NEW ZEALAND BANKERS ASSOCIATION

Submission

to the

Ministry of Business, Innovation and Employment

on the

Draft Responsible Lending Code

24 December 2014

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Submission by the New Zealand Bankers' Association to the Ministry of Business, Innovation and Employment on the Draft Responsible Lending Code

About NZBA

1. The New Zealand Bankers' Association (NZBA) works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes which contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.

2. The following fourteen registered banks in New Zealand are members of NZBA:
   - ANZ Bank New Zealand Limited
   - ASB Bank Limited
   - Bank of New Zealand
   - Bank of Tokyo-Mitsubishi, UFJ
   - Citibank, N.A.
   - The Co-operative Bank Limited
   - Heartland Bank Limited
   - The Hongkong and Shanghai Banking Corporation Limited
   - JPMorgan Chase Bank, N.A.
   - Kiwibank Limited
   - Rabobank New Zealand Limited
   - SBS Bank
   - TSB Bank Limited
   - Westpac New Zealand Limited.

Contact

3. We look forward to working further with officials during the development of the Code. In the meantime, if you would like to discuss any aspect of the submission, please contact:

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Executive Summary

4. The key points NZBA seeks to make in response to the Responsible Lending Code are:

- The Responsible Lending Code must reflect the Responsible Lending Principles objectives contained in the Credit Contracts and Consumer Finance Amendment Act. These provisions are intended to target unscrupulous lenders. Banks are recognised responsible lenders and set a benchmark for other lenders.
- The Responsible Lending Code should be principle-based rather than prescriptive. This would allow lenders to develop their own policies and procedures, be consistent with the approach in other financial services legislation, assist with implementation, and help future-proof the Code in a changing environment.
- In this principle-based approach, we also support scalable guidance that allows riskier products such as payday lending to be the subject of more targeted guidance. Scalable guidance should also take into account the multi-agency regulatory environment in which banks already operate, and avoid any contradiction or duplication between the Responsible Lending Code and the Financial Advisers Act 2008.
- The Responsible Lending Code should not impose additional record keeping obligations on lenders given the extensive policies and processes already in place to document interactions with customers. In our view this is unnecessary and would create significant additional compliance cost with no additional benefit.
- The Responsible Lending Code should be "technology neutral" and not differentiate between various delivery channels. This will also aid in future proofing the Code, as it will allow for new technology and delivery channels to be introduced without the need to revise the Code.
- We agree with the Responsible Lending Advisory Group that the Responsible Lending Code should not address the credit or default fees provisions given litigation currently before the Courts.
- The Responsible Lending Code should not restrict a lender's ability to make a pre-approved offer of credit to a customer based on the extensive information and credit history available to that lender to assess a customer's creditworthiness. Lenders should be able to make pre-approved offers to any consumer providing they can meet their lender responsibilities.
- The Responsible Lending Code should provide lenders flexibility to determine how they will meet their lender responsibilities, including whether they will provide either personalised financial advice or class advice, without imposing a requirement that personalised financial advice be given.

Introduction

5. NZBA is grateful for the opportunity to submit on the Draft Responsible Lending Code – Explanatory Material for Draft Code and Draft Code for Consultation (the Code).

6. NZBA supports the objectives of the Government in changing the laws that cover consumer credit to:
   - ensure creditors lend responsibly, and
   - provide improved protection for vulnerable consumers.

7. To achieve this purpose the Code should reflect the objectives of the Responsible Lending Principles contained in the Credit Contracts and Consumer Finance Amendment Act 2014.

8. Banks are recognised responsible lenders and set a benchmark for other lenders. We support the Code's objective of raising standards across the finance industry by ensuring that minimum standards are met. This is particularly important in relation to raising the practices of lenders who are not currently behaving in a responsible manner and may be exploiting the vulnerable recipients of credit.

General

9. In addition to our executive summary at paragraph 4, we make some general comments below. Our detailed responses to the questions in the draft Code are in the attachment to this submission.

