FINANCIAL SERVICES FEDERATION

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The Consumer Policy Team
Ministry of Business Innovation and Employment
WELLINGTON

By email to: consumer@mbie.govt.nz

CONSULTATION IN RELATION TO POTENTIAL CCCFA & FSP ACT EXEMPTIONS FOR SECURITISATIONS

We are writing to comment on the above document, which was sent to us with your email of 27 August, and which seeks feedback on proposals to exempt aspects of securitisations from -

a) New section 26A of the Credit Contracts and Consumer Finance Act ("CCCFA"), which will require disclosures in connection with transfers of consumer loans; and

b) Related new amendments to the Financial Service Providers (Registration and Dispute Resolution) Act 2008 ("FSP Act") which will require transferees of consumer loans to register under the FSP Act and join an ADR.

Background & Impact of Proposals on FSF Members: By way of background, the Financial Services Federation ("FSF") is New Zealand's industry organisation for responsible and ethical financial institutions. The FSF's members provide financing, leasing, investment, and insurance services to over 1 million New Zealanders, and its affiliate members include internationally recognised legal and consulting firms. A list of its members is attached at Appendix A.

Many FSF members are consumer lenders, some of whom presently fund their operations by transferring loans into securitisation structures, or have in the past. Despite those transfers, the transferring lender (the loan "originator") invariably maintains all client contact with the relevant borrowers and generally manages the customer relationship in the same way as if no securitisation had occurred, and all involved intend that to continue in the absence of default by the originator.

For members who thus fund themselves by securitisation arrangements, the proposals in the consultation document are vitally important, as it would be impracticable and costly for them to make the disclosures required by section 26A of the CCCFA to borrowers when loans are thus transferred. There would also be no benefit to their borrowers in requiring them to do so, as the loan originators continue to manage the entire customer relationship after such transfers, and indeed if disclosures were required, that could have unfavourable consequences by resulting in confused borrowers etc.

The FSF is accordingly strongly supportive of the proposal to exempt securitisations of consumer loan receivables from section 26A of the CCCFA.

The FSF also notes that when the Credit Contracts and Financial Services Law Reform Bill was introduced to Parliament in 2013, in submissions to officials that it made jointly with the New Zealand Bankers Association ("NZBA") prior to the Select Committee stage, the FSF proposed that what is now section 26A should be amended so as not to apply to securitisations. The FSF subsequently repeated that position in its submission on that Bill to the Commerce Select Committee, and also expressed support for officials' preferred alternative of exemption by regulation, as is now proposed.

A copy of the revised text of clause 19 of that Bill as suggested by the FSF and the NZBA at that time is attached as Appendix B, as reference will be made to some of its content below. It is referred to below as "the 2013 FSF / NZBA text".

The FSF's membership also includes –

a) 2 members that are engaged in debt collection activities;

b) Consumer lenders who do not fund themselves using securitisation structures, but who often use the services provided by debt collection agencies;

The disclosures required by section 26A of the CCCFA are also very relevant to those members, some of whom have other issues with section 26A. However, the FSF accepts that those issues transcend those with which the consultation document is concerned.

FSF Submissions:

The FSF's submissions now follow in the same sequence as the bold questions in the consultation document, which are set out below for convenience.

Submissions - Proposed scope of regulations to exempt securitisations from requirements for disclosure of transfers in section 26A CCCFA:

As a preliminary submission, the FSF confirms it strongly agrees that regulations under section 138(1)(da) of the CCCFA are needed to exempt disclosure of loan transfers in circumstances where the debtor's on-going relationship remains with the initial creditor, such as with securitisation structures.

