



DISCUSSION DOCUMENT: PROPOSED AMENDMENTS TO THE NATIONAL CREDIT REGULATIONS MADE IN TERMS OF THE NATIONAL CREDIT ACT 34 OF 2005.

1. INTRODUCTION

- 1.1. The Department of Trade and Industry (**the dti**) is publishing this Discussion Document in order to solicit views on a process it has embarked on to analyse areas of review in Regulations issued in terms of section 171 of the National Credit Act 34 of 2005 (NCA), as amended.
- 1.2. The NCA requires Minister to review various provisions relating to the regulation of credit from at various prescribed intervals. Furthermore, other problematic areas in need of clarity or review are identified from time to time during the application and enforcement of the NCA.
- 1.3. **the dti** has not yet reached a conclusion on the areas and manner of review. **the dti** will hence consider the responses to this Discussion Document to determine what further areas should be reviewed if any and the manner of such review.
- 1.4. This Discussion Document is not a replacement for Regulations or any other legislative process and commenting or participating on same does not preclude the public from later commenting/ participating in Draft Regulations once published in the Government Gazette.. In fact, the Discussion Document creates an informal platform for **the dti** and the public to engage on possible reviews. It is important that government and the public work closely together in policy and legislative development.
- 1.5. Written input on the Discussion Document can be e-mailed to CCRDComments@thedti.gov.za or hand delivered to **the dti** Campus, 77 Meintjies Street, Block B, 1st Floor, Sunnyside, Pretoria for

Attention: Ms. Tshililo Mabirimisa by no later than Friday, 27 September 2019.

2. OBJECT OF THE AMENDMENTS TO THE NATIONAL CREDIT REGULATIONS

2.1. **the dti** is considering amending the following:

Amendment of Regulation 1 of the Regulations

2.2. Inserting the definition of **'branch'** in response to the current business practice where registered credit providers or their agents may operate from the premises of a retailer and not from a stand-alone branch. The lacuna that currently exist in the credit law, enables retailers to sell credit products without registration as credit providers and without payment of registration fees in terms of the NCA. Some retailers have a wide footprint and premises scattered across the country, this amendment will compel credit providers who operate from such retailer premises to register those premises as branches for the purpose of the NCA. This amendment will in turn increase revenue for the National Credit Regulator (NCR) and assist with better regulation of the credit industry.

2.3. To define **'dispute'** in relation to Regulation 10A and section 134 of the Act. The definition is necessary to address the current phenomenon where consumers are overcharged by debt counsellors. The definition makes a clear distinction between the functions of debt counsellors and of alternative dispute resolution agents (ADRs). Debt counsellors and alternative dispute resolution agents have distinct roles as per the NCA; as such, it is important to ensure that there is no duplication of the work and responsibilities for the respective NCR registrants. The definition of **'respondent'** in relation to the work done by ADRs should also be attended to.

- 2.4. The classification of Credit bureaux into **‘primary credit bureau’**; **‘re-seller credit bureau’** and **‘specialised credit bureau’** and the definition of this three categories is necessary to address current industry trends that make it impossible for the NCR to regulate certain entities that operate a credit bureau function.
- 2.5. The understanding is that, there are entities that host large databases (‘host credit bureaux’) of consumer credit information and these are registered as credit bureaux in terms of the NCA. The registered credit bureau sells the information to other entities (“on-sellers”) that trade in such information. On-sellers do not have established databases and sell the information as received from the host credit bureaux. There are also entities that hold specialised consumer credit information such as credit information relating to medical records; rental data and employment data. The definition of a specialised credit bureau to cater for the latter is also proposed.
- 2.6. The current regulatory framework does not recognise these categories of credit bureaux and this makes it impossible for NCR to regulate non-data hosting credit bureaux or accredit credit bureaux to host databases. The proposed amendments will empower the NCR to classify credit bureaux in terms of the nature of their business (the type of information that they store and the functions that they discharge) and will also prescribe regulatory requirements through conditions of registration and guidelines for each category. The amendment will enable greater monitoring and regulation by the NCR.
- 2.7. The insertion of the definition of **‘having an effect in the Republic’** is also proposed and is necessary to simplify exemption applications in terms of section 4 of the NCA. Section 4 applies to every credit agreement between parties dealing at arm’s length and made within, or having an effect within the Republic of South Africa. Section 4 further lists four exceptions where the NCA does not apply including where a consumer whose credit provider is located outside the Republic, wherein the consumer applies to Minister in the prescribed manner and

form for an exemption from application of the NCA in terms of section 4(1)(d).

- 2.8. The NCA does not define what having an effect within the republic means. Having an effect can either have negative or positive consequences within South Africa. Arguably, it is not the intention of the legislation to reject applications that could potentially have positive effects but those that are potentially detrimental. A narrower definition of 'having an effect in the Republic' would help empower the Minister to objectively exercise his discretion in granting or rejecting applications for exemptions in terms of section 4(1)(d).

