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HomeChoice

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HomeChoice is a licensed service
provider in terms of FAIS legislation

THE NATIONAL CREDIT REGULATOR

Attention: Ms Nomsa Motshegare, CEO

Via e-mail: nmotshegare@ncr.org.za

4 October 2013

Dear Ms Motshegare

RE: DRAFT REVISED AFFORDABILITY ASSESSMENT GUIDELINES

1. Introduction

- 1.1. We refer to the Draft Revised Affordability Assessment Guidelines and Additional Amendments to the Credit Providers' Code to Combat Over-Indebtedness sent to the Credit Providers Association for comment on 26 September 2013.
- 1.2. We also refer you to the letter from HomeChoice dated 14 June 2013 in response to the initial Affordability Assessment Guidelines published for comment. We attach a copy of the letter as Annexure A. In this letter we stated that the draft guidelines were inadequate, as they:
 - 1.2.1. Apply a single process to a wide variety of different types of credit;
 - 1.2.2. Apply a process to individuals without adequately considering the varied household circumstances of customers;
 - 1.2.3. Are untested in their impact and effectiveness, particularly in the low income market;
 - 1.2.4. Ignore the growing internet and home shopping environment;
 - 1.2.5. Lead to reduced access to credit for black women in particular;
 - 1.2.6. Do not reflect international best practice;
 - 1.2.7. The new proposed guidelines have also not addressed these issues, which we believe are critical to our business.

1.3. We thank you for the opportunity afforded to credit providers to submit comments on the proposed guidelines. We fully support any attempt to combat over-indebtedness and reckless lending and believe that it is essential that we discuss the proposed guidelines with the relevant stakeholders at the NCR. In anticipation of such a meeting, we would like to provide the following comment for your consideration:

2. **HomeChoice Business Model:**

2.1. HomeChoice is a retailer of homeware products such as bedding and appliances, and offers these products on credit. Owing to the nature and value of these products, HomeChoice mainly enters into small credit agreements with an average value of R1 500.

2.2. HomeChoice has been operating successfully in the credit retail market for over 28 years and currently has a customer base of 500 000. During this time HomeChoice has developed extensive knowledge of credit risk management in its target market which is categorised as LSM 4 to 8 groups, and maintains a consistent focus on the responsible management of credit risk. The HomeChoice customer is female, and lives in a household whose earnings vary, but have an average of R7,200pm. Customers with a good payment record with HomeChoice become eligible to qualify for an unsecured term loan from FinChoice, a group subsidiary.

2.3. HomeChoice differs from traditional retailers in the following ways:

2.3.1. HomeChoice operates exclusively as a home shopping retailer and does not have any physical stores. Our products are sold through channels such as the Internet, mobile phones, telephone and a small quantity of orders are mailed. HomeChoice therefore has no direct personal contact with customers.

2.3.2. Unlike clothing retailers who offer credit facilities, and furniture retailers who offer secured instalment credit agreements, HomeChoice concludes a separate unsecured instalment credit agreement for each purchase. Our customers are therefore subject to credit verification for each purchase. The average term of our credit agreements is 16 months.

3. **Key comments related to the Proposed Affordability Guidelines**

We are concerned that the proposed guidelines will have an outcome that is contrary to the spirit and ambit of the National Credit Act ("NCA"). The NCA aims to remove barriers that have prevented consumers from gaining access to credit.

The guidelines as they are currently proposed will, for reasons set out below, prevent certain categories of customers gaining access to credit. This is a result of the affordability guidelines prescribing rules that credit providers will need to follow which do not take account of the specific circumstances of individual consumers, nor do they consider current internet shopping practices. Furthermore, there is no flexibility for credit providers to apply internal business processes that have been tested over time.

We further submit that the guidelines fail to consider the relative size of transactions adequately, and expect the same level of rigour and validation for a small credit agreement that, for example, allows a customer to buy a bedding set for R1,500, as for a customer taking out a home loan for R500,000. The requirement that income be validated is too onerous when the purchase value is small relative to a customers' income.

3.1. The Affordability Rules will not create a fair and objective assessment for all customers

In terms of the NCA, a credit provider must use fair and objective measures to assess and determine whether a potential consumer can afford to enter into the loan agreement. The legislator therefore clearly accepted the principle that different credit providers may need to apply different assessment models and procedures, and that different "rules" may apply to different types of consumers.

