NEW ZEALAND BANKERS ASSOCIATION

Submission

to the Ministry of Business, Innovation and Employment

on the

Exposure draft of the Credit Contracts and Consumer Finance Amendment Regulations 2020

5 February 2020

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About NZBA

1. The New Zealand Bankers' Association (NZBA) is the voice of the banking industry. We work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.

2. The following seventeen registered banks in New Zealand are members of NZBA:
   - ANZ Bank New Zealand Limited
   - ASB Bank Limited
   - Bank of China (NZ) Limited
   - Bank of New Zealand
   - China Construction Bank
   - Citibank N.A.
   - The Co-operative Bank Limited
   - Heartland Bank Limited
   - The Hongkong and Shanghai Banking Corporation Limited
   - Industrial and Commercial Bank of China (New Zealand) Limited
   - JPMorgan Chase Bank N.A.
   - Kiwibank Limited
   - MUFG Bank Ltd
   - Rabobank New Zealand Limited
   - SBS Bank
   - TSB Bank Limited
   - Westpac New Zealand Limited

Introduction

3. NZBA welcomes the opportunity to provide feedback to MBIE on the Exposure Draft of the Credit Contracts and Consumer Finance Amendment Regulations 2020 (the Draft Regulations) released in a consultation paper dated November 2019 (Consultation Paper). This submission provides feedback on the following areas covered by the Consultation Paper:
   - the Draft Regulations;
   - the additional regulations inserted by the Credit Contracts Legislation Amendment Act 2019 (Amendment Act) into the Credit Contracts and Consumer Finance Regulations 2004 (the Regulations); and
   - the Credit Contracts Legislation Amendment Act Commencement Order 2020 (Commencement Order).

4. We will respond by way of separate submission on the initial policy thinking on the content of the annual return to be required under s 116AAA of the Credit Contracts and Consumer Finance Act 2003 (CCCFA) as amended by the Amendment Act.

5. As you will see, we have relatively extensive feedback on the proposals. Notwithstanding this, we wish to emphasise that NZBA and its members continue to fully support the broad policy objectives underpinning the current CCCFA regime law reform underway.

6. We thank MBIE for its proactive engagement on both high level issues and points of detail. The Regulations are a very important part of the CCCFA regime such that they need to be clear and workable in practice, particularly given the new liability provisions introduced by the Amendment Act.

7. NZBA and its members remain willing to assist further, including by considering again re-drafted regulations prior to their finalisation. In that respect, while the industry is concerned to ensure that the regulations are finalised swiftly to ensure sufficient implementation time is available, we stress the importance of getting the regulations right and so encourage a timetable that enables that.

The Draft Regulations

8. As acknowledged by the Consultation Paper, there is a broad range of situations in which aspects of the Draft Regulations will apply in practice. In this section, we have sought to provide specific feedback on aspects which: (i) will create poor outcomes for customers; (ii) will create practical and operational difficulty for members, with attendant impact on customers; (iii) where we consider responsible practice could be better and/or more sustainably met in a different way; and (iv) where we do not consider that the proposals align with the primary legislation.

Regulation 4AA

9. Regulation 4AA relates to s 9C(3)(a)(i) of the CCCFA which requires lenders to make reasonable inquiries before entering into the agreement and before making a material change, so as to be satisfied that it is likely that the credit or finance provided under the agreement will meet the borrower's requirements and objectives.

10. As a general comment, we note that regulations relating to a lender's obligations to make inquiries (including regulation 4AA) should be clear that a lender can make inquiries by using information it already holds about a borrower, rather than being required to make all inquiries of the borrower directly.

11. Our comments specifically on regulation 4AA are:

    (a) In order to avoid confusion, the content and language should be better aligned with s 9C(3)(a)(i). Similarly, we suggest that the language in the headings and sub-headings of this regulation align with the content of the CCCFA.

    (b) We do not consider that the proposed 4AA(3) is clear. This includes because it does not specify the detail of the determination to be made. In order to address this issue, and to meet what we understand to be the objective of ensuring that the prescribed inquiries are made prior to the determination, we suggest that 4AA is restructured as set out below. Specifically, we have suggested the inclusion of a new 4AA(2) and redrafted 4AA(3). (See 4AA(5) below)

    (c) To avoid confusion and to align statutory language, we suggest that the reference to "maximum amount" in 4AA(2)(a) is amended to be a reference to "credit limit". This change aligns with language used in the CCCFA, including in the definition of "material change". (See 4AA(3)(a) below)

(d) We are still considering whether, in relation to 4AA(2)(b), which relates to the purpose of the credit or finance, guidance may be useful regarding the level of description that will be required. If so, we would like to work with you to determine where that guidance would best sit (eg in the Code) and on the substance of that guidance to avoid any unintended consequences.

(e) We recommend that 4AA(2)(c) and (d) are amalgamated and amended to focus on the timeframe sought for the credit. Our proposed language remains consistent with the existing language in the Responsible Lending Code (Code) at 4.3. (See 4AA(2)(c) and (d) below)

(f) We recommend that 4AA(2)(e) should be removed from this part of the regulations, given it is a matter more relevant to assisting a customer to make informed decisions, rather than to a borrower's requirements and objectives. NZBA would support further guidance on this point in the Code or, alternatively, in additional regulations but considers that the inclusion of it in this part of the regulations has the effect of confusing the different inquiries and determinations required under s 9C(3)(a)(i)-(iii) of the CCCFA. If that recommendation is not accepted, we ask that MBIE, in any event, reconsiders the drafting of this sub-clause in order to accommodate the fact that (i) the inquiries are asked in the context of both new agreements and material changes; and (ii) the costs for some categories of additional goods or services may be bundled in a credit product and a customer may require some, but not all, of the goods or services in that bundle. For example, the situation in (ii) may arise in respect of some credit card annual account fees in relation to which a customer may choose between a low cost credit card or a higher cost credit card but which has a bundle of additional benefits attached to it.

(g) We suggest that the reference to whether a customer is aware of the additional costs of the fees or charges being financed in 4AA(2)(f) is removed from this part of the Regulations, given it is a matter relevant to assisting a customer to make informed decisions, rather than a matter that relates to a borrower's requirements and objectives. NZBA would support further guidance on this point in the Code or, alternatively, in additional regulations but considers that the inclusion of it in this part of the Regulations has the effect of confusing the different inquiries and determinations required under s 9C(3)(a)(i)-(iii) of the CCCFA. We have also proposed an amendment to the wording in the new 4AA(3)(f) to "costs, other than fees or charges". This amendment better aligns with the existing wording within 4.3(f) of the Code which focusses on "additional expenses", rather than on fees and charges. NZBA does not consider that the current wording, which would require lenders to explain the capitalisation of fees such as establishment fees, is necessary or appropriate. (See 4AA(3)(f) below)

(h) We seek that a new sub-regulation is inserted into 4AA to clarify that when a lender undertakes the inquiries and determination in the context of a proposed material change, the lender is only required to have regard to the proposed material change (for example, the proposed amount of the increase of an existing credit limit or the proposed amount of the additional advance) and the purpose for the material change. (See 4AA(5) below) The provision should also make it clear that a lender does not need to inquire into terms again where the borrower already has a revolving facility or where the terms of the existing agreement will not otherwise change as a result of the material change.

Essentially, for a top up or increase to a credit limit, therefore, a lender would be asking about amount, purpose, and term needed (for term lending only). The other inquiries are not relevant where the borrower already has the facility.

12. Based on the comments above, our suggested amendments to regulation 4AA are as follows:

Assessment whether likely that credit or finance provided under agreement will meet borrower's requirements and objectives

4AA Lender must make inquiries ~~collect~~ and assess information

(1) This regulation applies, for the purpose of section 9C(3)(a)(i) and (5A) of the Act, before a lender enters into, or makes a material change to, an agreement, in order for a lender to determine whether it is satisfied that it is likely that the credit or finance provided under the agreement will meet the borrower's requirements and objectives.

Lender must make inquiries~~collect information~~

(2) Before undertaking its determination of whether it is satisfied that it is likely that the credit or finance provided under the agreement will meet the borrower's requirements and objectives, the lender must make the inquiries in (3).

(3) ~~T~~the lender must make reasonable inquiries in order to determine the following aspects of the borrower's requirements and objectives:

(a) the amount~~, or maximum amount,~~ of credit or finance that the borrower seeks, including~~, in the case of a revolving credit contract~~, the credit limit that the borrower seeks;

(b) the purpose of the credit or finance:

(c) the timeframe for which the borrower seeks ~~erm of~~ the credit or finance, including whether a particular term is sought or whether the borrower seeks credit on an ongoing basis (for example, by way of a revolving credit contract), ~~:~~

~~(d) if the agreement is a revolving credit contract, whether the borrower requires credit on an ongoing basis:~~

~~(e) if the agreement will include **fees or charges** for any other additional goods or services that were not part of the borrower's stated purpose of the credit or finance, whether the borrower requires those goods or services and accepts their costs:~~

(f) whether the borrower requires any costs, other than fees or charges, to be added to the amount of credit (for example, whether the borrower requires premiums for insurance related to the credit or payment for extended warranties or repayment waivers to be financed)~~, and whether the borrower is aware of the additional costs of the fees or charges being financed, rather than being paid for separately~~.

