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Ministry of Business, Innovation and Employment
Attention: Competition and Consumer Policy Team

By email: consumer@mbie.govt.nz

Exposure draft of the Credit Contracts and Consumer Finance Amendment Regulations 2020 – Submission of Kensington Swan

This is a submission by Kensington Swan in response to the exposure draft of the Credit Contracts and Consumer Finance Amendment Regulations 2020 (the '**Regulations**').

About Kensington Swan

Kensington Swan is one of New Zealand's premier law firms with a legal team comprising over 100 lawyers acting on government, commercial, banking, and financial markets projects from our offices in Wellington and Auckland.

We have extensive experience advising a range of lender and borrower market participants on financing matters, including banks and other finance providers.

Our submission

Our submission is attached. Overall, we support the overriding objective of the Credit Contracts Legislation Amendment Act 2019 (the '**Act**') to reduce irresponsible and predatory lending and consequential consumer harm. We recognise that the Regulations are intended to support the implementation of certain requirements introduced under the Act.

However, we are concerned that the detail of some aspects of the Regulations is such that they will not be wholly effective in achieving the above objectives. In particular:

- the assessments of whether the credit or finance will meet the borrower's objectives and that the borrower is likely to repay without financial hardship will impose further compliance costs on lenders and introduce more complexity for borrowers during the loan approval process. An unintended consequence of this is that it may lead to a reduction in some borrowers seeking lending from reputable financiers, which will leave such borrowers vulnerable to predatory lenders and/or loan products not caught under the CCCFA;
- in our view, multiple ongoing disclosure requirements in relation to the MoneyTalks service in the context of payment default and debt collection has limited value in protecting consumers;
- the information proposed to be contained in annual returns will require lenders to incur significant costs in extracting such information. Additionally, such information may not be readily or technically available (particularly for non-bank lenders). We query the value of the annual returns for enforcement and monitoring purposes as against the cost to lenders (which ultimately will be passed down to consumers) in producing the annual return statements given the existing powers of the Commerce Commission.

We confirm that this submission does not contain any confidential information that we consider should be withheld.

Further information

We are happy to discuss any aspect of our feedback on the exposure draft. Thank you for the opportunity to submit.

Yours faithfully
Kensington Swan

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

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Responses to exposure draft questions

SECTION 2: ASSESSMENT OF WHETHER CREDIT OR FINANCE WILL MEET THE BORROWER'S REQUIREMENTS AND OBJECTIVES

1 The proposed process for assessing the borrower's requirements and objectives

We are generally supportive of the purpose of Regulations 4AA and 4AB to provide clarity for lenders of the nature and scope of inquiries that need to be made. We note the approach taken is largely compatible with the relevant inquiries in the Responsible Lending Code (the '**Code**'). However, there are subtle differences, for example:

- Regulation 4AA(2)(e) is arguably more limited in scope than the guidance in 4.3(e) of the Code, the latter referring to a borrower requiring particular product features or flexibility and the 'relative importance of different features to the borrower'.
- Regulation 4AB(2) is wider in scope than the guidance contained at paragraph 9.3 of the Code as the matters to consider when assessing the borrower's requirements and objectives in relation to a relevant insurance contract. The Regulation requires the lender to determine whether the waiver, warranty or insurance is 'useful' for the borrower, which is not referred to in the Code. Additionally:
    - 9.3(c) of the Code refers to considering existing cover for insurance over secured property or leased goods, whereas Regulation 4AB(2)(a)(i) does not have this limitation; and
    - 9.3(d) of the Code refers to considering the borrower's employment status which may make them ineligible to claim under the insurance, but only for consumer credit insurance, whereas Regulation 4AB(2)(a)(ii) does not refer to consumer credit insurance, and also refers generally to the borrower's circumstances.