We submit that the manner in which the new proposed guidelines intends to prescribe the way in which discretionary income will need to be determined, will not result in a fair and objective test for all consumers, and particularly for low income customers, and people with informal employment.

3.1.1. Informal sources of income are ignored

The NCA makes provision in section 78 for all income from any source to be considered in assessing a customer's affordability. In contrast to this, the proposed guidelines would allow a credit provider to only consider income that can be validated by means of payslips, banks statements or other credible confirmation.

In the HomeChoice middle income mass target market, a large proportion of customers have informal income either as their main source of income or to supplement their salary. Common sources of informal income include rentals from letting available space in houses or backyards, providing services to the community where they live, informal trading or even domestic workers and gardeners. This informal income is usually received in cash, and it is therefore impossible to validate these amounts. In our country where we have unemployment levels of over 25% and high levels of poverty,

it is an economic and social reality that many people earn an informal income and/or supplement their wages.

The requirement that only validated income can be used in an affordability assessment gives rise to an unfair assessment in cases where the customers can actually afford the repayment of credit as a result of their informal income sources.

3.1.2. The expense table would prevent low income consumers buying products from HomeChoice

The proposed table of minimum living expense norms ("Table 1") creates similar inequalities. Despite the proposed guidelines allowing for the possibility of a customer having expenses below the minimums set out in the table, a credit provider may only consider such a customer's real expenses if they are able to obtain "credible written evidence" of the expenses. **In practice it is impossible to obtain credible written evidence** of food, transportation and in many cases, accommodation expenses, as these expenses are paid for in cash. It is also not possible to determine whether a prospective customer is fully disclosing their expenses.

The majority of our customers live in households with multiple members, and these expenses are shared in a variety of ways. This is particularly evident in the HomeChoice market where over 80% of customers are women. The sharing of expenses means that the actual expenses are impossible to verify. The customer's actual expenses are therefore not able to be used in an affordability assessment when they do fall below the minimums prescribed in Table 1.

The affordability guidelines are therefore likely to prohibit all customers with low formal incomes from buying HomeChoice products on credit, even when they can afford them. We submit that this will further entrench the disadvantages that our customers face in getting equitable access to credit.

3.1.3. Credit bureau data does not always reflect a customer's true expenses

There are a significant proportion of HomeChoice customers who have debt obligations listed in their name on the credit bureaux, whereas in reality another household member is responsible for paying this debt. In our investigations into customers who would fail the proposed affordability rules, it is common to find that a husband, mother or other family member pays some bureau commitments listed under the customer's bureau record.

In making a fair and objective assessment of such customers' affordability, it is necessary to take into account the fact that these debts are being paid by someone else. The affordability guidelines do not appear to have considered these customers' situation.

3.2. Credit sales through the Internet and direct marketing channels have not been considered in the proposals.

The Internet and mobile phone channels are showing the fastest growth in retail sales and credit granting internationally, and in HomeChoice is also the sales channel that has grown the fastest. The requirement for customers to submit documentation through these channels is not feasible or practical, and the proposals will therefore restrict sales through these important growth areas. We believe it is important to encourage shopping via these channels in our market as many South African women in the mass market work long hours, rely on costly commuter transport and are unable to easily reach formal retail outlets.

The overwhelming majority of our transactions are concluded through Internet or telephone-based channels. Expecting a customer transacting by phone to submit paper proof of income or expenses undermines the convenience and potential of these business channels. We submit that paperwork requirements create an excessive barrier given the small value of the credit we provide. Further, and more concerning, this will stifle the growth of this fast-growing retail sector.

3.3. Tests conducted on HomeChoice customer base using proposed guidelines

The HomeChoice business model has been tested through all credit cycles and, HomeChoice and FinChoice are confident that their current processes align with the spirit and intention of the NCA to prevent reckless credit and over-indebtedness and provide fair and accessible credit to its customers. This is demonstrated by the low proportion of customers who, due to changes in their life circumstances, eventually approach debt counsellors.

We have tested the proposed guidelines on our customer data. In these tests, 95% of the people who would fail the proposed guidelines remain good, paying customers and show no signs of becoming over-indebted. These people are thus given an unfair assessment by the proposed guidelines.

