

REMOVING BARRIERS TO
THE SHARING OF NON-
CONSENSUAL CREDIT
DATA

Government response to
consultation

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EXECUTIVE SUMMARY

Data sharing is an important tool which provides banks, credit card providers and other lenders with information about a consumer's existing credit commitments and repayment behaviour that enables them to assess whether he or she is managing existing commitments and whether further credit is affordable. The Government strongly supports the use of data sharing by the credit industry, wherever possible, to help prevent consumers becoming over-indebted as a result of taking on more credit commitments than they can afford.

In October 2006 the then Department of Trade and Industry published a public consultation on proposals to legislate to enable the sharing of "non-consensual credit data" – data on approximately 40 million credit accounts opened before lenders routinely notified their customers on opening an account that their data would be shared. Data on non-consensual accounts cannot currently be shared unless express consent is sought from individual account holders. Lenders have argued that to seek consent on all these accounts would be impractical and costly. They have therefore requested that Government consider the case for legislation to enable data sharing on these accounts without consent. The sharing of non-consensual data would enable lenders to gain a fuller picture of the extent of an individual's existing indebtedness in order to make responsible lending decisions with the aim of preventing over-indebtedness.

It is important that the right balance is struck between individual rights and the wider public interest. Any legislative provision to enable data sharing would need to be proportionate in order to satisfy the requirements of Article 8 of the European Convention on Human Rights (right to privacy) and the Data Protection Directive. In the light of evidence of public concern about the sharing of personal financial data, any legislative measure would also have to be framed so as to ensure public confidence in the security and integrity of the data sharing system.

44 organisations and individuals responded to the consultation, which closed in January 2007. The Government thanks all those who took the time to respond for their comments and apologises for the delay in issuing this response.

Respondents to consultation were divided on most of the issues raised in the consultation. Whilst a clear majority supported data sharing by financial service institutions as a means to facilitate responsible lending decisions, there was disagreement about whether the sharing of non-consensual data in particular would significantly contribute to the goal of preventing over-indebtedness.

Respondents were also strongly divided over whether a legislative measure to enable the sharing of non-consensual credit account data without the express consent of consumers could be regarded as lawful and proportionate, and over whether restrictions should be placed on the sharing of such data in the event that a measure were introduced.

In the light of questions raised in response to the consultation, the Government considers that further detailed exploration of the issues involved is required in order to reach a firm view on whether legislation should be introduced to enable the sharing of non-consensual credit data. The Department for Business, Enterprise and Regulatory Reform has therefore established an expert working group made up of individuals with a detailed professional understanding of the legal and practical complexities surrounding the sharing of personal financial information to consider all the issues raised by respondents to consultation. This group will report its recommendations to Ministers within a year.

CONTENTS

Chapter 1 - Introduction	7
Chapter 2 - Background	9
Chapter 3 - Summary of responses received	15
Chapter 4 - Would a legislative measure be in the public interest?.....	17
Chapter 6 - Would a legislative measure to enable the sharing of non- consensual credit data be proportionate?	25
Chapter 7 - What restrictions might be imposed on the sharing of such data in order to limit its impact on individual privacy?	31
Chapter 8 – Other issues	37
Chapter 9 – Safeguards.....	41
Chapter 10 - Conclusion.....	43
Annex A – List of respondents to consultation	45

CHAPTER 1 - INTRODUCTION

1.1. The UK credit industry is the largest and most diverse in Europe. For most, credit provides a useful tool with which to effectively deal with the uncertainty and irregularity of modern life. However, a small but growing minority of individuals experience difficulty with their credit commitments, finding themselves in a position of over-indebtedness.

1.2. The Government is keen to promote responsible lending within the credit market. A key element of responsible lending is not lending or extending further credit to a consumer who is already over-indebted, or who is at risk of becoming so. Lenders are encouraged, wherever practicable, to consider the full extent of a consumer's credit commitments when deciding whether or not to lend to that individual. This is usually achieved through the sharing of credit data via Credit Reference Agencies (CRAs). The consumer gives his/her permission to the lender to share their data via a "Fair Processing Notice" contained within the credit agreement. However, accounts opened before the late 1990s typically did not contain such fair processing notices. In practice this means that lenders are unable to share data, other than instances of default, on an estimated 40 million accounts. This is compared with around 400 million accounts on which data is currently shared.

1.3. The then Department of Trade and Industry (DTI) issued a consultation on the removal of barriers to the sharing of non-consensual credit data in October 2006, which sought views from stakeholders and the wider public on whether a legislative measure should be introduced to enable lenders to share data on these 40 million accounts without customers' consent in order to facilitate responsible lending decisions. Any interference with people's rights to privacy and the protection of their data is a serious matter, only to be undertaken where it is clearly lawful and in the public interest to do so. The consultation therefore sought views on the appropriate balance between individual rights and the wider public interest and how this might be achieved.

1.4. Consultation closed in January 2007. 44 organisations and individuals responded. This document sets out the Government's formal response to the feedback received. The Department for Business, Enterprise and Regulatory Reform (BERR) wishes to thank all those who took the time to respond to this consultation and apologises for the delay in issuing this response. A list of those respondents who were willing to have their names disclosed can be found at Annex A.

CHAPTER 2 - BACKGROUND

Non-consensual credit data: the issue

2.1. The UK credit industry is the largest within the EU, relatively competitive and offering a very diverse range of credit products to consumers. Many consumers consider credit to be an essential tool in modern living and utilise credit in a responsible manner. However, a small but growing minority of individuals are experiencing difficulty with their credit commitments¹.

2.2. Where it occurs, over-indebtedness has negative impacts, not only economically, but also socially, for example, through the impact of stress on individuals' health and family relationships. The Government is therefore keen to promote responsible lending within the credit market. A key element of responsible lending is not lending or extending credit to a consumer who is over-indebted or at risk of over-indebtedness. The Government also considers ongoing account management and the sympathetic management of accounts in arrears to be facets of responsible lending.

2.3. In the UK, lenders share data about an individual's use of credit in order to assist them in deciding whether or not to lend to that individual. The data can be used to identify whether or not an individual is a good credit risk, whether their risk profile is appropriate for the product on offer, and whether an individual is potentially over-indebted. The data can also be used for ongoing account management purposes such as managing credit limit increases on revolving credit products such as credit cards. Credit data is shared by lenders via CRAs.

2.4. The use of data sharing to promote responsible lending is highlighted in the Government's strategy for tackling over-indebtedness². The issue was also raised in some detail during the Treasury Select Committee enquiry into credit card charges and marketing³ and during the parliamentary passage of the Consumer Credit Act 2006. The Government strongly supports the use of data sharing, wherever practicable, to enable lenders to make the best informed decisions possible, in the interests of preventing consumers from becoming over-indebted.

2.5. Under the common law of banking confidentiality, a lender has an implied contractual duty to keep a consumer's affairs private unless certain conditions apply, for example, if disclosure is made with the express or

¹ Over-indebtedness in Britain: a DTI report on the MORI Financial Services Survey 2004 and Tackling Over-Indebtedness – Action Plans 2004 - 2007

² Tackling Over-Indebtedness – Action Plans 2004 - 2007

³ Treasury Select Committee second report into Credit Card Charges and Marketing, February 2005

implied consent of the consumer or disclosure is under compulsion by law. Credit accounts that were opened before “Fair Processing Notices” were routinely included in credit agreements are known as “non-consensual” or “historic” accounts. As consumers were not told when they opened these accounts that their data would be shared, lenders cannot share data relating to these accounts, except where an account is in default (where a customer has been in arrears for three months or more). In cases of default the contract is deemed to have broken down and in these cases lenders can share data relating to the account in default, subject to a number of conditions⁴.

2.6. It is estimated that data on approximately 40 million non-consensual credit accounts is not currently shared, compared to approximately 400 million⁵ accounts where a fair processing notice has been included. This is a particular issue for credit cards, store cards and current accounts, which can remain open for decades.

2.7. The Government’s policy objective is that, where appropriate, lenders should share relevant data to promote responsible lending. This includes using all the credit data that is legally available to them, to help identify the full spread of a consumer’s credit commitments when making lending decisions, and in ongoing account and arrears management.

2.8. Lenders themselves have made substantial progress towards that goal. At present it is believed that there is coverage of up to 70% of consumer credit agreements on CRA databases (approximately 400 million accounts, not all of which are currently active). The supply and use of data sharing by the credit industry as a whole is growing, with CRAs reporting that lenders are signing up 30 to 40 new portfolios a year.