In our view, the Regulations and the Code should align to the fullest extent possible. If they are inconsistent then the process for assessing the borrower's requirements and objectives will be increasingly difficult for lenders to navigate and manage in practice to ensure they are complying with their responsible lending obligations. Our experience is that most reputable lenders would already follow the guidance in the Code, often as a matter of policy. If a lender adheres to the scope of inquiries in Regulations 4AA and 4AB then, ideally, the lender should have comfort it has also complied with the scope of inquires in the Code, rather than needing to check compliance with the Code separately. Given compliance with the Regulations is mandatory, ensuring alignment with the relevant Code provisions, or clarifying which Code

	requirements will be specifically covered by Regulations 4AA and/or 4AB, would assist lenders in managing compliance and reduce the likelihood of additional compliance costs being passed on to consumers.
2	How these regulations could be refined to minimise cost for lenders
	The current definition of 'material changes' in clause 10(8) of the Act applies to any increase to a credit limit. For modest or relatively immaterial credit limit increases, the requirement for a lender to entirely re-run its process of assessing the borrower's requirements and objectives is likely to introduce additional costs for lenders (and in turn, borrowers) which may not be proportionate to the risk to and/or protection being afforded to the borrower. We suggest that a time limit and/or percentage de minimis increase to the original credit limit is considered. Alternatively, or in addition, borrowers could have the option of electing to waive the requirement for a lender to re-run the assessment in the event of a material change as currently defined.
3	Other features of an agreement that lenders should ask borrowers about
	We do not have comments to make specifically on this question; however, as per our comments in paragraph 1 above, the guidelines in the Code should, to the fullest extent, align with the scope of features detailed in the Regulations.
SECTION 3: ASSESSMENT THAT A BORROWER IS LIKELY TO REPAY WITHOUT SUBSTANTIAL HARDSHIP	
4	The proposed regulation requiring there to be a reasonable surplus after estimating likely income and expenses
	We support the general requirement to require a reasonable surplus, but note what is considered reasonable will differ between lenders. In this respect guidance in the Regulations or further commentary in the Code would be welcomed as to the parameters of a lender's discretion to consider what is 'reasonable'.
5	Whether there are any other exceptions that are not adequately captured by the provision for exceptional circumstances to the general rule
	We agree with the approach taken in relation to exceptions and agree that these are necessary to allow for flexibility to the general rule. We would expect guidance to be inserted in the Code to reaffirm that lenders are able to reasonably assess what types of circumstances would be considered 'exceptional'; for example – the exposure draft refers to a term deposit that will shortly mature – other examples would be welcome.

6	Whether the proposed requirement to compare the initial estimate of expenses against a reasonable level strikes an appropriate balance between prescription and flexibility
	There should be more prescriptive guidance as to what comprises 'any regular or frequently recurring discretionary expenses' in paragraph (c) of the 'relevant expenses' definition in Regulation 4AD. The example given is the purchase of cigarettes or sending money to family, but it is unclear what consists a regular or frequent discretionary expense – for example, would three payments a year to family be a regular or frequent payment from a lender's perspective? It is possible that such payments may be considered 'one-offs' by the potential borrower. Regulations 4AF(2) and 4AG(2) respectively requires the lender to ensure any conflict between information about relevant income and expenses is adequately reconciled. Further guidance in the Regulations and Code on the parameters of this responsibility is necessary, particularly as to whether a lender is still able to rely on copies of information provided by the borrower but authored by a third party (eg. in the case of a rental expense, a lender should be able to rely on the copy of a tenancy agreement provided by the borrower without need for the lender to check it with the borrower's landlord). Verification by a lender should not generally require third party verification unless the lender has specific concerns as to the reliability of the information provided.
7	How much, if any, of the proposed process above should apply to an assessment of affordability for guarantors
	We agree with MBIE's view that it would be disproportionate for the proposed assessment of affordability process to also apply to guarantors given a borrower is the primary debtor responsible for servicing its loan. Lenders already have a responsibility in the Code to guarantors to make inquiries into and assess substantial hardship for guarantors under section 9C(4) of the CCCFA, which is the appropriate setting given they are not primary debtors. In our view, the cost of loans which require a guarantee to be provided would increase given the increased compliance costs of making such an assessment.
8	How these regulations could be refined to better reflect existing good practice and minimise cost for lenders
	See our comments at paragraph 2 above regarding limiting the scope of 'material changes'. We consider that costs incurred by the lender to re-run these inquiries (and consequently compliance with clause 11 (section 9CA) of the Act) for changes that involve modest increases to credit limits would be disproportionate to consumer protections intended to be afforded under the Regulations and the Act. See also our comments at paragraph 6 in regards to reconciliation by lenders of relevant income and expenses.
SECTION 4: ADVERTISING	
9	How these regulations could be refined to reflect existing good practice and minimise undue cost for lenders
	We generally support the view that the advertising of payment amounts must state the total