4. Key Comments related to the Draft Amendments to the Code of Conduct

4.1. The NCA allows credit providers to have their own assessment mechanisms, and the code should not undermine this right.

The NCA specifically allows credit providers to determine their own mechanisms for performing affordability assessments (section 82 (1)). Therefore the requirement that all credit providers follow a single model and approach is in contravention of this section of the Act.

4.2. The LIFO principle unfairly penalises short-term lenders

The proposed use of the LIFO principle in the Debt Counselling Rules System ("DCRS") appears to be based on the opinion that credit providers are responsible for causing a customer to become over-indebted, and to penalise those responsible. It ignores the liability of the customer.

In our experience, most customers who apply for debt review have become over-indebted not as a result of credit extension, but owing to changes in life circumstances. These changes could include illness, changes in employment status, the loss of income by other household or family members, or unexpected funeral expenses. Customers in our target market do not have the financial resources to withstand the impact of any of these life changing circumstances and are therefore not able to meet debt obligations.

The application of the LIFO principle is also aimed at penalising short-term credit providers as these are likely to be the most recent loans taken out by a customer. The assumption that providers of short-term credit are more responsible for causing customers to become over-indebted than long-term credit providers is in our view overly punitive and incorrect.

While we appreciate the intent of the NCR to penalise credit providers who have over-leveraged consumers, it is inappropriate to assume that this is the only reason that consumers apply for debt review, and create rules based on this flawed assumption.

4.3. The DCRS changes unfairly penalise responsible lenders

The proposals for changes to the DCRS are similarly based on a desire to punish credit providers who are assumed to have over-leveraged customers, whether or not this is the case. For example, if a customer now has lower income or higher expenses than at the time that the last credit was granted, the stipulations in point 4.5.3 unjustly penalise credit providers who have correctly extended credit that was affordable at the time.

5. Conclusion

HomeChoice and FinChoice confirm their support of the NCR in its drive to combat over-indebtedness. However, as we have attempted to demonstrate above, the proposed guidelines could result in the following:

5.1.1. cause serious negative impacts on our business;

5.1.2. many consumers will be refused access to credit when they should qualify as credit customers.

This is contrary to the aim of the NCA and we therefore urge the NCR to consider alternative solutions and to consider international best practice. As we referred to in our previous submission, the UK has a very different approach to curb over-indebtedness.

Based on our reservations outlined above, we would welcome an opportunity to meet with the NCR to discuss our views on the proposed guidelines and the unfortunate impact these are likely to have on consumers in the middle to lower income market. We believe that through personal engagement we could assist in developing solutions which are fair to both consumers and credit providers, while also meeting the NCR's objectives of combating over-indebtedness.

Yours sincerely

Michael Roux

Director: Credit Risk

cc. Mr . L Mashapa via Email: lmashapa@ncr.org.za

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2 December 2013

**The Chairperson
Portfolio Committee on Trade and Industry**

Parliament
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Attention: Ms J Fubes

And to

The Committee Secretary

A Hermans: ahermans@parliament.gov.za; and to M Herling: mherling@parliament.gov.za; and
D Widdington: diddington@parliament.gov.za

SUBMISSIONS ON DRAFT NATIONAL CREDIT AMENDMENT BILL [B47-2013]

We refer to your request for submissions on the National Credit Amendment Bill ("amendment bill" or "bill") to the National Credit Act 34 of 2005 ("NCA").

