MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
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Exposure draft of the Credit Contracts and Consumer Finance Amendment Regulations 2020

Commentary and request for submissions

November 2019

newzealand.govt.nz

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How to have your say

Submissions process

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised in this document by 5pm on **5 February 2020**.

Your submission may respond to any or all of these issues. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

Please include your contact details in the cover letter or e-mail accompanying your submission.

You can make your submission by:

- sending your submission as a Microsoft Word document to ***consumer@mbie.govt.nz***.
- mailing your submission to:

  Competition and Consumer Policy team
  Building, Resources and Markets
  Ministry of Business, Innovation & Employment
  PO Box 1473
  Wellington 6140
  New Zealand

Please direct any questions that you have in relation to the submissions process to ***consumer@mbie.govt.nz***.

Use of information

The information provided in submissions will be used to inform MBIE's policy development process, and will inform advice to Ministers on responsible lending, debt collection and other consumer credit regulations. We may contact submitters directly if we require clarification of any matters in submissions.

Release of information

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If your submission contains any information that is confidential or you otherwise wish us not to publish, please:

- indicate this on the front of the submission, with any confidential information clearly marked within the text
- provide a separate version excluding the relevant information for publication on our website.

Submissions remain subject to request under the Official Information Act 1982. Please set out clearly in the cover letter or e-mail accompanying your submission if you have any objection to the release of any information in the submission, and in particular, which parts you consider should be withheld, together with the reasons for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.

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1 Introduction

Context

1. The Credit Contracts and Consumer Finance Act 2003 (**the Act**) helps to protect consumers when they borrow money. It applies to credit contracts, consumer leases and buy-back transactions of land.

2. In April 2019, the Minister of Commerce and Consumer Affairs introduced the Credit Contracts Legislation Amendment Bill. The purpose of the Bill was to reduce irresponsible and predatory lending, and resulting consumer harm. The Finance and Expenditure Committee reported back to the House on the Bill on 11 November 2019.

3. The main changes the Bill introduces are:

    a. a cap on the rate of interest and fees for high-cost loans of 0.8% per day, and a cap on total interest and fees to 100% of the first amount borrowed

    b. requirements to keep records that substantiate that loans are affordable and suitable and fees are not unreasonable

    c. the ability to set prescriptive requirements for affordability, suitability and advertising

    d. a fit and proper person test for directors and senior managers of creditors and mobile traders

    e. duties on directors and senior managers and tougher penalties for irresponsible lending

    f. disclosure at the commencement of debt collection

    g. requirements for consumer credit providers to give statistical information about their business to the Commerce Commission on an annual basis.

4. The Bill provides for the creation of regulations to support a range of these new requirements.

5. Some of these new regulations are provided in the accompanying exposure draft of the Credit Contracts and Consumer Finance Amendment Regulations (No 2) 2020 (**the draft regulations**). Additionally, the Bill itself inserts some new regulations into the Credit Contracts and Consumer Finance Regulations 2004 (**the regulations**).

Purpose of this document

6. MBIE is seeking feedback on:

    a. the accompanying draft regulations (discussed in sections 2 - 7)

    b. the commencement order (discussed at section 9)

    c. additional regulations inserted by the Bill (discussed at section 8)

    d. initial policy thinking on the content of the annual return (discussed in section 10).

7. This document provides a commentary to assist submitters, and asks questions to highlight areas on which we require feedback.

Purpose of consultation

8. The purpose of the consultation varies depending on the subject matter.

    a. Proposed regulations (exposure drafts) have been published to help MBIE refine the policy, as well as the drafting of the proposed regulations.

    We are aware that the draft regulations may not adequately account for the broad variety of situations which occur in practice. We seek specific feedback on the type of situations for which the requirement may be inappropriate. We encourage suggestions for more targeted, alternative requirements which are concrete, clear, and reflect existing, responsible practice.

    b. The commencement order has been published in order to be clear about the commencement dates for different obligations in the Bill. While the draft order has been carefully reviewed internally, this is also an opportunity to identify any errors in the allocation of provisions to specific dates.

    c. The consultation on regulations inserted in the Bill allows stakeholders to identify any drafting changes necessary to the regulations. There was limited scope for consultation on the wording during the select committee process. While the policy intention will have been set by Parliament when the Bill is passed, this is an opportunity to identify any drafting changes which may be necessary. Amendments can be implemented at the same time as new regulations are made.

    d. We are also seeking feedback on our initial policy thinking for annual returns. Submissions will inform the development of future regulations around information to be submitted by lenders as part of their annual return. The type of information which could be useful is quite extensive, so we are keen to hear about what information is likely to be the most useful and least useful, and about the feasibility of providing different types of information.

What's in the exposure draft of regulations?

9. The draft regulations support new requirements around the following matters.

10. **Affordability and suitability:** the Act requires lenders to make reasonable inquiries to be satisfied that the borrower is likely to repay the loan without substantial hardship ('affordability'), and the loan is likely to meet the borrower's requirements and objectives ('suitability'). The draft regulations set out the minimum inquiries that must be made before entering into any consumer credit contract, and how creditors must assess the affordability and suitability of the loan. This includes setting out verification of borrower income and expenses that must be undertaken as part of making reasonable inquiries.

11. **Responsible advertising:** the Act requires that lenders exercise the care, diligence and skill of a responsible lender in any advertisement. Lenders must also assist the borrower to reach an informed decision, including by ensuring that any advertising is not misleading, deceptive or confusing. The Bill provides that regulations can prescribe advertising standards for these purposes. The draft regulations set out a number of advertising standards that are largely based on requirements in the Responsible Lending Code.

12. **Disclosure at commencement of debt collection:** new section 132A of the Bill – which will apply to all credit contracts – will require debt collectors to disclose particular information at the commencement of debt collection action. The draft regulations set out the proposed information that must be disclosed.

13. The proposed regulations also cover how the new due diligence duties for directors and senior managers of creditors apply in the context of a **securitisation or covered bond arrangement**, and the information that needs to be disclosed when a consumer credit contract is varied (**variation disclosure**).

Other regulations inserted by the Bill

14. The Bill itself also makes regulations setting out **requirements to provide contact information** for support services in certain circumstances, and providing the **formulae for the calculation of weighted average annual interest rate** for the purpose of the definition of high-cost consumer credit contract, and the **rate of charge**.