Plain Language

10. As we have raised previously in discussions with you, the Code is not drafted in plain language despite the fact that the Code itself requires lenders to provide documentation drafted in plain language to assist customers. We think that this highlights the difficulty in drafting technical documents in plain language, but note that there are areas where plain language amendments could benefit the Code. We understand that some of our members have submitted individually with suggested drafting changes to this effect and we support those suggestions.

Timeframes

11. NZBA understands the tight legislative timeframe imposed for the introduction of the Code, and commends the significant efforts of officials to be available to consult while also progressing the Code quickly. As we have previously raised with you, even if the Code is finalised by March 2015 as currently intended, three months is not a sufficient timeframe for large organisations such as banks to review systems and processes, amend policies, start and complete new IT builds that may be required, and retrain staff so as to be compliant by 6 June 2015. This will be particularly difficult if there are significant changes from the draft Code to the final version as published in March. The difficulty of this transition is heightened by the volume of

regulatory change that financial services institutions are currently required to undertake.

12. We understand that this timeframe cannot be changed without a legislative amendment. If such an amendment is not an option, we strongly suggest that the limited timeframe adds weight to the case for a principles-based approach to the Code which will allow lenders flexibility to use existing processes to be compliant on 6 June 2015.

Transitional Arrangements

13. The Code should address how lenders should treat interactions with customers throughout the implementation of the Code. For example, there is no guidance as to how a lender should address a loan that has been approved but not drawn down as at 6 June 2015. For large lending organisations such as banks there are likely to be significant operational and customer service issues associated with this transition, and we submit that in the absence of some transitional relief, further guidance on these matters is provided.

Attachment

Responses to questions in the draft Code

1 Introduction

Question 1.2
Please provide any comments you may have on the ability for the lender to make a judgment about the number of inquiries and the extent of information sought, as well as the extent of the assistance that should be provided based on specified factors in the Code. Does this approach strike the right balance between consumer protection, providing certainty for lenders, and minimising unnecessary compliance costs?

NZBA strongly supports the concept of scalability in the Code.

The concept of scalability is already extensively used in practice by responsible lenders such as banks, as it is in the interests of the lender to effectively assess and manage the particular risks and circumstances of the borrower and/or product. Scalability as a concept is also widely understood in other markets legislation, for example the care, diligence and skill provisions set out in section 33 of the Financial Advisers Act.

In our view it is critical to the success of the Code that scalability is consistently applied throughout the Code, and that this scalability is principles-based. A lender must retain the flexibility and expert judgment to determine the appropriate course of action, taking into account the particular circumstances at hand.

Inquiries

Under the Credit Contracts and Consumer Finance Act 2003 as amended (CCCFA) it is reasonable for a lender to consider whatever factors will assist it to be satisfied that the credit arrangement will meet a borrower's needs and objectives or that payments can be made without causing substantial hardship.

We note that the factors in the Code are derived from the Australian Securities and Investment Commission's regulatory guide *RG209 Credit licensing: Responsible lending conduct.* We further note that the Code does not recognise that in the Australian equivalent these factors were part of an inclusive list.

NZBA submits that a more appropriate focus for the Code would be a principles-based approach which allows lenders to determine the appropriate level of inquiry based on factors such as the type of product, the particular borrower, and the wider individual customer's circumstances.

Some scalability provisions in the Code are likely to create confusion and are biased towards requiring more inquiries. The Code should allow lenders to make inquiries into unlisted factors rather than the "checklist" style implied currently, which does not provide lenders

sufficient capacity to exercise judgment in relation to individual borrowers. The Code prescribes in full what types of inquiries a lender may make, and the assistance lenders must provide, only leaving a limited discretion for the lender to make more or fewer inquiries. For example, there are a number of circumstances of the need to scale up (paragraphs 4.2 and 5.5) but limited circumstances of the right to scale down (paragraphs 4.3 and 5.6).