Feedback is welcomed on whether the scope of an exemption could be defined in this way, and whether the particular criteria outlined would be appropriate for the scope of an exemption or there are other criteria that should be considered

When this question asks "whether the scope of an exemption could be defined in this way", the FSF takes "this way" to be referring to the proposal immediately before this question, namely –

> *"…an exemption for securitisations could be captured effectively by using a definition which defines the type of entity to be exempt. A definition could encompass a special purpose vehicle (SPV) with specific features…"*

The FSF accepts that many securitisations involve loans being transferred to a special purpose entity or "SPV", and that what is stated at subparagraphs a. – c. of paragraph 8 of the consultation document is likely to be true of many or even most securitisations. As a result, it is no doubt desirable that an exemption should refer to transfers to an SPV, and that the concept of SPV be defined.

However, the FSF understands that not all securitisations or similar transfers necessarily involve an SPV. While arguably not strictly "securitisations", similar funding facilities may involve a transfer of loan contracts to a funder such as another financial institution which is ***not*** an SPV, and which accordingly may not have the characteristics described in paragraphs 8 b. or c. of the consultation document. Such facilities may however be little different in effect from those securitisations that do involve SPVs, including because at all material times the originator maintains the relationship with the borrower.

The FSF submits that such facilities should also be exempt from section 26A, and that any exemption should not be confined only to transfers to SPVs. Instead, the exemption ought also to exempt transfers to entities that are not SPVs where all material aspects of the post-transfer debtor / creditor relationship remain between the originator and the borrower, in the absence of originator default.

For those reasons, the 2013 FSF / NZBA text applied not only to transfers to SPVs but also to transfers where the originator continued to manage the customer relationship (referred to in Appendix B as "serviced terms"). The FSF submits that any exemption in regulations should also take that approach.

The FSF also notes that the drafting of the exemption and s26A refers to consumer credit contracts only. It does not reference consumer lease as defined in s60. While most consumer leases will be consumer credit contracts under s16 there may be circumstances where a consumer lease does not meet the definition of a consumer credit contract, yet still meets the s60 definition of a consumer lease. In such a case the creditor would still want the s26A disclosure exemption to apply.

The FSF therefore submits that the wording should be amended to reference "consumer credit contract or a consumer lease".

a. ***Do you consider that a provision like this is required as well as or instead of the formulation above? If you consider a provision should be defined this way, what are your views on how such a provision can be effectively defined to ensure that it does not capture situations such as transfer of a credit contract to a debt collector?***

When this question asks if "a provision like this is required as well as or instead of the formulation above", the FSF takes "a provision like this" to be referring to the proposal immediately before this question, namely –

> "…*an exemption could be provided for circumstances where a transfer is made on terms that provide for the initial creditor to provide management and administrative services in relation to the consumer credit contract*."

As just explained in its response to the immediately preceding question, the FSF considers that a provision of that kind would be required ***as well as*** a formulation of the kind referred to in paragraph 8 of the consultation document, which referred only to SPVs.

The FSF does not see any real difficulty distinguishing between such a situation and that in which loans are transferred to a debt collector. Transfers to a debt collector might readily be carved out of the exemption by reference to some or all of the following:

- The fact that the transfer would mean that the originator ceased to have an exclusive relationship with the relevant borrowers;
- The fact that the transferred loans were in default;
- Description of the nature of the transferee's business (namely as that of a collection agency).

b. ***In your view, do the proposals outlined above adequately describe the circumstances in which an exemption is appropriate, avoiding under- and over-capture? Does the first part above, which proposes to define an exemption by the type of SPV that is exempt, adequately define the scope of an exemption, or is something broader required?***

As already noted, the FSF does consider that something broader than an exemption referring only to SPVs is required, since not all relevant funding facilities necessarily involve SPV entities.

