

## BRIEFING

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### SUBJECT: PROPOSED CHANGES IN CONSUMER CREDIT LEGISLATION

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Consumer Credit legislation is a complex area of the law which has impacted on RSL's and their subsidiaries for many years.

There are however major changes afoot and SFHA has commissioned [Len Freedman](#) of TC Young to explain them to members.

### INTRODUCTION

#### **What are the proposed changes in Consumer Credit legislation?**

Since 1974 Consumer Credit has been regulated by the Office of Fair Trading ("OFT") under the Consumer Credit Act 1974. From 1 April 2014 regulation will move to the Financial Conduct Authority ("FCA") and will be governed through Financial Services Legislation.

There is a transitional period so that those with existing licences with OFT can convert to interim authorisations with FCA and this is discussed below. However from October 2014 those with interim authorisations will have to apply for full FCA authorisation which must be in place by 1 April 2016 and in some cases before that date.

#### **Q. So what does that mean in practice?**

By all accounts regulation post 1 April 2014 will be significantly more pro-active and intensive with regulatory staff numbers doubled, the budget almost trebled, greater powers to investigate and scrutinise, more effective tools to enforce and a wider range of sanctions and penalties.

As one might expect, with one particular exemption noted below authorisation will also be rather more expensive. In addition to paying increased fees, those authorised will be expected to provide much more information, comply with many more regulations and demonstrate much greater commitment to training, systems and controls all in line with existing FCA requirements, in areas such as savings, investment, insurance, pensions and first mortgages.

It is estimated that obtaining full authorisation is likely to take up to a year – and in some cases longer - from application to approval.

#### **Q. So. More bad news then?**

Not entirely. Although many of the provisions of the Consumer Credit Act will be broadly unchanged there are some provisions in the new legislation that will benefit the Sector and these are noted below. It is anticipated that by 1 April 2016 there will be significantly fewer organisations with FCA authorisation than are currently licensed by OFT. Increased costs and compliance obligations may cause many to discontinue the activity – possibly by referring the work to those who carry it out on a significantly larger scale or structuring their affairs to ensure they make full use of the exemptions that the law provides.

In order to do that however they need to be aware of what activities may potentially require authorisation post 1 April 2014 and what the exemptions are.

**Q: What does all this have to do with Scottish Registered Social Landlords?**

Registered Social Landlords and their subsidiaries are involved in consumer credit in four main ways:-

- (a) Involvement in Scottish Government Shared Equity (LIFT) (presently Category C - credit brokerage; Category F - Debt Recovery; and Category G - Debt Administration – See also HSGN/ 2013 / 03)
- (b) Hire of movables in furnished lettings (Category B- Consumer Hire)
- (c) Time to pay (Category A – Consumer Credit )
- (d) Debt advice ( Category D – Debt Adjusting; Category E – Debt Counselling and Category H – Credit information services )

Many of them currently have licences on one or more categories. The aim of the briefing is to explain what the changes will mean, what exemptions they provide and what RSL's should do.

If you decide your organisation requires to obtain a licence from OFT and then convert to the FCA requirements, you will have to move quickly. This guidance should assist in making that decision.

**LIFT**

**Q: Okay so what's the position with LIFT?**

As noted above since 6 April 2008 RSLs and subsidiaries involved in LIFT have been requested to obtain licences for Debt Recovery and Debt Administration for the various activities set out in Scottish Government's After Sale Shared Equity Procedures <http://www.scotland.gov.uk/Topics/BuiltEnvironment/Housing/BuyingSelling/lift/ASSEPdocument>

They have also required a licence for credit brokerage. This has primarily been for work carried out from initial enquiry to completion of the shared equity arrangements although it is also likely to be required to implement Golden Share arrangements and a change of parties (e.g. because the owner has got married / entered into civil partnership)

**Q So has there been a change to that?**

Under the new legislation authorisation for both Debt Recovery and Debt Administration is not required if (a) the work is in respect of New Supply Shared Equity transaction and (b) the RSL/subsidiary carrying out the debt recovery / debt administration was the RSL/subsidiary that sold the property to the Purchaser ("Supplier Exemption").

**Q. What about other forms of shared equity – any good news there?**

None whatever. Authorisation will be required in all other cases. These will include debt recovery / administration for any property sold under Open Market Shared Equity, Help to Buy and most if not all New Supply with Developers Shared Equity.

**Q So if the RSL has only been involved in New Supply Shared Equity they won't ever need authorisation for Debt Recovery or Debt Administration – right?**

Not quite. It should be noted that:

- (a) the RSL or RSL subsidiary carrying out the debt recovery/debt administration must be the same RSL or RSL subsidiary that sold the property to the owner; the Supplier Exemption will NOT apply if the work is carried out by another organisation in its Group.
  