15. Because these requirements are inserted by the Bill into the Regulations, the drafting of these can be refined via amending the Regulations directly after the Bill receives Royal assent, where required.

Process and timeline

16. We welcome feedback before **5 February 2020**.

17. Once submissions have been analysed, the proposed new regulations and any amending regulations will be finalised and made, likely in **April 2020**. Most of the draft regulations will come into force at the same time as a range of substantive provisions of the Bill in **April 2021,** with the exception of regulations for securitisations and covered bond arrangements, which will come into force in June 2020.

2 Assessment of whether credit or finance will meet the borrower's requirements and objectives

18. The focus of these regulations is to prescribe the steps to be taken to fulfil the lender responsibility principle in section 9C(3)(a)(i) of the Act, which requires lenders to make reasonable inquiries to be satisfied that the credit or finance under the agreement will meet the borrower's requirements and objectives.

19. The proposed approach of the regulations in this section is to shift existing guidance set out in the Responsible Lending Code into regulation, and add additional detail where necessary to reflect existing good practice or address key compliance issues.

New regulation 4AA – Lender must collect and assess information

20. Regulation 4AA draws on paragraph 4.3 of the Responsible Lending Code to require lenders to ask the borrower about the amount, purpose and term of the credit, and assess whether the agreement is compatible with these requirements. Lenders must also ask about whether specific features meet the borrower's requirements where applicable, these being:

    a. where the agreement is a revolving credit facility, whether the borrower requires credit on an ongoing basis

    b. where the creditor proposes any fees or charges for additional goods or services that were not part of the borrower's stated purpose of the credit, whether the borrower requires these and is prepared to accept their costs. An example might be, for motor vehicle finance, additional charges for six-monthly servicing of the motor vehicle.

    c. where the borrower requires any fees or charges for additional goods or services to be financed, whether the borrower is aware of the additional costs of doing so.

21. Regulation 4AA(2)(e) requires lenders to ask whether the borrower wants the additional features or not. Regulation 4AA(2)(f) then requires the lender to ask whether the additional features need to be added to the finance, or whether the borrower would prefer to pay for them separately (and not incur costs of borrowing for these features).

22. We are interested in your views on whether there are any other types of features the lender should specifically be asking the borrower about.

New regulation 4AB – Additional requirements for waivers, warranties and insurance

23. Specific additional requirements in regulation 4AB are to apply to repayment waivers, extended warranties and relevant insurance contracts. These are intended to set out how lenders are to meet the obligations in sections 9C(3)(a)(i) and (5)(a)(i). Regulation 4AB(2) requires lenders to consider whether these products are useful to the borrower by asking

about any existing cover and whether the borrower's circumstances make them ineligible to claim some or all of the benefits under the proposed credit-related insurance policy.

24. Subclause (3) requires lenders to assess whether the waiver, warranty or insurance meets the borrower's requirements and objectives.

KEY AREAS WE WOULD LIKE YOUR FEEDBACK ON:

- The proposed process for assessing the borrower's requirements and objectives.
- How these regulations could be refined to minimise cost for lenders.
- Other features of an agreement that lenders should ask borrowers about.

3 Assessment that a borrower is likely to repay without substantial hardship

Overall approach

25. The draft regulations draw on existing non-binding guidance set out in the Responsible Lending Code, adding additional detail where necessary to reflect existing good practice or to address key compliance issues raised by financial mentors and other consumer advocates. The draft regulations reflect practices currently in use by lenders, a variety of which we visited in the course of our research.

26. The Responsible Lending Code will be updated to provide guidance and further detail to support the implementation of the regulations.

27. We have also looked to broadly align with the rules and guidance from the UK's Financial Conduct Authority and the Australian Securities and Investment Commission on responsible lending. Both of these jurisdictions apply a combination of mandatory requirements and guidance.

Nature and scope of requirements

28. These requirements are minimum requirements and do not prevent lenders from undertaking additional inquiries in order to satisfy the responsible lending principles in sections 9C(3)(a) and 9C(5A) of the Act, nor to assess credit or other risks.

29. The intention is that these minimum requirements apply to all consumer credit contracts (with an additional regulation applying only to applications for high-cost consumer credit contracts) and exceptions where required.

30. The policy objective is a set of prescriptive requirements which reflect existing good practice, are clear (for lenders and borrowers alike), and straightforward to enforce. The intention is to avoid very broad exceptions, as this would defeat the objective of prescriptive requirements.

31. We are aware that these draft regulations may not adequately account for the broad variety of situations which occur in practice. Where lenders wish to submit that a proposed requirement should not apply to their business, or a particular type of product, we strongly encourage suggestions for specific alternative requirements which achieve a similar policy objective.

32. During preliminary consultations, it was suggested that a 'comply or explain' approach (also termed 'if not, why not') would be most appropriate to ensure the regulations could account for the wide variety in the consumer credit market. This approach is used for corporate governance requirements in the context of self-regulation. It is also used to determine whether or not the mandatory Australian National Credit Code applies in relation to a given contract (see section 13 of that Code). However, we do not believe it is

feasible to apply this approach in relation to mandatory and non-binary questions, like the particular requirements set out in the draft regulations. We think this would defeat the purpose of setting prescriptive minimum standards. However, we welcome suggestions as to ways this might be made to work in the context of prescriptive regulations.

Focus of requirements

33. The focus of these regulations is to prescribe the steps that must be taken to fulfil responsible lending obligations in relation to sections 9C(3)(a) and 9C(5A) of the Act. The regulations set out how lenders will be required to make reasonable inquiries to be satisfied that the borrower is likely to repay the loan without substantial hardship.

34. We also note that by prescribing the inquiries that lenders must make as part of satisfying the lender responsibility principles, these regulations also set out that verification of income and expenses that must be undertaken by lenders. Lenders expressed concerns about the Bill's removal of section 9C(7), which allowed lenders to rely on information provided by a borrower unless the lender has reasonable grounds to believe the information is not reliable. Lenders were concerned that with the change, the level of verification required was unclear, and they risked being held to a standard which is unduly onerous or unreasonable. The intention of the regulations is also help clarify what types of information needs to be verified, and ways to do this.

35. The regulations do not include requirements for satisfying section 9C(4)(a) in relation to guarantees. Our initial view is that the proposed prescribed process would be disproportionate to the level of risk for guarantors, but this is an issue we invite feedback on.