INTRODUCTION

1. HomeChoice (Pty) Ltd ("HomeChoice") is a credit provider specialising in small unsecured credit agreements. HomeChoice, with its sister company FinChoice (Pty) Ltd, ("FinChoice") provides retail credit products including loans. We refer to both companies as "we".
2. HomeChoice is a member of the Credit Providers Association ("CPA") and of the Large Non-Bank Lenders Association ("LNBLA") that represents credit granted to consumers in excess of R33 billion under the NCA.
3. We have relevant voice that must be heard, distinct from larger retail credit providers or the Banking Association of South Africa ("BASA"), or smaller credit loan providers that are members of Micro Finance South Africa ("MFSA"). We deliver these submissions with specific reference to the market sector we represent and in addition to those submissions filed by other associations.
4. HomeChoice is concerned that customers (a) in the lower income groups, (b) in remote areas and (c) presently remotely utilising the internet or telephonic access to apply for credit (not in the physical presence of the credit provider), will unfairly in a discriminatory manner be deprived of access to the credit market.
5. Such discriminatory effects (seemingly unplanned) of the proposed draft Affordability Assessment Guidelines ("guidelines" or "proposed affordability assessment guidelines") published for comment in September 2013, read with the intended NCA amendments, will render access to credit impossible, expensive and result in unfair discrimination against these classes of consumers as well as those credit providers such as us, that serve them.
6. Save for the unfair discriminatory effects, it appears that the powers provided by the amendment to the Minister and the National Credit Regulator ("NCR"), amounts to very broad discretionary powers without constraints, that will amount to the exercise of powers that would inter alia (a) undermine and erode the objects, spirit and purposes of the NCA, as well as (b) prescribing measures that are *ultra vires* the NCA, if not unconstitutional.
7. It is legally and constitutionally unacceptable that the NCR and the Minister may rewrite legislation through a process of issuing guidelines. (Under the constitutional requirement of rationality of a legislative provision or exercise of public power, if the provision or conduct is irrational or arbitrary, it must be declared unconstitutional and invalid). From the intended amendments read with the affordability guidelines in draft, it appears that the amendment will arbitrarily infringe on credit providers' right to create their own risk and affordability assessment criteria under the NCA.

HomeChoice (Pty) Ltd (Reg. No. 1985/002759/07)

Directors RE Garratt (Chairman) SM Maltz (Group CEO) LM Buckham (CEO) A Kirsten (COO)
A Abrahams ES Bester P Burnett CA Mackenzie LC Pretorius ME Roux GR Wills

8. There are irreconcilable contradictions in the method(s) under section 48(2)(b) whereby the Minister either "after consultation with" the National Credit Regulator" or in section 82(2) the Minister, "in consultation with" the National Credit Regulator") are authorised to prescribe or publish guidelines.

PRINCIPAL SUBMISSIONS

- Our principal objections relate to the discriminatory effects of the amendments, read with the guidelines, that will result in discriminatory deprivation of access to credit for an important sector of the credit market.
- Additionally and without consultation, the amendment and guidelines will arbitrarily impact on sound and empirically proven reliable credit scoring models and affordability assessment processes, such as that which we apply in respect of our customers. Currently the NCA allows a credit provider to determine for itself any scoring or other evaluative mechanism or model to be used in managing, underwriting and pricing credit risk, as well as any affordability assessment mechanism.
- The pending amendment, read with the proposed affordability assessment guidelines, impose unrealistic requirements will render the affordability assessment process more costly, with no added benefits, such as that credit bureau reports must be obtained on any assessment.
- The value of credit bureau information is limited, secondary to any immediate assessment of a customer and is of limited or reduced value (given the effect of section 71A read with "credit amnesty" notice recently issued).
- The NCA neither (a) requires that credit providers must file consumer credit information with any Credit Bureau (save for the limited reporting requirements under section 69(2)), nor (b) requires credit providers to obtain reports on a consumer when making an assessment under section 81(1) read with section 82(1) and section 61(5). The guidelines read with the amendment will be *ultra vires* and discriminatory in effect.

PROVIDING CREDIT TO HISTORICALLY DISADVANTAGED CONSUMERS

9. HomeChoice's business reaches out to consumers that historically have been unable to access credit in a fair and equal manner.
10. Our average customer profile reflects the important role we serve in the economy to empower historically disadvantaged consumers by providing access to credit. The following facts applicable to our customers should be taken into account:
- 84% of our customers are women and breadwinners;
 - Our average customers are black aspirant and upwardly mobile middle class;
 - Our average customers resides in geographically remote rural areas;
 - Our customers that are reliant on internet or telephonically originated credit agreements;
 - We have a growing customer base of 500,000+ customers;
 - We engage in business with a large repeat customer base;
 - The average personal income: R7000pm (not household income);
 - The average purchase value: R1500, ranging from R299 to R5000;
 - The purchase structure: cash, 6 and 16 month instalment terms; and
 - Less than 50% of new customer applications are accepted for credit due to our internally determined risk and affordability rules.
11. The provision of credit and loans serve to alleviate socio-economic distress during periods of financial hardship in remote, rural areas or other undeveloped areas or under circumstances where the consumer otherwise have no access to credit.
12. HomeChoice extended its mail order sales into a multi-channel direct marketer, and provides credit to the expanding urban middle-income mass market in southern Africa.
13. HomeChoice sells homeware products, mainly bedding, but also kitchen appliances, luggage and electronic items by way of home shopping through internet, mobile sites and through digital internet based catalogues.
14. HomeChoice has no face-to-face contact with consumers and we do not operate any retail shopping facilities as all credit agreements are remotely concluded. We employ over 1,000 people. About 93% of our revenue (R1.4bn in 2012) is derived from credit agreements with consumers, which agreements are all concluded remotely.