- (b) the owner should be the person who acquired the property from the RSL or RSL subsidiary. That may not be the case (i) where a Spouse / Civil Partner has previously been added or (ii) following a buy back and re-sale by Scottish Ministers under Golden Share arrangements.

**Q So how do we get round that?**

At the risk of stating the blindingly obvious the simplest way to avoid the problem in (a) is not to have the work carried out by another organisation in the Group.

If (b) arises in relation to a particular after - sales transaction the safe approach is to refer the work to an organisation involved in Open Market Shared Equity and / or Help to Buy who will need to have the requisite authorisations and probably the volume to justify.

Alternatively if this contingency is only likely to arise on a very infrequent basis – which for most RSLs involved exclusively in New Supply Shared Equity is likely to be the case – it is probable that post 1 April 2014 authorisation will not be required due to the “by way of business” test not being met.

This test is discussed below and will hopefully be clarified by more detailed Guidance (known as Perimeter Guidance) being issued by FCA. Until then if this cannot be resolved by referring the work elsewhere you should take legal advice based on the precise facts and circumstances and the interim permission you have.

**Q: So what about credit brokerage – same thing no doubt?**

In a word - No. That would be far too easy. The Supplier Exemption does not apply to brokerage. Another exemption may in certain limited circumstances be available but should be handled with care.

The matter is important as acting as broker without a licence in a transaction has potentially severe consequences and not simply on the RSL/ subsidiary.

The short answer here is

- (a) If an RSL/ subsidiary may be involved in credit brokerage post 1 April 2014 – including (i) after –sale transactions where a new Spouse is added to the title and (ii) Golden Share

arrangements they need to have a Category C brokerage licence. Otherwise they don't do the work and refer it to an organisation that has.

(b) If an RSL/ subsidiary has been involved in a LIFT transaction since 6 April 2008 without a Category C licence they take should take legal advice as soon as possible.

## **FURNISHED TENANCIES AND CONSUMER HIRE – CATEGORY B**

**Q We have some furnished tenancies where we hire out furnishings and white goods to tenants. Will we need to be authorised for Consumer Hire?**

Depends how the tenancy agreement is drafted.

If the white goods and furnishings are subject to a separate hiring charge this is likely to be deemed to be a separate lease of movables which currently requires a Category B licence. The terms of that lease would also require to be drafted in accordance with standard templates and have clear rights of termination and in some cases cancellation which would not sit well with a conventional furnished tenancy.

**Q So how do we get round that?**

The way to avoid is covered in Commentary to the legislation which states that there it will not be necessary to have a separate Consumer Hire Agreement *“if under the lease, payments are made in the form of rent”*.

As a general rule therefore where any RSL provides furnished lettings – including for example, sheltered housing - they should ensure that furnishings / white goods etc. are **included** in the lease itself and charged as part of the rental.

If that is seen to give rise to difficulties on any particular case due to the nature of the movables, advice should be sought. One solution may be to apply right now (and in very short order) for a Consumer Hire licence and then convert to an interim permission prior to 1 April 2014– but it won't get round the problem of having to draft compliant agreements with rights of termination and possibly cancellation.

This needs careful consideration particularly in relation to any existing furnished leases.

## **TIME TO PAY - CATEGORY A**

**Q So what's the issue here then?**

RSLs often give time to pay for rent arrears. Indeed under Scottish Secured Tenancies (Proceedings for Possession) (Pre-Action Requirements) Order 2012 they may be bound to do so. They – or a factoring subsidiary – may also give time to pay for arrears of factoring charges.

Owners may also be given time to pay in common works schemes where agreement is reached at the outset that payment may be made over a period of time.

**Q What has that got to do with Consumer Credit?**

The term “credit” is defined in the legislation as *“a cash loan or any other form of financial accommodation”* and will include any legally binding agreement to allow a person time to pay their debts. Under the EU Directive, such an Agreement would be exempt if the repayment arrangements are only of the arrears, free from interest or other charges.

### **Q Sounds pretty sensible – so what’s the problem?**

Unfortunately for reasons known only to itself – assuming they are known to anyone - the UK Government has implemented this in a stricter manner and insisted that for exemption to apply repayment must be in no more than four instalments and the repayment period must not exceed 12 months ( “4 Payments Exemption”). Accordingly, if someone owes £260 and agrees to pay £5 per week for a year the Regulations apply; if they agree to pay £65 every three months the Regulations don’t apply.