36. In addition, the regulations do not include requirements for satisfying section 9C(5)(a) in relation to insurance contracts. We expect that in most cases the lender will take into account the insurance costs in the affordability assessment for the credit agreement (e.g if the insurance premiums are financed, then as part of the weekly repayments; if not financed, as an expense to be assessed). For instances where the lender did not anticipate that insurance would be included, they still have to assess whether an insurance contract is affordable under 9C(5)(a), but our initial view is that it would be disproportionate to require them to perform the proposed prescribed process.

New regulation 4AE – General rule for assessing whether a loan is affordable

37. Regulation 4AE requires the lender to determine that the borrower will have a reasonable surplus after their likely expenses (including payments under the new agreement) have been subtracted from their likely income, or to determine that exceptional circumstances mean that they will be able to meet the payments under the agreement and all other expenses.

38. The first part of this general rule requires lenders to make reasonable inquiries in order to make a forward-looking estimate of the income the borrower will receive and the expenses that the borrower will incur once the credit contract is entered into.

39. This forward-looking aspect is important, as the expenses of the borrower will change significantly as a result of the credit contract being entered into as well as surrounding events e.g the borrower will need to make payments under the credit contract and the borrower may also reduce some discretionary expenses and discretionary components of living expenses.

40. Lenders must make provision for a reasonable surplus after subtracting likely expenses from likely income. This surplus is intended to allow for

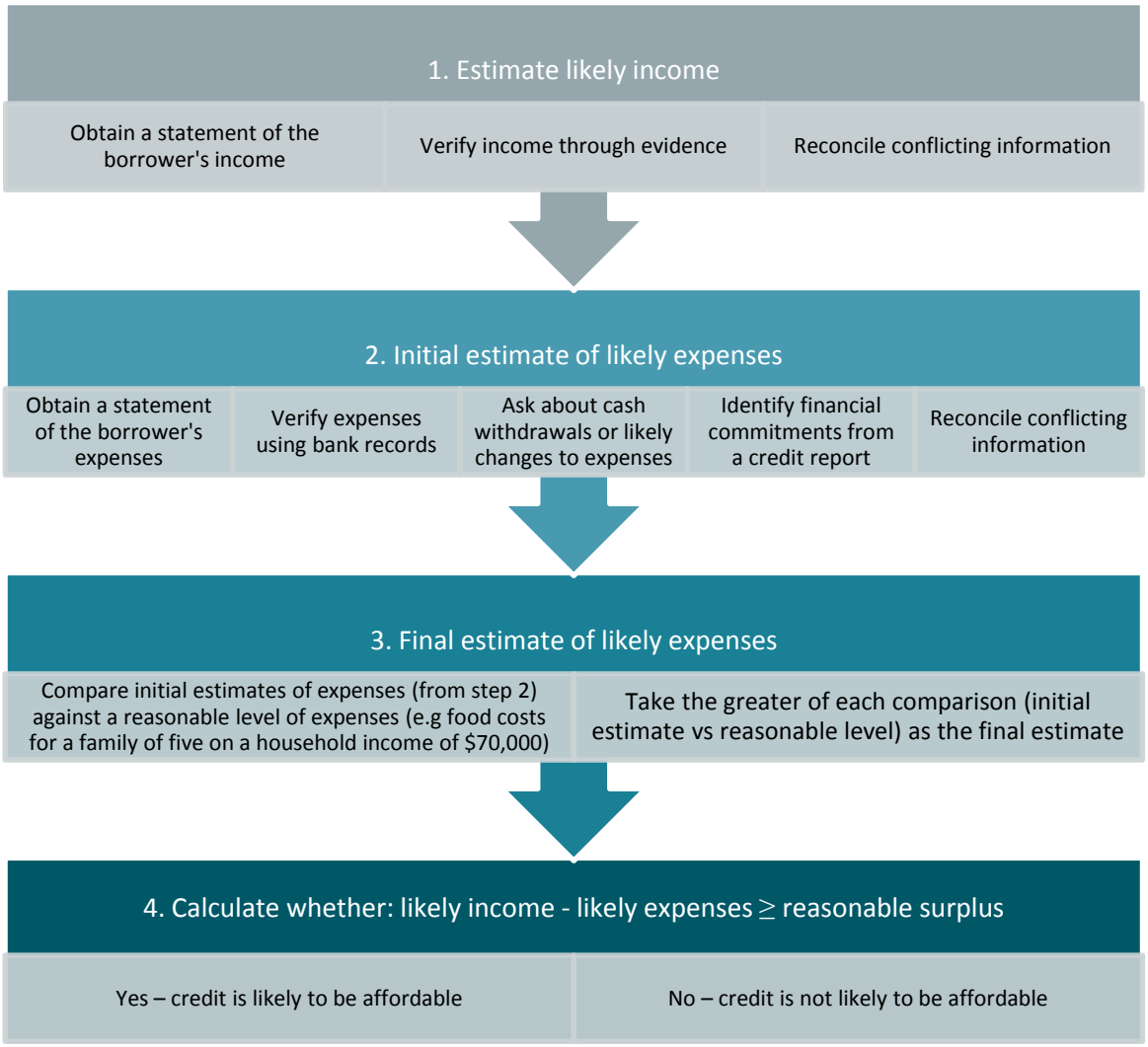
    a. any potential underestimation of relevant expenses, and

    b. payment of or savings for other expenses, such as contingency savings.

41. The draft regulations do not prescribe a dollar figure or percentage of income in the regulations for what is a reasonable surplus. However, we invite your views on whether this is appropriate or whether there are preferable alternatives.

42. The overall process to be followed is set out in the diagram below.

Diagram: process for assessing whether a loan is affordable



43. While we think that the general rule of ensuring there is a reasonable surplus after subtracting expenses from income will be suitable in most cases, there may be some situations where this assessment of income and expenses is not the only way to show affordability. The draft regulations provide alternatives to this general rule in which the lender must be satisfied on reasonable grounds that the borrower is unlikely to suffer hardship because of other sources of money (apart from the borrower's income) that mean that the borrower is able to meet the payments under the agreement and meet all their other expenses.

44. Two situations provided in the draft regulations are where a borrower intends to pay off a short-term bridging loan with savings and the proceeds of sale of an asset that has already been replaced (e.g they have bought a new house and plan to sell their old one), or a reverse mortgage, where the borrower intends to draw down capital to pay off the loan. In these cases, a subtraction of expenses from income alone may indicate that the loan is not affordable, but these other sources of money prevent substantial hardship.

