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Minister	Hon Kris Faafoi	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Credit contracts and consumer finance amendment regulations 2020	Date to be published	21 September 2020

List of documents that have been proactively released

Date	Title	Author
8 September 2020	<i>Credit contracts and consumer finance amendment regulations 2020</i>	<i>Office of the Minister of Commerce and Consumer Affairs</i>
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Information redacted

YES / NO

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In Confidence

Office of the Minister of Commerce and Consumer Affairs
Chair, Cabinet Legislation Committee

CREDIT CONTRACTS AND CONSUMER FINANCE AMENDMENT REGULATIONS 2020

Proposal

- 1 This paper seeks authorisation for submission to the Executive Council of the:
 - 1.1. Credit Contracts Legislation Amendment Act Commencement Order 2020; and
 - 1.2. Credit Contracts and Consumer Finance Amendment Regulations 2020 (**CCCFA regulations**).

Executive Summary

- 2 As one of the steps to address non-compliance with responsible lending requirements, Cabinet endorsed the development of prescriptive, binding requirements around affordability, suitability, credit advertising standards and debt collection disclosure in September 2018 [DEV-18-MIN-0204].
- 3 The intention was that the resulting regulations would prescribe practices which are either already recommended in the (non-binding) Responsible Lending Code, or consistent with existing good practice in the industry. These regulations were to support the implementation of the Credit Contracts Legislation Amendment Act 2019 (**the Amendment Act**).
- 4 This paper seeks authorisation for the submission to the Executive Council of a portion of the CCCFA regulations: those relating to credit advertising standards, debt collection disclosure, variation disclosure, disclosure of information about dispute resolution and financial mentoring services, and how the due diligence duty of directors and senior managers applies to securitisation, covered bond and similar arrangements. It also seeks authorisation for the submission to the Executive Council of a commencement order, to bring into force the remaining provisions of the Amendment Act on 1 October 2021.
- 5 The provisions enabling applications for certification as a fit and proper person will commence earlier on 1 June 2021. This is to provide the Commerce Commission sufficient lead time for processing certifications before the requirement to be certified comes into force.

Background

- 6 In December 2019, the Amendment Act was passed introducing significant changes to lending and borrowing laws. It also provided for the creation of

prescriptive regulations to support the implementation of the new changes introduced in the Amendment Act.

- 7 To enable consultation and ensure the regulations are practical and fit for purpose, Cabinet agreed to release an exposure draft of the regulations [CAB-18-MIN-0466 refers]. In November 2019, MBIE released an exposure draft of the regulations for public consultation. At the same time, feedback was sought on some regulations relating to disclosure of information about dispute resolution and financial mentoring services which had been made by Parliament in the Amendment Act on select committee advice, as there had been limited scope for consultation on these before they were made.
- 8 Consultation closed on 5 February 2020 and MBIE received 40 submissions. Most submissions focussed primarily on affordability and suitability requirements. However, submitters did provide constructive suggestions on making the advertising, securitisation and disclosure requirements more practical.¹
- 9 Due to the COVID-19 pandemic, the development of all regulations was temporarily suspended. In early June, this work resumed and a revised draft of affordability, suitability and variation disclosure regulations was circulated for targeted consultation with those who had submitted on the exposure draft.
- 10 This paper seeks authorisation for the submission to the Executive Council of a portion of the CCCFA regulations which can be finalised based on feedback to date. As there are remaining issues to be resolved on the draft affordability and suitability regulations, I have instructed officials to continue to work with industry over the coming months, with a view to finalising that portion in October 2020.
- 11 This two-part approach is to provide industry with as much lead time and certainty as possible to prepare their businesses for compliance. Finalising the first portion now means the sector can start updating their systems, processes and staff training, while the remaining regulations are being finalised.
- 12 This paper also seeks authorisation for the submission to the Executive Council of a commencement order, to bring into force the remaining provisions of the Amendment Act on 1 October 2021. These were initially set down for commencement on 1 April 2021 but this start date was delayed due to the impact of COVID-19.