In our view many of these provisions will not have the desired effect. For example, while it is understandable that a lender may be required to provide more assistance to a borrower with characteristics that make them more vulnerable (e.g. English is a second language) as per paragraph 7.7(e), it is not clear why a lender should be required to seek further information from them (paragraphs 4.2(d) and 5.5(d)), where the focus should rather be on promoting understanding.

In relation to the inquiries into the borrower's requirements and objectives, the scalability provisions should also reflect that in many instances such information cannot be established as it is not relevant to the particular product, or the customer does not know the answer. For example, credit cards do not have a set purpose, or a customer may just want to know how much they can borrow and do not have a predetermined limit or time frame in mind. Inquiries should be able to be scaled back to the appropriate level for such situations.

As noted above, it is important that scalability is universally applied throughout the Code. For example, for non-complex and/or common credit products, paragraphs 7.6 to 7.9 allow the level of explanation and assistance provided to be scaled to a lower level. The same flexibility should also apply to the key features information provided under paragraph 7.2.

NZBA agrees that lenders should be required to make more inquiries, or give more assistance, where there is reason for the lender to believe that a customer is vulnerable. This should be subject to the prohibition on discrimination under the Human Rights Act which will limit a lender's ability to treat a customer with certain characteristics differently on the basis of those characteristics. Further, we submit that the onus on a lender to make further inquiries or provide assistance in relation to these customers should be subject to what the lender could reasonably have been expected to know in the circumstances of the interaction regarding the particular product. This would ensure that the Code does not hold lenders to a set of circumstances which they could not have been expected to have known at the time of interacting.

Demonstrating Compliance

The record keeping requirements should equally be able to be scaled down. Lenders should be entitled to take a risk-based approach and have the flexibility to work within existing processes that are proven to be effective. In our view, the current provisions relating to demonstrating compliance and record-keeping are overly onerous and will have the effect of significant compliance cost and customer inconvenience for limited additional benefit.

It is critical that the Code does not impose significant additional costs or processes on lenders. This is particularly important in relation to banks. The sheer size of their operations and volume of interactions with customers means this could impose significant extra cost to

banks to show compliance, with arguably no additional benefit to customers. Importantly, banks are already responsible lenders.

We commend the move in the most recent draft of the Code towards using compliance policies as a means of demonstrating compliance. However, we note that this should come with the flexibility to allow for other methods as a means of compliance, such as the use of a risk management framework. This will ensure that expert judgment and manual assessments, which are themselves more able to be adapted to the circumstances of a particular customer interaction, are able to be continued in the current form. Removal of this flexibility will result in overly-cautious process driven policies and processes which are geared more towards automation and record-keeping than expert judgement.

For example, paragraph 7.7(f) will have the effect of requiring an individual record of what has been discussed in the event that a customer appears to have not understood the information that is being provided. This adds compliance cost when dealing with certain groups and may restrict access to credit for those groups.

Question 1.3
Please provide any comments you may have in relation to the aim that the Code be technology neutral, and whether the guidance in the Code allows for technology neutrality (including by reference to specific aspects of the guidance).

NZBA supports the objective that the Code should be technology neutral and ensuring that whether credit is provided online or in person should not be a factor as to the number or extent of inquiries or extent of assistance provided. This is especially important given the rate of change in the financial services market, much of which is driven by increased competition in the digital technology space. New products and business models are ever evolving and pose an increasing challenge to traditional lenders. Existing lenders need to be able to adapt to the changing market, and the Code must not hinder technological development.

Lenders are responding to these pressures by increasing the focus on online interactions, driven primarily by customer demand for a quick and hassle-free interaction with their bank. NZBA is concerned that aspects of the Code remain reliant on a face-to-face interaction with a customer and cannot be satisfied or will deter an online dealing. In particular:

a) Vulnerability – when dealing in an online space it will be difficult for a lender to identify customer vulnerabilities that are not expressly disclosed. The requirements of chapters 4 and 5 do not meet the objective of technology neutrality in relation to vulnerable customers because lenders will be forced to seek the maximum amount of information required in the Code on the assumption that a customer *might* be vulnerable. This will be a deterrent to transacting online.
b) Informed decisions – in order to get comfort that a customer fully understands a product in an online space, a lender will be required to over-provide documentation to a customer to ensure the customer is informed. This may deter customers from transacting online.
c) Language – the wording of the Code presupposes a traditional over the counter banking interaction. For example, the requirement in paragraph 4.9 that a lender

"satisfy themselves" suggests a decision made by a staff member and precludes this assessment being automated, while paragraphs 4.10 and 5.16 expect "checklists for staff" which implies pen and paper.