If the exemption were broader and applied not only to transfers to appropriately defined SPVs but also to –

a) transfers of the relevant loans back to the originator at the end of the term of the relevant funding (which needs to be covered, as noted in para 10 of the consultation document); and

b) transfers to non-SPV funders where all material aspects of the post-transfer debtor / creditor relationship remain between the originator and the borrower, in the absence of originator default;

so that the exemption was effectively in favour of three types of loan transfer (as with para 3 of the 2013 FSF / NZBA text) then the FSF would consider that appropriate, and as likely to avoid under- or over-capture.

c. ***Do the proposals outlined above ensure that securitisations are exempted where necessary, while ensuring that the debtor will be notified if debt is transferred to another party (for example, a debt collector)?***

The FSF considers that what has already been addressed by it above should ensure that securitisations are generally exempted where necessary, for the reasons already given above.

The FSF believes that the debtor would still be notified if the debt was subsequently transferred to another party such as a debt collector, simply because such a second transfer would not be within the scope of the exempted transactions if the exemptions are drafted as the FSF has suggested above.

d. ***Where the debtor's relationship is transferred from the initial creditor to another creditor during the period that a loan is securitised, this transfer should be notified to the debtor. Are there situations***

where this would occur, and what impact would this have if this type of transfer occurred and a loan was then transferred back from a securitisation?

A situation of this kind would be unusual in the experience of FSF members but the FSF would not necessarily always agree that "this transfer should be notified to the debtor". For example, the transfer might be back to a party related to the originator, perhaps to facilitate a further funding facility by the same group, in circumstances where the same persons and procedures in the originator's group would continue to apply to the borrower relationship before and after the transfer.

In such circumstances the reasons for exempting the initial transfer would also apply in favour of exempting the subsequent transfer to the related party, and both transfers would effectively be invisible to the borrower. From a borrower's perspective, and in a real sense, loan management would be likely to be seamless throughout and there would be no policy reason to require an unnecessary disclosure.

Such considerations led to the inclusion of transfers to "related entities" in the 2013 FSF / NZBA text.

Submissions - Proposed scope of regulations to exempt transfers from the requirements of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 in the same circumstances as where they are exempted from section 26A CCCFA:

e. ***In your view, does this proposed scope, where the exemption is defined consistent with the exemption for disclosure of transfer, ensure that all debtors will continue to have access to dispute resolution when needed, particularly for situations where a debt is referred to a debt collector or repossession agent, while reducing unnecessary compliance costs?***

The FSF considers that an exemption from the FSP Act defined consistently with an exemption from disclosure under section 26A of CCCFA is desirable. In particular, an exemption from the FSP Act aligned to one from section 26A of CCCFA could ensure that all debtors would continue to have access to dispute resolution when needed, as –

a) for situations where a debt is subsequently referred to a debt collector, as already noted at the FSF's response to question c above, that second transfer would not be within the scope of the exempted transactions (and very likely the debt collector would already be registered under the FSP Act and belong to an ADR, independently of and before the transfer occurred anyway)

b) for situations where a debt had been transferred to an SPV or other funder and an originator default occurred so that the SPV or other funder wanted to collect future payments directly from borrowers, then –

    i. in the case of non-SPV funders of transferred loans, since their business would most likely already comprise financial services wider than those referred to in the section 26A exemption's definition of an SPV, they too would very likely already be registered under the FSP Act and to belong to an ADR because of their other non-exempt activities;

    ii. in the case of SPVs, the possibility of them wishing to contact borrowers directly is probably unlikely, but the exemption from the FSP Act might be expressed so as to cease when the SPV wanted to contact borrowers, so that the obligation to join an ADR would arise at that time.

f. ***In your view, does this proposed scope avoid under- or over-capture of creditors?***

The FSF would consider such a scope to be appropriate for a related exemption from the FSP Act, and as being likely to avoid under- or over-capture.

Concluding Comment: The FSF trusts that its above submissions will be helpful, and would be happy to discuss as necessary if you require any clarification or further input on the above matters.