CCCFA Regulations proposed to be made

- 13 The attached draft CCCFA regulations cover:
 - 13.1. responsible advertising standards
 - 13.2. the information to be disclosed at the start of debt collection
 - 13.3. disclosure of information about dispute resolution services and financial mentoring services

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This consultation meets the statutory prerequisite for making regulations regarding advertising and securitisation (in sections 138(1BA) and 138(1C) of the CCCFA respectively).

- 13.4. technical specifications for disclosure when a contract has been varied and how directors and senior managers' duties apply in securitisation, covered bond and similar contexts.

14 These are described in turn below.

Responsible advertising standards

- 15 The CCCFA has long provided a number of obligations on lenders to ensure that their advertising is consistent with the duties of a responsible lender, and assists borrowers to make informed decisions. The Responsible Lending Code provides guidance on how lenders can meet their responsibility to advertise responsibly. However, MBIE's 2018 desk-based review of lender websites found that the Code's guidance on advertising is poorly adhered to by some lenders. The study found that 20 per cent of finance company websites failed to disclose their interest rates, while 65 per cent of high-cost lender websites failed to include risk warnings.
- 16 Accordingly, the Amendment Act provided that regulations can prescribe specific requirements relating to the content of advertisements. The draft regulations prescribing advertising standards largely reflect existing guidance in the Responsible Lending Code. These binding regulations will make it easier to identify and enforce breaches of lenders' responsibilities relating to advertising standards.
- 17 The main requirements in the regulations include the following:
 - 17.1. If the advertisement states a payment amount (e.g. "\$10 per week"), it must also state other key information including the total amount of the payments, or the annual interest rate or rates for the products covered by the advertisement.
 - 17.2. If the advertisement relates to structured finance, it should state, in addition to the regular repayment amount, the amount of the lump sum payments.
 - 17.3. If the advertisement states an interest rate (e.g. "from 9.95% p.a."), this must be an annual interest rate charge (rather than a daily or weekly charge), and the amount of mandatory fees must be stated. A range of key additional information must be provided for context, depending on the circumstances. For example, if the rate is variable, a statement to that effect must be included.
 - 17.4. If the advertisement states that there is no interest it must disclose any mandatory fees.
 - 17.5. Advertisements are prohibited from representing that the lender will not fully inquire into the borrower's circumstances (e.g. "no credit checks") or that the loan has already been approved if affordability and suitability inquiries are not yet complete (e.g. "\$500 credit available in your account").

Debt collection disclosure

- 18 In 2018, the majority (around 60 per cent) of debt collection complaints received by the Commerce Commission pertained to misrepresentation of the money owed and misrepresentation of debtor rights. These issues include debt collectors seeking non-existent debts, debts owed to a different person, statute-barred debt, or inflated amounts of debt.
- 19 Accordingly, the Amendment Act enabled regulations to specify the key information that debt collectors must disclose to debtors at the commencement of debt collection action. This includes the name of the original creditor, the nature of additional fees and costs added, and contact information for dispute resolution and financial mentoring services. The intention is that the disclosure of this information at the outset increases transparency around the debt owed, makes it easier to identify unreasonable fees and encourages debtors to access help as needed.