PREVIOUS SUBMISSIONS BY HOMECHOICE: NO RESPONSE

15. Submissions were made on the NCR's draft guidelines of 17 May 2013, the earlier draft amendment bill and the National Credit Act Policy Review Framework, as well as the revised Affordability Assessment Guidelines and Code of Conduct of 26 September 2013.
16. We annex a bundle of these submissions herewith in chronological order.
17. There has been no attempt by the recipients (NCR or the DTI) to engage with HomeChoice in any discussion or to invite any consultation on the concerns expressed in our submissions, notwithstanding delivery of these submissions as invited.
18. The submissions were clearly ignored. We intend to make oral representations in accordance with your invitation and will expand on the content hereof.

SUBMISSIONS ON NATIONAL CREDIT BILL

19. The NCA currently authorises the NCR to publish guidelines proposing evaluative mechanisms, models and procedures to be used in the assessment required by section 81.
20. Unamended, section 82(2)(b) provides that:
"The National Credit Regulator may –
(a) Pre-approve the evaluative mechanisms, models and procedures to be used in terms of section 81 in respect of proposed developmental credit agreements; and
(b) Publish guidelines proposing evaluative mechanisms, models and procedures to be used in terms of section 81, applicable to other credit agreements."
21. Section 82(3) that is not due for amendment provides that a guideline published by the National Credit Regulator is not binding on a credit provider.

AMENDMENTS TO SECTION 82(2) AND SECTION 48(1)(b) WITH GUIDELINES:

POSSIBLE *ULTRA VIRES* DEPRIVATION OF CREDIT PROVIDERS' RIGHT TO DETERMINE SCORING MODEL FOR AFFORDABILITY ASSESSMENT

22. The amendment of section 82(2)(b) provides that:
"The Minister, in consultation with the National Credit Regulator may:
(a) ;
(b) Publish guidelines proposing evaluative mechanisms, models and procedures to be used in terms of section 81 and any other guidelines related thereto, applicable to **[other]** credit agreements."
(Omission in bold print enclosed in square brackets and insertions underlined)
23. The amendments to section 82 will result in the Minister in consultation with the NCR to be empowered jointly to publish guidelines proposing evaluative mechanisms, models and procedures to be used for assessment.
24. The credit provider is expressly authorised in section 61(5) (read with section 65(1)) to determine its own assessment models:
"A credit provider may determine for itself any scoring or other evaluative mechanism or model to be used in managing, underwriting and pricing creditors, provided that any such mechanism or model is not founded or structured upon a statistical or other analysis in which the basis of risk categorization, differentiation or assessment is a ground of unfair discrimination prohibited in section 9(3) of the Constitution."
25. Read with section 61(5), section 82(3) clearly provides that a credit provider is free to create its own evaluative mechanisms, models and procedures to be used. Additionally, section 82(1) clearly empowers the credit provider to use its own affordability assessment process:
"...a credit provider may determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligations under section 81, provided that such mechanism, model or procedure results in a fair and objective assessment." (With our added emphasis).

26. Tension arises between on the one hand, the existing provisions of the NCA, current empirically sound assessment practices and on the other hand the proposed guidelines which are published with the intention to be binding on credit providers. This consequence is also indicated by the amendment of section 48(1)(b) that will be *ultra vires* the NCA and constitute an arbitrary deprivation of the credit providers' rights and will result in the reducing of access to credit for consumers.

SECTION 48(1)(b)

27. Currently section 48(1)(b) provides that on the consideration of an application to be registered as credit provider the NCR must consider the application relating to the following criteria:

"(b) the commitments, if any, made by the applicant or any associated person in connection with combating over-indebtedness, including whether the applicant or any associated person has subscribed to any relevant industry code of conduct approved by a regulator or regulatory authority;"

28. In the context of the current section 48, the registration criteria are focused on another "*relevant industry code of conduct approved by a regulator or regulatory authority*", but not to regulations by the Minister or guidelines of the NCR.

