0**
11	**01 June 2012**	**28 June 2012**	**£405**	**£101.25**	**0**
12	**29 June 2012**	**26 July 2012**	**£355**	**£88.75**	**0**
13	**27 July 2012**	**25 October 2012**	**£475**	**£356.25**	**2**
14	26 October 2012	29 November 2012	£270	£67.50	0
15	16 January 2013	31 January 2013	£125	£31.25	0
16	15 February 2013	28 February 2013	£100	£25.00	0
17	01 March 2013	28 March 2013	£150	£37.50	0
18	03 April 2013	25 April 2013	£80	£20.00	0
19	15 June 2013	27 June 2013	£120	£30.00	0
20	03 December 2013	19 December 2013	£125	£25.00	0
21	20 December 2013	27 February 2014	£250	£125.00	1
22	28 February 2014	24 April 2014	£290	£145.00	1
23	25 April 2014	26 June 2014	£300	£150.00	1
24	03 July 2014	29 July 2014	£385	£133.00	0

Loans in bold upheld by Lender B prior to our involvement
Loan highlighted in grey upheld as a result of this provisional decision