Dispute resolution services and financial mentoring services

- 20 These regulations were made at the select committee stage of the Amendment Bill.
- 21 They require lenders to disclose information about the creditor's dispute resolution scheme and independent financial mentoring services. They have yet to come into force. The attached regulations make adjustments in response to subsequent consultation and are supported by lenders, consumer advocates and others. The intention of the changes is to make the requirements more practical to operationalise.
- 21.1. Where a complaint is made by a debtor, a lender must disclose information about its dispute resolution scheme no later than 2 working days after a complaint is received or as soon as practicable after that time, unless it is resolved to the customer's satisfaction prior to that time. The previous requirement was for the information to be disclosed 'as soon as practicable' after a complaint is received, irrespective of whether it was immediately resolved. This change would align the disclosure requirement with the recent Financial Markets Conduct (Regulated Financial Advice Disclosure) Amendment Regulations 2020 made on 22 June 2020.
- 21.2. A lender must disclose information and contact details for financial mentoring services if an application for a high-cost loan is declined, as well as where a person has made a default in payment or exceeds their credit limit. The previous requirement was for the disclosure to be made with every payment reminder after default or exceeding the credit limit. These regulations amend the requirement so that disclosure about financial mentoring services is only required, with payment reminders given, after the person's payment has been overdue for more than 10 working days or their credit limit has been exceeded for more than 10 working days. Creditors are exempt from the requirement to disclose if a default is rectified within 10 working days.

Other technical specifications under the Amendment Act

- 22 This is a technical change to clarify the operation of disclosure of agreed changes under section 22 of the CCCFA for the benefit of lenders and the Commerce Commission. The Amendment Act enabled regulations to specify the details of what must be disclosed to a borrower under that section, after a change to a consumer credit contract is agreed.
- 23 The draft regulations set out the information that must be disclosed about the agreed change. This information is based on the information already required for initial disclosure (before the credit contract is entered into), which must be re-disclosed if it changes as a result of the agreed change. For example, if the annual interest rate changes, lenders would need to re-disclose that rate, the new amount of interest to be charged, the new amount of the payments, etc.
- 24 The draft regulations also prescribe how due diligence duties for directors and senior managers apply in the context of securitisation, covered bond arrangements and other similar arrangements.

Clarification of exemption for Residential Prone Buildings Financial Assistance Scheme

- 25 The Credit Contracts and Consumer Finance (Residential Earthquake-prone Building Financial Assistance Scheme) Amendment Regulations 2020 were submitted to the Executive Council on Monday 3 August. These regulations exempt credit contracts under the Residential Earthquake Prone Buildings Financial Assistance Scheme (**REPB loans scheme**) from classification as 'consumer credit contracts' under the CCCFA.
- 26 One of the conditions of the exemption is that Kāinga Ora will disclose to the debtor a subset of information from Schedule 1 of the CCCFA (key information concerning consumer credit contract) that is ascertainable and relevant to credit contracts under the scheme.
- 27 However, a technical issue has been raised with the application of section 32(1)(b) to the REPB loans scheme. Section 32(1)(b) provides that disclosure must 'contain the information required by this Act'.
- 28 The regulations clarify that Kāinga Ora only needs to disclose the matters specified in the exemption, and not the full disclosure ordinarily required by the Act.

Commencement order for the Credit Contracts Legislation Amendment Act

- 29 The Amendment Act passed at the end of 2019. Some provisions have already commenced, including those relating to interest rate caps and mobile traders.
- 30 The bulk of the reforms, which apply to all consumer lenders, were set to commence on 1 April 2021, but this date was deferred along with other financial sector regulation, due to the impacts of COVID-19.
- 31 The attached Commencement Order proposes that:

- 31.1. most remaining provisions of the Amendment Act come into force on 1 October 2021. I am advised that this date will enable the necessary updates to the Responsible Lending Code to be developed as well as the subsequent 9 months lead-time for industry to prepare for implementation.
- 31.2. provisions enabling applications to be made for certification as a fit and proper person will commence earlier, on 1 June 2021, to provide lead time for processing before the requirement to be certified comes into force.
- 31.3. Section 21 of the Amendment Act will come into force on 1 October 2020. The provision clarifies cancellation rights for layby sales. It was intended to come into force on 1 June 2020 but was unintentionally omitted from the relevant Commencement Order.