2.9. A large tranche of data was added in 2002 when mail order companies agreed to wider data sharing across all CRAs, adding approximately 35 million accounts to the databases. By September 2005, all credit card lenders were sharing full credit card data, where legally able to do so, resulting in the addition of at least 6 million further accounts. Credit and Storecard providers have also jointly agreed to share more information on their customers in order

⁴ These are:

- The consumer must be clearly advised that the account is not operating in accordance with the agreement and must be given time to rectify the situation before action is taken (typically 28 days);
- The individual must also be advised that if the situation is not rectified, details of the account will be passed on to a credit reference agency and shared with others;
- Prior to this, all customers whose data is not currently shared must have been informed that data sharing will occur where accounts are in default, and the procedure that will be followed.

⁵ At the time of publication of the consultation document put this figure at an estimated at 350 million accounts. (Information provided by industry).

to identify those who regularly only pay the minimum balance or less than the full balance and those who regularly use their cards to get cash advances. These behaviours have been identified by analysis as signs consistent with a borrower being under financial pressure. This behavioural data sharing is expected to commence in February 2008.

2.10. The retail banks have also fulfilled their commitment to share data on all loans by the end of 2005, subject to logistics and feasibility. They have also worked to shape a non-mandatory agreement⁶ for the sharing of positive data on current accounts, recognising the unique nature of the current account relationship and the particularities of overdraft facilities compared to other credit products.

2.11. Following review of the sector by the Competition Commission⁷, the home credit industry is also moving towards establishing a data sharing system which takes account of the nature of typical home credit loans – usually low value and with repayments on a weekly, rather than monthly, basis. It is currently expected that data on these loans will be shared from June 2008.

2.12. Recently agreed revisions to the Banking Code provide that all subscribers must share full data on all accounts where they are legally able to do so in the credit assessment process. The new Banking Code will also require subscribers to periodically review customers' credit card limits using CRA and internal data in order to seek to spot borrowers who may be experiencing difficulties at an early stage.

2.13. Given their reliance on CRA data, lenders have been examining how this could be improved. It is the lenders' view that the significant next step in enabling them to see the full spread of a consumer's credit commitments would be the addition of non-consensual data to the CRA databases. Lenders believe that there are significant barriers to achieving individual consent for all 40 million of these accounts. However, without consent, data sharing on these accounts would bring into question the consumer's individual right to the privacy of their financial information. The Government therefore issued a consultation document in October 2006 seeking views on the extent to which it would be proportionate to legislate to allow for non-consensual data to be shared, subject to the appropriate safeguards.

⁶ Full data sharing on these accounts will become mandatory for Banking Code subscribers as a result of recently agreed changes to the Banking Code which comes into force in March 2008.

⁷ Competition Commission Home Credit Market Investigation November 2006

Legal barriers to the sharing of non-consensual data

2.14. There are three potential ways in which lenders might be able to take account of a prospective borrower's non-consensual credit commitments:

- Lenders could seek explicit consumer consent in respect of those accounts where consent has not yet been given
- Lenders could require prospective borrowers to provide documentary proof of income and other credit commitments when applying for new credit
- The Government could provide an express legal basis to enable banks to share appropriate and relevant data on non-consensual credit accounts, for responsible lending purposes, without gaining the consumer's specific permission.

2.15. Lenders have argued that the first two options are impractical. They argue that writing individually to customers with non-consensual accounts to seek their consent would be likely to result in a very low response rate. When one lender sent out requests to nearly 1m consumers it reported a response rate of 3%, despite offering a charity donation for each response received. The option of seeking documentary evidence has also been rejected by a number of lenders as impractical. Whilst this may be cost-effective for large loans such as mortgages, it has proved an inconvenient method for assessing a customer's ability to repay for the majority of credit agreements where much smaller sums are involved. Moreover, lenders consider that customers that represent the greatest risk of default may have the greatest incentive to withhold information that could be considered negative. It is argued that for lenders to verify the information given to them by consumers would be a very costly process.

2.16. Lenders have therefore asked the Government to consider legislating to provide an express legal basis for appropriate data sharing on non-consensual accounts in the interests of responsible lending. However, in order to satisfy the requirements of Article 8 of the European Convention on Human Rights (ECHR) (the right to privacy) and the Data Protection Directive (DPD), enacted in domestic legislation through the Data Protection Act 1998 (DPA), any measure would have to be proportionate, such that the intrusion on individuals' privacy was justified by the public benefits of the measure.

2.17. The consultation document and accompanying partial Regulatory Impact Assessment set out the available evidence about the number of accounts likely to be affected by such a measure and sought to quantify the likely benefits of improved lending decisions. Four options were presented:

- Option 1 – Do nothing
- Option 2 – Encourage the sharing of non-consensual accounts through seeking express individual consent

- Option 3 – Bring forward legislation to enable the sharing of non-consensual accounts subject to restrictions (e.g. provision for an individual opt-out)
- Option 4 – Bring forward legislation to enable the sharing of non-consensual accounts without restriction

2.18. The partial Regulatory Impact Assessment (RIA) which accompanied the consultation document set out an initial analysis of the costs and benefits of each option. On the basis of the information available, the Government concluded that Option 3 appeared to offer the best balance of costs and benefits, assuming that it would be both possible and feasible to strike an appropriate balance between individual rights and the wider public interest, such that any measure was compliant with the ECHR and the DPD.

2.19. As this response to consultation makes no firm recommendation for legislative action, it is not accompanied by an Impact Assessment. However, should the Government decide to bring forward proposals for legislative change in future an Impact Assessment, using data from the partial RIA issued with the consultation, will be prepared in the light of information provided by respondents to this consultation and the results of future investigation.

2.20. In order to be compliant with the ECHR and DPD, a legislative measure would have to be:

- Clearly in the public interest
- Necessary in order to achieve the benefits desired
- Proportionate

In addition, any solution, whether legislative or non-legislative, must be cost-effective and simple to administer.

2.21. In order to determine whether a solution meeting these criteria can be found, the consultation document asked respondents to consider a series of questions:

1. Is seeking consent individually from holders of non-consensual credit accounts a practical solution to gain consumers' consent to share data on non-consensual credit accounts? If not, or if you think there is an alternative approach, please give details.
2. Can lenders reliably and satisfactorily assess the extent of a consumer's ability to repay borrowing by demanding documentary evidence from the consumer? Please give reasons for your answer.
3. In what cases do you consider that the sharing of non-consensual data would be proportionate? Please give evidence to support your position

and of how practical it would be (in your view) to produce a workable definition of the different types of consumer.

4. Do you consider that legislation to permit the sharing of non-consensual data would breach the Article 8 ECHR rights (right to privacy) of consumers? Do you consider that any breach would apply to all consumers, only to consumers who were not at risk of being over-indebted, or only to non credit active consumers?
5. What restrictions do you consider should be placed upon lenders when sharing non-consensual data? Please give evidence where possible about the costs and benefits of such restrictions.
6. What restrictions do you consider should be made concerning the types of data that could be shared?
7. Do you agree that if the sharing of data on non-consensual credit accounts was to occur, consumers should be given the opportunity to object to their data being shared? What form should this opt-out take?
8. What other barriers are you aware of that may prevent the sharing of data that could help identify whether a consumer is over-indebted?
9. Are the principles of reciprocity a significant deterrent against the use of shared credit data to identify individuals for marketing purposes? Does SCoR provide a suitable forum for the governance of consumer credit data? If not, what additional safeguards do you think are needed?

2.22. The consultation document and partial Regulatory Impact Assessment can be found at <http://www.berr.gov.uk/consultations/page34515.html>

CHAPTER 3 - SUMMARY OF RESPONSES RECEIVED

3.1. 44 responses were received. The breakdown of respondents was as follows:

Banks, building societies and credit card providers	10
Financial services industry bodies (trade and professional associations, etc)	9
Individuals	9
Consumer bodies	5
Government departments, local authorities and public bodies	4
Credit reference agencies	3
Other	2
Academics	1
Utility companies	1
Total	44

A list of those respondents who were willing to have their names disclosed can be found at Annex A.

3.2. The overwhelming majority of respondents were supportive of the principle of sharing non-consensual data, if possible, in order to prevent over-indebtedness. However, respondents were divided over the conditions under which lenders should be able to share non-consensual data. Of the 44 organisations and individuals who responded, six respondents were against any form of legislative measure which would enable the sharing of this data without express consumer consent. A further two respondents did not express a preference. Nine respondents, made up of consumer bodies, public bodies and others expressed concerns about a legislative measure, and six of these questioned whether this would be justified by the benefits it would deliver.