Lender must assess information

(~~43~~) In making its determination of whether it is satisfied that it is likely that the credit or finance provided under the agreement will meet the borrower's requirements and objectives ,t~~T~~he lender must take into account the aspects of the borrower's requirements and objectives it has determined as a result of its inquiries in (3) above. ~~then make the determination in section 9C(3)(a)(i).~~

(5) For the avoidance of doubt, when the lender makes the inquiries in (3) and the assessment in (4) in relation to a proposed material change,

(a) the lender is only required to have regard to the proposed material change (for example, the proposed amount of increase of an existing credit limit and the purpose of the increase, or the proposed amount of the additional advance and the purpose of the additional advance, and not aspects of the existing credit or finance);

(b) the lender is not required to make inquiries in relation to aspects of the agreement that are not to be changed (for example, the timeframe if the borrower is seeking an increase to a revolving credit facility).

Regulation 4AB

13. Regulation 4AB is described as relating to ss 9C(3)(a)(i) and 9C(5) of the CCCFA which concern inquiries and assessments to be made by lenders in respect of repayment waivers, extended warranties and insurance contracts.

14. NZBA's members' focus, given the nature of their business models, is the aspect of 4AB dealing with insurance contracts. In relation to repayment waiver or extended warranties aspects of the regulation, we do query, however, whether what is proposed is possible under the empowering statute. Notably,

    (a) in respect of the rationale for the inclusion of repayment waivers and extended warranties in the regulation, while s 9B(4) of the CCCFA deems a repayment waiver or extended warranty to form part of the agreement, it does not deem those products to be part of the "credit or finance". In that regard, the test in s 9C(3)(a)(i) of the CCCFA is limited to the "credit or finance" provided under the agreement, rather than the agreement in a broader sense; and

    (b) in respect of the reference to "material change" in 4AB(1)(a)(ii), the definition of "material change" in s 9C(8) of the CCCFA is limited to credit limit increases and advances. The definition is not of a nature that captures changes to repayment waivers or extended warranties.

15. For the above reasons, in our amended version of the regulation below, we have removed the aspects of the regulation dealing with repayment waivers and extended warranties.

16. Our comments on the insurance aspects of 4AB are as follows:

    (a) Similar to our comments in respect of 4AA, we suggest that: (i) the content and language of this regulation is better aligned with s 9C(3)(a)(i) and 9C(5) of the CCCFA; (ii) the language in the headings and sub-headings of the regulation align with the content of the regulations as drafted; (iii) 4AB is restructured to include a new 4AB(2); and (iv) 4AB(3) is redrafted to include more detail about the required determination. (See 4AB(5) below)

    (b) We do not agree that there should be a cross-reference in 4AB to 4AA. Related to our comments above about repayment waivers and extended warranties, the inquiries in 4AA are not relevant to insurance. An insurance contract is not "credit or finance" provided under the agreement for the purposes of s 9C(3)(a)(i) of the CCCFA.

    (c) The new concept that appears in the regulations of a lender needing to make inquiries about whether an insurance contract is "useful", should not be introduced. This would add unnecessary complications to, and inconsistencies with, the existing statutory test and would lead to the need for additional guidance on what "usefulness" involves. We propose, therefore, that 4AB(2) is amended to retain the existing statutory focus on considering the borrowers'

requirements and objectives in obtaining the insurance and to be better aligned with the existing guidance at 9.3 of the Code. (See 4AB(2) and 4AB(3) below) Our proposed amendments also aim to make clearer that the CCCFA does not require lenders to provide advice and/or undertake a detailed suitability assessment or review of a borrower's existing insurances. We are concerned that the current wording confirms the position in this regard. (See 4AB(3) and 4AB(5) below)

(d) We recommend that 4AB(2)(b) is removed as it is a matter more relevant to assisting a customer to make informed decisions, rather than to assessing a borrower's requirements and objectives. NZBA would support further guidance on this point in the Code or, alternatively, in additional regulations but considers that the inclusion of it in this part of the regulations has the effect of confusing the different inquiries and determinations required under s 9C(3)(a)(i)-(iii) of the CCCFA.

4AB Additional requirements for certain waivers, warranties, and insurance

Purpose and application

(1) This regulation applies~~, in addition to regulation 4AA,—~~

~~(a) for the purpose of section 9C(3)(a)(i) and (5A) of the Act,—~~

~~(i) before a lender enters into an agreement, to the extent that a repayment waiver or extended warranty forms part of the agreement under section 9B(4) of the Act:~~

~~(ii) before a lender makes a material change to a repayment waiver or extended warranty that forms part of the agreement under section 9B(4) of the Act,—~~

~~in order for a lender to determine whether it is likely that the credit or finance provided under the agreement will meet the borrower's requirements and objectives; and~~

(~~b~~a) for the purpose of section 9C(5)(a)(i) and (5A) of the Act, before a lender arranges a relevant insurance contract, in order for a lender to determine whether it is satisfied that it is likely that the insurance will meet the borrower's requirements and objectives.

Lender must make inquiries~~collect information~~

(2) Before undertaking its determination of whether it is satisfied that it is likely that the relevant insurance contract will meet the borrower's requirements and objectives, the lender must make the inquiries in (3).

(3) The lender must make reasonable inquiries in order to determine the following aspects of the borrower's requirements and objectives:

(a) what risks the borrower seeks protection against,~~whether the waiver, warranty, or insurance is useful for the borrower,~~ which may include inquiries into—

(i) whether the borrower has existing cover that may protect against some ~~or all of the~~ risks~~ for which the borrower is seeking cover~~:

(ii) whether the borrower's circumstances (for example employment status and age) may make them ineligible to claim most ~~some or all~~ of the benefits under the relevant ~~proposed waiver, warranty, or~~ insurance contract~~: and~~

~~(b) whether the borrower accepts the additional costs of the waiver, warranty, or insurance.~~

Lender must assess information

(~~4~~3) In making its determination of whether it is satisfied that it is likely that the insurance contract will meet the borrower's requirements and objectives, the lender must take into account the aspects of the borrower's requirements and objectives it has determined as a result of its inquiries in (3)

above. ~~The lender must then make the determination in section 9C(3)(a)(i) or (5)(a)(i) in so far as it applies to the repayment waiver, extended warranty, or relevant insurance contract~~

(5) For the avoidance of doubt, where a borrower already has insurance cover, the lender is entitled to (but does not have to) rely on the information provided by the borrower in respect of that cover and is not expected to review the terms of the borrower's insurance cover.

Overarching comments on regulation 4AC–4AI – Assessment of Substantial Hardship

17. We appreciate the indication in the Consultation Paper that MBIE encourages submissions on these regulations, given that they need to adequately account for the broad variety of situations which occur in practice. Our key concerns with these regulations include:

(a) poor customer outcomes (eg greater restrictions in access to credit, increase in information to be provided, delays in credit assessment, duplication of information, banks not able to rely on information they already hold about potential borrowers);

(b) unintended consequences:

(i) the potential impacts for borrowers and the wider NZ economy if a significant tightening in the availability of credit goes deeper than is envisaged by the implementation of the Draft Regulations. In this regard NZBA strongly recommends an economist's view of the proposed regulations is obtained if this has not already been done; and

(ii) arising from fast-tracked legislation, including weaker scrutiny, less time to assess weaknesses and fully understand impacts thereby increasing the likelihood of legal errors or unintended consequences;

(c) conservative interpretation by NZBA members arising from the ambiguity and inconsistencies in the drafting as NZBA members have zero tolerance for non-compliance with legislation; and

(d) significant implementation challenges for NZBA members – the proposed changes require significant uplift to processes, procedures (including training) and systems which takes time and significant input of resource and expertise.

18. We elaborate on these key issues further in the following section at paragraphs 27 to 40 below. Before that, in this section, we address a number of points in relation to the intention of the regulations as described in the Consultation Paper itself.

Comments on Consultation Paper – paragraphs 25 and 27

19. In terms of the overall approach as stated in paragraphs 25 and 27 of the Consultation Paper, NZBA does not entirely agree with a number of the points made.

(i) The proposed regulations reflect practices currently in use by lenders

20. All members have existing systems, procedures and policies in place to comply with s 9C(3)(a)(ii) of the CCCFA and a range of different approaches are taken. While closer to some existing bank's processes than others, the proposed approach does not reflect the current approach of any NZBA member. NZBA members are willing to provide MBIE with additional information about their current approaches if that would assist in designing a more appropriate approach. As a general comment, NZBA considers the framework needs to accommodate judgement on the part of the lender. Inquiries and verifications, however approached, will never be an exact accounting exercise. The overarching purpose – to assess whether the lending is affordable – should not be lost. In this respect, we note that NZBA members' existing practices do allow for the judgement of the lender.

(ii) The Draft Regulations are consistent with the non-binding guidance set out in the Responsible Lending Code

21. Again, we do not agree that the Draft Regulations are consistent with the non-binding guidance set out in the Code:

(a) While the content of the proposed regulations does in part reflect the Code, a key feature of the Code is that it allows for scalability and tailoring based on the proposed borrower's individual circumstances. For example, the Code recognises that reasonable inquiries "should" be made into a borrower's income, expenses and likelihood of repayment but then places responsibility on the lender to be satisfied that the scope and methods of inquiry are reasonable and provide a sufficient basis for the decision (5.5 and 5.6). The Code also: (i) describes particular inquiries but only in an illustrative way (eg inquiries into the borrower's income, expenses and likelihood of repayment "may" include… at 5.7–5.9); and (ii) recognises that what is reasonable will differ depending on the circumstances, including providing guidance as to where more extensive inquiries may be required (5.10 and 5.12).