2 Obligations that apply before and throughout the agreement

Question 2.1
Please provide any comments you may have on the guidance in this chapter, including any suggested revisions or additions.

NZBA makes the following points in relation to this chapter:

Paragraph 2.1 – the Code relies heavily on lenders "implementing and maintaining policies" in relation to Code compliance. As noted in relation to question 1.2 above, NZBA considers that this concept should be extended to allow lenders flexibility to achieve compliance through the use of policies, procedures, and processes.

Paragraph 2.2 – the Code should provide more flexibility as to what training in relation to the Code is provided to the staff of a lender. This would enable lenders discretion to ensure that staff only receive training relevant to the interaction with the Code that is relevant to their role. For example, a frontline staff member will not make decisions as to the marketing and advertising of credit products and will not require training on this aspect of the Code. In the interest of minimising unnecessary compliance cost, we suggest that flexibility to provide targeted training would be more appropriate.

Paragraph 2.4 – as currently drafted paragraph 2.4 suggests that an agent of the lender could include a broker. As noted above, this confuses the role of brokers, who should accurately be recognised as the agents of the borrower. We wish to reinforce that a lender should not be required to monitor and audit the internal practices of brokers, and lenders should be entitled to rely on information provided by a broker on the same terms as information provided by a borrower directly.

Paragraph 2.6(d)– the Code should make it clear that this obligation is subject to the lender's Privacy Act obligations, and also that any request from an adviser must be reasonable and within the expectations of the borrower.

Paragraph 2.7 – when contacting borrowers, lenders should be required "to make reasonable attempts" to use a borrower's preferred channel of communication rather than prescribe that the lender "should first attempt to contact a borrower through that channel". Lenders establish borrowers' preferred communication methods and do endeavour to use them. However, this may not always be possible and the Code should reflect this. This requirement should also be subject to any lender security requirements or reasonable policies on how they communicate with individual borrowers. For example, a lender should not be required to address an individual customer's query in a public forum.

Paragraph 2.9 – as noted elsewhere, NZBA considers that the record keeping requirements in the Code are too prescriptive and should provide lenders the flexibility to determine how they evidence compliance with the lender responsibility principles.

3 Advertising

Question 3.1
Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.

NZBA cautions against the Code restating or paraphrasing existing obligations under legislation such as the Fair Trading Act (for example, paragraph 3.2(a)). The Code should not repeat any existing legal obligations that are set out in legislation, other than the CCCFA. In addition, when restating legislation the Code should be careful to not paraphrase a legislative requirement in a way which could impose additional obligations above what the legislation requires.

In addition, the requirement that the fact that an interest rate is variable should be given equal prominence to the rate itself is not supported. In an advertisement, it is appropriate that the rate receives the greatest prominence. In addition, it is not evidence why the Code highlights variable interest rates and not fixed or capped rates.

The example relating to paragraph 3.4 implies that where a subsequent interest rate is not ascertainable, the range will still be. However, this may not always be the case and there should not be an expectation that lenders need to foresee (and therefore potentially cap) what the maximum interest rate for a product will be.

Question 3.6
Do you agree that it is appropriate for all advertising of high-cost short-term credit agreements to carry a risk warning? Why or why not?

NZBA supports high-cost short-term credit arrangements carrying a risk warning. These agreements are likely to create confusion for borrowers and therefore result in customers making uninformed or confused decisions.

4 Inquiries into and assessment of borrower's requirement and objectives

Question 4.1
Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.