3.3. Of the remainder, a clear majority (mainly lenders and bodies representing the financial services sector) favoured Option 4 (legislation to enable the sharing of this data without any restrictions), although a small number of lenders indicated that they would be willing to support certain restrictions if these were required in order to ensure legal compliance.

3.4. A large minority of respondents favoured the inclusion in any enabling measure of restrictions on the way that non-consensual credit data could be shared. A number of this group of respondents emphasised that all available methods of seeking consent should be considered before moving to legislation.

3.5. The Government has considered responses to consultation very carefully and has concluded that there is insufficient evidence at present on which to base firm proposals for change. However, given the potential for significant public benefits in preventing over-indebtedness, the Government considers that it is important to explore all the options to enable lenders to share non-consensual credit data. The Government has therefore established an expert working group to examine in detail the costs and benefits of the sharing of non-consensual credit data and the options for implementing this. This group, made up of individuals with in-depth understanding of data sharing practice, as well as data protection and human rights considerations, is drawn from lenders, credit reference agencies, consumer groups, academia and relevant government departments and public bodies. The group will consider all the alternative solutions to this issue and report its findings to Ministers within a year. The Government considers that this approach offers the best prospect of delivering a speedy and effective solution and calls on all stakeholders to support the work of the group by responding positively to any requests for information and evidence it may make.

3.6. On 25 October the Prime Minister asked Dr Mark Walport, a Director of the Wellcome Trust, and Richard Thomas, the Information Commissioner, to conduct a review of the framework for the use and protection of information in the private and public sector. The review will be published in the first half of 2008. The review will:

- consider whether there should be any changes to the way the Data Protection Act 1998 operates in the UK and the options for implementing any such changes
- provide recommendations on the powers and sanctions available to the regulator and courts in the legislation governing data sharing and data protection
- provide recommendations on how data-sharing policy should be developed in a way that ensures proper transparency, scrutiny and accountability

The expert working group on non-consensual data sharing will liaise with the Walport/Thomas Review as appropriate and take account of the Review's findings in its recommendations to Ministers.

CHAPTER 4 - WOULD A LEGISLATIVE MEASURE BE IN THE PUBLIC INTEREST?

4.1. Most respondents supported the analysis in the partial RIA that sharing data on non-consensual accounts has the potential to directly benefit approximately 80,000 currently over-indebted consumers, plus consumers who are identified as being on the cusp of over-indebtedness. The British Bankers' Association (BBA) in its response stated that "Whilst the figures may be estimated, the logic associated with the exercise is irrefutable. More sharing of data concerning financial liabilities leads to greater awareness amongst credit providers and, undoubtedly, assists in curbing over-indebtedness."

4.2. A small number of respondents, however, queried whether the sharing of non-consensual data would really make a significant difference in terms of preventing over-indebtedness. Citizens Advice cautioned that since the growth of automated data sharing and credit scoring from the late 1990s, levels of over-indebtedness have continued to grow, and expressed the view that lenders have in many cases continued to grant further credit where this is not in the consumer's interest. Citizens Advice argue that "When the evidence available from existing shared data, a lender's own account data and borrowers' circumstances are apparently not being used in a way that minimises poor lending decisions, then the public benefits of sharing non-consensual data may be rather less than the consultation paper suggests." Similar concerns were advanced by the Information Commissioner's Office (ICO) and ScottishPower.

4.3. The Institute of Credit Management (ICM) explained that its membership had mixed views on this issue. Some members consider that it has been proven that a reliable credit decision can be made using credit scoring techniques on only a sub-set of information on the applicant's financial position. These members took the view that the extent of information available today is already more than enough to evaluate risk with a high degree of confidence. Likewise, the Money Advice Trust and National Debtline, responding jointly (MAT/NDL), queried whether the information made available would be of sufficient quality to assist in improving lending decisions. The ICO expressed concerns that the most dramatic rises in unsecured debt had taken place in the last 10 years, and that the problem of over-indebtedness may well stem from recent accounts, rather than the historic accounts from which data cannot currently be shared.

4.4. Citizens Advice and the ICO also queried whether improved risk assessment as a result of additional data sharing would lead to lower levels of default on debt commitments. They contended that sharing additional data might in fact result in mainstream lenders declining more loan applications, with the result that borrowers may apply for the same amount of credit at a higher price from a sub-prime provider. The ICO indicated that if this was the

result of increased data sharing, rather than the desired aim of reducing the number of individuals who borrow too heavily, then this fact could materially affect the question of proportionality as it threatens the benefits claimed for the proposals. Despite these reservations, Citizens Advice felt there might nonetheless be a case for public action to allow the sharing of non-consensual data, as long as the case for this is properly balanced against public concerns for privacy and data protection.

4.5. The Government thanks respondents for their comments. We note concerns of Citizens Advice and the ICO that the potential benefits of this individual measure might not be directly realised if it results in borrowers who have been declined a loan by a mainstream lender taking out a more expensive loan elsewhere. The Government is not persuaded that this should be a barrier to action to enable the sharing of non-consensual data, subject to its being directly material to the question of proportionality. This issue must be considered against the wider backdrop of action by Government, regulators and the financial services sector to improve the quality of lending decisions across all segments of the market.

4.6. For example, the Consumer Credit Act 2006 has strengthened the consumer credit licensing regime, administered by the Office of Fair Trading (OFT). From April 2008 the OFT will have stronger and wider ranging powers to assess a licensee's fitness to hold a licence and to investigate suspected cases of misconduct, including imposing sanctions in the form of requirements on licences or penalties of up to £50,000 in cases where the conduct might fall short of action to revoke a licence. The new fitness test for holding a licence will also make clear that the OFT may have regard to whether a licensee lends responsibly. Furthermore, the Consumer Credit Act 2006 strengthened opportunities for redress for consumers where things go wrong. The Financial Ombudsman Service's jurisdiction has been extended to cover consumer credit licensees so that consumers can seek independent and impartial resolution of disputes with their lender more quickly and cheaper than previously. Consumers also have access to redress through the Courts through the new unfair relationships test which looks at the lender-borrower relationship more widely than previously. These measures, alongside ongoing dialogue with the consumer credit industry and efforts by the industry itself through self-regulation and the spread of best practice, are acting to drive up standards in responsible lending across the sector.

4.7. The Government would not expect any responsible lender, whether high street bank or a sub-prime provider, to make a loan to someone who simply cannot afford to pay it back. Data sharing is a means of enabling lenders who want to take a responsible approach to their lending decisions to make the best-informed decisions they can. The Government considers that supporting lenders to make appropriate lending decisions through the use of data sharing will support the development of best practice throughout the market.

4.8. Nonetheless, we note concerns of the ICO and others that a robust case for the specific benefits of sharing non-consensual data is critical to making the case that a legislative measure may be necessary and that any interference with individual rights to privacy entailed by such a measure would be proportionate to the benefits it achieved. In the light of this, Ministers have asked the expert working group to consider in detail the evidence base for action in this area, particularly with regard to the proportionality of any possible legislative measure.

CHAPTER 5 - ARE THERE ALTERNATIVES TO LEGISLATION?

5.1. The consultation document posited two alternatives to legislation to enable the sharing of non-consensual data. The first of these was for lenders to seek consent individually from the holders of non-consensual credit accounts. The second was for lenders to supplement the shared data which they can currently legally access by demanding documentary evidence from the consumer in order to assess his or her ability to repay.

Consultation Question 1: Is seeking consent individually from holders of non-consensual credit accounts a practical solution to gain consumers' consent to share data on non-consensual credit accounts? If not, or if you think there is an alternative approach, please give details.

5.2. A significant majority of respondents highlighted the point raised in the consultation document that the response rate to a direct mailing seeking customer consent was likely to be very low, rendering this route futile and costly. A number of respondents agreed that response rates to marketing mail outs conducted by their organisations tended to be in the region of 1-2%. Others, such as Callcredit (a CRA) and CIFAS, a financial services industry scheme to prevent fraud through data sharing, suggested it was likely that those consumers most at risk of over-indebtedness would be least likely to respond. The BBA expressed the view, supported by a number of lenders, that non-response or refusal to give consent could give rise to fairness issues or the risk of a two-tier system, as not having granted consent might be taken as an indicator that a customer wished to hide a previous credit history.

5.3. Others, however, indicated some support for this option or for alternative methods of seeking consent. One building society believed that seeking consent could be practical, as long as the issue was clearly explained to consumers so that they understood the purpose and benefits of sharing their data. The OFT felt that all reasonable attempts to gain consent should be made before a legislative option was contemplated. The then Department for Constitutional Affairs (DCA, now Ministry of Justice) also believed that obtaining consent would be the best solution. The OFT argued that lenders could encourage consumers to provide consent by incentivising a response, for example, by making a contribution to charity for every response received.