This does not make a great deal of sense and may run contrary to obligations to agree payments that are appropriate having regard to the circumstances of the debtor.

Where time to pay is provided for a future debt – e.g. agreeing to spread out the cost of roof repair / refurbishment etc.-, consumer credit will also apply unless the money is agreed to be repaid within 12 months and in not more than 4 instalments.

### **Q So if we give time to pay we will need authorisation?**

In the absence of anything else, yes. In addition a compliant consumer credit agreement would be required with everything that entails including pre-contract explanations and information; setting out in template form with all boxes in the right order accurately completed and in the right order – **and print size**; rights of cancellation, termination, information and much else to boot (“Consumer credit paraphernalia”).

Leaving aside the administrative inconvenience this creates there may also be considerable practical difficulties in meeting certain of these requirements in a normal charge back situation.

### **Q So is there a way out?**

Yes although it doesn’t cover every contingency. Given the added costs and problems that entering into compliant agreements could cause (see above) representations were made to Treasury during the Consultation period for the new legislation and they seem to have listened – at least in part – in so far as providing an exemption for Registered Social Landlords which will avoid the need for both (a) a complaint agreement and (b) authorisation.

### **Q Did you say RSLs are exempt – why didn’t you say that before - no need to worry about anything, then?**

Not quite. The exemption only applies where the credit is provided by an RSL and a standard security is obtained from the consumer.

It cannot therefore apply (a) where time to pay is given to tenants or (b) if a non – RSL (i.e. a factoring) subsidiary is used.

In addition because of the way in which the exemption is drafted it is unlikely that a Notice of Potential Liability will suffice although in many cases these are more suited than standard securities to back up agreements for arrears of routine factoring charges.

As should be clear but I will say it anyway, as the RSL exemption only applies where the RSL provides credit, it is of no relevance to requirements for authorisation under LIFT ( see above) or debt advice (see below).

**Q So when might RSLs want to use the exemption?**

The most likely use currently is in common works schemes where sums require to be charged back to owners and the RSL agrees time to pay arrangements rather than require them to repay the entire sum at the one time. If standard securities are taken the arrangements will be exempt and will not require to be authorised.

**Q But what about other situations- what do we do then?**

Again there may be some good – or at least better – news. For example without wishing to be too technical the Regulations and any consequent requirement for authorisation will only apply if the commitment to allow time to pay is legally binding.

Where the arrangement is to defer payment of arrears and no interest or other charges are levied it may be possible to either ensure the arrangement is not legally binding or if it is that it ceases to have effect if payment is not made in accordance with its terms.

There is also the question of whether the arrangements meet the “the by way of business” test.

**Q What is the “by way of business test?”**

In order for an organisation to require authorisation under Financial Services legislation for an activity they have to carry it out “by way of business”.

**Q Sounds suitably vague and woolly – can we get more detail**

A little. As mentioned above FCA can provide Guidance – known as Perimeter Guidance - on specific areas. Their Guidance on the “by way of business” test is that in considering whether authorisation is required key considerations will be:-

- (a) degree of continuity;
- (b) whether there is a commercial element;
- (c) scale of activity
- (d) proportion which bears to unregulated activities; and
- (e) nature of activity.

**Q Still sounds pretty vague and woolly – can you get a bit more specific still please?**

Hopefully yes. We have received advice that authorisation is unlikely to be required for time to pay arrangements entered into by an RSL for arrears of existing rental or factoring where no interest or charges are levied. That is also likely to be the case with a profit distributing subsidiary.

We understand it would be very unusual for an RSL or subsidiary to charge interest in such circumstances although in some cases a small charge may be made to cover administration etc. .

Given the generic criteria on the “business test “ set out above this would not necessarily lead to a requirement for authorisation and we would hope that more precise clarification can be given to the sector post 1 April 2014 when specific issues can be raised with the Perimeter Guidance team at FCA.

From guidance given in relation to other matters however it would appear that an RSL (which is by its nature not for profit and usually charitable) would be looked upon more favourably (in terms of not requiring authorisation) than a non –charitable subsidiary.

**Q So if this test is not met can we just ignore all this consumer credit stuff?**

No. Even if FCA authorisation is not required, a time to pay arrangement it will still potentially be a regulated agreement unless it falls into an exempt category (e.g. the RSL Exemption or the 4 Payments Exemption). This means that it is still potentially subject to the consumer credit paraphernalia.

In addition even if the Agreement is exempt the RSL or subsidiary will like all credit providers be expected to adhere to basic standards of fairness and transparency as well as acting in the spirit of the legislation and FCA Guidance. They will also be subject to advertising regulations.