Commencement of regulations and 28-day rule

- 32 The regulations will also commence on 1 October 2021, which will be more than 28 days after its notification in the *New Zealand Gazette*.
- 33 I propose to waive the 28 day rule for the technical correction to the regulation implemented by the Credit Contracts and Consumer Finance (Residential Earthquake-prone Building Financial Assistance Scheme) Amendment Regulations 2020 as it is a minor, technical change that has little or no effect on the public. I propose that the amendment comes into effect on 3 September with the rest of the Credit Contracts and Consumer Finance (Residential Earthquake-prone Building Financial Assistance Scheme) Amendment Regulations 2020.

Compliance

- 34 The proposed regulations comply with:
 - 34.1. the principles of the Treaty of Waitangi;
 - 34.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
 - 34.3. the principles and guidelines set out in the Privacy Act 1993;
 - 34.4. relevant international standards and obligations; and
 - 34.5. the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

Statutory prerequisites for regulations

- 35 The following sections prescribe the conditions which must be met before regulations are made under the CCCFA.
- 36 Section 138(1A) of the CCCFA provides that the Minister may only recommend that exemption regulations are made under section 138(1)(ab) if he or she:
 - 36.1. has had regard to the purposes of the CCCFA; and
 - 36.2. is satisfied that the exemption would not cause significant detriment to borrowers under credit contracts; and

- 36.3. is satisfied that compliance with the relevant provision or provisions of the CCCFA would, in the circumstances, require a creditor or a class of creditors to comply with requirements that are unduly onerous or burdensome.
- 37 Section 138(1BA) provides that the Minister may only recommend that advertising regulations be made after consulting the persons (or the representatives of the persons) who the Minister considers will be substantially affected by the regulations.
- 38 Section 138(1C) provides that the Minister may only recommend that regulations be made only if he or she is satisfied that the circumstances that are prescribed relate to a securitisation or covered bond arrangement or any similar arrangement.
- 39 All the statutory conditions above have been met. A summary of how the exemption meets the relevant criteria is set out in the statement of reasons attached to the regulations.

Regulations Review Committee

- 40 There are no grounds for the Regulations Review Committee to draw the regulations to the attention of the House of Representatives under Standing Order 319.

Certification by Parliamentary Counsel

- 41 The regulations and commencement order have been certified by Parliamentary Counsel Office as being in order for submission to Cabinet.

Impact Assessment

- 42 A Regulatory Impact Assessment was prepared in accordance with the necessary requirements and was submitted at the time that Cabinet approval was sought for the policy relating to the relevant regulations [DEV-18-MIN-0204].

Publicity

- 43 I intend to publish a press release regarding the making of these regulations and commencement order. The Ministry of Business, Innovation and Employment (MBIE) will notify interested stakeholders.

Proactive Release

- 44 I intend to release the paper proactively in whole within 30 days. MBIE will publish a copy on its website.

Consultation

- 45 The Treasury and Parliamentary Counsel Office have been consulted on this paper and the draft regulations and commencement order. The Commerce Commission has been consulted on the draft regulations and commencement order.

Recommendations

I recommend that the Cabinet Legislation Committee:

Implementation of decisions arising from the review of the CCCFA

- 1 **Note** that on 18 September 2018 the Cabinet Economic Development Committee endorsed the development of prescriptive, binding requirements including around affordability, suitability and credit advertising standards and debt collection disclosure [DEV-18-MIN-0204];
- 2 **Note** that the Minister of Commerce and Consumer Affairs released an exposure draft of the regulations for consultation in November 2019 and was authorised to make decisions on minor issues in response to feedback on the exposure draft [DEV-18-MIN-0204];
- 3 **Note** that the attached Credit Contracts and Consumer Finance Amendment Regulations 2020 will give effect to the decision referred to in recommendations 1 and 2 above (except as it relates to affordability and suitability requirements);