45. There is also a more general exception for exceptional circumstances in which there is another source of money that will be used for loan repayments. This could capture, for instance, a term deposit that will shortly mature.

46. We are interested in whether there are any other exceptions we should be considering and whether they are adequately captured by the provision for exceptional circumstances to the general rule.

New regulation 4AF – Lenders must estimate borrower's likely income (step 1 of diagram)

47. Regulation 4AF requires the lender to, in estimating the borrower's likely income going forward, have regard to the borrower's statement of their current income (regulation 4AF(1)(a)), supported by reliable documentary evidence (regulation 4AF(1)(b)), and any information provided by the borrower about likely changes to income (regulation 4AF(1)(c)).

48. These steps can be carried out in any order – the regulation does not require them to be undertaken in the order in which they are listed.

49. Lenders are required to reconcile any inconsistencies between information they receive about income (regulation 4AF(2)). This is likely to mean that lenders will have to, if practical, determine the source of any discrepancy between information received, and make judgements as to the most reliable information.

New regulation 4AG – Lenders must do initial estimate of borrower's likely relevant expenses (step 2 of diagram)

50. Regulation 4AG requires lenders to formulate an initial estimate of post-contract expenses. Lenders would need to obtain from borrowers a categorised statement of their relevant expenses (regulation 4AG(1)(a). Relevant expenses are defined as covering fixed financial commitments, living expenses, and regular or frequently recurring discretionary expenses. Categories might include expenses like rent/mortgage, power, telephone and internet, transport etc. The draft regulation is not prescriptive about the categories used. An example of regular or frequently recurring discretionary expenses might be that the borrower regularly purchases cigarettes, or sends money to family every month, and wishes to continue to do so while making debt repayments. The regulations would require these expenses be taken into account as part of the assessment of relevant expenses, and not assumed to cease. Otherwise there is a risk that essential living expenses are cut back instead, resulting in hardship.

51. The categorised statement of expenses will need to be compared to the expenses that are evident from bank account records (regulation 4AG(1)(b)). The starting point for a bank account record search is the accounts into which their stated income sources are deposited (regulation 4AG(1)(b)(i)). However, money may be transferred from there to other accounts. In this case, the records for these will need to be obtained (regulation 4AG(1)(b)(ii)), and further inquiries will need to be made of the borrower where there are

significant cash withdrawals (regulation 4AG(1)(c)). Some expenses may also not be apparent from bank transaction records, and credit reports provide another source of information (regulation 4AG(1)(e)) – particularly of outstanding debt commitments that may need to be paid in future.

52. There may be inconsistencies between information sources. Any inconsistencies in the information will need to be reconciled (regulation 4AG(2)). As with income, this is likely to mean that lenders will have to, if practical, determine the source of any discrepancy between information received, and make judgements as to the most reliable information.

New regulation 4AH – Final estimate of likely expenses (step 3 of diagram)

53. Regulation 4AH proposes that lenders must adjust the initial estimate of the borrower's likely living expenses, by reference to reasonable costs for a person in the same position as the borrower. Fixed financial commitments, such as other debt repayments, are not required to be compared because it would be difficult to establish a reasonable comparison.

54. The purpose of this requirement is two-fold. Borrowers may understate or omit certain expenses (inadvertently or sometimes deliberately), and the level of these expenses may not be readily identifiable from transaction records. Comparing expenses to reasonable costs for a person in the same position enables adjustment to account for these shortfalls and ensures that any gaps are filled. In other cases, borrowers may already be in substantial hardship (e.g. going without meals in order to service debt), in which case their historic expenses may not reflect levels necessary to keep them out of hardship over the term of the loan.

55. Subclause (1)(a) provides that lenders must compare the initial estimate of living expenses either individually or as groups of expenses. A comparison against individual expenses would involve, for example, considering whether the amount estimated for food expenditure, electricity, etc. was reasonable. A comparison against a group of expenses might involve comparing total living expenses against a reasonable level of living expenses for a person in the position of the borrower. We understand that at present some lenders perform the former type of comparison, while others perform the latter. Lenders may choose to compare individual expenses or broader groups of expenses, depending on what is most workable.

56. Subclause (2), on the other hand, provides that only discretionary expenses that are comparable need to be compared. Where a lender is comparing individual living expenses against a reasonable level, we recognise that while some types of expenses have benchmarking data available (or can be relatively simply researched), not all discretionary or living expenses will have a readily accessible comparison. For example, what a person spends on transport can vary significantly, depending on a range of factors that aren't necessarily captured by consideration of where the person lives and how many dependents they have. It may be unreasonable to expect lenders to compare against a reasonable level in certain circumstances. However, we propose that expenses which

cannot be easily compared must still be "sense-checked" i.e. lenders should inquire further where a borrower said they spend $10 a week on transport but the borrower is employed and has four children.

57. We are interested in your views on whether this flexible requirement to compare expenses is sufficient to ensure that expense estimates are appropriately realistic.

58. Subclause (1)(a) also provides that lenders are to have regard to the ages of the borrower's dependents. We are aware that some lenders use comparators which take into account the age of dependents (e.g benchmarks of costs for infants' care or for primary school-aged children). However, other lenders have told us they do not commonly factor in the age of dependents when comparing expenses because there are other variables which affect how much a borrower spends on dependents which are not linked to age. We invite your views on whether a requirement to have regard to the ages of dependents, if relevant.

New regulation 4AI – Presumption that loan is unaffordable (only applies to applications for high-cost loans)

59. Regulation 4AI inserts a new presumption that an applicant is unlikely to make the repayments on a high-cost loan without suffering substantial hardship, where the applicant has been in default under one or more loans (not just high-cost ones) in the preceding 90 days and this default has not been corrected. The intent of this presumption is to prevent situations where a borrower attempts to use a high-cost loan to pay off another unpaid balance that is in default, which is likely to worsen their financial situation. If the borrower is already in default under another loan, they are already failing to make repayments without substantial hardship, and are unlikely to be able to make repayments on an additional high-cost loan without substantial hardship.

60. Other types of credit (such as a non-high cost debt consolidation loan) are not restricted by this presumption.

61. The presumption will apply if the lender's inquiries provide evidence (i.e. certain credit record and bank transaction events) that the borrower has been in default on a credit contract at any point over the past 90 days.