5.4. A number of respondents considered alternative methods of seeking consent other than mailshots. Which? suggested that seeking consent when borrowers log on to internet banking sites might offer a viable approach. They noted that figures released by APACS, the UK payments association, show that 16.9 million adults now bank online in the UK – two thirds of online account holders go online at least once a week and one in five does so daily. Other respondents argued that consent should be sought at the point at

which a consumer applies for new credit. The Finance and Leasing Association (FLA) and Equifax (a CRA), however, expressed the view that to seek consent through various points of consumer contact would be at best a piecemeal solution, which was not viable on the scale required.

5.5. Finally, two respondents, a PhD student studying debt at the University of East Anglia and HBOS, raised the possibility that lenders could review the terms and conditions of non-consented accounts and ask consumers to sign new agreements which contained Fair Processing Notices informing them that their data would now be shared. HBOS, however, rejected this proposal, arguing that calling in all agreements would be costly and as complex as a universal mailshot.

5.6. The Government notes the concerns of lenders that seeking consent from individual consumers would be costly and impractical. The Government agrees that a large exercise in writing out to all consumers for their consent is unlikely to be effective in adding significant volumes of currently non-consensual data to the CRA databases. However, the Government agrees that, if an affordable and practical method of seeking consent on a significant scale can be found, this would be the preferred outcome. This is particularly the case as any legislative measure to enable the sharing of non-consensual credit data is likely to require the inclusion of specific safeguards and would require primary legislation – it would therefore take some years to come into effect. The Government has asked the expert group on non-consensual data sharing to consider whether alternative options, such as seeking consent at the point of an application for further credit, may be workable.

Consultation Question 2: Can lenders reliably and satisfactorily assess the extent of a consumer's ability to repay borrowing by demanding documentary evidence from the consumer? Please give reasons for your answer.

5.7. A clear majority of respondents expressed the view that seeking documentary evidence from consumers would be impractical and unreliable on its own, and noted that verification of information provided by consumers would be costly and slow. Several suggested that the costs of seeking such information might be likely to affect the industry's ability to provide low-cost small value loans. Others expressed the view that customers most likely to struggle with affordability were those least likely to declare the full extent of their commitments. Several respondents also pointed out that even honest customers risk misrepresenting their situation as a result of poor record-keeping or simply forgetting about particular commitments. A number concurred with the view expressed by the Trading Standards Institute (TSI) that consumers might seek to circumvent these processes in the interests of speed and convenience. Several respondents, such as the BBA and Experian (a CRA), felt that such a system would be unworkable in the case of internet and telephone delivery channels.

5.8. A number of respondents argued that the information which could be gleaned through documentary evidence was insufficient to enable a proper assessment of affordability. Which? and the Steering Committee of Reciprocity (SCoR, the industry body which oversees the sharing of data by lending institutions) both stated that an accurate assessment of affordability depends not only on the scale of existing credit commitments, but also other positive data such as income data. Experian also noted that data on how customers manage their existing commitments is critical to a prediction of their ability to manage debts going forward. ScottishPower added that seeking documentary evidence would only assist at the point of applying for new credit, whereas data sharing could support ongoing account management practices and enable lenders to anticipate changes in a consumer's ability to pay over time.

5.9. The Money Advice Trust and National Debtline, on the other hand, took the view that documentary evidence was not necessary, and argued that an "on-trust" calculation of income and outgoings, coupled with disclosure of all existing credit commitments, should be sufficient to make an initial assessment of ability to pay. Citizens Advice argued that credit applications should routinely include space for borrowers to set out their income, expenditure and other commitments. This would act as a useful tool for borrowers to assess for themselves what repayments they could afford. They noted that lenders had concerns about the delay this would introduce to the application and decision-making process, but argued that such concerns were misplaced – consumers should be encouraged to take their time and think carefully about borrowing decisions.

5.10. The OFT suggested different approaches could be taken to high value, long-term loans versus small, short-term ones. They made the suggestion, supported by a number of individual respondents, that consumers could be asked to give consent at the point of application for the lender in question to verify information provided by the consumer through bilateral arrangements with other lenders. The OFT acknowledged this approach might be costly but felt it might only be necessary in exceptional circumstances. The OFT acknowledged that there might be concerns about competitiveness if some lenders were to verify information provided by consumers while others did not. It suggested that it might be possible to incorporate guidance on this issue into the Banking Code.

5.11. The Government thanks respondents for their comments on this question. Having carefully considered responses received, the Government remains unpersuaded that seeking documentary evidence from consumers can provide a viable alternative to data sharing through the credit reference agencies. Data sharing provides a quick, cost effective and reliable means of verifying consumer commitments and supports competition in the consumer credit market. Data sharing allows for reliable verification of a consumer's commitments and avoids the problems of deliberate or accidental

misreporting of their financial situation by consumers. Furthermore, ongoing account management and risk profiling based on ability to repay relies on income and repayment data not easily gleaned through documentary evidence. The Government therefore believes that in the right conditions data sharing can deliver strong benefits which would be lost were lenders to rely on the provision of documentary evidence by consumers.

CHAPTER 6 - WOULD A LEGISLATIVE MEASURE TO ENABLE THE SHARING OF NON-CONSENSUAL CREDIT DATA BE PROPORTIONATE?

6.1. As noted in paragraph 2.16 above, in order for a legislative measure that enables the sharing of non-consensual credit data to satisfy the requirements of Article 8 of the ECHR (the right to privacy) and the DPD, any measure would have to be proportionate, such that the nature and extent of the intrusion on individuals' privacy was justified by the public benefits of the measure. The consultation document set out an initial assessment of the costs and benefits to consumers of the proposal.

6.2. The consultation document stated, drawing on analysis of one major lender's non-consensual book, that a measure to enable the sharing of non-consensual credit data would be beneficial to an estimated 80,000 consumers who are currently identified as being over-indebted, as well as improving the ability of lenders to identify consumers who are on the cusp of over-indebtedness. For these two groups, the sharing of non-consensual data would help lenders identify those prospective borrowers who are not suitable for further credit, as well as improving their ability to identify early those who are experiencing difficulties with their debts and respond appropriately.

6.3. The consultation document also suggested that a legislative measure could carry benefits for those consumers who are credit active but who are not over-indebted. For this group of consumers, the sharing of non-consensual data would contribute to a "thickening" of their credit file, which in turn may lead to lenders being able to offer lower APRs and a wider range of products overall. Whether an individual's credit risk is improved by the addition of non-consensual data depends, of course, on his/her repayment behaviour in respect of any non-consensual accounts held. It is possible, therefore, that for some credit-active consumers, the addition of non-consensual credit data could lead to a worsening of their credit record. Consequently, this group may find themselves excluded from some mainstream credit products and facing higher-cost credit options.

6.4. The consultation document noted that a proportion of consumers who hold non-consensual accounts may have no active credit facilities or commitments. This group would derive little or no benefit from the sharing of non-consensual credit data and for them in particular, a measure of this sort could be seen as breaching their right to privacy.

6.5. In addition, the consultation document noted that there might be costs to consumers of a measure to enable the sharing of non-consensual data. A number of recent research reports indicate that the public is concerned about the way that personal data, and financial information in particular, is handled. Although the industry self-regulates to ensure the appropriate and lawful

handling of data, there may be public concerns that increased data sharing could lead to an increased risk of inadvertent disclosure, identity theft or other security breaches.

6.6. In light of the analysis of costs and benefits set out, the consultation document sought views on whether the sharing of non-consensual data could be considered proportionate and whether respondents felt that legislation to permit such data sharing would breach the Article 8 ECHR rights of consumers.

Consultation Question 3: In what cases do you consider that the sharing of non-consensual data would be proportionate? Please give evidence to support your position and of how practical it would be (in your view) to produce a workable definition of the different types of consumer.

6.7. A majority of respondents from the financial services sector as well as AdviceUK argued that data should be shared on all consumers. A number of these pointed out that this data sharing would go no further than what already occurs in respect of more recent accounts covered by fair processing provisions. One individual respondent noted that it was quite likely that a large number of customers with non-consensual accounts will have later opened accounts where data is shared with their knowledge, and so they would be highly unlikely to refuse consent for sharing on previous accounts.

