



## FINANCIAL SERVICES FEDERATION

19 March 2021

Commerce Commission New Zealand  
44 The Terrace  
PO Box 2351  
Wellington, Wellington 6140  
New Zealand

By email: [certification@comcom.govt.nz](mailto:certification@comcom.govt.nz).

### **Draft consultation: Due diligence duties for directors and senior managers**

Thank you for the opportunity for the FSF to comment on the draft guidance: Due diligence duties for directors and senior managers (“the Guidance”). The FSF is grateful to the Commerce Commission for the opportunity to submit feedback on the Guidance, and for the Commission’s on-going efforts in aiding our members, and the wider lending community, in their transition to becoming compliant under the new Credit Contracts and Consumer Finance laws and regulations.

By way of background, the FSF is the industry body representing responsible non-bank lenders, credit-related insurance providers, and fleet leasing providers. We have over 65 members and affiliates providing these products to more than 1.5 million New Zealand consumers and business. Our affiliate members include internationally recognised legal and consulting partners. A list of our members is attached as Appendix A. Data relating to the extent to which FSF members (excluding Affiliate members) contribute to New Zealand consumers, society and business is attached as Appendix B.

The FSF agrees with the Commerce Commission that the new obligations and duties under the Credit Contracts and Consumer Finance Act (CCCFA) are extensive and significant, including the new due diligence duties. Our members appreciate the Commerce Commission’s efforts in attempting to simplify and provide insight into how best to meet compliance with these obligations from the top down.

The FSF submits that on the whole the Guidance appears to be reasonable and helpful. The obligations and duties imposed on directors and senior managers appear to be laid out comprehensively and prescriptively. The FSF appreciates the efforts undergone by the Commerce Commission to continually structure guidance to centre around the consumer and their rightful protection.

This submission is in general agreement with the Commerce Commission and its intended purpose; however, we do have a few suggestions we would like the Commission to consider during this round of consultation that the FSF believes would improve the Guidance by

making it more consistent with the legislation it is providing guidance on and more user-friendly.

### *Definition of a lender*

The FSF suggests that the Guidance adopts the same definition of “lender” as is in the CCCFA. The definition of lender in the draft Guidance appears to be much broader than its parent legislation, and the FSF has concerns regarding the interpretation in this Guidance versus the interpretation in the legislation. The emphasised suggestion would be to remove **“A lender means a person or business...”** and replace it with the already established definition **“a lender means - (a) a creditor under a consumer credit contracts: (b) a transferee under a buy-back transaction”**.<sup>1</sup> Creditor is then respectively defined in the interpretation section.<sup>2</sup>

### *Definitions of a director and a senior manager*

The FSF notices a large difference between the structure and format of the two definitions. The definition of who is a director appears to be well a formulated and thorough definition which is consistent with the definition found in the Financial Markets Conduct Act 2013 (“FMCA”)<sup>3</sup>. It is then followed by a non-exhaustive definition list, again consistent with the definition provided in the FMCA [14].

Turning to the definition of a senior manager, the test is not quite the same. Despite also being consistent with its respective definition in the FMCA,<sup>4</sup> the Guidance references the “critical test” of defining a senior manager to be a person who exercises “significant influence” over the management or administration of an entity yet there is no attempt nor indication of what might be viewed as “significant” influence. There are various references to large and small enterprises and reporting lines to the CEO but nothing that given any clear guidance on this point. Given the gravity of the role of “Senior Manager”, the statutory duty that one must take on and the consequences of being found wanting in this regard are significant. The FSF struggles to find actual commentary or insight as to what form this critical test takes and therefore suggests further guidance to clarify this definition. The Reserve Bank Act 1989, which regulates registered banks, has provided a definition of “significant influence”.<sup>5</sup>

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<sup>1</sup> Section 9B of the CCCFA 2003

<sup>2</sup> Section 5 of the CCCFA 2003

<sup>3</sup> Section 6 FMCA 2013

<sup>4</sup> Section 6 of the FMCA 2013

<sup>5</sup> Section 5 of The Reserve Bank 1989 significant influence in relation to a registered bank, means—  
(a) the ability to directly or indirectly appoint 25% or more of the board of directors (or other persons exercising powers of management, however described) of the registered bank; or  
(b) a direct or indirect qualifying interest in 10% or more of the voting securities issued or allotted by the registered bank

The FSF queries whether this legal definition of “significant influence” in relation to registered banks should then be considered relevant, in an amended context, to other lenders.