**Q OK but what common works schemes where time to pay is agreed at the outset?**

This is a bit trickier. Whilst it is one thing to give time to pay up an existing debt interest free the term may be viewed differently where interest free credit is offered at the outset due to suspicions that it is implicitly forming an integral part of the pricing (e.g. motor dealers /retailers etc.).

Again a not for profit RSL is likely to be viewed more favourably (as in less likely to require authorisation) than a subsidiary. In addition the RSL has the advantage of the RSL Exemption which if used will avoid the need for providing a regulated agreement with all the difficulties that entails.

**COUNSELLING / ADJUSTMENT AND CREDIT INFORMATION SERVICES (DEBT ADVICE)**

**Q We often advise tenants on meeting their rent – will we need Authorisation?**

Not as such. Licences, and after 1 April 2014 authorisations, are only required where advice is given on debts owed to others (3<sup>rd</sup> Party Debt). That said however, in order to advise a tenant on how best to meet the debts of your organisation you are likely to need to understand their total debt position.

Debt Counselling is where you advise the client on how best to manage debts owed to others. Debt Adjusting is where you contact creditors with a view to settling these debts and Credit Information Services is where you check their credit history. Once again however seeking information about credit worthiness to assess their ability to assume or repay debts owed to you does not require a licence.

**Q So do I need all three categories and are there any more?**

That depends. It is difficult to adjust someone's debt (D) without counselling (E) them first and it is difficult to do either without finding out what their debts are (H). You could however find out what their debts are and counsel them without contacting creditors to adjust.

There is another category known as credit repair where you contact organisations to persuade them to change someone's credit rating or altering / omitting information about their financial standing but that is far less likely to be carried out by RSLs.

**Q But we just refer people to Agencies – will that need authorisation?**

Then that is fine. You don't currently need licences and you won't need authorisations to simply to refer someone to an Agency who specialise in this type of work and will doubtless be fully authorised – or, if a local authority, be exempt from authorisation for this type of activity.

If however you employ your own dedicated staff and you will need authorisation at least for Credit Information Services and Debt Counselling if not also for Debt Adjusting and you do not have these categories of licence you should obtain forthwith.

What you want to avoid is to have your staff drift in to giving debt advice for which FCA authorisation is required without anyone realising that they are doing so and without having that authorisation.

It has to be appreciated that behind the requirement for authorisation are detailed requirements – which from 1 April 2014 will have the force of law - on how these activities should be carried out – and organisations should either make a conscious decision to employ people who are fully conversant with these rules and obtain relevant categories of license which are then converted into interim permissions or make a conscious decision not to be involved and ensure that they have arrangements/ protocols in place so that staff

- (a) know when to refer customers to debt advice agencies whether from the council or citizens advice bureaus etc. so that clients are receiving advice from authorised personnel and
  
- (b) do not inadvertently advise on areas on which they are not authorised to advise.

**Q We give Welfare rights advice- will we need to be authorised for that?**

Welfare is about money owed to the customer. Consumer Credit is about money owed by him. That said however it is likely that the Welfare Rights officer may also wish to provide advice on the debtor's situation generally.

If the Welfare Rights officer is an employee of the Council / Citizens Advice Bureau etc and is working under their Authorisation well and good, if however they are employed by the RSL authorisation will be required.

**Q But we are a charity and don't charge for advice. Won't the by way of business exemption help us here?**

An excellent question and highly perceptive. Unfortunately the answer is no. FCA and the UK Government were well aware that this exemption could apply so changed the legislation so that the *"by way of business test"* was specifically broadened to include debt advice provided by not for profit organisations without charge. On the plus side however if you are an RSL, or other not –for – profit , whose only consumer credit activities are Debt Advice you will be subject to lighter regulation and minimal if any fees.

## **7. CONCLUSION**

As can be seen from this Briefing, none of this is simple. Each housing association and where relevant its subsidiary will need to go through its current activities and assess whether (a) these may potentially require authorisation (b) arrangements and / or protocols could be put in place so as to avoid that requirement.

If, however you think you may need to expand your current licences to cover more categories you will need to act very quickly.

**Whilst we have tried to make this Briefing Note as clear and simple as we can consumer credit is a highly complex area of law with many anomalies and inconsistencies.**

**Although we have sought to cover the main issues affecting RSLs and their subsidiaries the Note of its nature cannot and is not intended to be a comprehensive statement of the law. Legal advice should be taken in individual circumstances.**

**If you are in any way unsure of what this briefing means for your organisation you should consult your legal advisor immediately.**