	amount of payments or the annual interest rate at least as prominently as the amount of a payment. This will ensure this information is transparent to the public and will provide consistency with paragraph 3.3(c) of the Code. Specifically, in relation to the phrase '15 minute approval' under Regulation 4AN(a), it is appropriate for this to be included as an example of prohibited advertising practices. Whilst the phrase could be intended to be a metaphor to convey that the lender has an efficient and quick loan approval process, the phrase should not be interpreted in this manner from a consumer protection perspective as to do so would be misleading. As a matter of practice, the assessments required by a lender under the Act in order to comply with its responsible lending duties should, if discharged with due care, diligence and skill, take longer than 15 minutes.
SECTION 5: VARIATION DISCLOSURE	
10	How these regulations could be refined to best inform borrowers about the effect of changes to credit contracts, and minimise undue cost for lenders
	We welcome clarification being provided in the Regulations to detail the minimum requirements of what comprises 'full particulars' under section 22(1)(a) of the CCCFA.
SECTION 6: PROVISIONS ABOUT SECURITISATION AND COVERED BOND ARRANGEMENTS	
11	Whether the proposed regulations appropriately prescribe how due diligence duties apply in the context of securitisation and covered bond arrangements
	We support the proposed regulations in providing exemptions to trustees of securitisation and covered bond arrangements and prescribing the due diligence duties to apply to contract managers of such arrangements. We note contract managers typically play a critical role as they oversee the contracts throughout their lifecycle and manage these arrangements between the various contractual parties. This can be distinguished from trustees, who typically do not perform the functions of a creditor, and therefore the exemption is necessary and appropriate.
SECTION 7: DEBT COLLECTION DISCLOSURE	
12	The structure of disclosure of charges, and if this reflects industry practice for how charges are passed on
	No comments on this point.
13	Whether the regulations capture all the information that should be disclosed to debtors (for example, in relation to costs associated with court proceedings)
	In our view, the Regulations adequately capture the essential information that should be disclosed to debtors in the context of debt collections. Further information such as about fees relating to potential court costs should fall outside of this framework. Due to the inherent unpredictable nature of litigation, it will be impractical and place an undue burden on the creditors to estimate litigation costs. If such a requirement was introduced, it would likely lead to debtors being misled about the true litigation costs given the difficulties involved in providing