As noted above in our answer to question 1.2, NZBA strongly supports flexibility and scalability in the Code, and submits that careful consideration should be given to the most effective way to ensure that lenders can both scale up and down inquiries in circumstances where this is considered appropriate.

Question 4.4
For lenders, please provide an estimate of cost (both one-off costs and ongoing costs), over and above costs you incur in inquiring into a borrower's requirements and objectives today:

- **that you may incur if you had to comply with the relevant principles and responsibilities without any guidance in these areas;**
- **that you may incur if you comply with the guidance in this chapter.**

In the timeframe available NZBA has been unable to collate industry data as to costs. We are aware that lenders will incur costs in relation to policy and process reviews, possible systems rebuilds, as well as both upfront and ongoing training requirements, among other costs.

Question 4.6
If you are a lender, and based on your current experience, do you consider the guidance in this chapter will in practice require you to provide "personalised financial advice" under the Financial Advisers Act 2008, and if so how?

As noted in our submission, NZBA considers that the Code will not require a lender to provide personalised financial advice. This is because the relevant responsible lending principle only require an "assessment" of whether it is "likely" that the credit will meet the borrower's requirements and objectives. They do not require the lender to go further and provide the borrower with an opinion or a recommendation in relation to the requested product or any alternative. We support this position, and note that in many instances lenders will provide personalised financial advice as a means to meet their obligations as a responsible lender.

Question 4.7
Please provide any comments you may have in relation to the specific guidance for high-cost short-term credit agreements, reverse mortgages, buy-back transactions, and pre-approved offers of credit.

NZBA is concerned that as currently drafted, the Code limits a lender's ability to make a pre-approved offer to credit to existing customers and prohibits offers to new customers.

In our view, the Code does not sufficiently recognise that a pre-approved offer of credit to a customer is based on stronger information as to a customer's creditworthiness than a customer-initiated offer of credit.

Currently pre-approvals are primarily offered on products such as credit cards and personal loans, but in theory could be made in relation to any credit product. Pre-approvals are also made in relation to variations on existing products, such as limit increases on credit cards and personal or home loan "top-ups". Some lenders may pre-approve repayment holidays on personal loans. Offers are currently made primarily to existing customers, but in some instances a lender may "pre-approve" a credit card in conjunction with another product such as a home loan in relation to which the lender would conduct the inquiries as required by the Code. With the development in recent years of comprehensive credit reporting whereby

lenders and service providers such as power or telecommunication companies share information as to a customer's creditworthiness, the Code should be flexible to allow for this practice to develop within the requirements of the Code.

Further, lenders are more conservative in making pre-approved offers than in offering credit in a traditional manner. Offers will not be made to any customer who has indicated that they do not wish to receive such offers, and lenders will rule out customers based on certain customer behaviour. This might include customers who have been declared bankrupt, have had recent declines, post account write-offs or defaults, have declared financial difficulty or are showing signs of financial difficulty (such as using a shadow limit). Lenders also conduct modelling based on a customer's previous behaviour as it relates to propensity to repay. This modelling is more comprehensive and reliable than information provided by a new customer as it is based on behaviour statistics rather than anecdotal evidence. Pro-active offers of credit may be extended to customers with the following characteristics (though different banks will have slightly different criteria):

- Sound performance in other facilities;
- Accounts with individual and/or combined credit limits below maximum thresholds;
- Accounts that maintain balances within defined parameters based on credit limit;
- Accounts that meet current/lifetime delinquency thresholds;
- Accounts that display a history of payment patterns in excess of minimum repayment amount obligations by defined margins; and
- Meets minimum risk standards – these are applied by utilisation of behavioural scoring. This is an empirically derived statistical measure based on the actual dynamics of a customer's account and rates the account as to its propensity to be good or bad in terms of repayment performance. A wide variety of account characteristics such as balance to limit relationship, account tenure, transaction type mix, repayment ratios and current/previous delinquency events go into the equation to determine a behavioural score that is dynamic in that it updates at least monthly and is therefore reflective of what is currently happening to a particular account.