Insertion of Regulation 2A- Application requirements for exemption in terms of section 4(1)(d) and Regulation 2B- Assessment criteria for exemption applications

- 2.9. Section 4 (1) (d) therein provides that a credit agreement in respect of which the credit provider is located outside the Republic, may be exempt from the application of the NCA upon approval by the Minister, on application by the consumer in the prescribed manner and form. The location of credit providers outside South Africa makes it impossible for the NCR to monitor compliance with the NCA. The implication is that the NCR should not in the ordinary course of business be expected to monitor such credit providers. Furthermore, the bulk of exemptions applications received to date relate to loan applications by South African citizens to purchase fixed property in the UK (77%) and to a limited extent by foreigners to purchase property in South Africa (18%).
- 2.10. The NCR already requires an applicant to fill in an application form, with attached identity documents and a copy of the credit agreement to be exempted. The insertion of further requirements in the Regulations seeks to formalise the process.

Amendment of Regulation 10A

- 2.11. Various amendments to Regulation 10A relating to Payment Distribution Agents (PDA), for clarity, compliance enhancement and to address certain issues identified in the payment distribution process. It is proposed that the aspects relating to capital requirements be clarified and enhanced by requesting proof from a registered bank.
- 2.12. A proposal is made to increase the number of days within which a PDA may distribute funds collected for such a purpose. Various PDAs have raised an issue with the five days currently provided for, as being too short and inappropriate considering the risk of possible payment reversals by the consumers. Increasing the number of days within which distributions may be made minimises the risk as highlighted and mitigated related to losses for PDA, where reversals are done post distribution of funds by PDAs.
- 2.13. Due to the systemic risk highlighted above and notwithstanding the proposals made therein, it is further necessary and proposed that PDAs be guaranteed reimbursement by credit providers where payment reversals occur post distribution of payments by PDAs. The impact study conducted by the NCR also found that allowing 15 days for distribution of the funds will sufficiently address highlighted risk.

Amendment of Regulation 10B

- 2.14. Amendments are proposed to Regulation 10B which relates to Alternative Dispute Resolution Agents (ADR) to enhance compliance with and ensure practical implementation of the Regulations by ADRs. The NCR's role is clearly outlined in the NCA; however, Regulation 10B inappropriately imposed other functions for the NCR. For example, Regulation 10B (2) (f) compels the NCR to commit not to hinder an ADR from allowing its adjudicators to serve in adjudicator panels of other ADRs. The NCR should not necessarily encroach on the duties

of an ADR in its manner, hence the proposal to compel the ADRs to allow their adjudicators to serve on adjudicator panel of other ADRs, without any reference to the NCR.

- 2.15. Similarly, where the training of adjudicators is concerned, it is sufficient to compel ADRs to provide training to their adjudicators without any involvement by the NCR, as proposed. The role of the NCR should primarily be that which is expressly provided for in the NCA, as such these proposals are primarily for clarity and consistency purposes.

Insertion of Regulation 10C- Unidentified funds collected by payment distribution agents

- 2.16. Regulation 10C which relates to unidentified funds collected by PDAs requires amendments. A sustainable and effective debt review process is one that ensures that payments are collected from consumers and distributed to creditors accurately, efficiently and on time, in accordance with the restructured, accepted payment plan. However, exceptions do occur, as a result of incorrect or invalid banking or reference details, thus leading to a PDA being unable to distribute the payment.
- 2.17. Amendments should make it possible to regulate these unidentified funds and proposes that where a PDA is unable to identify the funds, same should be deposited into a trust account established for this purpose by the NCR.
- 2.18. The proposal is that the interest on unidentified funds should be deposited into an already existing trust account operated by the NCR. The existing PDA interest trust account is for interest which accumulates on payments collected by PDAs and yet to be distributed, within the prescribed timelines. The trust account funds are used by the NCR for consumer education and related programmes as prescribed by the Payment Distribution Agents Interest Utilisation Policy as approved.

Insertion of Regulation 10D- Dispute resolution process for Alternative Dispute Resolution Agents

- 2.19. A dispute resolution process for ADRs is proposed. As registrants with the NCR, ADRs have a vital role to discharge which involves addressing consumer complaints through conciliation and mediation of disputes. The process of dispute resolution as alluded to should be prescribed as such.
- 2.20. A procedure to be followed for consumers to submit complaints to ADRs in a prescribed form, for conciliation and mediation of disputes. The disputes resolution process contemplated herein will be purely undertaken by the ADR with no legal representation for either the applicant or respondent.