(b) By contrast, the proposed regulations lock lenders into needing to make particular inquiries and take particular steps regardless of the borrower's circumstances. In this regard, while we appreciate that MBIE intended to set a minimum standard that could broadly apply to all lending, the regulations do not achieve this intention. The inflexibility in the proposed regulations will instead lead to lenders needing to take steps that in some circumstances are neither appropriate nor necessary.

(c) In addition to the operational cost and system challenges for banks, we question whether the proposed regulations move away from what is a more customer-centric approach whereby borrower's individual circumstances can be taken into account. This change will negatively impact on customers. For example, overall poor customer experiences if a process is required that is not relevant to the customer, customer frustration at needing to provide information they know is already held by the bank and a general increase in the likelihood of credit applications being declined. A potential risk, if borrowers get frustrated with lending processes, is that they apply for more credit than they need in order not to have to repeat the processes again at a later date or significantly increase

cash withdrawals which result in expenses being more difficult to categorise and verify.

(iii) The proposed regulations broadly align with the UK's Financial Conduct Authority (FCA) or Australian Securities and Investments Commission (ASIC) responsible lending rules

22. We disagree that the proposed regulations broadly align with the UK or Australian responsible lending rules.

23. Similar to our comments above about the Code, the level of prescription of mandatory steps means that the proposed regulations are significantly different to the approach taken in the UK and Australian responsible lending rules. We appreciate that the revised Australian responsible lending rules were released in December 2019 so MBIE may not have had the benefit of considering them when preparing the Draft Regulations. These revised rules should be taken into account.

24. Broadly, NZBA supports the New Zealand regulations being brought more into line with the UK and Australian responsible lending positions. In that respect, the UK position is that for some rules certain steps are not required if the firm can demonstrate that those steps are not necessary in the individual circumstances (see, for example, UK FCA Handbook CONC 5.2A.15 and 5.2A.20).

25. The following is also relevant when considering how the proposed regulations should apply to banks (and the level of mandatory steps required):

    (a) At no stage in the current law reform process have banks' current substantial hardship assessment practices been identified as presently causing harm. As with other areas, therefore, this is one in which banks should be distinguished from those offering high-cost consumer credit contracts, and where prescriptive or additional regulation for banks is not necessarily required.

    (b) Banks are subject to existing credit-worthiness related rules, requirements and monitoring via the Reserve Bank of New Zealand (RBNZ) and, in some instances, the Australian Prudential Regulation Authority (APRA). Related to this, RBNZ monitoring via the Dashboard shows very low non-performing loan ratios across all the banks. While we appreciate a non-performing loan measurement is not directly on point as a measure of substantial hardship, it is still indicative of very low customer harm levels within the New Zealand banking sector in terms of affordability issues. Bearing in mind too that when we explore the reason why those consumer customers are in arrears, it is most often reflective of wholly independent events (eg job loss, illness or relationship break up).

    (c) Section 9CA of the Amendment Act introduced new requirements and the ability for greater scrutiny of lenders' substantial hardship assessment processes. In this regard, the new record keeping requirements will ensure refreshed and continued focus by the banks on compliance with s 9C(3)(a)(ii) of the CCCFA and the Code guidance. Noting that records will need to be kept of inquiries made (including the results of those inquiries) and which demonstrate how the

lender has satisfied itself as to the likelihood that a borrower will be able to make the payments without suffering substantial hardship.

26. Before addressing specific issues, we highlight that we look forward to continuing to work with MBIE to explore a more appropriate option for these regulations 4AC – 4AI. NZBA considers that possible alternative approaches could be adopted to the design of the Regulations too. For example, (a) minimum standards similar to those currently drafted could be introduced but apply to high cost lenders only (with the position for other lenders continuing to be addressed through guidance in the Code); or (b) two sets of minimum standards could be drafted – one set for high cost lenders and the other for other lenders.

Specific comments on regulations 4AC–4AI – Assessment of Substantial Hardship

27. We address our key points in relation to the drafting of the proposed regulations below – noting that many are interconnected. As you will see, a number of overarching themes appear which are:

    (a) as discussed already above, the need for scalability and the ability to tailor inquiries and assessments to particular borrower circumstances;

    (b) the need to ensure that it is clear that lenders do not necessarily need to collect information directly from customers but can also use other sources of information when making reasonable inquiries;

    (c) concerns with how specific words or terms have been defined (or not defined); and

    (d) the need for the regulations to allow for technological advancement (eg open banking developments).

Need for materiality thresholds, including for "Material Changes"

28. There should be some form of materiality threshold included in the affordability regulations. As they stand, the proposed regulations require the same inquiries, verification and assessment steps for all new lending and for "material changes". By comparison, we note that the UK responsible lending rules include a threshold of where there is a "significant" increase of the amount of credit provided or the credit limit. (See UK FCA Handbook CONC 5.2A4)

29. Specifically we note that, while containing the word "material", "material changes" can actually in practice be quite minor changes (eg an overdraft limit increase of $50). In this respect, the CCCFA does not include a significance filter within the "material changes" definition. Material changes include any situation in which, for example, the parties agree to change the agreement by increasing a credit limit or where the lender makes an additional advance that the lender did not take into account when previously satisfying itself as to the matters in 9C(3)(a).

Need to recognise existing relationships with customers

30. The proposed regulations throughout do not adequately provide for the common situation where banks have an existing relationship with the proposed borrower. Instead, the regulations are framed on the basis that the lender has no existing knowledge of the borrower. In this respect, the regulations should allow for lenders to utilise existing information and data about a customer, rather than need to necessarily undertake new inquiry and assessment processes. This should also include allowing lenders to ask potential borrowers to validate income and expense information from sources they hold in order to meet reasonable inquiry obligations.

Mandatory process flow is restrictive and repetitive

31. The regulations should allow for a process flow that is tailored to the way in which the borrower intends to repay the credit. This is not achieved in the proposed regulations. Instead, the proposed process is centred on a borrower who will repay the loan using income. For example, the proposed regulations require lenders to undertake income and expenses checks as a step in the assessment, even if this is not the case. This is because, while the regulations allow for "exceptional circumstances" in regulation 4AE(b)(ii) and (iii), a lender's ability to determine that exceptional circumstances apply only arises at the end of the process and so does not remove the need for a lender to undertake potentially irrelevant inquiry and assessment steps. Regulation 4AE(b)(ii) and (iii) should, accordingly, be exceptions to the general rules in regulation 4AE(a), not additional steps.

32. More generally, we consider that the regulations should be reconsidered and restructured to enable a number of different pathways of inquiry relevant to the particular lending contemplated. For example, the regulations could include as a first step a requirement that lenders must make reasonable inquiries as to how the borrower intends to make payments under the agreement, including (as applicable) (a) from income; (b) from any assets that the borrower is willing and able to sell; and (c) from any other source. The lender should then be able to undertake inquiries and an assessment relevant to the borrowers' individual position. By way of comparison, see UK FCA Handbook CONC 5.2A.12.

33. The inquiry, verification and assessment process set out in the regulations is also unnecessarily repetitive – with the potential impact being that buffers are added upon buffers, thus, reducing borrowers' access to credit. For example, the inclusion of all of the following steps in the process is not appropriate: (i) discretionary expenses being included within "relevant expenses"; (ii) the need for a comparison against "reasonable expenses" with the presumption being that the comparator will be used if higher; and (iii) the lender needing to be satisfied that a "reasonable surplus" is available.

More guidance is required on "reasonably foreseeable time period" (regulation 4AE(a))

34. Additional detail is required about the meaning of "reasonably foreseeable time period". We understand that MBIE's intention here is that it is a period, such as one to two years, in which it is reasonable for the lender to make assumptions about the borrower's circumstances. If this is the case, we ask that either the wording of the regulations is clarified to reflect this or that examples are given in the regulations to help clarify the meaning.

Requirement to allow a reasonable surplus (regulation 4AE(b))

35. In relation to the concept embedded in regulation 4AE(b) that a lender must be satisfied on reasonable grounds that it is not likely that the borrower will suffer substantial hardship because "the borrower's likely income exceeds their likely relevant expenses allowing a reasonable surplus to pay or save for other expenses":

    (a) The wording here should be aligned with that in the CCCFA. For example, the CCCFA does not require the lender to be satisfied on "reasonable grounds". Instead, the lender must make "reasonable inquiries so as to be satisfied". The regulation should state that "the lender must be satisfied that it is likely that the borrower can meet their obligations under the agreement without suffering substantial hardship".

    (b) The reference to "reasonable surplus" is likely to increase uncertainty for creditors and lead to operational difficulties. This includes because, while banks may take into account the need for some surplus, this can occur in a variety of ways (eg buffers may be added by applying haircuts to income, scalars to expenses and adding buffers to interest rates in case these rise), rather than a step being undertaken at the end of the assessment process to consider the amount of surplus.