The FSF is acutely aware that the Guidance is in no position to provide a legal definition of “significant influence”, however, urges that further clarification by way of examples would be most appropriate in this instance. This could take the form of a non-exhaustive list of exemplar senior manager roles, as was similarly done for the director definition.

#### *Remainder of the Guidance*

The FSF submits that the remainder of the guidance is thorough and well described, particularly the sections relating to the obligations around systems and procedures for lending related tasks. The FSF notes however that in some aspects the Commerce Commission has used language that extends beyond what is actually required in the legislation. Currently, the Guidance appears to be prescriptive, with heavy detailing of what is required at each step of the systems and procedures life cycle. A prescriptive approach has always been heavily contended in consultations, primarily because of the diversity in the size and nature of domestic businesses.

The FSF therefore urges the Commerce Commission to reconsider the prescriptive nature of the remainder of the Guidance, and seriously consider a more principles-based approach, as is successfully implemented in other guidance.

#### *Concluding remarks*

The FSF again reiterates the importance of protecting the consumer and commends the Commerce Commission’s efforts to do that. This protective purpose is well represented in the Guidance, however, this has resulted in the Guidance becoming more prescriptive. The FSF urges the Commerce Commission to adopt a more principles-based approach in the Guidance. This will ensure that the Commission is not unnecessarily punishing the lender and forcing a redistribution of resources into compliance with the Guidance as opposed to customer satisfaction. The Guidance should not go any further than the legislation already does.

Once again, the FSF is grateful to the Commerce Commission for the opportunity to make a submission on the draft for consultation: Due diligence duties for directors and senior managers and would be very happy to speak to any points which may require clarification.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Diana Yeritsyan', written in a cursive style.

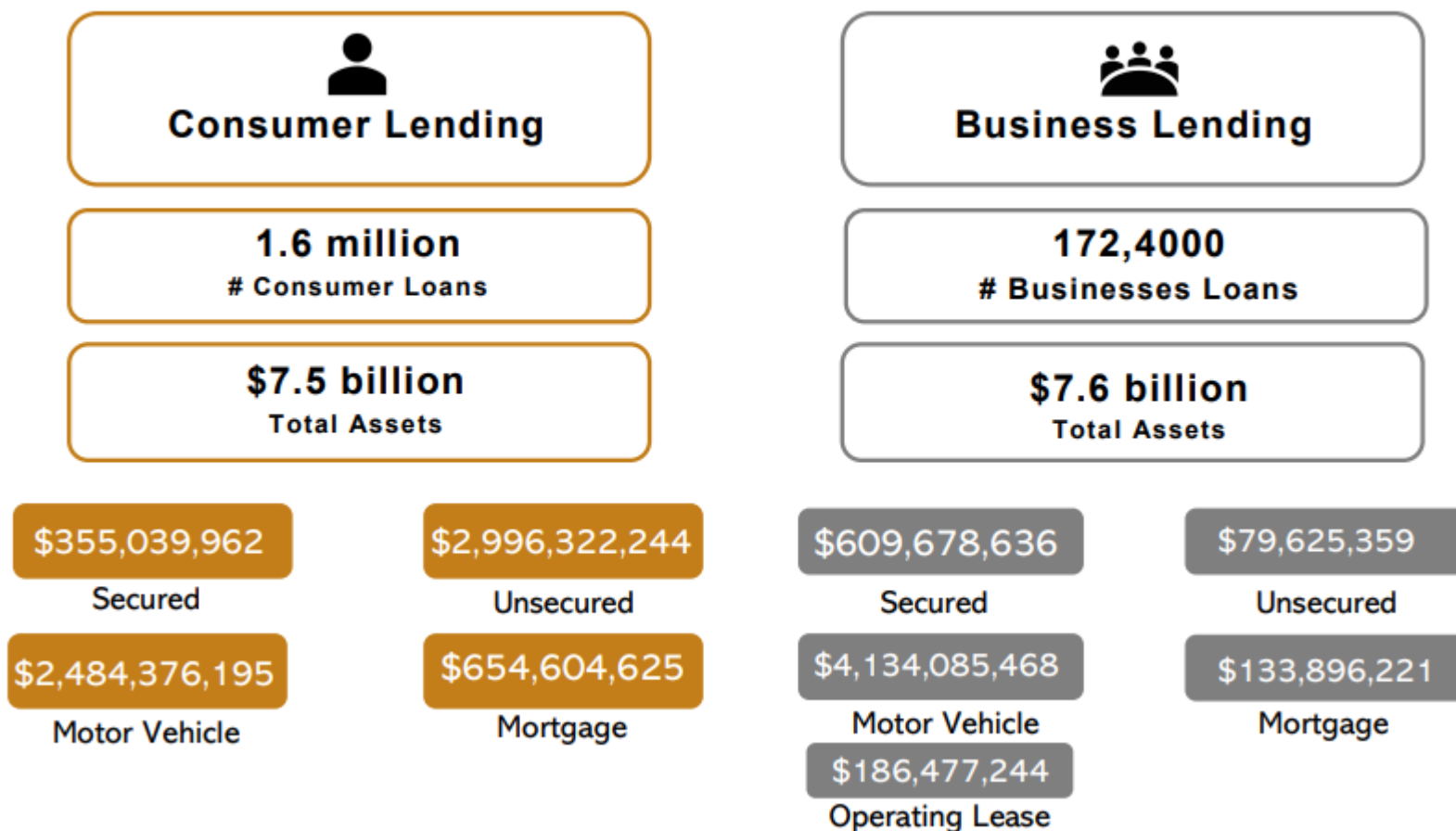
Diana Yeritsyan  
Legal and Policy Manager