	an estimate. Generally, the uncertainty around costs and the inability to provide accurate estimates of court proceedings may mislead debtors and result in debtors making incorrect conclusions on court proceedings. We agree that some consumers will find the volume of information unhelpful and may not attempt to or correctly navigate information provided.
14	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)
	We see minimal value in Regulation 24(h) which refers a borrower to MoneyTalks. Once the parties have moved into the debt collection process, budgeting and financial capability advice is unlikely to be useful in the context of that particular debt.
15	How the disclosure obligations could be refined to better improve transparency or to better enable debtors to seek assistance (where needed)
	See comments in paragraph 14 above.
16	If the provision of model disclosure statements would assist in compliance with these regulations and their empowering provision (new section 132A)
	In our view, the provision of model disclosure statements (like model initial disclosure and continuous disclosure statements) would assist in compliance. The provision of the model disclosure statements will support debt collectors to best inform debtors and it will avoid insufficient information being provided to debtors. Further, we do not consider there will be competitive advantage in debt collectors endeavouring to model their own disclosure statements.
SECTION 8: OTHER REGULATIONS INSERTED BY THE ACT	
17	How the drafting of the regulations inserted by the Act could be refined to be more effective and minimise cost for lenders
	Disclosure required under new section 26B of the CCCFA should be kept to a minimum to reduce costs to lenders, while providing comfort to consumers that relevant information will be disclosed to them where appropriate. **Disclosure about dispute resolution schemes** Under new section 26B(1)(a), information about the creditor's dispute resolution scheme must be disclosed by a creditor in every notice required under section 57A(1)(a) of the CCCFA. Section 57A(1)(a) requires the lender to send notice to the consumer to acknowledge receipt of the hardship application. We do not believe it is appropriate to provide information about a lender's dispute resolution scheme when the lender provides notice to acknowledge receipt of the application. There is a high risk that providing information about the lender's dispute resolution scheme at this stage will undermine trust and confidence in lenders. Furthermore, it will result in consumers

receiving information at a time it is not relevant to them, and potentially being confused.

If information under new section 26B(1)(a) must be disclosed, such disclosure should be limited to where the lender decides not to change the consumer credit contract in accordance with the hardship application. This approach would be a far more effective and relevant way of managing this disclosure obligation.

Disclosure about financial mentoring services

Under new section 26B(2) of the CCCFA and clause 59(1B) of the Act (which refers to clause 5A of the Credit Contracts and Consumer Finance Regulations 2004 ('**2004 Regulations**')), information about financial mentoring services must be disclosed as follows:

New section of the CCCFA	Circumstance	Clause of the draft Act	Timing for disclosure
26B(2)(a)	Where a debtor has made a default in payment, or has caused the credit limit under the contract to be exceeded.	59(1B) (5A(3) of the 2004 Regulations)	In every payment reminder sent by a creditor to a debtor under a consumer credit contract.
26B(2)(b)	By a creditor in every notice required under section 57A(1)(a) of the CCCFA.	-	-
26B(2)(c)	By a creditor who declines an application for a high-cost consumer credit contract.	59(1B) (5A(4) of the 2004 Regulations)	At the time when the creditor advises the person that their application for a high-cost consumer credit contract has been declined.

New section 26B(2)(a) of the CCCFA

We do not believe it is appropriate for disclosure to be in every payment reminder sent by a lender. Greater clarification is required on which interactions with the consumer constitute a 'communication' for the definition of a payment reminder. If a communication includes oral communications, agents of creditors would need to comply in every interaction with the debtor six months following a default. This requirement would capture, for example, where a default in exceeding the credit limit is accidental and, following a telephone conversation with the consumer, may be immediately rectified. Such a disclosure requirement would be logistically and procedurally difficult for lenders to comply with and requires clarity.

In our view, the circumstances for disclosure under new section 26B(2)(a) CCCFA should be limited to the initial formal written reminder or notification that the debtor has defaulted or exceeded their credit limit (for each default or breach).