Yours sincerely

Lyn McMorran
EXECUTIVE DIRECTOR

APPENDIX A

<table>
<tr><th>Debenture Issuers - (NBDT)
Non-Bank Deposit Takers</th><th>Vehicle Lenders</th><th>Finance Company
Diversified Lenders</th><th>Credit Reporting</th><th>Insurance</th><th>Affiliate Members</th></tr>
<tr>
<td><u>Rated</u>
• Asset Finance (B)
• Avanti Finance (BB)
• Fisher & Paykel Finance (BB+)
• Medical Securities (A-)

<u>Non-Rated</u>
• Mutual Credit Finance
• Prometheus Finance</td>
<td>• BMW Financial Services
• Branded Financial Services
• Community Financial Services Limited
• European Financial Services
• Fleet Partners NZ Ltd
• Mercedes-Benz Financial Services
• Motor Trade Finances
• Nissan Financial Services NZ Pty Ltd
• ORIX NZ
• SG Fleet
• Toyota Finance NZ
• Yamaha Motor Finance</td>
<td>• Advaro Ltd
• Centracorp Finance 2000
• Dorchester Finance
• Finance Now
• Future Finance
• GE Capital
• Home Direct
• Instant Finance
• John Deere Financial
• Oxford Finance Ltd
• DTR Thorn Rentals
• South Pacific Loans
• TW Financial Services</td>
<td>• VEDA Advantage

<u>Debt Collection Agency</u>
• Baycorp (NZ)</td>
<td>• Autosure
• Protecta Insurance
• Provident Insurance Corporation Ltd

<u>Associate Members</u>
• Southsure Assurance</td>
<td>• American Express International (NZ) Ltd
• Buddle Findlay
• Chapman Tripp
• Deloitte
• Ernst & Young
• Finzsoft
• KPMG
• PriceWaterhouseCoopers
• SimpsonWestern</td>
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APPENDIX B

DRAFT CARVE OUT OF SECURITISATIONS FROM CLAUSE 19 OF THE CC&FSLR BILL / FROM PROPOSED SECTION 26A OF CCCFA

"(3) Nothing in this section applies to a transfer of a consumer credit contract which is -

(a) a transfer to a securitisation SPV;

(b) a transfer to a person which is made on serviced terms (the transferee); or

(c) a transfer by a securitisation SPV or a transfereee to the creditor from whom the consumer credit contract was acquired (the original creditor), the sponsor or a related entity of the original creditor or sponsor.

(4) For the purposes of this section -

"**related entity**" includes-

a) any entity that forms part of a group for the purposes of the Financial Reporting Act 1993 or would do so if that Act applied to any group of which that entity is a member, and

b) a company that is a related company as defined in the Companies Act 1993.

"**securities**" has the same meaning as in the Securities Act 1978;

"**securitisation SPV**" means an SPV -

a) *to which a consumer credit contract is, or will be, transferred by a creditor;*
b) which has granted, or will grant, a security interest in that consumer credit contract for the benefit of its secured creditors;
c) which carries on a business of acquiring, holding or originating consumer credit contracts (including any business incidental to that purpose, such as issuing securities in connection with acquiring, holding or originating consumer credit contracts); and
d) does not carry on any other business,

and includes a "covered bond SPV" as defined in the [Reserve Bank of New Zealand (Covered Bonds) Amendment Act 2013].

"**serviced terms**" means that as part of the arrangements in connection with the transfer of the consumer credit contract but subject to the terms of any servicing agreement with the acquiring creditor, either the original creditor, the transferring creditor or any other person provides management and administrative services in relation to the consumer credit contract.

"**sponsor**" means the person principally responsible for establishing the programme pursuant to which consumer credit contracts were or are transferred to the securitisation SPV or the transferee.

"**SPV**" means a special purpose vehicle. [***Drafting Note****: This definition is as per the Reserve Bank of New Zealand (Covered Bonds) Amendment Bill noted above*]

"**transfer**" includes an assignment, sale, or other form of disposal***. [Drafting Note****: Due to this definition, the bracketed words that appear in the first line of proposed section 26A can now be deleted]*