## Membership List as at February 2021

Non-Bank Deposit Takers Leasing Providers	Vehicle Lenders	Finance Company Diversified Lenders	Finance Company Diversified Lenders	Credit-related Insurance Providers	Affiliate Members
<u>Rated</u> Asset Finance (B) <u>Non-Rated</u> Mutual Credit Finance Gold Band Finance ➤ Loan Co  <u>Leasing Providers</u> Custom Fleet Fleet Partners NZ Ltd Lease Plan ORIX NZ SG Fleet	AA Finance Limited Auto Finance Direct Limited BMW Financial Services ➤ Mini ➤ Alphera Financial Services Community Financial Services European Financial Services Go Car Finance Ltd Honda Financial Services Mercedes-Benz Financial Motor Trade Finance Nissan Financial Services NZ Ltd ➤ Mitsubishi Motors Financial Services ➤ Skyline Car Finance Onyx Finance Limited Toyota Finance NZ Yamaha Motor Finance	Avanti Finance ➤ Branded Financial Caterpillar Financial Services NZ Ltd CentraCorp Finance 2000 Finance Now ➤ The Warehouse Financial Services ➤ Southsure Assurance Flexi Group (NZ) Limited Future Finance Geneva Finance Home Direct Instant Finance ➤ Fair City ➤ My Finance John Deere Financial Latitude Financial Metro Finance Pepper NZ Limited Personal Loan Corporation Pioneer Finance Prospa NZ Ltd South Pacific Loans	L & F Group ➤ Speirs Finance ➤ Speirs Corporate & Leasing ➤ Yoogo Fleet Thorn Group Financial Services Ltd Turners Automotive Group ➤ Autosure UDC Finance Limited  <u>Credit Reporting &amp; Debt Collection Agencies</u> Baycorp (NZ) ➤ Credit Corp Centrix Collection House Equifax (prev Veda) Illion (prev Dun & Bradstreet (NZ) Limited Intercoll Quadrant Group (NZ) Limited	Protecta Insurance Provident Insurance Corporation Ltd	255 Finance Limited Buddle Findlay Chapman Tripp Credit Sense Pty Ltd Experian EY FinTech NZ Finzsoft GreenMount Advisory Happy Prime Consultancy Limited HPD Software Ltd KPMG LexisNexis PWC Simpson Western Verifier Australia  Total: 66 members



The Financial Services Federation (FSF) is the association for responsible finance and leasing companies operating in New Zealand. This infographic is a snapshot of our 40 lending members, the membership list can be found at our website [www.fsf.org.nz](http://www.fsf.org.nz).



FSF lending members data survey period as at 29 February 2020 . Data collected and aggregated by KPMG. Values in NZ\$.