Amendment of Regulation 17- Categories of consumer credit information and their corresponding retention periods

- 2.21. A proposal is made for the retention of confirmed fraud related information in the Credit Bureau. Various credit providers and stakeholders have recommended that the Regulations make provision for the retention of this information in line with the proposed maximum retention period proposed. It is also proposed that any other relevant credit information not expressly described in Regulation 17 should also be retained for a certain period.

Insertion of Regulation 18- Maintenance and retention of consumer credit information by credit bureau

- 2.22. A proposal is made for a new Regulation 18 to improve the existing regulation in its entirety. The prescribed format for consumer credit information ought to be clear and enforceable by the NCR. Amongst other key aspects, it is proposed that the credit bureaux be required to retain consumer credit information containing details in respect of race

only for the purposes of providing it to the NCR for research and statistics. This aspect is crucial considering allegations of discriminatory lending practices in the market. The information provided herein will give value to statistics compiled by the NCR.

- 2.23. In line with the proposal regarding the proposed retention of fraud related information; it is proposed that Regulation 18 make provision for fraud related information accordingly. The proposal is to outline, improve and clarify the standards and requirements for the maintenance and retention of consumer credit information by credit bureaux. It ought to be borne in mind that, as proposed; credit bureaux will be classified differently depending on the unique information held in each specific case.

Insertion of Regulation 18A- Maintenance and retention of consumer credit information from credit agreements sold to third parties

- 2.24. A proposal is made to regulate the maintenance and retention of consumer credit information for credit agreements which are later on sold to third parties, such as debt collectors. The NCA read with the Regulations prescribe periods for which certain consumer credit information should be retained within the credit bureaux as per Regulation 17 and the requirements and standards as contained in Regulation 18, previously referred to above.
- 2.25. An interpretational issue arises when consumer credit information is listed accordingly and the credit agreements thereof are on-sold by credit providers and subject to collection by third parties not party to the original credit agreement. As such, the maintenance and retention requirements for consumer credit information ought to be clarified and limited to cater specifically for the issue concerning on-sold credit information.

Insertion of Regulation 18B-Classification of credit bureaux

2.26. The NCR needs to be empowered to register credit bureaux in accordance with the various classification. Furthermore, only a primary credit bureau may hold the full file of consumer credit information, including payment profile information. Another key aspect is the proposal to compel the NCR to develop hosting standards and criteria for the various credit bureaux, to identify and regulate the consumer credit information held therein in a clear and consistent manner.

Insertion of Regulation 18C- Specific requirements and obligations for different categories of credit bureaux

2.27. This will enable the NCR, through the conditions of registration and guidelines, to impose specific requirements and obligations on various credit bureaux according to category. The NCR should have the necessary authority to allow it to properly discharge its duties as outlined in the NCA, in particular relating to the registrants regulated by the NCR. The guidelines issued by the NCR are binding.

Amendment of Regulation 19

2.28. Provisions should be made to enhance the regulation of credit providers, credit bureaux and sources of information related to submitting and updating of consumer credit information held in the credit bureaux. Provisions could include prescribing fees payable by credit providers and termination of access to consumer credit information by credit providers.

Amendment of Regulation 20

2.29. A proposal is made for a provision to compel credit bureaux to issue consistent credit reports, regardless of whether such report is issued for a financial benefit or issued free of charge. This proposal follows

numerous complaints received by the NCR regarding the inconsistencies of credit reports issued, as highlighted, and seeks to compel credit bureaux to maintain consistent standards.

Insertion of Regulation 22A- Use of information held on the records of credit bureaux for marketing purposes

2.30. A proposal to insert a new provision which regulates the use of consumer credit information held on the records of credit bureaux for marketing purposes. Various complaints have been raised to **the dti** and the NCR relating to unsolicited marketing of products and services to consumers, without the consumers having authorised the use of their information or contact details for marketing purposes. Provision could also be made for the credit score or indicator and proposes what should transpire should the consumer challenge the accuracy of the credit score or indicator.

2.31. These provisions are intended to curb the unscrupulous use of consumer credit information without the prior consent of the consumer. These provisions will equally enable the NCR to ensure that appropriate measures are put in place to monitor and enforce compliance with the proposed Regulations.

Amendment of Regulation 23A

2.32. This amendment would address the numerous concerns raised by credit providers regarding the use of the affordability assessment criteria currently stipulated in the Regulations. Although the judgement into the matter between the Minister of Trade and Industry, the NCR and the clothing retailers was recently delivered, it is proposed that the criteria be enhanced and clarified to cater for the validation of income of consumers in the informal economy, amongst others. The amendment will also ensure that income earning consumers in the formal market be subject to the affordability assessment criteria.

- 2.33. Another key aspect is the proposal to compel credit providers to submit their affordability assessment models, procedures and mechanisms to the NCR, to allow scrutiny and ensure utilising of the income validation methods referred in the revised affordability assessment criteria.