Pre-approval offers will also be dependent upon a lender's internal risk appetite for each product portfolio that specifies the performance outcomes that are acceptable. The making of offers is tuned to ensure that the business acquired is within that risk appetite.

When presented to customers, an offer may be pro-active in the form of a letter, email or online banking pop-up that makes a direct approach to a customer, or passive in the form of an option available through online banking that a customer may elect to take up. An offer may highlight the impact of future repayments in taking up the offer. Some lenders may send a pre-approved card with an offer letter which requires activating in order to take up the offer.

Offers are conditional upon the customer accepting the offer of credit or increased credit. Some offers will be conditional upon the customer confirming that they have not had any material change in circumstances.

There is no evidence to suggest that pre-approved offers of credit should be treated any differently to products offered through a more traditional format. Indeed, lenders are more conservative in pre-approved offers and a customer will generally be offered less through a

pre-approval than they could get if they approached a new lender in a branch. The likelihood of delinquency is able to be predicted using historical behavioural data. This is more accurate than information provided by a customer in a standard application process. Pre-approved credit products are less risky than general credit products. For example, the 90+ day delinquency rate for credit cards where a customer has completed a 'traditional' application process is higher across the industry than the equivalent delinquency rate where a product has been pre-approved (either by a standalone pre-approval, or in conjunction with a home loan).

On this basis NZBA strongly submits that the Code should be clarified to make it clear that lenders can exercise the same judgment as to the level of inquiries as for any other type of credit using information already held by that lender. As noted above, the Code should be future-proofed by amending to allow for the developments in comprehensive credit reporting to allow making a pre-approved offer to a new customer based on the increased flow of credit information between lenders and service providers.

5 Inquiries into and assessment of substantial hardship (borrowers)

Question 5.1
Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.

Substantial Hardship

NZBA strongly supports this objective of the Code to ensure a customer will not experience substantial hardship as a result of entering into a credit contract. However, NZBA is concerned with several of the provisions which relate to this requirement.

In particular, we are concerned that the Code does not allow lenders to decline a hardship application for technical reasons. NZBA submits that the Code should not put a gloss on the legislation, and that a lender should be entitled to decline a hardship application if customers do not meet the unforeseen hardship criteria set out in the CCCFA.

Further, we submit that the expectation in the Code that lenders will consider amending agreements in favour of a borrower even if they do not meet the unforeseen hardship criteria imposes additional obligations on top of the legislative requirements. There will also be considerable administrative cost and resource required to notify customers and provide comprehensive information each time they miss a payment. While the objective sought to be furthered is supported by NZBA, we suggest these requirements could be imposed after a certain number of missed payments within a specified time period.

We are also concerned that the requirement in paragraph 5.2(i) that lenders predict changes over the entire term of the loan is particularly onerous on lenders. This will require forecasting both changes to interest rates and the circumstances of the borrower over an extended period, which in the case of a home loan might be 30 years. This will be impractical and in many instances impossible for products with longer terms. Therefore, we strongly submit that lenders should only be required to foresee future changes for a specified

timeframe from the start of the term. We consider a 12 month timeframe would be appropriate.

Finally, we note it is common industry practice to use objective information about borrowers' typical expenditure to assess whether it is likely that an individual borrower will make repayments without suffering substantial hardship, instead of self-reported data from individual borrowers about expenses. Our members report that such objective, industry information is more accurate predictor of affordability than self-reported data. The Guidance appears to allow lenders to continue to use this type of objective data as paragraph 5.3(c) allows lenders to make inquiries by using information from reliable third parties. However, the Code would benefit from clarification on this point. In our view, paragraph 5.2 should be amended to refer explicitly to objective, external data regarding standard living costs as a factor lenders may consider.

Verification

NZBA agrees with the principle that a lender should not be able to "contract out" of its responsibilities under the Code through the use of third party intermediaries such as brokers.