6.8. Experian argued that in fact much higher numbers of consumers stand to benefit than set out in the consultation document. Experian noted that most people get into financial difficulties due to a sudden change in their circumstances such as illness or losing their job. Because of this, the populations of the three categories of consumer outlined in the consultation (over-indebted, credit active but not over-indebted and non-credit active) will be constantly interchanging. Experian pointed to research⁸ which suggests that 25% of all consumers find their debts to be either somewhat of a burden or a heavy burden, arguing therefore that a significant proportion of consumers are worthy of scrutiny. Moreover, according to an FSA survey⁹ 70% of the population have made no provision for a drop in income such that even a small change in circumstances, or a sudden large bill, could have a significant impact on their ability to pay their debts.

6.9. Experian also identified wider benefits of sharing non-consensual data, pointing out that data shared with the credit reference agencies is used to combat identity fraud and money laundering by facilitating the swift and effective electronic verification of identity. It considered that this is of

⁸ The MORI Financial Services Survey 2004 found that 20% of those surveyed found their debts to be somewhat of a burden and a further 5% considered their debts to be a heavy burden.

⁹ Financial Capability in the UK: Establishing a Baseline, 2006

particular benefit to the customers of online share dealing and savings providers who would otherwise have to verify their identity by sending certified copies of documents such as passports and driving licences through the post, which can cause considerable concern to consumers. Electronic ID checking is used by Experian to verify the identity of individuals applying for a copy of their credit file. Currently, over 25% of such applications are manually reviewed as insufficient electronic data is held on the consumer in question, and some 11% are asked to provide additional information. On this basis, Experian suggests that up to 25% of consumers applying for savings and investment products which require ID verification may be considered likely to benefit from the addition of non-consensual credit data to their files.

6.10. Others, such as the then Department for Constitutional Affairs, felt that whilst it was likely that sharing of data on over-indebted consumers could be considered proportionate, sharing the data of other consumers was harder to justify. The ICO argued that consideration should be given to ways of limiting the number of people potentially affected, and that the sharing of data on non-credit active consumers should be avoided as in the case of this group the intrusion into private life would not make any obvious contribution to the reduction of over-indebtedness. The OFT concurred and argued that, given the figures stated in the consultation document regarding the proportion of consumers who either have no credit facilities or no current credit commitments¹⁰, the estimate of 80,000 over-indebted consumers may be an over-statement of the number of potential beneficiaries of sharing non-consensual credit data. The TSI queried whether credit active consumers who are not over-indebted would benefit, arguing that the sharing of this data could actually increase credit exclusion if the addition of new data worsened consumers' risk profile.

6.11. Furthermore, as noted in paragraphs 4.2 – 4.4 above, several respondents queried whether the benefits set out in the consultation document would accrue to consumers at all. One individual respondent, who asked for their identity to remain confidential, vehemently opposed the measure and queried whether any sharing of non-consensual data could be regarded as proportionate when other measures were open to the Government to help prevent over-indebtedness such as outlawing pre-authorized credit card applications or unsolicited increases in credit limits. Another individual respondent argued that the only data sharing which is strictly needed is whether an account is in default, information which lenders can already legitimately share.

6.12. A number of respondents commented on public concerns regarding privacy and security around the handling of financial personal data. Citizens

¹⁰ Approximately 25% of UK households have no credit facilities and 53% of households have no current credit commitments. (Data drawn from Household Survey on Over-Indebtedness, Elaine Kempson, Personal Finance Research Centre, 2002)

Advice, Which? and the DCA emphasised that high levels of public concern meant that the case for sharing non-consensual credit data must be very robust in order to justify legislative action. Which? called for further analysis to test the benefits of the proposal, stating that the assessment of any costs should take into account a measure of consumers' right to privacy. An individual respondent felt that the consultation document had not provided sufficient information on this point, particularly with regard to the scale of the potential for disclosures. She asked how many organisations and how many employees of these organisations would have access to the data. She urged the Government to conduct a risk assessment, particularly in the light of evidence that there is a growing illicit trade in personal data. Against this, the ICM quoted the views of one senior member, who considered that any concerns over security were outweighed by the potential benefits of sharing non-consensual credit data, arguing that "As a consumer I too share concerns over data being mishandled by the credit reference agencies and lenders. However, provided that there is a robust process for correcting such data, any mishandling is very much the lesser of two evils."

6.13. A clear majority of respondents who commented felt that it would not be possible to produce a workable definition of different types of consumer. A number echoed the point made by the FLA and Equifax that attempting to restrict the consumers on whom data is shared by reference to a measure of their over-indebtedness presents a "Catch-22" – how can lenders who hold non-consensual accounts determine which consumers are credit active or at risk of over-indebtedness without sharing the non-consensual data with the CRAs? Others expressed the view that distinguishing between categories of consumer could be regarded as discriminatory.

6.14. The ICM, however, reported that some of its members considered that it would be possible to exclude non-credit active consumers from such a measure and to provide a mechanism whereby data was shared as soon as one of these individuals became credit active. It noted that this would present some technological challenges, but felt that it should not be beyond the ability of the finance industry to find a solution.

Consultation Question 4: Do you consider that legislation to permit the sharing of non-consensual data would breach the Article 8 ECHR rights (right to privacy) of consumers? Do you consider that any breach would apply to all consumers, only to consumers who were not at risk of being over-indebted, or only to non credit active consumers?

6.15. About a third of those who responded to this question expressed the view that it was beyond their expertise to comment, and several urged Government to seek expert legal advice on this point. The DCA noted that consideration would also need to be given to whether any measure breached either Article 1 of the first protocol ECHR rights (right to protection of property) or the Data Protection Principles.

6.16. Of the remaining respondents, those representing the financial services sector tended to the view that legislation would not constitute an unlawful breach of Article 8 rights because it was justified by the benefits it would deliver and because checks and balances on the handling of such data are in place. Four individual respondents concurred with this view. The BBA further argued that sharing non-consensual data would promote compliance with the Data Protection Principles, as these require that data held must be adequate, relevant, accurate, not excessive and up to date. The BBA submitted that these principles cannot be adhered to if an individual's data held by a CRA is not complete because of the withholding of non-consensual data.

6.17. A number of respondents shared the view, expressed by the TSI, that whether legislation constituted a breach of Article 8 rights depended on whether the measure was justified and proportionate. The TSI queried whether the proposal would be "using a sledgehammer to crack a nut" – if so, it would be excessive and should not be pursued. Three individual respondents were confident on this point, arguing that in any circumstances a legislative measure would be excessive and disproportionate.

6.18. A number of respondents pointed out that the potential uses of data shared in this way were relevant to an assessment of whether such legislation would breach ECHR rights. Which? assumed that legislation would only allow data sharing for the purposes of responsible lending and not for debt collection. The DCA also questioned whether data shared in this way could be accessed by foreign lenders, as they might not be subject to the same rigorous domestic controls. In addition, Which? expressed concerns about data accuracy and argued that Article 8 might be triggered where the denial of a credit application is based on incorrect data. In their view, any legislation should include provisions giving individuals the opportunity to know and to object to the reasons for any rejection.

6.19. The Government thanks respondents for their contributions, in particular for the further evidence supplied as to the potential benefits of sharing non-consensual data. It is clear that an assessment of the proportionality of any proposed measure depends not only on the costs and benefits to consumers arising from any intrusion on their privacy, but also the nature and extent of that intrusion and the safeguards which are in place to ensure the security of individual's private information. Responses to consultation reveal significant differences of opinion among respondents about the extent to which a legislative measure could be regarded as justified or proportionate.

6.20. The Government considers that further detailed examination of the issue is required before a decision on this matter can be reached, and that the proportionality and legality of each alternative solution must be

considered on a case by case basis. In light of this, the Government has tasked the expert working group on non-consensual credit data to consider the merits of individual legislative or other solutions to this issue on a case by case basis, including a detailed assessment of the costs and benefits of each approach. Moreover, in the light of a number of high-profile recent security breaches in the handling of financial data which have led to considerable public concerns, the group's appraisal of any given solution should include a security risk assessment. The Government calls on all stakeholders to support the work of this group wherever possible through the provision of relevant evidence.

6.21. As noted in Chapter 3, the recently commissioned Walport/Thomas Review will evaluate the framework for the use and protection of information in the private and public sector and report its findings in the first half of 2008. The Review will consider the need for changes to the operation of the Data Protection Act 1998, make recommendations about the powers and sanctions available to the regulator and the courts, and consider how data sharing policy should be developed in a way that ensures proper transparency, scrutiny and accountability. The expert working group on non-consensual data sharing will liaise with the Walport/Thomas Review as appropriate and take account of the Review's findings in its recommendations to Ministers.