Amendment of Regulation 24

- 2.34. This seeks to address the issue of debt counsellors unlawfully enrolling consumers in debt review processes. It is necessary to compel consumers applying for debt review to submit the required information in writing. This proposal seeks to address the issue of consumers giving away pertinent detail telephonically to debt counsellors. Complaints have been raised with **the dti** and the NCR that numerous consumers are unlawfully enrolled into the debt review process without their knowledge or approval, having telephonically given their information unaware of the intended purpose. It ought to be determined whether a printed transcript of a telephonic conversation where such information is given, will qualify as information having been provided in writing.

- 2.35. It is proposed that Debt counsellors also be compelled to require documentary proof of the information provided by a consumer. Further proposals herein are intended to address highlighted challenges encountered within the debt review process.

Insertion of Regulation 24A- Debt re-arrangement rules, system and funding

- 2.36. A proposal is made to enable the NCR to prescribe debt re-arrangement rules. Debt counsellors and credit providers will be compelled to apply the debt re-arrangement rules prescribed by the NCR through binding guidelines. The use of and adherence to the debt re-arrangement rules is vital for the sustainability of the debt review process, hence the stipulated concessions will be compulsory for all debt counsellors and credit providers to apply.

- 2.37. In order to guarantee the use of and compliance with the prescribed debt re-arrangement rules, it is necessary for all role players in the debt review process to contribute financially to the operation and maintenance of the rules system.

Insertion of Regulation 24B- Advertising and marketing practices of debt counsellors

- 2.38. Proposals are made to curb misleading advertising, promote the full disclosure of all relevant costs of debt review process and the costs and fees payable to a debt counsellor, as part of the advertising or marketing of debt counsellor services. Provision should be included to prohibit marketing practices, which border on harassment of consumers, in an attempt persuade them to enter into the debt review process.

Amendment of Regulation 42- Maximum Initiation Fee

- 2.39. The NCR is required to review initiation fees at intervals of not more than three years in terms of Regulation 45 of the NCA and advise the Minister of any necessary changes. The last review of initiation fees came into effect in 2016. A proposal is made to amend the maximum initiation fees that can be charged by credit providers for different credit facilities in terms of section 105(1) of the NCA.

Insertion of Regulation 42A- Supplementary requirements regarding the accrual of the cost of credit whilst the consumer is in default

- 2.40. Clarity is required in addressing the situation relating to the accumulation or accrual of the cost of credit whilst the consumer is in default. Section 103 (5) of the NCA codifies the common law in duplum rule and states that the amounts contemplated in section 101 (1) (b) to (g) (cost of credit provisions) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that

credit agreement as at the time that the default occurs. The proposed provision will add some level of detail regarding the interpretation of section 103 (5).

- 2.41. Legal costs incurred by the credit provider up to the date of judgement to enforce a credit agreement should also be included when determining the meaning of collection costs. This proposal will ensure that legal costs are included, when interpreting and applying the limitations placed by section 103 (5) on the accumulation of costs whilst a consumer is in default on a credit agreement. This proposal will benefit the consumer, as often the provisions of section 103 (5) are conveniently interpreted to exclude legal costs, which are separately imposed and later demanded from the consumer.
- 2.42. The operation and application of section 103 (5) is clarified and it is proposed that consumers be prohibited from waiving away the protection granted by section 103 (5).

Amendment of Regulation 44

- 2.43. A review of the maximum monthly service fee charged by credit providers in terms of section 105(1) of the NCA is under consideration. The last review of the maximum monthly service fee came into effect on 6th May 2016 and is now due.

Amendment of Regulation 45- Changes to interest rates and credit fees

- 2.44. A proposal is made for the time intervals for the review and determination of credit fees and interest rates to be separated. It is proposed that adjustment of credit fees be made at intervals not exceeding three years upon the recommendation of NCR. It is also proposed that certain pertinent factors should be considered in making the latter adjustment.
- 2.45. It is proposed that the adjustment of the interest be flexible and not be

linked to any interval. Rather adjustments to the interest should be made upon the recommendations of the NCR in that regard. It is also proposed that certain pertinent factors should be considered in making the latter adjustments, the factors such as inflation rate.

Amendment of Regulation 75

- 2.46. A proposal is made to amend various prescribed forms required and used by the NCR. It is proposed that the NCR be enabled to amend the prescribed form through binding guidelines. This will ensure simplicity and operational efficiency.

Amendment of Schedule 2 (Prescribed Fees) to the Regulations

- 2.47. Amendments are proposed to Schedule 2 (Prescribed Fees) to the Regulations by inserting fees which PDAs and debt counsellors may recover from consumers for services rendered.
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