    (c) Furthermore, the Regulations as drafted largely assume that lending is to be repaid from income, whereas this is not always the case. There is no point calculating a 'reasonable surplus' if it was never intended that income was the source of repayment. Bridging finance and other temporary arrangements are usually repaid from a source other than income, and on occasion members may lend to customers that are asset rich (ie money available via Term Deposits, shares & other assets), but cashflow poor. This is especially the case with high net worth customers. In such circumstances a lender may consider the lending is responsible, albeit a reasonable surplus may not be available.

36. For these reasons, we recommend the removal of the need for a reasonable surplus. Consideration could instead be given to including the absence of a surplus being a red flag as to further inquiries or that more robust verification may be required. (Compare ASIC Regulatory Guide 209.88)

37. In regulation 4AE(b)(ii) we also note that the phrase 'in respect of land' needs to be removed as this may remove the ability to use any type of bridging finance or other arrangement which is not in respect of land.

    Requirement to make reasonable inquiries in order to estimate the borrower's likely income (regulations 4AE(a)(i) and 4AF)

38. There are a number of issues with the drafting of these regulations which raise workability issues:

    (a) The definition of "income" requires further refinement, including in relation to potentially adding that Kiwisaver and superannuation contributions can be assessed on the basis of minimum payments (ie reflecting that customers may choose to change these settings if, for example, purchasing a home) and to

make clear that income includes income other than salary and wages (eg including government benefits and dividends).

(b) The regulations make it mandatory for a lender to obtain from the borrower a statement of their current income and to then verify that income information. In some instances these mandatory steps (including the verification) would, however, be inappropriate given the need for a forward-looking assessment. For example, for a customer who is about to switch jobs, their future income over the course of the relevant agreement, rather than their current income, should be the focus.

(c) Banks commonly hold existing income information from customers, including due to pay coming into transactional accounts or because a borrower has recently completed another credit application (eg a home loan versus a credit card). For this reason, the language "obtain from the borrower a statement of their current income" is too narrow and prescriptive. Lenders should, for example, be able to provide information back to a borrower and have them confirm it is still correct.

(d) We are also concerned that references to "statements" and "documentary evidence" is not "future-proofed" and does not reflect technological advancements (ie do these terms imply written statements).

(e) The term "adequately reconciled" is uncertain as to the obligation imposed on lenders. For example, in some instances lenders would average or apply "haircuts" rather than definitively resolve or reconcile issues.

(vii) Requirement to make reasonable inquiries in order to estimate the borrower's likely relevant expenses (regulations 4AE(a)(ii), 4AG and 4AH)

39. There are again a number of issues with these regulations which raise workability issues:

(a) The same issues as described in relation to 4AE(a)(i) and 4AF above apply here in relation to the mandatory nature of the required steps and the need to "obtain" information from a borrower.

(b) The definition of "relevant expenses" requires amendment, including to remove "discretionary expenses". In terms of conceptualising a borrower's expenses, key categories are: (a) existing debts and commitments; (b) living expenses (including those items listed in current living expenses description in 4AD (other than personal expenses which are of a discretionary nature (eg what does 'personal care' mean?) plus child support that is payable); (c) any other fixed or variable expenses that the borrower is either required to make or is unable or unwilling to give up; and (d) discretionary expenses. In this regard, the concept of discretionary expenses is that they can be "given up" by a borrower if needed. It is not appropriate, therefore, to include them within affordability assessments. In practice: (i) it is extremely difficult to verify discretionary expenses; (ii) many discretionary expenses are below a materiality threshold that means they are unlikely to impact the affordability assessment; and (iii) it is difficult to define discretionary expenses. The requirement to compare any regular or frequently recurring discretionary expenses against a reasonable cost of those expenses at

regulation 4AH(2) also needs to be removed. It is not possible to build bench-marking models for 'discretionary expenses'.

(c) The reference to "current relevant expenses" in 4AG(1)(a) and (b) is also problematic and requires amendment. The focus should be on a forward-looking perspective, not necessarily the current position. For example, for a customer wanting a home loan, collecting and verifying information about their current rent is both burdensome and ultimately irrelevant.

(d) We are also concerned that the term "categorised statement" in 4AG(1)(a) implies a written statement of expenses and does not reflect technological advancements/open banking in terms of banks' ability to analyse and obtain this data themselves. We note that most borrowers would find it very difficult to prepare a categorised statement of their expenses. Banks may have a better grasp of a borrower's true expense position and can present this data to borrowers to discuss and confirm, including advising of any gaps.

(e) The requirement in 4AG(1)(b)(ii) to verify relevant expenses by checking 90 days' worth of transactional records for any bank account into which the borrower's income is paid and any bank account or credit card of the borrower into which the borrower's income is transferred is unduly onerous and unreasonable. In the banks' experience, borrowers' account usage:

(i) can be very complex;

(ii) may not be an accurate representation of usual income and expenses (eg if the 90-day period falls over the Christmas period or during a major holiday away, or includes significant one-off purchases, or there are seasonal fluctuations in expenses (eg energy bills), or the borrower is in business for themselves). These factors are also relevant when calculating surpluses; and

(iii) is often not an appropriate measure for high net worth individuals or for borrowers in business on their own account, but who are borrowing for personal purposes.

(f) Further, regulation 4AG(1)(b)(ii) is very broad in terms of the accounts it would capture. For example, it would extend to capture an account that the borrower pays money into over that period, regardless of whether it is their own. Given the requirement in regulation 4AG(1)(b)(i) to review expenses based on transaction records for the account the income is transferred into, payments to the other accounts can be identified and queried without needing to also see what the money was spent on in the other account. Transferring income to another account is the same in principle as a cash withdrawal under regulation 4AG(1)(c). The same standard should be applied (ie questioning material or regular withdrawals of the same amount). This requirement should, accordingly, be removed and replaced by something more proportionate and/or the regulations should expressly allow the use of conservative estimates of expenses or place greater reliance on the use of benchmarks in the alternative.

(g) The requirement in 4AG(1)(c) is unworkable. Creditors will be required to question all cash withdrawals, regardless of amount, as it will be impossible to determine whether the withdrawal "may contribute towards payment of a relevant expense". An alternative approach, if required, may be to focus on: (i) material cash withdrawals given account balances or account behaviour; or (ii) regular withdrawals of the same amount. Consideration also needs to be given to the potential unintended consequence, that to avoid all expenses in bank statements being categorised and verified, borrower behaviour may change to pay for most expenses with cash, or to withdraw cash and deposit these funds into an undeclared bank account.

(h) The scope of regulation 4AG(2) is very broad and lacks clarity. It is unclear what is meant by "relevant expenses" and similarly, what an adequate reconciliation would be. For example, a customer states their power bill is $200 per month. However, through transaction review it is apparent it actually varies between $185 and $220 per month. It is unclear whether this amounts to a conflict, and if so, what an accurate way to reconcile this would be. NZBA suggests further guidance be provided around the intended meaning of these phrases and what they are designed to capture.

(i) Relating to our comments in relation to regulation 4A(1)(b)(ii) above, the definition of "bank account" in 4AG(3) is too broad. Any account, including savings accounts, could be used for the payment of expenses. If used, the provision should refer to transactional accounts and be limited to a borrower's primary account. Lenders are required to assess expenses generally, and seek to verify, and it is not appropriate for a lender to need to verify against all statements from all of the borrower's accounts in all situations.

(j) In relation to 4AH, if a lender has undertaken a reconciliation of a customer's actual expenses, it should not also be mandatory for a lender to compare the expenses against a "reasonable cost of expenses" benchmark. This would amount to a process double up and so is unnecessary and inefficient. If prescribed, however, more prescription or guidance is required as to the meaning of "reasonable cost of expenses" in order to ensure lenders apply the requirement consistently.

(k) The definition of "living expenses" includes items which cannot be benchmarked due to the wide variation of those expenses from borrower to borrower and taking into account personal choice and circumstances. Personal expenses (including clothing and personal care), school fees, child-care costs, medical and transport expenses all vary so widely it is not possible to develop a benchmark against which a meaningful test of those reasonable costs can be measured.

(l) If the requirement to benchmark living expenses is to be retained, lenders need some flexibility in determining what is considered a living expense and should therefore be benchmarked. The regulations should also provide some guidance around benchmarking, especially if lenders are permitted to use benchmarking in place of full verification. This would hold lenders to account with the benchmarks they use. The APRA gives some useful guidance around this, which could be adopted.

(viii) Guarantors and insurance (paras 35 and 36 of Consultation Paper)

40. NZBA agrees with the decisions not to include requirements for satisfying s 9C(4)(a) of the CCCFA in relation to guarantees or for satisfying s 9C(5)(a)(ii) in relation to insurance contracts. We note for most guarantees in a banking context, the lender will take the guarantee to provide access to underlying security, and will rely on that security rather than necessarily the guarantor's ability to meet repayments under the contract. Assessing affordability solely on an income / expense bases for guarantors will create issues, particularly for first home buyer / parent backed guarantee scenarios, where the parents are often asset rich and cash poor. Likewise, for insurance, the assessment of affordability may need to be different – affordability may be incorporated into the lending assessment. We continue to hold concerns that requiring affordability assessments of credit-related insurance creates market distortions, as other insurers are not required to assess affordability.

Regulation 4AK – Advertising of payment amounts

41. We make the following comments about regulation 4AK:

(a) In order to clarify the conduct targeted by this regulation, the regulation should be re-drafted to focus on "repayments", rather than "payments" and an example should be added. This position would be more aligned with the current drafting in the Code at 3.3(c). We consider that the use of "payments" is too broad and could cause confusion. For example, it may be construed to cover payments of credit fees (eg establishment fees that may feature in advertisements).