CHAPTER 7 - WHAT RESTRICTIONS MIGHT BE IMPOSED ON THE SHARING OF SUCH DATA IN ORDER TO LIMIT ITS IMPACT ON INDIVIDUAL PRIVACY?

7.1. The consultation document noted that one way to address the proportionality requirement may be to restrict the way in which non-consensual credit data may be shared. The consultation document therefore sought views on what restrictions respondents felt should be placed on lenders as to how and when data is shared and the costs and benefits of these. The consultation also sought views on whether the types of data to be shared should be restricted, and proposed that one way to do so would be to restrict the types of data shared to those currently shared by lenders for more recent accounts. The consultation also raised the possibility of including a regulation-making power to specify additional fields in future should it be proven that the sharing of other data types would be beneficial. The data currently shared is:

- Unique Record Identifier – for matching purposes. This identifier is not disclosed on the data file.
- Account Type – shows as Current Account, Credit Card, Loan, etc.
- Start Date – the date on which the account was first opened
- Closed/Settled/End Date – the date on which the account was closed (if applicable)
- Name and Address – title, forename, middle name, surname, full address and postal code
- Date of Birth
- Balance – the balance of the debt on the date all accounts are reported. For current accounts the account is currently reported when an overdraft is past due or when the funds borrowed exceed £1250.
- Credit Balance Indicator – this field indicates if an account is in credit and is typically blank. When populated it generally only occurs for revolving credit products such as credit cards. This field is not currently populated for current accounts with a credit balance (as opposed to those in overdraft) as these accounts are not shared at all. However, this field may be populated in future if lenders decide to share current account balance data as a way of measuring the consumer's ability to repay.
- Credit limit for revolving products - while mandatory for credit cards, this is an optional field for current accounts.
- Account Status Code – graduated scale from status 0 through to status 8 reflecting past due status or perceived level of risk from the account.
- Account Flag – to show special status such as cardholder deceased, cardholder using a debt management programme, partial settlement, etc.
- Default Date – where applicable.
- Default Balance – where applicable.

Consultation Question 5: What restrictions do you consider should be placed upon lenders when sharing non-consensual data? Please give evidence where possible about the costs and benefits of such restrictions.

Consultation Question 6: What restrictions do you consider should be made concerning the types of data that could be shared?

7.2. A clear majority of financial services organisations which commented stated that there should be no restrictions on the sharing of non-consensual credit data. Several, such as Experian and the BBA, wished to emphasise that under the Principles of Reciprocity (the rules that currently govern data sharing by the credit industry) data is currently shared in compliance with data protection rules and cannot be used for marketing purposes. Many pointed out that additional restrictions would limit the effectiveness of non-consensual data sharing with regard to the prevention of over-indebtedness, as well as potentially losing other benefits such as the thickening of other consumers' credit files and allowing the use of data sharing in ongoing account management. In addition, a number of respondents supported the view expressed by Cabot and the ICM that to introduce additional rules and restrictions would create undue complexity, making the Principles of Reciprocity unwieldy and impractical to operate. The ICM, however, made clear that these comments were subject to its view, reported in paragraph 6.14 above, that data should not be shared on non-credit active consumers.

7.3. Many respondents discussed the treatment of non-consensual current account data. The ICO encouraged serious consideration of the exclusion of current accounts, especially those where no overdraft facility exists or where this facility is not used. This view was echoed by an individual respondent, who noted that most mainstream current accounts come with an overdraft facility, whether this is requested by the consumer or not. The ICM pointed out, however, that under existing data sharing practice data is not in fact shared on current accounts without an overdraft or on those where the overdraft is either less than £1250 or not in arrears¹¹. In its view, then, it is not necessary to restrict the data types to be shared on current accounts. ScottishPower, however, felt that there should be an express restriction in the legislation to limit lenders' future reporting on current accounts. Others agreed that data in relation to current accounts potentially involved more significant confidentiality concerns and that data items to be shared on current accounts should be carefully defined.

7.4. MAT/NDL suggested that the sharing of non-consensual credit data should be restricted to the point at which a consumer makes a request for further credit. The FLA and Equifax opposed this approach, arguing that this

¹¹ In fact, the Government understands that it is current practice for the majority of lenders to share data on all overdraft balances, whatever their amount.

would prevent lenders from using the data for ongoing account management purposes. The BBA, supported by a number of lenders, felt that this approach would be very slow and would not have the desired impact of significantly increasing the volume of non-consensual data which is shared.

7.5. Another suggestion was that lenders should only be able to access non-consensual data when they had reasonable concerns about an individual's ability to repay, for example where a consumer was more than three months in arrears on one of his/her consensual accounts. The BBA rejected this approach, stating that it would result in some customers who were at risk of over-indebtedness not being identified, as it may be only the unshared data that identifies them as such. It objected that this approach would also prevent other consumers benefiting from a thickening of their credit file. An individual respondent, a founder member of SCoR, took the view that this proposal was short-sighted. The sharing of default data only had, in his view, contributed to over-indebtedness, which could and should be identified before accounts reach arrears of three months or more.

7.6. Three individual respondents took the view that the sharing of non-consensual data should be heavily restricted, with lenders allowed to disclose the existence of an account, but nothing more. Another individual respondent argued that lenders should be obliged to seek consent every time data is shared.

7.7. Roughly a third of respondents who commented supported the proposal to restrict the sharing of non-consensual data to the data types outlined at paragraph 7.1 above. Others, including Experian, SCoR, CML and four individual respondents, stated that the data types to be shared should always be the same as those for consensual accounts without commenting whether this should be specified in legislation. In addition, the ICO, FLA and Which? all expressed support for the idea of a regulation-making power providing for the addition of new fields in future, subject to Parliamentary scrutiny and approval.

7.8. Callcredit, however, felt that legislation should not restrict the types of data to be shared at all, as this could limit the industry's ability to respond to changes in the market and in consumer behaviour and expectations. It stated that the use of new data types, for example indicators of the flows of credit through an account, has been key to the development of new techniques such as Callcredit's over-indebtedness initiative. Callcredit suggested instead that industry guidance should make clear that full consideration should be given in advance of introducing new fields.

7.9. The TSI expressed concerns, shared by an individual respondent, about the sharing of income data, which they felt involved a greater intrusion on individual privacy than credit data. The TSI also queried how the "account status code" would work – who would decide upon the perceived level of

risk posed by a consumer and on what factors would this depend? The FLA and BBA wished to emphasise that the credit industry had no intentions of sharing data on individual transactions such as direct debit payments from current accounts or the purchase of goods or services on a credit card.

7.10. Experian and the ICO both highlighted that in all circumstances, consumers must be notified of the intention to share data, what data will be shared, and under what circumstances, as well as providing signposts to further information, in line with data protection rules. DCA added that debtors should have the ability to gain access to the information being shared and the opportunity to have it rectified if it is out of date or inaccurate.

7.11. The Government notes concerns raised about the sharing of non-consensual data in respect of current accounts. The Government notes that in the case of current account data in particular, a difficult balance must be struck between confidentiality and ensuring that any legislation is flexible enough take account of future developments. At the same time, the Government notes the views expressed by parts of the credit industry that the sharing of positive data will make the greatest contribution to the prevention of over-indebtedness. However, the sharing of positive data, such as data on credit card usage and information on credit turnover, potentially presents greater public concerns regarding confidentiality. The Government takes very seriously these concerns.

7.12. In the light of respondents' views on the proportionality of sharing non-consensual data, Government believes that a more in-depth consideration of the costs and benefits of particular restrictions is required. The Government has therefore tasked the expert working group on non-consensual credit data with examining these issues.

Other potential restrictions: "The opt-out"

7.13. The consultation document specifically proposed that, if any non-consensual data were to be shared, lenders should be required to give consumers notice of the intention to share the data on their non-consensual accounts and the option to object to that sharing. The consultation sought views on the principle of such an opt-out and the form it should take.

Consultation Question 7: Do you agree that if the sharing of data on non-consensual credit accounts was to occur, consumers should be given the opportunity to object to their data being shared? What form should this opt-out take?

7.14. A quarter of respondents (mainly consumer groups and public bodies) favoured an opt-out. This group also included two lenders, MBNA and Britannia Building Society. The ICM reported that some of its members felt that an opt-out to all data sharing, not just that on non-consensual accounts,

should be offered, arguing that there were occasions where this could help to protect the individual, for example in cases of mental incapacity or where an individual was seeking to strongly protect themselves against identity fraud. Both the DCA and ScottishPower noted that an opt-out could contribute towards the proportionality of any measure.