62. The presumption will stand unless the lender can show that there are reasonable grounds to believe that the borrower is up-to-date on repayments and is no longer in default. Evidence would include credit record and bank transaction events e.g. transaction records show a direct debit that was been declined due to insufficient funds has gone through two days later.

63. The presumption will only apply where an applicant seeks to enter into a high-cost consumer credit contract (i.e with an annual interest rate of more than 50 percent, as defined in the Bill).

KEY AREAS WE WOULD LIKE YOUR FEEDBACK ON:

- The proposed regulation requiring there to be a reasonable surplus after estimating likely income and expenses.
- Whether there are any other exceptions that are not adequately captured by the provision for exceptional circumstances to the general rule.
- Whether the proposed requirement to compare the initial estimate of expenses against a reasonable level strikes an appropriate balance between prescription and flexibility.
- How much, if any, of the proposed process above should apply to an assessment of affordability for guarantors.
- How these regulations could be refined to better reflect existing good practice and minimise cost for lenders.

4 Advertising

64. New regulations 4AJ to 4AN prescribe advertising standards for the purposes of section 9C(3)(b)(i) of the Act, which is amended by the Bill.

65. Section 9C(3)(b)(i)(A), as amended by the Bill provides that any advertising by lenders must comply with the advertising standards set out in regulations. Section 9C(3)(b)(i)(B) provides that lenders must assist the borrower to reach an informed decision as to whether or not to enter into an agreement and to be reasonably aware of its full implications, including by ensuring that any advertising is not, and is not likely to be, misleading, deceptive or confusing to borrowers.

66. Additionally, the Act provides that lenders must exercise the care, diligence and skill of a responsible lender in any advertisement for providing credit or finance under any agreement (s9C(2)(a)(i)).

67. Relevant definitions introduced by the Bill as reported back by the Committee are as shown below.

DEFINITIONS RELATING TO ADVERTISING

ADVERTISEMENT

any form of communication—
(a) that is to be, or has been, distributed to a person; and
(b) that is reasonably likely to induce a person to inquire about or apply for an agreement; and
(c) that is authorised or instigated by, or on behalf of, the lender or an associated person of the lender, or prepared with the co-operation of any of those persons.

DISTRIBUTE

includes—
(a) make available, publish, and circulate; and
(b) communicate by letter, newspaper, an Internet site, broadcasting, an audio or visual service, sound recording, television, film, video, or any form of electronic or other means of communication

68. The definition of advertisement (and, accordingly, advertising and advertise[1]) is broad. It potentially captures verbal conversations and other individual communications where these are likely to induce persons to inquire about or apply for an agreement. For this reason, some of the proposed advertising regulations are restricted to advertising to the public or a section of the public. The intention is that only public or "systematic" advertising is captured by advertising regulations limited to this scope. For instance, a newspaper or social media advertisement, or the script of a telemarketing campaign would constitute an advertisement to the public or a section of the public, but a discussion of interest rates with an individual borrower in a branch of a lender would generally not.

[1] See section 32 of the Interpretation Act 1999, which provides that parts of speech and grammatical forms of a word that is defined in an enactment have corresponding meanings in the same enactment.

69. The advertising regulations are based on those requirements in Chapter 3 of the Responsible Lending Code (Advertising) that were potentially suitable for mandatory regulations. These include requirements to disclose particular information as part of advertisements, and prohibitions on particular practices.

70. We consider these standards to be desirable for all relevant lenders, to ensure that advertising is responsible. For this reason, the advertising standards are proposed to apply to all consumer credit contracts.

71. The Responsible Lending Code will be updated to account for these requirements having been moved into regulation. If needed, further detail will be included in the updated Code, to support the implementation of the regulations.

New regulations 4AK – Advertising of payment amounts

72. This regulation provides that if an advertisement is being distributed to the public or section of the public refers to an amount of a payment, it must state the total amount of the payments (if ascertainable) or the annual interest rate. This information must be at least as prominent as the amount of a payment. This regulation is based on Responsible Lending Code paragraph 3.3.c.

73. This regulation means that where an advertisement states something along the lines of, for example, "$10 per week", further information will need to be provided about the total amount of the payments, or the interest rate applicable.

74. As with the equivalent Responsible Lending Code provision, it is intended to address, for example:

    a. an advertisement for a washing machine for $40 per week. Borrowers need to be given information about the total amount of payments, to assess whether the appliance is competitively priced and worthwhile for them

    b. an advertisement that a borrower can borrower up to $2,000 and pay back only $20 per week. The terms of loan and the total amount that might need to be paid back are unclear. In the example, the loan could be a 3-year loan with an interest rate of around 18% p.a. and a $100 establishment fee (total payments of $3,108), or a 5-year loan with a 44% p.a. interest rate and a $100 establishment fee (total payments of $5,200). These are quite different loans.

New regulation 4AL – Advertising of interest rates or charges

75. This regulation provides that if an advertisement is being distributed to the public or section of the public and refers to an interest rate or interest charge, it must provide information about the annual interest rates of the class of credit contracts covered by the advertisement, as well as any mandatory credit fees. This regulation is based on Responsible Lending Code paragraph 3.3.b., and guidance in the Responsible Lending Code paragraph 3.3.e regarding promotional periods.

76. For example, representations such as “rates from 9.99% p.a.”, “interest 7% per week”, and “interest free for six months” would all require a more fulsome description of applicable interest rates and any mandatory fees. They would need to be at least as prominent as the other information provided about interest rates.

77. The intention is to address:

    a. unrealistic and potentially misleading representations of likely interest charges based on the lowest-risk borrowers (e.g an advertisement that states “from 9.95%”, when actual interest rates for many borrowers are up to 26%)

    b. potentially misleading representations of interest free or low-interest loans or interest free periods, where there may be substantial establishment fees (e.g $400) or high interest rates after the interest free period expires

    c. potentially misleading representations of interest rates on a daily or weekly basis, which borrowers may not appreciate are substantially higher than annual interest rates they see from many other lenders.

78. The interest rates required to be quoted in the regulation are those ordinarily available for “that class of credit contracts”. The advertisement itself can specify the relevant class of credit contracts, provided it does so in a transparent way. For example, if an advertisement states that the interest rate is for home loans with a one-year fixed interest period for borrowers with over 20% equity, this would be the relevant class of credit contracts. Interest rates would not need to be disclosed for other fixed interest periods, for low-equity borrowers or for other types of loans.