(b) We consider that the use of the phrase "class of credit contracts" is unclear in 4AK(2)b) (and in other proposed Draft Regulations) and could, inadvertently, capture products that are within the same "class" but that have variable "features". For example, we consider that a "credit card" would be a class of contract, but there may be a selection of credit card products available with different 'features', like travel rewards or low rates. A travel rewards credit card would not be a separate class of contract to a low rate credit card. Likewise, a "term home loan" would be a class of contract, but may have different 'features', like the choice of a range of floating or fixed interest rates. A home loan with a one year fixed interest rate would not be a different class of contract to a home loan with a floating interest rate (indeed the contract may have different interest rates over the term of the contract).

42. A potential fix to this issue at 4AK(2)(b) is set out below in which the agreement referred to in the advertisement would be defined as a "relevant agreement" and a new interpretation provision added into the regulations (either in regulation 3 or potentially as 4AJ(2)) that defines the phrase "a contract of the same type as the relevant agreement". That definition could then be incorporated in the relevant places within regulation 4AK and 4AL too:

> "**a contract of the same type as the relevant agreement**" means a contract that has the same characteristics as the relevant agreement including in respect of (a) product type and (b) key contractual features excluding interest rates. (For example if the relevant agreement was a home loan with a fixed rate for a one year term, the contract of the same type as the relevant agreement would be a home loan with a fixed rate for a one year term.)

43. As a general point across the regulations, particularly apparent in 4AK, we note that there is currently a mixed use of "agreement", "contract", and "credit contract" used in different places. This usage should be checked for consistency prior to finalisation to avoid any unintended consequences, and should align to the terms used in the lender responsibilities in the CCCFA.

44. As explained in further detail below, the focus on prominence in the regulations creates practical difficulties in relation to 4AL. For consistency with our proposed amendments to other regulations, therefore, we suggest that 4AK(3) is amended to remove the prominence requirement. We suggest instead incorporating a requirement that the content is brought to the attention of a reasonable person, which would be consistent with the approach taken in s 32 of the CCCFA.

45. Our suggested amendments to 4AK are as follows. This includes the changes flagged above and also makes some other changes in order to make it align with the rest of the legislative framework (eg "the regulations" prescribe the relevant assumptions, rather than "Schedule 1"):

4AK Advertising of repayment amounts

(1) This regulation applies if an advertisement is being distributed to the public or a section of the public and it refers to an amount of a repayment to be paid by the borrower under an agreement (**the relevant agreement**). (For example, $25 per week repayments only.)

(2) The advertisement must state,—

(a) ~~if ascertainable,~~ the total amount of the repayments, ~~(~~but only if :

(i) ascertainable; and

(ii) the relevant agreement ~~the contract~~ would, on the assumptions set out in the regulations ~~Schedule 1~~, be paid out within 7 years of the date on which credit is first provided under the contract), or

(b) in any other case, the annual interest rate ~~or rates for that class of credit contracts (with the rate or rates being~~ expressed as a percentage), repayment frequency and term used to calculate that repayment ~~in terms of a percentage)~~.

(3) For the purposes of (2)(b) above, where there is more than one interest rate or a range of interest rates available for borrowers obtaining a contract of the same type as the relevant agreement, the annual interest rate used to calculate the repayment must be the highest of those rates.

(4) The advertisement must express the information in (2) above, clearly, concisely, and in a manner likely to bring the information to the attention of a reasonable person. ~~is information must be as prominent as the amount of a payment.~~

Regulation 4AL – Advertising of interest rates or charges

46. NZBA fully supports the need for advertising which is clear, fair and not misleading. However, in terms of the level of information required in advertisements, it must be remembered that advertising is only ever an initial stage in the lending process. Lenders must still meet lender responsibilities to assess suitability and assist informed decision making, and make disclosure, where a borrower, having been exposed to a lender's advertising, approaches that lender for credit. The existence of these later requirements within a lending lifecycle is important context that should be kept in mind when specifying the amount of information required to be included within advertisements themselves.

47. Our specific comments on 4AL are as follows:

(a) As above, in 4AL(2)(a) clarification is required regarding the use of the term "class of credit contracts". For example, we understand MBIE's intention is not to require a lender advertising a particular interest rate for a fixed term home loan to include all fixed and floating rates in the advertisement. We, therefore, again, suggest the incorporation of definitions of "the relevant agreement" and a "contract of the same type as the relevant agreement".

(b) We are also concerned with the reference in 4AL(2)(b) which states that if there is more than one rate, the advertisement must state "how each rate applies". Practical issues that arise in relation to this wording identified are:

(i) Home loans may roll off fixed interest rates at the end of a term and onto variable rates. While consumer credit contracts will set out these two different rate structures, we do not consider the level of detail is necessary in an advertisement.

(ii) Credit cards can have multiple interest rates applicable from day one (for example, where there are different interest rates paid for purchases compared to interest rates applied to cash withdrawals. It is unclear therefore, in this example whether both rates are required.

(iii) Some products (eg for credit card balance transfers) may have 0% interest rates, which then later roll off that arrangement. For promotional rates in general, a similar issue arises as it is unclear what type of statement is required for when the product rolls of that promotion.

48. Against the background of these issues, we have considered what we understand to be the underlying policy concerns, namely to ensure clarity where the rate advertised:

(a) is not available to all borrowers;

(b) has specific eligibility criteria or conditions before that rate is available; or

(c) is promotional and a higher rate will apply after a specific time. In light of those policy concerns, we have then proposed an alternative drafting that imposes more specific obligations and which does not give rise to the issues identified. (See 4AL(4) below)

49. To aid interpretation and clarity, in 4AL(2)(e) we consider a definition of "mandatory fees or charges" should be added to the interpretation section at regulation 3 of the Regulations for use in regulation 4AA(2)(e) (redrafted as 4AA(3)(e) below) and elsewhere in the Draft Regulations. Our proposed definition is:

> "**mandatory fees or charges** means fees or charges that the borrower must pay under a consumer credit contract regardless of the borrower's conduct in respect of the contract, including:
>
> (i) whether or not the borrower uses particular goods, services or features under the contract; and

(ii)	whether or not the borrower meets the obligations under the contract. (For example, an establishment fee due under a contract would be a mandatory fee or charge, while a default fee would not be.)"

50. The example referred to in 4AL(2) may cause confusion, as it is unclear whether the example is referring to a fixed term credit contract which has a range of interest rates based on customer risk, or to a revolving credit contract which has different interest rates based on the types of purchases or the promotional period. We suggest this example, if included, is amended to ensure clarity on this point. As you will see, we have, in any event, suggested an amended example below to better fit with our proposed new approach to 4AL(2).

51. In relation to 4AL(2)(a), we recommend that the ordinarily available to borrowers reference is removed. In particular, this may contradict specific advertising that is targeted at a group of customers – for example, those with large deposits who may be able to get a better interest rate. In these situations, the rate is "ordinarily available" to borrowers if they meet that criteria. We would not want any inference, however, that the rate must be one ordinarily available to all borrowers, as this would restrict this type of targeted advertising.

52. In relation to the reference in 4AL(2)(c) that the annual interest rate or rates stated must be at least as prominent as any other interest rate or interest rate change, as above in relation to 4AK we consider that this requirement should be more aligned to the position within s 32 of the CCCFA. The requirement for prominence is not clear. For example, it is an uncertain requirement in the context of digital advertising where advertisements include banner ads or tiles and then landing pages with additional information. Requiring all content to be prominent can also detract from key messages and create confusion for customers. We accordingly consider that what is proposed currently risks making it harder for customers to understand and differentiate between offers or understand the actual offer being promoted by the creditor.

53. In regulation 4AL(2)(c), we also prefer that the advertisement is required to "make it clear" whether the rate is fixed or variable, without it necessarily requiring a statement to this effect. For example, where a lender may advertise a "one year fixed interest rate" on a home loan, we do not believe we would necessarily have to state that the rate is fixed for one year.

54. In relation to 4AL(2)(e), the requirement to state the method of calculation of fees or charges (where the amount is not ascertainable) may be impractical as this would be difficult to effectively communicate in an advertisement. To address this, we have suggested that, where the amount is not ascertainable, the advertisement must state where information about the method of calculation of the fees or charges can be obtained.

4AL	**Advertising of interest rates or charges**
(1)	This regulation applies if an advertisement is being distributed to the public or a section of the public and it refers to an interest rate or an interest charge due under an agreement (**the relevant agreement**).
(2)	The advertisement must ~~state~~ —

(a) state the interest rate as an annual percentage ~~interest~~ for a contract of the same type as the relevant agreement~~rate or rates for the class of credit contracts covered by the advertisement (with the rate or rates being expressed in terms of a percentage)~~:

(b) where relevant include a statement to the effect that a higher interest rate than advertised may apply:

(i) to a specific borrower or class of borrowers;

(ii) in specific situations (for example, where eligibility, risk, or other criteria apply);

(iii) at the end of a promotional period (for example, where the rate advertised relates to a balance transfer on a credit card and is initially 0%).