However, we are concerned that the Code confuses the relationship between a lender and an intermediary, such as a broker. That relationship is one of independent contractors. This may include some contractual element and the provision of training to contractors in relation to a lender's product but there is no employee, agency or partnership arrangement between the two parties. A lender will have no authority over the intermediary and the intermediary will have no authority to act on behalf of a lender. Indeed, the intermediary will actively offer the products of any number of competing lenders at once.

Paragraphs 5.11 and 5.12 of the Code allow a lender to rely on information provided by the borrower, unless the lender has reasonable grounds to believe the information is not reliable. In that instance the lender will be on notice to verify the accuracy of that information. However, a more onerous standard is applied where information is provided by an intermediary, as paragraph 5.13(b) will:

a) require lender supervision and audit of all intermediaries' internal policies and procedures; or
b) require lenders to verify information provided by the intermediary in circumstances where the lender would not have had to verify that same information had it been provided directly by the borrower.

Lenders will not be in a position to supervise and audit the internal processes of each intermediary, so the effect of paragraph 5.13 will require lenders to verify all information provided by an intermediary in all circumstances. NZBA submits that a more consistent approach would allow a lender to treat the information provided by an intermediary as the borrower's agent on the same terms as information provided by the borrower directly. This would maintain the requirement that a lender is on notice in the event that they have reason to believe the information is not reliable, and will have to verify that information. Such an approach provides the intended protection and does not relieve lenders of their obligations

under the Code, but avoids unnecessary duplication of information checking and monitoring of intermediaries by lenders.

NZBA submits that the following amendment to paragraph 5.13 will achieve this outcome:

*5.13 Lenders may ask for or receive information from intermediaries, such as brokers acting on behalf of the borrower. Where that is the case, the lender**:***

(a) should require that those intermediaries implement and maintain appropriate processes for the collection and verification of information, consistent with the Guidance set out in this Code;

(b) should take reasonable steps to remedy any potential breach of the Guidance set out in this Code by any intermediary, if the lender has any reason to believe that such intermediary's practices are not in fact consistent with the processes referred to in (a); and

(c) may rely on information provided to it by intermediaries as though it had been provided to it by the borrower, unless the lender has reasonable grounds to believe that the information is not reliable, in which case the lender should take reasonable steps to verify the information.

6 Inquiries into and assessment of substantial hardship (guarantors)

Question 6.1
Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.

NZBA is conscious of the competing privacy concerns that lenders have to manage in relation to transactions involving guarantors. Lenders have to achieve a balance between protecting the privacy of borrowers in hardship or default and engaging with the guarantor. It would be beneficial if the Code could provide more guidance on how lenders should manage this interaction, particularly in relation to timing of disclosure of the hardship/default to the guarantor. We suggest the following language to address this point:

> *A lender may elect to notify a guarantor of possible issues with the borrower's debt repayments where hardship or default has occurred, but should alert the guarantor at the point a borrower is 90 days or more in arrears.*

Question 6.5
Are the inquiries that should be made of the borrower to assess whether it is likely that the borrower will be able to make the payments under the agreement without suffering substantial hardship also relevant for the guarantor. Why or why not?

NZBA considers that certain provisions relating to guarantors are unnecessarily onerous to lenders. For example, paragraph 6.2 requires a lender to undertake a serviceability assessment for a guarantor to the same level as the borrower. This will require significant changes to current processes and may restrict access or increase the cost of credit, which is likely to affect first homebuyers the most significantly. NZBA queries the need for such an assessment, and considers it inappropriate that the Code considers a guarantor must be

able to afford the entire liability of the borrower, even in situations where a guarantor's liability is limited to a particular asset. Further, when determining what information to seek from a guarantor, the Code should be clear that lenders can take into account that the risk profile of the guarantor is different to that of the borrower.

We are also concerned that the fact that guarantors will in most instances be required to obtain independent legal advice is not appropriately reflected the Code.

7 Assisting borrowers to make an informed decision

Question 7.1
Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.

Code / Financial Advisers Act Overlap

NZBA does not support the Code *requiring* lenders to provide personalised financial advice.