79. Advertisements must disclose any “mandatory credit fees”, such as establishment fees and regular account management fees. The intention is that contingent or optional credit fees such as prepayment fees do not need to be disclosed.

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

80. This regulation provides that if an advertisement states there is no interest, it must disclose any mandatory fees (see paragraph 79 above). Currently, under the Responsible Lending Code, advertisements should state that there are mandatory fees to avoid misleading consumers. This regulation goes further in requiring disclosure of the amount or method of calculation of those fees in all cases.

81. Note that this proposed regulation would apply to all advertisements.

New regulation 4AN – Prohibited advertising practices

82. This regulation prohibits certain representations, based on Responsible Lending Code paragraphs 3.4 and 3.5. This proposed regulation applies to all advertising.

83. One area that we would particularly welcome further feedback on is the inclusion in the draft regulations of the phrase "15-minute approval" as an example of a representation that implies that the lender will not inquire fully into the borrowers' circumstances. The intention is that, given both the existing lender responsibilities around affordability and suitability, and minimum requirements being introduced by these regulations, such a representation would either be misleading, or would indicate that the lender's approval process is non-compliant. While lenders are making use of increasingly sophisticated technology for assessing borrower applications, we do not consider compliant assessments will be able to be consistently undertaken in such a short period in the near future due to the need for human intervention and checking.

Advertising regulations relating to high-cost consumer credit contracts included in the Bill

84. Clause 59 of the Bill as reported back from select committee inserts two new advertising regulations into the Credit Contracts and Consumer Finance Regulations 2004, which relate to high-cost lending. These are requirements that advertisements for high-cost consumer credit disclose:

    a. the risk warning currently required by Responsible Lending Code paragraph 3.6

    b. information about the *MoneyTalks* service for budgeting and financial capability advice.

85. Due to the potential length of the information about *MoneyTalks,* this information only needs to be provided in some circumstances, primarily on the lender's website. The Bill proposes that this information be provided on the home page of the lender's web site, and any web page to which the advertisement links. For example, if a social media promoted post links to the "Application" web page on the lender's web site, that web page would need to include the required information about *MoneyTalks*. This ensures that the borrower receives information about *MoneyTalks* as soon as they interact with the lender's website.

86. In addition, print advertisements (e.g newspaper advertisements and mailouts) would need to carry this information.

KEY AREAS WE WOULD LIKE YOUR FEEDBACK ON:

- How these regulations could be refined to reflect existing good practice and minimise undue cost for lenders.

5 Variation disclosure

87. Clause 5 of the draft regulations inserts new regulations 4F, 4G and 4H relating to matters that must be disclosed as part of variation disclosure.

88. Section 22(1) of the CCCFA provides that every creditor must ensure that the following information is disclosed to every debtor if the parties to the contract agree to change the contract:

    a. full particulars of the change (22(1)(a))

    b. any other information prescribed by regulations to be information that must be disclosed under this section (22(1)(b)).

89. There is no definition of "full particulars" and the courts have not considered what precisely must be disclosed. In particular, there is a lack of clarity about whether it requires disclosure only of the change itself (e.g an increase in the interest rate) or also of the effect of the change (e.g a consequential increase in the amount of a fortnightly repayment).

90. In agreeing to policy decisions for the Bill, Cabinet agreed to clarify that the requirement on creditors to disclose "full particulars" when they make a variation disclosure under section 22 includes the requirement to disclose the effect of the change (rather than just the change itself).

91. New regulation 4F gives effect to this decision by requiring certain information to be disclosed when there is an agreed change. The additional information that is to be disclosed largely replicates the information described in paragraphs (f) to (j), (l) and (o) of Schedule 1 of the Act, which sets the content of initial disclosure (before the credit contract is entered into). This information must be re-disclosed, if it changes as a result of the agreed change.

92. New regulations 4F(2)(f), 4G and 4H also require re-disclosure to the borrower of the rate of charge for high-cost consumer credit contracts, if this changes as a result of an agreed change, or if the creditor exercises a power specified in section 23(1) of the Act. This disclosure must also be made to guarantors in certain circumstances specified in section 26(1) of the Act.

KEY AREAS WE WOULD LIKE YOUR FEEDBACK ON:

- How these regulations could be refined to best inform borrowers about the effect of changes to credit contracts, and minimise undue cost for lenders.

6 Provisions about securitisation and covered bond arrangements

93. The Bill includes amendments in response to comments from submitters that the duty of due diligence for directors and senior managers at clause 23 of the Bill should apply to the contract manager where a contract is transferred to a trustee or other special purpose vehicle in the context of securitisation and covered bond arrangements.

94. Clause 23 of the Bill provides that the new due diligence duty for directors and senior managers of creditors does not apply in prescribed circumstances that relate to securitisation or covered bond arrangements or similar arrangements.

95. Clause 43 of the Bill provides a regulation-making power to prescribe how section 59B applies in the context of securitisation and similar arrangements and to exempt directors and senior managers from these sections in some cases.

96. The intent of regulations 22 and 23 is to ensure that it is clear who the responsibilities attach to in the context of these complex arrangements. Regulation 22 sets out the circumstances in which the duty of due diligence applies, and regulation 23 sets out how the duty of due diligence applies in those circumstances.

97. Regulation 23 provides that the due diligence duty in new section 59B does not apply to directors and senior managers of the new creditor (i.e the trustee), but does apply to directors and senior managers of the contract manager in the context of securitisation or covered bond arrangements or similar arrangements. Directors and senior managers of the contract manager need to ensure that *either or both* the new creditor (i.e the trustee) and the original creditor comply with the Act. We understand that the original creditor is often the contract manager.

98. This only applies where there is a contract manager that performs the essential functions of managing the credit contract, as provided by regulation 22(2)(c).

KEY AREAS WE WOULD LIKE YOUR FEEDBACK ON:

- Whether the proposed regulations appropriately prescribe how due diligence duties apply in the context of securitisation and covered bond arrangements.

7 Debt collection disclosure

99. These regulations specify the information that debt collectors must disclose to debtors at the commencement of debt collection action. We understand that much of this information is already disclosed by responsible debt collection agencies.