7.15. Four respondents rejected the idea of an opt-out in favour of an opt-in (i.e. positive consent). One individual respondent objected that lenders could never be certain their customers had received the relevant information unless some form of positive response was required. Consent could not be assumed from a non-response. The Cheshire Building Society noted that to achieve benefits at a market level, an opt-out was reasonable, but argued that lenders should be educating customers about these benefits in order to encourage them to opt in.

7.16. Just over half of all respondents, all of them financial services organisations with the exception of AdviceUK, stated a preference that there should be no opt-out. A number of objections to providing an opt-out were made. An opt-out would introduce significant additional cost which might deter some lenders from taking advantage of enabling legislation. The measure might lead to consumer confusion and complexity. It was also suggested that those borrowers with the greatest interest in concealing a poor credit record might be those most likely to exercise the opt-out right. That said, a small number of this group recognised that an opt-out would go some way towards alleviating concerns about the interference in individuals' private affairs, and therefore indicated that, despite their preference that one should not be offered, they would be willing to support this option if necessary.

7.17. The BBA expressed concerns, voiced by a large number of respondents that if an opt-out were employed, an account marker would be required to denote a consumer's status as having opted out. Would lenders take such a marker as an indication that an individual had something to hide? The ICO echoed these concerns, stating that it would be necessary to include a marker, otherwise there would be no way of telling whether a consumer had no historic information or whether historic accounts did exist but the consumer in question had opted out of data sharing. This, the ICO argued, would result in lenders having to make inferences about the existence of historic accounts, so lending decisions would continue to be made on risky grounds. The ICO was clear, however, that the existence of a flag should not lead to discriminatory treatment of those who have exercised their right to opt out but who do wish to apply for credit. One approach might be for lenders, on seeing a flag, to make further enquiries of the individual and possibly collect further information directly from them at the point of application.

7.18. Some respondents were clear that opting out could lead to consumers being turned down for credit, either because of a lack of data on their file or because a lender might be concerned about what their non-consensual account data concealed, but saw no particular difficulties with this, believing that this was the trade-off consumers must make in exercising their choice.

7.19. Respondents raised a number of concerns about how an opt-out would work in practice. Would an opt-out last forever or would consumers be allowed to opt-in at a later date? Conversely, would opting-out in the first place be a one-off opportunity? In addition, a number of respondents felt that such an exercise could raise customer expectations of being able to opt-out of all data sharing altogether, presenting a difficulty for lenders in how to respond. The ICO noted that the success of this approach depended on the assumption that opt-out rates would be low.

7.20. Other respondents saw fewer difficulties with the proposal, but made a number of recommendations for how it should be carried out in practice. Citizens Advice led calls for the opt-out to be accompanied by clear information about the purpose of data sharing and the implications for consumers in exercising their choice. Citizens Advice called for a public information campaign and offered to work with Government in this area. These comments were echoed by the ICO, which argued that the Government should not rely upon apathy in ensuring that large numbers of consumers did not exercise the right to opt-out. Without adequate consumer information, there was a risk that consumers would feel that they had not had a genuine opportunity to exercise their choice and the benefits of the opt-out model might therefore be lost.

7.21. The Government welcomes responses received in this area and notes that respondents are equally split for and against this option. A number of questions present themselves about this proposal. For example, the Government notes concerns that an opt-out might lead to discriminatory treatment of consumers who had exercised this right. In addition, Ministers take note of the practical concerns raised by respondents and welcome the solutions suggested. The Government considers that these issues must be considered in greater detail before a judgement can be made in this matter and has therefore tasked the expert working group to examine the case for an opt-out in greater detail.

CHAPTER 8 – OTHER ISSUES

8.1. The consultation document noted that over-indebtedness is not uniquely related to consumer credit and that calls had been made for the addition of data on other liabilities to the CRA databases, including utility debts, student loans and council tax arrears. The consultation document sought views on the sharing of this data and other barriers to identifying the extent of an individual's indebtedness.

Consultation Question 8: What other barriers are you aware of that may prevent the sharing of data that could help identify whether a consumer is over-indebted?

8.2. Eight respondents were not aware of any other barriers to the use of data sharing in order to prevent over-indebtedness. In contrast, 20 respondents (six individuals, 13 finance services organisations and one consumer advice body) supported the sharing of data on utility debts, student loans or council tax arrears. In addition, respondents suggested further data sources which they felt would add to the picture of an individual's income and outgoings in order to enable lenders to identify the over-indebted. These included details of court-imposed fines owed by a consumer, council and private monthly rental costs, child support liabilities, loans taken out in other countries, unpaid HMRC debts and income, as declared for tax purposes.

8.3. MAT/NDL and Citizens Advice opposed the sharing of data on utility debts and council tax arrears. Both organisations stated that cases of fuel debt were often due to billing errors. Citizens Advice noted that approximately 45,000 enquiries were received by Citizens Advice Bureaux in 2005/06 in relation to fuel debts, and in around 10,000 of these liability for the debt was in dispute. Both organisations expressed concern that the sharing of utility debt data could therefore be misleading. Similarly, both organisations argued that council tax arrears were frequently the result of poor take-up or administration of council tax benefit. Finally, as the majority of income-contingent student loans are recovered through deductions at source by employers, both Citizens Advice and MAT/NDL stated they were not persuaded of the value of sharing such data in preventing over-indebtedness.

8.4. Four respondents argued that the main barrier to the sharing of data relevant to preventing over-indebtedness was the fact that data is not currently shared across the entire credit industry. Both the ICM and Lloyds TSB felt that sharing data should be a condition of being granted a consumer credit licence. Which? and an individual respondent added that the sharing of more data could help people to build up a credit file and improve their credit rating. Finally, three respondents noted that data accuracy could be a barrier to preventing over-indebtedness through data sharing. HBOS noted that non-

consensual accounts were likely to be old. It was important, therefore, that there should be a concerted effort to contact consumers and update their records if this data were shared.

8.5. As noted in Chapter 2 above, the Government supports the sharing of all data which may assist in preventing further lending to the over-committed in so far as this is possible. In light of this, the Government has been considering where it may be appropriate and useful to share data relating to consumers' non-credit financial commitments. As a result, the Government has included a clause in the Child Maintenance and Other Payments Bill to enable the sharing of child support liabilities. Where a liability order is in place against a non-resident parent, this will be shared with the CRAs. Conversely, parents who keep up their maintenance payments will be able to consent to the sharing of their data so that this can contribute to their credit file.

8.6. The Department for Innovation, Universities and Skills (DIUS) is constrained by legislation from sharing data on the existence of individual student loans, especially if those loans are being repaid. It is, however, permitted for data to be shared on one type of student loans if the borrowers are in breach of their credit agreements. DIUS continues to review the benefits of sharing default data on these pre-1988 Student Loans (Mortgage Style Loans, which are regulated by the Consumer Credit Act 1974). Post - 1998 Income Contingent Student Loans are exempt from the Consumer Credit Act . Thus they remain outside the scope of this particular review as the concept of default for these loans has not arisen. Repayments for these are deducted from individuals' earnings by individual employers via HMRC.

8.7. In the case of utility debts, the sharing of certain data about accounts in default may, in certain circumstances, be permissible within the existing legislative framework. Indeed, since the consultation document was issued, a small number of individual utilities companies have begun to share data on accounts in default, taking account of guidance from the ICO. Others are in discussions with the CRAs and ICO about sharing default data and some have moved to the testing phase. The Government notes concerns expressed about the sharing of such data where liability for the debt is in question. The operation of data protection rules should ensure that a consumer's credit record will not be affected by cases of administrative error. When customers who buy their energy supply on credit (i.e. via payment in arrears) enter payment difficulties they must be notified by the energy provider that data on their accounts will be shared if they default at least 28 days in advance of any data sharing occurring, giving the consumer the opportunity to respond. If a customer disputes liability for a debt, or the amount of the debt is disputed, the energy supplier should take reasonable steps to verify the details of the default before sharing the data. If a consumer disputes the debt after data on their account is shared, the energy provider must ensure that this is noted, and the CRA will place a marker on

the individual's record to ensure that organisations accessing this data are aware that the account is in dispute. The utility provider will have 28 days to verify the data in question and make any corrections. Consumers who are unhappy with the handling of a complaint about data accuracy may take their complaint to the ICO. The ICO maintains an ongoing dialogue with the CRAs and utility companies on this matter and monitors consumer complaints. The Government is confident that the ICO and the industry will respond appropriately to any evidence of significant problems arising as a result of data inaccuracies.

8.8. The Government notes concerns raised about the sharing of council tax arrears data. The Government considers that the current legal framework appropriately protects the privacy of taxpayer records and does not intend to make changes. Data on council tax liability orders is not currently included on the Register of Judgements, Orders and Fines and there are no plans to do so at present.