~~if there is more than 1 rate, how each rate applies:~~

(c) ~~state~~make it clear whether the ~~if an~~ annual interest rate is variable or adjustable, or is fixed for the term or any part of the term of the contract~~, the period during which the annual interest rate is fixed~~:

(d) ~~if an annual interest rate is variable or adjustable, a statement to that effect:~~

(e) state any mandatory credit fees or charges that may be payable, and:

(i) if ascertainable, the amount of those fees;

(ii) ~~(for example, any establishment fees and regular account management fees) and the amount of those fees if ascertainable or,~~ if not ascertainable, where information about the method of calculation can be obtained.~~the method of calculation of the fees.~~

Example

A creditor that refers to an interest rate in an advertisement might include the following statement: "A higher interest rate may apply if borrowing more than 80% of a home loan's value. ~~Interest 9.95%–24.95% per annum.~~ Establishment fee $100."

(3) For the avoidance of doubt, ~~However,~~ subclause (2) does not require the advertisement to state matters in relation to default interest charges.

The ~~annual interest rate or rates stated in the~~ advertisement must express the information in (2) above clearly, concisely and in a manner likely to bring the information above to the attention of a reasonable person. —

~~(a) must be the rate or rates that are ordinarily available to borrowers who meet the lender's borrowing requirements for that class of credit contracts:~~

~~(b) must be the current annual interest rate or rates, if the rate is variable or adjustable:~~

~~(c) must be at least as prominent as any other interest rate or interest charge.~~

Regulation 4AM – Advertising of credit fees if advertisement states there is no interest

55. NZBA's only comments in relation to 4AM are, consistent with comments made above, for MBIE to utilise a uniform definition for mandatory fees and charges and to amend the requirement to state the method of calculation of fees or charges (where the amount is not ascertainable). For example, with reference to our proposed definition of mandatory fees or charges above:

4AM

Advertising of credit fees if advertisement states there is no interest

(1) This regulation applies if—

(a) an advertisement states that there is no interest under the contract; but

(b) there are mandatory credit fees or charges under the contract.

(2) The advertisement must state any mandatory ~~credit~~ fees or charges and the amount of those fees or charges if ascertainable or, if not, where information about the method of calculation of the fees or charges can be obtained.

Regulation 4AN – Advertising of interest rates or charges

56. Our comments in relation to 4AN are that:

(a) Technology developments may ultimately be such that lenders can genuinely quickly (and responsibly) process lending applications. Lenders may, therefore, increasingly wish to compete on the time that it takes to complete the reasonable inquiries requirements and other approval processes. For this reason, we consider that the time based examples in 4AN(a) could lead to uncertainty and so should be removed.

(b) We suggest that, for ease of understanding, 4AN(3) is split in two to deal separately with (i) the suggestion that a loan has already been approved; and (ii) the suggestion that a loan has already been granted.

4AN Prohibited advertising practices

An advertisement must not make any of the following representations, explicitly or by implication:

(a) that the lender will not inquire fully into the borrower's circumstances (for example, "no credit checks", "~~instant approval~~", "~~15 minute approval~~", or "guaranteed acceptance"):

(b) that the lender will not fully take into account a borrower's circumstances in assessing whether or not to enter into an agreement (for example, "bankrupt—OK", "bad credit history—OK"):

(c) that a loan has already been approved ~~or granted~~, if the inquiries required by section 9C(3)(a) have not been completed ~~and the credit contract has not been entered into or varied (as applicable) (for example, "$500 credit available in your account").~~

(d) that a loan has already been granted, if the credit contract has not been entered into or varied (for example, "$500 credit available in your account").

Regulation 4F – Variation disclosure

57. In relation to 4F, NZBA's strong view is that the information should be disclosed on a forward-looking basis ie from the point of the variation going forward.

58. Providing customers with comparative information from the loan's inception or the last loan change (given the length of time that may have elapsed, the number of changes that can be made over the life of a customer's loan, and the inherent indicative nature of that information) would likely cause significant confusion for customers, given it will not be relevant to the loan's current position or the effect of the change the customer wishes to make. In this regard, as highlighted by the example below, we note that it is very common over the lifetime of a loan for multiple changes to be made which mean that what was initially disclosed becomes increasingly irrelevant.

Example:

In initial disclosure, Creditor A told Customer A they would have 150 monthly repayments on a floating rate loan.

Floating interest rates later reduce. In accordance with the terms of the customer's loan, Customer A's loan term reduces, and Customer A now has 145 monthly repayments.

Later still, Customer A extends their loan term, changing the number of payments to 160 monthly repayments.

And after more time, Customer A makes a lump sum payment, and in accordance with the terms of the customer's loan, Customer A's loan term reduces and the number of repayments changes to 150 monthly repayments.

59. In this example, having to provide updated information given as part of initial disclosure (for example, 150 monthly repayments) will confuse and mislead customers. Creditor A should give information about the consequential effect the lump sum payment will have – that, in accordance with the terms of the customer's loan, the customer's loan term will reduce and it will reduce the number of repayments.

60. Calculating such information would also be extremely difficult. The approach would, accordingly, impose significant compliance costs on lenders and require substantial technology changes.

61. Given the potential complications and the number of changes that can be made over the life of a customer's loan, NZBA's strong view, therefore, is that it is more helpful to customers to provide a forward-looking view only ie from the point of the variation going forward.

62. We also recommend that 4F expressly confirms that lenders only need to disclose the types of information which the lender, in relation to the particular contract being varied, was required to disclose under s 17 at the time of initial disclosure. (See 4F(3)(i) below)

63. Against the comments above, our suggested re-drafting of 4F is as follows:

Disclosure

4F Disclosure of agreed changes

(1) This regulation applies for the purposes of section 22(1) of the Act.

[OPTION ONE]

(2) The following is information that must be disclosed, but only to the extent that:

(a) that key information was disclosed before the contract was entered into pursuant to section 17(1);

(b) the change agreed to affects any of that key information; and

(c) the updated key information is calculated, where applicable, as at the date the change takes effect and on a forward-looking basis~~it has changed as a result of the variation~~:

[OPTION TWO]

(2) Any consequential changes to the information described below, but only where that information is applicable to the contract and was required to be disclosed before the contract was entered into pursuant to section 17(1):

Credit limit

(~~aa~~) the credit limit:

Annual interest rate

(~~bb~~) the annual interest rate or rates under the contract (with the rate or rates being expressed in terms of a percentage):

(~~cc~~) if there is more than 1 rate, how each rate applies:

(~~dd~~) if an annual interest rate is fixed for the term or any part of the term of the contract, the period during which the annual interest rate is fixed:

(~~ee~~) if an annual interest rate is determined by referring to a base rate, particulars that describe how the annual interest rate is determined, including—

(i) the name of the base rate or a description of it; and

(ii) the margin or margins (if any) above or below the base rate to be applied to determine the annual interest rate; and

(iii) where and when the base rate is published or, if it is not published, how the debtor may ascertain the rate; and

(iv) the current annual interest rate or rates:

Total interest charges

(~~ff~~) the total amount of interest charges payable under the contract , if ascertainable (but only if the contract would, on the assumptions set out in Schedule 1, be paid out within 7 years of the date on which credit is first provided under the contract):

Credit fees and charges

(~~gg~~) if the contract is a high-cost consumer credit contract, a statement of the rate of charge under the contract, as required to be calculated in accordance with section 45D of the Act and these regulations:

Payments required

(~~hh~~) if more than 1 payment is to be made,—

(i) the amount of the payments or the method of calculating the amount; and

(ii) if ascertainable, the number of the payments; and

(iii) if ascertainable, the total amount of the payments (but only if the contract would, on the assumptions set out in Schedule 1, be paid out within 7 years of the date on which credit is first provided under the contract); and

(iv) when the first payment is due after the effective date of the change, if ascertainable, and the frequency of payments.

(3) Any information disclosed pursuant to 2(f) and (h)(ii) and (iii) above is to be calculated from the effective date of the change to the contract.

Regulations 20 and 24 – Provisions about securitisation and covered bond arrangements

64. While NZBA supports the inclusion of regulations 22 and 23 (in providing relief to the new creditor from the duties imposed by s 59B) we have some concerns regarding how these regulations will play out in circumstances where the contract manager needs to be replaced under the transaction documents for the securitisation / covered

bond programme. This replacement would typically only arise where there have been material breaches or an insolvency of the contract manager. If the directors and senior managers of the replacement contract manager must be willing to take on the due diligence responsibilities under regulations 22 and 23, this may pose difficulties in finding a suitable[1] replacement within any required contractual timeframe or at all. It would be an onerous burden to place on the replacement contract manager. It is also unclear whether, if a replacement contract manager could not be appointed, the new creditor would be required to take on these obligations to comply with the due diligence responsibilities under s 59B. Again, if this is the intended consequence of the proposed regulation, entities that currently perform securitisation trustee roles may be disinclined to provide those services going forward. The role of the securitisation trustee is generally undertaken by corporate trustees.

65. One solution may be to amend the wording of regulation 23 to expressly provide that s 59B does not apply to the new creditor, and instead only applies to the contract manager for so long as it is the original creditor. (See 23(b) below)

66. We acknowledge that anti-avoidance provisions may need to be included to discourage the original creditor from avoiding these obligations (eg by creating a subsidiary to take on the contract manager role). On balance, we think this would be a very low risk given creditors that establish securitisation/covered bond programmes wish to maintain their business relationship with the underlying borrower and accordingly would be unwilling to allow a third party (even a subsidiary) to take on that role as this would impact on their ability to interact with those borrowers. As MBIE will be aware, securitisation/covered bond programmes are established in a manner that does not notify the borrowers of the transfer of their consumer credit contracts. This was the reason regulations 19 and 20 were introduced into the Regulations in 2015. Nevertheless, we would be open to discussing this further with MBIE.