100. The intention is that the disclosure of this information will increase transparency around the debt owed and its composition, make it easier to identify unreasonable fees, and to encourage debtors to access help options as needed. We are interested in whether you think the disclosure of this information would have these intended effects.

101. Several of the items to be disclosed rely on our definition of when debt has been passed to debt collection. We are interested in your feedback on whether this best reflects industry practice in terms of how debtors are charged for debt collection action.

Unpaid balances

102. The information provided by this disclosure should ensure borrowers are informed of how much they owe, whilst also ensuring they have enough information to challenge any potential inaccuracies or fees that are potentially unreasonable. We consider that, in order for this to be achieved, borrowers need to know (1) the total amount to be collected, (2) how this is comprised, including the unpaid loan balance prior to any debt collection fees being added, and (3) any debt collection fees since added.

103. To simplify how this information is disclosed, we have aligned regulation 24 with the existing provisions in section 19 of the Act (continuing disclosure).

104. Additionally, there are fees and interest charges which may be ongoing and for which the total amount to be paid may not be ascertainable (e.g because it depends on the repayment terms). Where these are relevant, these should be disclosed at regulation 24(3)(c).

Continuing disclosure

105. Most consumer credit contracts require continuing disclosure statements under section 18 of the Act. As noted above, where this is required, we think the disclosure under section 132A should align with other disclosure being provided.

106. Where continuing disclosure is not required (for credit contracts and some consumer credit contracts), regulation 24(4) proposes more limited disclosure requirements. This is intended to reflect the differences between credit contracts and consumer credit contracts, whilst still ensuring that the overall aim of increased transparency and accountability are met. We are interested in your feedback on whether these disclosure requirements are appropriate for credit contracts whilst still meeting the needs of consumers.

107. Both cases require the specific disclosure of debt collection charges.

Excluded fees

108. However, there are some fees which could fall outside of this framework (for example, where any potential court costs could be passed on to debtors). We are interested in your feedback on the merits of including or excluding this information, including whether guidelines as to the layout of information would assist in achieving the overall policy objectives.

109. On the one hand, it would ensure that disclosure is complete and would ensure transparency. However, some consumers may find the volume of information unhelpful and difficult to navigate, or the provision of information around costs not yet incurred to be intimidating.

KEY AREAS WE WOULD LIKE YOUR FEEDBACK ON:

- The structure of disclosure of charges, and if this reflects industry practice for how charges are passed on.
- Whether the regulations capture all the information that should be disclosed to debtors (for example, in relation to costs associated with court proceedings).
- Whether all the disclosure requirements are appropriate for credit contracts that are not also consumer credit contracts (for example, disclosure of redress options like MoneyTalks).
- How the disclosure obligations could be refined to better improve transparency or to better enable debtors to seek assistance (where needed).
- If the provision of model disclosure statements would assist in compliance with these regulations and their empowering provision (new section 132A).

8 Other regulations inserted by the Bill

110. Clause 59 of the Bill also makes regulations in relation to the following:

    a. a new requirement to provide contact details for the *MoneyTalks* service in payment reminders, or an application for a high-cost consumer credit contract is declined

    b. a new requirement to provide contact details for dispute resolution schemes when a complaint is received

    c. the formulae used to calculate the weighted average annual interest rate (for the purposes of the definition of high-cost consumer credit contract) and the rate of charge.

111. Because these requirements are inserted by regulations, they can be further amended by regulations after Royal assent.

112. While the policy direction will have been agreed by Parliament, we invite submitters to provide feedback if they have any drafting concerns, i.e about the way in which any of these requirements have been expressed.

New regulation 5A(3) – Requirement to provide contact details for to *MoneyTalks* in payment reminders

113. New regulation 5A(3) requires that the following information be provided in every payment reminder sent by a creditor under a consumer credit contract:

    a. that the person can ask for free and confidential budgeting and financial capability advice from *MoneyTalks*

    b. the contact details for *MoneyTalks*

    c. a link to *MoneyTalk's* Internet site.

114. The purpose of this is to help encourage borrowers to seek advice from trained financial mentors at the earliest possible opportunity, when they are behind on any debt repayments.

115. "Payment reminder" is defined in section 132A of the Bill as a communication made within 6 months of a default in payment that requires a payment that is overdue, excluding filing enforcement proceedings and various other communications.

New regulation 5A(2) and 5A(4) – Requirement to provide information about disputes resolution schemes and financial mentor services

116. New regulation 5A(4) requires the following information about dispute resolution schemes to be disclosed to any person who makes a complaint:

a. the name of, and contact details for, the dispute resolution scheme of which the creditor is a member

b. 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.

117. This is similar to existing requirements in the scheme rules of Insurance and Financial Services Ombudsman Scheme, Financial Services Complaints Limited and Financial Disputes Resolution Service.

118. "Complaint" is defined as "an expression of dissatisfaction related to its services to which a response or a resolution is explicitly or implicitly expected". This is based on the definition in ISO 10002:2018[2]. This definition is widely used in complaints policies in New Zealand, including the scheme rules of the above disputes resolution schemes.

Formulae in relation to the rate cap

119. Section 45AAC(d) of the Bill allows for contracts to be declared, by regulations, to be a type of contract that is a high-cost credit contract.

120. Section 45(d)(1) of the Bill provides for regulations to prescribe how the rate charge should be calculated, for the purpose of defining a high-cost consumer credit contract.

Key areas we would like your feedback on:

- How the drafting of the regulations inserted by the Bill could be refined to be more effective and minimise cost for lenders.
- Is there another way to describe the *MoneyTalks* service, to better encourage people to seek assistance?

[2] International Organization for Standardization, ISO 10002:2018, *Quality management – Customer satisfaction – Guidelines for complaints handling in organization, https://www.iso.org/obp/ui/#iso:std:iso:10002:ed-3:v1:en*. The definition used in the standard is "expression of dissatisfaction made to an organization (3.8), related to its product or service, or the complaints-handling process itself, where a response or resolution is explicitly or implicitly expected".

9 Credit Contracts Legislation Amendment Act Commencement Order 2020

121. The accompanying draft Credit Contracts Legislation Amendment Act Commencement Order 2020 (**commencement order**) sets out proposed dates for most of the provisions of the Bill to come into force. This should be read together with clause 2 of the Bill, which sets out the dates that a number of other provisions come into force.