8.9. The Department for Work and Pensions has invested over £183m in helping just over 370 local authorities to raise standards in Housing and Council Tax Benefit administration through its Performance Standards Fund. Government is on track to meet our PSA target to reduce average new claims processing times to no more than 48 days by March 2008 - we have cut over three weeks from the average time taken to process new Housing Benefit and Council Tax Benefit claims from 55 days in 2002/03 to 33 days in 2006/07. In the fourth quarter of 2006/07 new claims were processed in an average of 30 days. Work is also ongoing to improve take-up of Council Tax Benefit, with a priority focus on pensioners, who have the lowest take-up. A number of initiatives have already been taken, including a significant reduction in bureaucracy by providing access to Council Tax Benefit and Housing Benefit via The Pension Service, through a single telephone call, whilst applying for Pension Credit. These efforts are already bearing fruit: Council Tax Benefit take-up by pensioners increased in 2005-06 for the first time since 1997.

8.10. The Government notes calls for the sharing of other forms of data such as details of income reported to the tax authorities. The Government considers that the sharing of such data may be highly sensitive, and may be subject to additional legal and practical considerations; each case must be assessed against its merits, in the context of wider public policy objectives. The sharing of data on income reported to the tax authorities in particular could have very significant implications for individual privacy. The Government has no plans to consider the sharing of these sorts of data items at this stage. The Government is of course committed to tackling over-indebtedness and will examine these issues on a case by case basis if significant and convincing evidence emerges that the addition of other data types to the CRA databases may materially assist in the prevention of over-indebtedness.

CHAPTER 9 – SAFEGUARDS

9.1. As noted at various points in this document, the safeguards in place to prevent the potential misuse of credit account data will be an important consideration in whether any measure to allow the sharing of non-consensual data is lawful and proportionate. Visible safeguards are also important in addressing public concerns about the safety and security of personal data. The consultation document noted that there currently exist a range of safeguards on the sharing of credit account data by lenders. Prime amongst these is data protection legislation, enforced by the ICO. The consumer credit licensing regime, administered by the OFT, also provides a check on potential misuse through the rules governing the licensing of CRAs and other credit intermediaries, as well as through the fitness test for holding a licence (strengthened under the Consumer Credit Act 2006), which could take into account any serious, persistent and deliberate breaches of the data protection principles.

9.2. The sharing of personal data by the closed user groups¹² at the CRAs is also subject to self-regulation by the industry's own "Principles of Reciprocity" (PoR), policed by the CRAs. Key amongst these is that shared data cannot be used for predatory marketing. The Steering Committee on Reciprocity (SCoR) oversees and develops the Principles. It is formed by representatives of the three main CRAs and industry trade associations – the British Bankers Association, the Finance and Leasing Association, the Council for Mortgage Lenders, the Mail Order Trade Association and the Consumer Credit Trade Association. The consultation document sought views on whether this system of self-regulation would be sufficient if non-consented data were to be shared.

Consultation Question Nine: Are the principles of reciprocity a significant deterrent against the use of shared credit data to identify individuals for marketing purposes? Does SCoR provide a suitable forum for the governance of consumer credit data? If not, what additional safeguards do you think are needed?

9.3. The majority of respondents who commented felt that SCoR and the Principles of Reciprocity were effective and that no new safeguards would be required for non-consensual data sharing. Only one respondent, an individual, felt strongly that SCoR was not effective, arguing that industry self-regulation was not transparent and was not accountable to consumers. One respondent, the TSI, felt that an assessment of SCoR's effectiveness was not possible on the available evidence, and noted that the fact that the

¹² Closed user groups refer to the lenders who can access the non-public data from the CRA databases. This data is only available to those who contribute this kind of information to the database. Only lenders who add credit account data into the database can retrieve credit account data from it.

sanction of exclusion from the closed user groups had never been used was a matter of concern. Whilst this could demonstrate very good levels of compliance by lenders it could also be because breaches go undetected. A small number of other respondents also supported an independent review of the operation of the Principles of Reciprocity in practice.

9.4. A number of suggestions were made for improving the effectiveness of self-regulation. The ICM and the Cheshire Building Society both felt SCoR's processes could be more transparent and that greater visibility could be given to breaches of the rules and their consequences. HBOS felt that there should be greater efforts to ensure that member organisations had in place adequate processes to ensure all data users were educated about their responsibilities. In addition, the internal audit department of every organisation involved should have a remit to cover adherence to the Principles of Reciprocity and the signoff process for the use of shared data should always comply with the PoR. The ICM called for the then Department of Trade and Industry or other similar body to have a seat on SCoR. Citizens Advice felt that, whilst it had no reason to doubt the effectiveness of SCoR, it was vital to maintain public confidence in the integrity of the data protection regime and therefore any measure to enable the sharing of non-consensual data must not only be shown to deliver important benefits, but must be accompanied by very good safeguards. Lloyds TSB agreed that new safeguards might be required for the sharing of non-consensual data and suggested that SCoR's authority in policing compliant data sharing should be more explicitly set out. The Money Advice Trust and National Debtline felt that the PoR should be backed up by legislation restricting the purposes for which data can be shared.

9.5. The Government notes the general support for the effectiveness of the Principles of Reciprocity and their oversight by SCoR. However, the Government also notes that safeguards on the secure use of non-consensual data, were it to be shared, may have an important bearing on the proportionality of any solution. In addition, the Government considers that it is vital to maintain public confidence in the security of the use of personal data by organisations. In light of this, the Government has asked the expert working group on non-consensual credit data to conduct a security risk assessment of any potential solutions to this issue and to consider what, if any, further safeguards might be introduced to ensure that the system ensuring its proper use is as effective and robust as possible. The working group will take into account any relevant recommendations of the Walport/Thomas Review in its deliberations.

CHAPTER 10 - CONCLUSION

10.1. The Government thanks all the organisations and individuals who took the time to respond to this consultation. The Government has considered all the responses received very carefully. The Government's policy remains that data sharing via the credit reference agencies by lenders on the credit accounts they hold can be an important and effective tool in preventing over-indebtedness. The Government therefore encourages lenders to share all legally permissible data and welcomes the significant strides the industry has made in this respect in recent years.

10.2. The question of sharing non-consensual data, however, is a complex one, which brings into play human rights concerns. The Government takes very seriously the protection of individual freedoms in this area – any action which cuts across the right to private life of individual citizens must be undertaken on the basis of very careful consideration of the issues and a sound evidence base.

10.3. In light of responses to consultation, the Government has concluded that there is insufficient evidence at present on which to base firm proposals for change. The Government has therefore established an expert working group to examine in detail the costs and benefits of the sharing of non-consensual credit data and the options for implementing this. This group, made up of individuals with in depth understanding of data sharing practice, as well as data protection and human rights considerations, is drawn from lenders, credit reference agencies, consumer groups, academia and relevant government departments and public bodies. The group will consider all the alternative solutions to this issue and report its findings to Ministers within a year, taking account of the recommendations of the independent Thomas/Walport Review of data sharing, due to report in the first half of 2008. The Government considers that this approach offers the best prospect of delivering a speedy and effective solution to the question of non-consensual credit data, and calls on all stakeholders to support the work of the group through the provision of relevant evidence.

ANNEX A – LIST OF RESPONDENTS TO CONSULTATION

The following respondents were content for their names to be made public. Where individual members of the public responded to the consultation, names and addresses were supplied. The Government has listed here only the names of those willing for their details to be disclosed. In addition, a further four individuals responded but asked that their names be withheld.

Advice UK
Alliance and Leicester
APACS
Birmingham City Council
Britannia Building Society
British Bankers' Association (BBA)
British Computer Society (BCS)
Cabot Financial
Callcredit
Cheshire Building Society
CIFAS, The UK's Fraud Prevention Service
Citizens Advice
Civil Court Users Association (CCUA)
Council of Mortgage Lenders (CML)
Department for Constitutional Affairs (DCA)
Direct Marketing Association (DMA)
Equifax
Experian
Finance and Leasing Association (FLA)
George Wilkinson
GMAC-RFC
HBOS
HSBC
Information Commissioner's Officer (ICO)
Institute of Credit Management (ICM)
Lloyds TSB
MBNA
Money Advice Trust/National Debtline
Nationwide
Office of Fair Trading (OFT)
Paul Smith
Phil Bacon
ScottishPower
Steering Committee on Reciprocity (SCOR)
Tony Barnard
Trading Standards Institute (TSI)

End