67. In relation to regulation 22(2)(c)(ii), there is a risk that the inclusion of "as if the contract manager were the creditor" could undermine the effectiveness of the transfer for the purposes of securitisation (as it implies the contract manager is the creditor, which is no longer the case given the consumer credit contract would be absolutely assigned to the new creditor). Our proposal is that the wording be amended to ensure the contract manager still has obligations to comply with the CCCFA, without suggesting the contract manager is acting as the creditor. A similar amendment should also be made at regulation 20(2)(b). (See 22(2)(c)(ii) below)

> *Other provisions about securitisation or covered bond arrangements or similar arrangements*
>
> **22 Circumstances in which section 59B(4) of Act applies**
>
> (1) This regulation prescribes circumstances for the purpose of section 59B(4) of the Act.
>
> (2) The circumstances are that—
>
> (a) the rights of a person who provides credit under a consumer credit contract (an **original creditor)** are transferred (whether by assignment or by operation of law) to another creditor (the **new creditor);** and

[1] In the case of a rated securitisation and covered bond programmes (which are always rated), the suitability of the replacement would also be considered by the relevant rating agency (S&P, Moody's or Fitch Ratings).

(b) the transfer is made for the purposes of securitisation or covered bond arrangements or similar arrangements; and

(c) there is a contract between the new creditor and a person (a **contract manager)** that provides for the contract manager—

(i) to collect all payments from every debtor and guarantor; and

(ii) otherwise to manage the relevant contract and every guarantee and to comply with the Act, including the same provisions as the new creditor must comply with ~~as if the contract manager were the creditor~~; and

(iii) to deal with every debtor or guarantor for those purposes accordingly.

(3) Any term used in this regulation, but defined in regulation 19, has the meaning given in regulation 19.

23 How section 59B of Act applies in those circumstances

In the circumstances prescribed in regulation 22,—

(a) section 59B of the Act does not apply to the directors and senior managers of the new creditor:

(b) where the contract manager is the original creditor:

(i) section 59B of the Act applies to the directors and senior managers of the contract manager as follows:

(~~i~~A) those directors and senior managers must exercise due diligence to ensure that the duties and obligations of a creditor under the Act are complied with:

(~~ii~~B) section 59B(2)(a) of the Act applies as if the nature of the business to be taken into account were the contract manager's business (for example, its size) and the nature of the consumer credit contracts that are subject to the securitisation, covered bond arrangements, or similar arrangements:

(~~c~~ii) the Act (including section 116A) applies to the directors and senior managers of the contract manager in respect of any breach of section 59B.

Regulation 24 – Debt collection disclosure

68. In relation to the information that regulation 24 proposes needs to be disclosed before debt collection starts, we have the following comments:

(a) 24(1) refers to information needing to be disclosed "as is applicable". In order to ensure consistent compliance across lenders, we recommend, however, that the individual sub-clauses where information may not need to be disclosed are separately identified.

(b) In relation to 24(1)(c), we do not consider that there is a need for information "about the debtor's purpose of the credit when the credit was entered into" to be disclosed as a matter of course. If the concern is that borrowers may not recall to what the loan related, we recommend that the regulations are, instead, amended to inform the borrower of their rights to obtain the records kept by lenders pursuant to s 9CA(5) of the CCCFA. In terms of issues relating to providing purpose information which support the removal of this aspect, we note that:

(i) Lenders may not retain this information in their records depending on when the consumer credit contract was entered into. Home loans can have terms up to 30 years and this information may not be available for aged consumer credit contracts.

(ii) The purpose of lending may have changed over time from when initially assessed as part of a lender's suitability assessments. For example, a customer may have acquired a flexible home loan initially to fund the purchase of a home, but the use of the flexible home loan may have changed to be available access to credit and a way for the customer to reduce their interest charges over time. Further, the purpose of lending is unlikely to be relevant at the start of debt collection, and is unlikely to be valuable to a borrower to determine the nature of the debt being collected.

(iii) Creditors are not required to refer to the purpose of lending in any other communications, including initial disclosure, variation disclosure or continuing disclosure. Instead, a reference number is usually attached to the loan, and used through the life of that loan.

(iv) Under the transitional provisions in the Amendment Act, these provisions will apply to all existing agreements to the extent debt collecting starts after commencement. However, the obligation on lenders to keep records of inquiries into borrowers' requirements and objectives (including the purpose of the lending) will only come into effect from April 2021.

(c) In relation to 24(1)(f)(iii), it is unclear what "explanation of what that service provides" means and which agency this applies to (ie the Commerce Commission or Dispute Resolution Scheme or both?). The services provided by dispute resolution schemes are extensive, and subject to specific terms of reference. It would be difficult to comprehensively include an explanation of those services in a debt collection letter. We instead recommend that a simple explanation only is required, similar to the approach adopted for MoneyTalks at 24(1)(h). (See 24(1)(f)(ii) below)

(d) We recommend that 24(1)(g) is removed. Pursuant to s 57 of the CCCFA, borrowers are unable to make hardship applications when in default for two weeks or more after receiving a repossession warning notice, failed to make four or more consecutive periodic payments by or on the due dates or has been in default for two months or more. As debt collection disclosure is only likely to be given after these periods elapse, it renders the reference to the ability to make a hardship application in s 55 of the CCCFA irrelevant. We note further that, in most situations, if following the Code, the lender should already have disclosed this information.

(e) In relation to 24(1)(h), we note that the level of information required to be provided regarding MoneyTalks is not insignificant, particularly in light of the requirement to provide this on the first page. We also query the requirement to have this information on a front page, rather than placing an obligation on lenders which aimed at making the information noticeable to a borrower. In that regard, we consider that the "front page requirement" unnecessarily limits other modern design approaches to presenting information eg using behavioural insights learnings. Accordingly, we recommend that this aspect is altered to require that the information is presented clearly, concisely and in a way that means it is brought to the attention of a reasonable person. (See 24(2) below)

69. We do not believe that the distinction based on continuing disclosure in 24(3)(a) and (b) is appropriate. We consider that, rather than some information being provided to some borrowers which supplements past continuing disclosure statements under 24(3)(a), all borrowers should receive the information at 24(3)(b). We consider this approach would be easier for customers to understand and also removes a number of potential operational difficulties for debt collectors and lenders in respect of providing the information in 24(3)(a).

70. Against the background of the above, we make the following suggested amendments. We ask that further thought is also given to what "contact details" means in relation to the Commission, the dispute resolution scheme and MoneyTalks (for example, physical address, post, phone and / or email?). Given space constraints our expectation is that a phone number and email address ought to be sufficient. We also ask that the drafting remains such that lenders are not precluded from referring borrowers to other agencies (eg free budget advisers, community law centres etc).

24 Disclosure before debt collection starts

(1) The following information is the information that must be disclosed under section 132A of the Act concerning the contract ~~as is applicable~~:

Information about credit contract

(a) the full name and contact details of the creditor at the date of the credit contract:

(b) the date of the credit contract:

~~(c) the debtor's purpose of the credit when the credit contract was entered into:~~*Statement about debt to be collected*

(d) a statement as required by subclause (3) ~~or (4):~~

Information about debt collection

(e) the full name and contact details of the debt collector:

(f) information about ways in which the debtor can make a complaint about the debt collector, including—

(i) the contact details for the Commerce Commission:

(ii) where the creditor is required to be a member of a ~~the name and contact details for the~~ dispute resolution scheme ~~of which the creditor is a member (unless the~~ under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 ~~does not require the creditor to be a member of such a scheme)~~:

(A) the name and contact details for that scheme, including a link to the scheme's internet site; and

(B) a statement that the person can ask that scheme to investigate or help to resolve a complaint against the creditor for free.

~~(iii) an explanation of what that service provides:~~(iv) ~~that the scheme will not charge a fee to any complainant to investigate or resolve a complaint:~~*Other information*

~~(g) a statement of the debtor's right under section 55 of the Act (if applicable), and advice as to how an application under that section may be made:~~(h) that the person can ask for free and confidential budgeting and financial capability advice from MoneyTalks, the contact details for MoneyTalks, and a link to MoneyTalk's Internet site.

(i) that the person can request the records about the inquiries made by the lender under s 9C(3)(a) and (5)(a) that relate to the relevant contract.

(2) The contact details for MoneyTalks must be provided clearly, concisely, and in a manner likely to bring the information to the attention of a reasonable personon the first page of the disclosure statement.

Statement about debt to be collected

(3) If the contract is a consumer credit contract in connection with which continuing disclosure under section 18 of the Act is required, the statement required by subclause (1)(d) must disclose—

Matters disclosed under section 19

(a) the following information for the period starting with the closing date of the period covered by the last continuing disclosure statement under section 19 of the Act and ending with the date on which the disclosure under section 132A of the Act is made:

(i) the opening and closing dates of the period covered by the statement; and

(ii) the opening and closing unpaid balances; and

(iii) the date, amount, and a description of each advance during the statement period; and

(iv) the date and amount of each interest charge debited to the debtor's account during the statement period; and

(v) the date and amount of each amount paid by the debtor to the creditor, or credited to the debtor, during the statement period; and

(vi) the date, amount, and a description of each fee or charge debited to the debtor's account during the statement period; and

Extra information

(b) to the extent that the amounts in paragraph (a) do not include any default fees yet to be debited, the total amount of those fees, and the total amount to be collected (as increased by those further fees), to the extent that those amounts are ascertainable at the time of disclosure; and

(c) the rates of any ongoing interest charges, credit fees, and default fees that will continue to be charged under the contract.