122. The main dates are shown in the table below.

COMMENCEMENT DATES	
the day after Royal assent	• new enforcement provisions, including pecuniary penalties, statutory damages and enforceable undertakings • expanded options for creditors to make electronic disclosure
1 June 2020	• new requirements on high-cost lenders, including the total cost of credit cap and rate cap • mobile traders to be treated as creditors under consumer credit contracts • duties on directors and senior managers
1 September 2020	• applications open for certifications of directors and senior managers as fit and proper persons
1 April 2021	• requirements to keep records of affordability and suitability assessments, and how fees are calculated • providing disclosure to borrowers in languages used in advertising language • providing information about disputes resolution schemes and financial mentoring services • creditors and mobile traders required to hold certifications (currently registered creditors have until their next annual confirmation to obtain a certification) • regulations setting minimum requirements for affordability, suitability, responsible advertising

123. These dates were originally recommended to select committee in our Departmental Report, based on submissions on the Bill. However, in recognition of the complexity of the Bill and the potential for errors in setting commencement dates, we recommended that many of these dates be set by Order in Council, to enable errors to be addressed.

124. We are not proposing to revisit the dates on which the main provisions of the Bill will come into force. However, we have published the draft commencement order so as to provide certainty around commencement dates, and to enable feedback on any apparent errors in the allocation of specific provisions to the dates set out in the commencement order[3].

[3] An example of such an error would be if an offence provision were listed as stating before the relevant defences.

Key areas we would like your feedback on:

- Any errors in the allocation of provisions to dates specified in the commencement order.

10 Content of the annual return

125. Under section 116AAA, the Bill requires that lenders provide an annual return to the Commerce Commission, in which they provide statistical information about their business.

126. We set out below our initial thoughts on the types of information which could support the Commerce Commission's monitoring and enforcement functions in relation to the consumer credit industry.

127. Your feedback will inform the content of future regulations specifying the information to be provided, in what form, and by whom. We invite feedback around the feasibility of providing this information, and alternative suggestions for similar information which may be simpler or easier to generate and provide. We acknowledge that this is a long list of potential data types and are interested in your thoughts on which information is most (and least) useful for monitoring purposes.

Information about the loan book

128. Total dollar amount of consumer credit provided.

129. Total dollar amount of consumer credit outstanding as at the end of the period.

130. Proportion of revenue coming from interest, fees, default interest and default fees.

131. The number of consumer credit contracts entered into for which a security interest is or may be taken under the contract.

132. The number of high-cost consumer credit contracts and related consumer credit contracts entered into.

133. The number of consumer credit contracts provided at an annual interest rate of:

    a. 10% or less

    b. 11% to 25%

    c. 25% to 29%

    d. 30% to 40%

    e. 41% to 50%

f. 51% or greater.

134. For each of the categories listed above, the number of consumer credit contracts where the terms of the loan were extended or the loan was rolled over or refinanced.

135. Information about interest rates and fees as required to be disclosed under the Credit Contracts and Consumer Finance Regulations 2004, sections 4B to 4D and if interest rates and fees have changed during the reporting period, details about changes.

136. The average term of a loan.

Information to be provided about high-cost lending

137. The number of consumer credit contracts provided, with data both as an average (mean) across all consumer credit contracts, and as averages (means) for all consumer credit contracts in each of the following categories:

    a. 0.0 – 0.29 per cent rate of charge per day

    b. 03 – 0.49 per cent rate of charge per day

    c. 0.5 – 0.8 per cent rate of charge per day.

138. The number of consumer credit contracts and related consumer credit contracts where total payments made reached 90 per cent or more of the first advance.

139. A breakdown of the stated purpose for which a borrower requested a consumer credit contract (broken down by the lender's internal categories).

Information to be provided in relation to car finance

140. The number of loans which included insurance (including repayment waiver products), broken down by the type of insurance provided.

141. The number of loans with insurance where a claim was lodged.

142. The number of loans with a repayment waiver where a claim was lodged.

143. The number of loans with insurance where a claim was approved and paid out.

144. The number of loans with a repayment waiver where a claim was approved and paid out.

Information about loans

145. The number of unique borrowers (i.e where each borrower is only counted once regardless of how many times they borrowed).

146. The number of unique borrowers for high-cost consumer credit contracts.

147. The information at paragraphs 148, 149 and 150 should be provided as a total across all consumer credit provided and as totals for all consumer credit provided in each of the following brackets of total income before tax and any other compulsory deductions (i.e including all sources of income), in New Zealand dollars

    a. $0–$30,000

    b. $30,001–$50,000

    c. $50,001–$70,000

    d. $70,001–$100,000

    e. $100,001–$120,000

    f. $120,001–$150,000

    g. >$150,000.

148. The number of consumer credit contracts entered into, broken down into the number that were new customers and the number that were returning customers.

149. The number of applications for consumer credit that were declined, broken down into the number that were new customers and the number that were returning customers.

150. The number of applications for consumer credit that were withdrawn.

151. The number of loans which were defaulted on or fell into arrears within one month of taking out the loan.

152. The number of loans which were repaid in full by taking out a new loan with the creditor.

153. The number of loans which included an assignment of wages.

154. The number of loans with attachment orders, as a result of default.

155. The number of consumer credit contracts for which debt collection action was undertaken (for example, by being transferred to an internal debt collection team, by contracting a debt collector to collect the debt, or by on-selling the debt to a debt collector)

156. The number of hardship applications received in the period.

157. The number of hardship applications approved in the period.

158. Number of loans for which there was a guarantor.

159. Number of loans where the guarantor was asked to repay the debt.

Information about complaints

160. The number of complaints made to the creditor in the period.

161. The number of complaints that were resolved internally in the period.

Proposed period of reporting and timing

162. We propose that information in the annual return be provided for the preceding calendar year (1 January to 31 December), and that it be provided by 31 July of the following year. For example, on 31 July 2021, consumer creditors would provide the prescribed information for the calendar year 1 January 2020 to 31 December 2020.

KEY AREAS WE WOULD LIKE YOUR FEEDBACK ON:

- Whether this information is already held by lenders, or can be reasonably determined based on information already available to lenders.
- Whether the statistical information covers key areas of interest for monitoring and enforcement.
- What types of information – listed above – do you believe are the least useful for monitoring purposes?
- The proposed reporting periods and timing of returns
- Whether there are types of information – listed above – which would only be usefully provided by some types of lenders.
- Whether assignment of loans would impact on the ability to provide this information.