Additional matters addressed by the draft regulations

- 4 **Note** that the draft regulations also amend regulations made by Parliament in 2019 in relation to disclosure requirements on consumer lenders. Feedback from subsequent consultation is that these changes are needed to make the requirements more practical to implement and are supported by both lenders and consumer advocates;
- 5 **Agree** to amend the regulations inserted by the Amendment Act as follows:
 - 5.1. Require lenders to disclose information about financial dispute resolution schemes where a complaint is unresolved after 2 days (rather than in all cases);
 - 5.2. Require lenders to disclose information about financial mentoring services where an account is in default or the credit limit has been exceeded for more than 10 days (rather than with each payment reminder);
- 6 **Note** that the amendment described in recommendation 5.2. above is implemented by creating an exemption to the financial mentoring service disclosure requirement, (for cases where a default is rectified within 10 days);
- 7 **Note** that the attached Credit Contracts and Consumer Finance Amendment Regulations 2020 give also effect to the decision in paragraph 5 above;
- 8 **Note** that the Credit Contracts and Consumer Finance (Residential Earthquake-prone Building Financial Assistance Scheme) Amendment Regulations 2020 were submitted to the Executive Council on 3 August 2020;
- 9 **Note** that the regulations clarify that section 32(1)(b) of the CCCFA does not apply to loans issued under the Residential Earthquake-prone Building Financial Assistance Scheme;

Commencement dates for remaining Credit Contracts Legislation Amendment Act provisions

- 10 **Note** that the bulk of provisions in the Credit Contracts Legislation Amendment Act 2019 was set to commence on 1 April 2021, but that this was deferred due to the impacts of COVID-19, along with other financial sector regulation;
- 11 **Agree** to commence most of the Credit Contracts Legislation Amendment Act on 1 October 2021;
- 12 **Agree** that provisions enabling applications for certification of directors and senior managers of consumer credit providers and mobile traders as fit and proper persons commence earlier, on 1 June 2021;
- 13 **Agree** that section 21 of the Credit Contracts Legislation Amendment Act commence on 1 October 2020;

Authorisation for submission to Executive Council

- 14 **Note** that the following statutory prerequisites apply to these regulations:
 - 14.1. Section 138(1A) of the CCCFA requires that the Minister has regard to the purposes of the CCCFA; and is satisfied that the exemption would not cause significant detriment to borrowers under credit contracts; and is satisfied that compliance with the relevant provision or provisions of the CCCFA would, in the circumstances, require a creditor or a class of creditors to comply with requirements that are unduly onerous or burdensome;
 - 14.2. Section 138(1BA) provides that the Minister may only recommend that advertising regulations be made after consulting the persons (or the representatives of the persons) who the Minister considers will be substantially affected by the regulations;
 - 14.3. Section 138(1C) provides that the Minister may only recommend that regulations be made only if he or she is satisfied that the circumstances that are prescribed relate to a securitisation or covered bond arrangement or any similar arrangement;
- 15 **Note** the advice of the Minister for Commerce and Consumer Affairs that these requirements have been met;
- 16 **Authorise** the submission to the Executive Council of the Credit Contracts and Consumer Finance Amendment Regulations 2020;
- 17 **Authorise** the submission to the Executive Council of the Credit Contracts Legislation Amendment Act Commencement Order 2020;
- 18 **Note** that a waiver of the 28-day rule is sought for the technical correction to the regulation implemented by the Credit Contracts and Consumer Finance (Residential Earthquake-prone Building Financial Assistance Scheme) Amendment Regulations 2020 on the grounds that it is a minor, technical change that has little or no effect on the public;

- 19 **Agree** to waive the 28-day rule so that this technical correction can come into force on 3 September with the rest of the Credit Contracts and Consumer Finance (Residential Earthquake-prone Building Financial Assistance Scheme) Amendment Regulations 2020;

Further work on affordability and suitability regulations

- 20 **Note** that officials will continue work with the sector and consumer representatives to finalise affordability and suitability regulations, with a view to these being made in October 2020.

Authorised for lodgement

Hon Kris Faafoi

Minister of Commerce and Consumer Affairs