	General To facilitate compliance by lenders, it would be helpful for the draft Regulations to set out all information required to be disclosed under the draft Regulations in a schedule. Such an approach would mirror the method in Schedule 1 of the CCCFA and ensure lenders can navigate their way around the disclosure requirements in one place.
18	Is there another way to describe the MoneyTalks service, to better encourage people to seek assistance
	We make no submissions in response to this question.
SECTION 9: CREDIT CONTRACTS LEGISLATION AMENDMENT ACT COMMENCEMENT ORDER 2020	
19	Any errors in the allocation of provisions to dates specified in the commencement order
	We have not identified any errors in the commencement order.
SECTION 10: CONTENT OF THE ANNUAL RETURN	
20	Whether this information is already held by lenders, or can be reasonably determined based on information already available to lenders
	We expect it is unlikely that lenders would already hold the majority of the information set out in paragraphs 128 to 161 of the exposure draft. We are also concerned that it would be practically and technically difficult for lenders (and in particular non-bank lenders) to provide the majority of this information without incurring unreasonable expense. Where some raw data or information is available and/or held by a lender, there may be real challenges in determining whether the majority of the information to be provided in an annual return would be able to be *reasonably* determined or extracted. Such a requirement would create an unduly large quantity of work, and would necessitate additional time and cost expenditure.
21	Whether the statistical information covers key areas of interest for monitoring and enforcement
	To the extent that some of the information may be able to be reasonably determined from the information already available to lenders, we do not consider it would all be key areas of interest or relevant for monitoring and enforcement purposes by the Commerce Commission. For example, we consider the information set out in paragraphs 147 to 150 of the exposure draft to not be a key area of interest for monitoring and enforcement purposes, particularly compared to, for example, the information set out in paragraph 160. As drafted, paragraphs 147 to 150 create more laborious and cumbersome obligations with which lenders will need to comply. In addition, the size of a lender's loan book should not be a relevant factor for monitoring and enforcement purposes. Enforcement action may occur irrespective of the size of a lender's

	loan book. Accordingly, information such as that set out in paragraphs 128, 129, or 136 are not obviously a relevant or a key area of interest for monitoring and enforcement purposes.
22	What types of information – listed above – do you believe are the least useful for monitoring purposes
	See comments in paragraph 21 above.
23	The proposed reporting periods and timing of returns
	The current proposed period of reporting and timing would give lenders seven months to prepare and provide the information from the previous calendar year. As discussed further above, to the extent that extracting such information is reasonably and technically practicable for lenders, we consider this is not an unreasonable time period. However, we would not expect lenders to comply in the first year. New section 116AAA (*Requirement for annual return*) of the CCCFA comes into force on 1 April 2021. This date would only give lenders four months to prepare the information and comply by 31 July 2021. Given the numerous significant changes to be introduced by the Act and Regulations that lenders will also be navigating in the consumer credit space generally, we propose that the provision of the first annual return be delayed to at least 31 December 2021.
24	Whether there are types of information – listed above – which would only be usefully provided by some types of lenders
	For a substantial part of the types of information, there is an apparent concern to capture information in respect of lenders that provide high-cost consumer credit contracts. We consider it would be unfair for the vast majority of lenders that do not provide high-cost consumer credit contracts to be caught by these requirements and to be subject to additional compliance. Accordingly, the information set out at paragraphs 132 to 134, 137 to 139, and 145 to 146 of the exposure draft would be usefully provided only by lenders that primarily provide high-cost consumer credit contracts. Such lenders could be defined as those 'carrying on a business of providing' or 'making a practice of providing' high-cost consumer credit, similar to the tests applying to a who is a creditor for the purposes of a consumer creditor contract under section 11(d)(i) and (ii) of the CCCFA. Alternatively, a threshold percentage may be set where, for example, a material percentage of lender's loan book comprises high-cost consumer credit contracts, they will be considered a high-cost consumer credit lender. We would expect that the information to be provided in relation to car finance (paragraphs 140 to 144) would only be usefully provided by lenders that predominantly provide motor vehicle finance. A similar test could be provided as above, where only lenders that 'carry on the business of providing' or 'make a practice of providing' motor vehicle finance, or those caught under a set threshold percentage, would need to provide such information.
25	Whether assignment of loans would impact on the ability to provide this information
	To the extent that extracting such information is reasonably and technically practicable for lenders, assignment of loans would make such information less likely to be reasonably determined from the information already available. It would be more cumbersome to provide

such information, particularly in respect of loans that have already been assigned. Furthermore, it may not even be technically possible for lenders to provide such information depending on who the loan has been assigned to.