However, we strongly support the ability of a lender to meet its obligations under the Responsible Lending Principles by providing personalised financial advice. Lenders should not be obliged to provide personalised financial advice but in many instances will choose to provide information through either personalised financial advice or class advice.

The relevant responsible lending principle requires a lender to make inquiries so as to be satisfied that it is likely that a particular product will meet the borrower's requirements and objectives. However, it does not require a lender to go further and determine whether the product will completely meet those objectives and requirements and decide whether there are other products which may better meet those objectives.

That said, lenders will, and often should, go further than just undertaking a likely assessment of the suitability of a product, with the result that they will provide personalised advice to the borrower under the Financial Advisers Act. It is likely that the Code guidance will, from a practical perspective, encourage lenders to provide personalised financial advice, with the result that lenders may provide more personalised financial advice after 6 June 2015 than they did before.

We note that some lenders will not be in a position to give personalised financial advice effectively to customers. Making this type of advice compulsory may lead to an increase in miss-selling and confusion as some lenders are ill-equipped to adequately provide personalised advice. Equally, some lenders would find the costs prohibitive to comply with the Financial Advisers Act. Even for large lenders like banks there would be significant cost as well as practical difficulties in retraining staff by June 2015 if the Code were to make personalised financial advice mandatory.

Legal Advice

NZBA submits that the guidance at paragraph 7.4 should be clarified to make clear that a recommendation of independent legal advice is only required where a lender had

"reasonable" grounds to believe that the circumstances set out in paragraph 7.4(a) and (b) apply based on conversations they have had with the borrower or information they have received, rather than requiring any level of investigation by the lender.

Total Payments

Paragraphs 7.2(e) and 7.21(h) refer to the disclosure of total repayments and the total amount payable under the agreement. There is a disconnect between these requirements and the requirement to disclose the total interest charges as part of initial disclosure under clause I of Schedule 1 of the CCCFA. In addition, the requirement under the CCCFA only applies to loans of seven years or less. The guidance in the Code should be aligned with the CCCFA requirements.

10 Fees

Question 10.1
Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.

While the unreasonable fees issue remains before the courts, NZBA considers the commentary in the Fees section of the Code is misplaced. Given that this section could soon to be outdated following a court ruling, we consider a more appropriate approach would be to outline in this section that reasonableness of fees is a matter to be determined by the courts, and lenders should have regard to any relevant precedent as it is passed down by the court. This allows the Code flexibility to develop with the Common Law.

In the alternative, we make the following comments on this section:

- the reference to "profit" at paragraph 10.10 should be removed, but the Code should keep the language of costs and reasonable standards of commercial practice.
- paragraph 10.10 associates the concept of a financial year to fees, which is associated with the notion of profits. The Code should more appropriately require lenders to have fee review processes in place which could be tied to trigger-events or be time based.
- paragraph 10.5(b) should be removed on the basis that there is no legislative requirement in the CCCFA for a lender to mitigate losses caused as a result of a borrower's default.

11 Subsequent Dealings

Question 11.1
Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.

Paragraph 11.4 should be clarified to set out whether the requirement regarding the use of a credit balance to repay another amount the borrower owes only relates to credit balances for

an “agreement” (as defined in the lender responsibility principles) and not any credit balance the borrower has with the lender.

Paragraph 11.8 should be expanded to address a lender’s obligations in the event that a substantial hardship assessment undertaken in response to a borrower request to increase their existing credit determines that the borrower does not now meet the substantial hardship test for their existing borrowing (where the lender was not previously aware of the borrower’s change of circumstances). In our view it will not be in the interests of the borrower for the lender to demand repayment of the existing credit, and we submit that the Code should address whether there is an expectation that the lender initiate hardship discussions with the borrower.

12 Default and other problems

Question 12.1
Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.

As noted above in response to question 5.1, NZBA submits that lenders should not be required to notify a borrower every time a payment is missed. This is because the cost of providing the notification proposed at paragraph 12.2 would be significant due to the increased communication requirements, requiring more staff to manage this process and increased communication costs.