Example

Debt collection is about to start in June under a consumer credit contract. The last continuing disclosure statement was 1 May.

Section 132A disclosure is made on 1 June. The unpaid balance is now $100 (which must be disclosed under paragraph (a)(ii)). The unpaid balance includes default fees of $10 that the creditor debited on 25 May (which must be disclosed under paragraph (a)(vi)).

The contract provides that, if debt collection starts, further default fees totalling $15 can be debited. Those fees are ascertainable. Those total default fees of $15 must be disclosed under paragraph (b), along with the total amount to be collected, which is $115 ($100 as increased by $15).

The contract also provides that, if debt collection starts, charges of $1 per phone call, and default interest charges of y% of the unpaid balance, may be debited. It is not ascertainable how many telephone calls may be needed. The rate of $1 per telephone call and the rate of y% must be disclosed under paragraph (c).(43) If the contract is not a consumer credit contract in connection with which continuing disclosure under section 18 of the Act is required, tThe statement required by subclause (1)(d) must disclose—

(a) the unpaid balance before any default fees relating to the debt collection are debited to the debtor under the contract; and

(b) the total amount of any default fees to be debited to the debtor under the contract, and the total amount to be collected (as increased by those further fees), to the extent that those amounts are ascertainable at the time of disclosure; and

(c) the rates of any ongoing interest charges, credit fees, and default fees that will continue to be charged under the contract.

The additional regulations inserted by the Amendment Act into the Regulations

New regulation 5A(3) and (6) – MoneyTalks contact details in payment reminders

71. Section 26B(2) sets out that information about financial mentoring services must be disclosed as follows:

> (a) by a creditor, to a debtor who has made a default in payment or has caused the credit limit under the contract to be exceeded:
>
> (b) by a creditor in every notice required under section 57A(1)(a) (obligations of creditor in relation to hardship applications):
>
> (c) by a creditor who declines an application for a high-cost consumer credit contract, to the applicant.

72. Given the breadth of s 26B(2)(a), we recommend that 5A(3) is clearer that the information only needs to be provided in the circumstances set out in 5A(3) and that complying with the regulation therefore extinguishes a borrower's obligation under s 26B(2)(a). In this regard, while 5A(3) is currently apparently limited by reference to the information being included in "payment reminders" as defined in s 132A(6) of the CCCFA, we note that this addresses only defaults in payments and not situations in which the credit limit under a contract has been exceeded. (Noting, however, that we agree that financial mentor information should not typically need to be sent when a customer exceeds a credit limit under a contract.)

73. The current use of "payment reminder" in 5A(3) also causes difficulties and therefore its use also more generally requires refinement. In that regard, the definition of payment reminder in s 132A(6) of the CCCFA is broad and will result in financial mentor details being sent in unnecessary and inappropriate circumstances. The key issues that we have identified here are that:

    (a) The obligation imposed should not lead to lenders having to send information about financial mentors too early after a customer defaults. As drafted, 5A(3) would capture very early communications that lenders have with borrowers when payments are missed (such that the information is not necessary and potentially will cause offence to a customer who has simply missed a repayment). For example, this might be the case in relation to text message reminders about a credit card minimum repayment date having been missed. To prevent this consequence, we suggest that the requirement in 5A(3) is restricted to only payment reminders sent after a certain time period. This would prevent information being sent out prematurely with reminders where a customer may simply have forgotten to make a payment. We are happy to discuss what an appropriate time period would be, but we suggest a period of 30 days would be appropriate. This accords with internal timeframes at the banks for escalating to a 'pre-demand' process.

(b) The requirement should be limited to be clear that the obligation only arises when communications are sent in particular written forms (eg letters and emails), rather than text messages or made verbally. In this respect, we note the potential unintended consequence of this regulation as currently drafted, is that lenders may be dis-incentivised from communicating with borrowers through some communication means (eg via text) even though these are often an effective means of communication.

(c) The requirement should not be drafted in a way that requires disclosure of the information in every communication post default. In this respect, we note that several payment reminders may be sent in the first six months of default – eg multiple payment reminders may be sent as a customer courtesy. To address this, we propose the requirement be amended so that the information in 26B(2)(a) is required to be sent, unless that information has been provided to the customer in the last 30 days.

New regulation 5A(2) and 5A(4) – Information about dispute resolution schemes

74. While NZBA strongly supports appropriate dissemination of information about its dispute resolution scheme, the current definition of "complaint" in 5A(2) requires the provision of this information in too broad a range of circumstances. The result being dispute resolution scheme details being provided in unnecessary and inappropriate circumstances.

75. We also note that an unintended consequence may be that dispute resolution schemes would be required to deal with a number of unnecessary and inappropriate complaints. In light of that, NZBA suggests that, to the extent MBIE has not already done so, it consults with dispute resolution schemes to ensure these provisions will operate effectively in practice.

76. Against the above, we consider the definition needs to be amended to:

(a) Be more specific in terms of the subject matter of complaints intended to be captured by the sub-clause. In this regard, rather than capturing expressions of dissatisfaction relating to "its services", the definition should be narrowed to capturing expressions of dissatisfaction "by a borrower or a guarantor in connection with a consumer credit contract, credit related insurance, or guarantee".

(b) Provide for the ability for the lender to itself address and handle complaints on receipt, rather than having to provide the information about the Banking Ombudsman service prematurely. In this respect, banks typically deal immediately with complaints on receipt (eg by the correction of an error being made at branch level or via call centre assistance) and consistent with the Banking Ombudsman's terms of reference, have their own internal complaints processes which consider and handle complaints before escalation to the Banking Ombudsman occurs. It would, therefore, be sensible to: (i) make clear that this requirement should not apply where the creditor has or will resolve the borrower or guarantor's complaint to their satisfaction; and (ii) only impose the obligation where a response is explicitly or implicitly required in writing. This may help also address materiality issues (discussed further below).

(c) We suggest that there needs to be some scale or materiality imposed before the requirement to disclose the service is applied. In this regard, at a minimum, we recommend that the requirement should not be imposed where the creditor has reasonable grounds to believe the complaint is frivolous or vexatious.

77. In relation to 5A(5)(b), we also suggest similar changes to those described in paragraph 68(c) above in relation to debt collection disclosure in respect of the detail that needs to be provided about the scheme.

> **5A Disclosure about dispute resolution and financial mentoring services: hardship applications, arrears, credit declined, and complaints**
>
> (1) This regulation is for the purposes of section 26B of the Act.
>
> *When information needs to be provided*
>
> (2) The information required under section 26B(1)(c) must be disclosed by the creditor as soon as practicable after the creditor receives an expression of dissatisfaction from a borrower or guarantor in connection with a consumer credit contract, credit related insurance, or guarantee ~~related to its services to~~ that
>
> (i) the lender has not or is unable to resolve within a reasonable period;
>
> (ii) is not vexatious and frivolous; and
>
> (iii) to which a written response ~~or a resolution~~ is explicitly or implicitly expected (a **complaint).**
>
> ….
>
> *What information must be provided*
>
> (5) The following information must be disclosed about dispute resolution schemes:
>
> (a) the name and contact details for that scheme, including a link to the scheme's internet site; and
>
> ~~the name of and contact details for the dispute resolution scheme of which the creditor is a member (unless the Financial Service Providers (Registration and Dispute Resolution) Act 2008 does not require the creditor to be a member of such a scheme):~~
>
> (b) a statement that the person can ask that scheme to investigate or help to resolve a complaint against the creditor for free. ~~an explanation of what that scheme provides:~~
>
> ~~(c) that the scheme will not charge a fee to any complainant to investigate or resolve a complaint.~~

Commencement Order

78. Our view is that s 59B should not come into force until 1 April 2021, rather than 1 June 2020 as proposed. This is because:

(a) Extensive due diligence will be required to meet the new duty, given the personal liability imposed and the size and complexity of the banking businesses. This will be a time consuming exercise, and sufficient time should be provided to enable this to be properly carried out.

(b) The commencement date for the due diligence should align with the extension provided for compliance with the Regulations (ie 1 April 2021). It will be difficult

to provide compliance assurance regarding the due diligence obligations, while procedures and processes are changing to meet the Draft Regulations. It would be more effective to align the commencement dates and avoid duplication of effort in this respect.

79. We also query the intended repeal date for s 9C(7) of the CCCFA. At present it appears that this is to occur in June 2020, rather than at the same time as related changes that are coming into effect in April 2021. We recommend, therefore, that the Commencement Order should ensure the retention of the s 9C(7) provision until April 2021 by including a reference to s 10(3) of the Amendment Act within the list of provisions at 2(a) of the Commencement Order.

Next steps

80. We repeat again NZBA's willingness to continue to work with MBIE on refining these important regulations.

Contact details

81. If you would like to discuss any aspect of this submission, please contact:

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