29. In the amended form of section 48(1)(b) it will provide that the criteria to be taken into consideration would include:

"... the commitments, if any, made by the applicant or any associated person in connection with combating over-indebtedness [**including whether the applicant or any associated person has subscribed to any relevant industry code of conduct approved by a regulator or regulatory authority**] or compliance with a prescribed code of conduct or a guideline including but not limited to an affordability assessment guideline prescribed by the Minister after consultation with the National Credit Regulator;"

(Omission in bold print enclosed in square brackets and insertions underlined)

30. In the context of section 48(b) read with section 82(2)(b) as amended, it seems clear that what is intended is that the Minister "*after consultation with the National Credit Regulator*" (in terms of section 48(b)) and in terms of section 82 may "*in consultation with the National Credit Regulator*"; either prescribe guidelines on affordability assessment and publish guidelines proposing evaluative mechanisms, models and procedures to be used in terms of an assessment under section 81.

31. Given the fact that non-compliance may be considered to be a bar to registration, it appears that the Minister and the NCR will seek adherence to the proposed guidelines. Whilst section 82(3), or the Act as amended as a whole, remains silent with any express provision as to the binding force of the prescribed guideline, it is suggested by the amended section 48(1)(b) that compliance will be a prerequisite *inter alia* in respect of the registration of a credit provider.

32. It is trite that the phrase "*affordability assessment*" now used in section 48(1)(b) refers to the assessment process under section 81, as this process is widely referred to as the "*affordability assessment*" within the industry, and is used in that meaning in section 81(1).

33. The amendment will undermine the credit providers' right to determine and make *affordability assessments* for itself as the law provides and in accordance with the spirit, objects and purpose of the NCA requires.

MINISTER'S DECISION: "IN CONSULTATION WITH" OR "AFTER CONSULTATION WITH" NCR

34. There are irreconcilable contradictions in the method(s) under section 48(2)(b) whereby the Minister either "after consultation with the National Credit Regulator" or in section 82(2) the Minister, "in consultation with the National Credit Regulator") are authorised to prescribe or publish guidelines.

35. The decision of the Minister after consultation with the National Credit Regulator, requires the Minister to act in good faith after having considered the NCR's views; but the Minister will not be bound to the view expressed by the National Credit Regulator. The decision is accordingly that of the Minister and the Minister may or may not adhere or give effect to the views of the National Credit Regulator.

36. The decision of the Minister "in consultation with" the NCR means they must take a decision jointly. The decision is not taken by the Minister independently. Under section 171(1)(b) the Minister, in consultation with the National Credit Regulator, may make regulations for matters relating to the functions of the National Credit Regulator, but the provisions of this subsection is limited to matters that does not authorise the prescribing of codes or guidelines. Any regulation, to have effect, must be made under section 171.

AFFORDABILITY ASSESSMENT GUIDELINES

37. Risk scoring models are the results of scientific mathematical analysis derived from consumer credit information. The best and most reliable source is the consumer and the payment profile of such consumer, held by the credit provider.
38. Over many years, empirical analyses have shown that internal credit scoring mechanisms based on reliable credit information obtained from our own existing customers are much more reliable than any secondary (in effect third hand) credit information derived from credit bureau scores.
39. Under the proposed affordability assessment guidelines a large sector of low income consumers as well as consumers in rural areas will be deprived from gaining access to credit at any level. The guidelines contain requirements that will result in unreliable results, skewed against the consumer and deprive the consumer from access to credit.
40. Additionally, credit providers such as us that are dependent on transacting with consumers by way of the internet or telephonic origination of credit agreements would be severely prejudiced through the requirements of the proposed affordability assessment guidelines.
41. We have delivered submissions on the NCR's Affordability Assessment Guidelines, but we have had no response to our commentary and critical discussion of the proper guidelines. We incorporate these submissions as if repeated herein.
42. Against the above discussion of the legally untenable aspects of the amendment, we refer to NCR's proposed Affordability Assessment Guidelines, and summarise some aspects of concern below.
43. We emphasise that our submissions are based on our business of providing responsible credit in a low income market sector. Our customers often are informally employed and self-employed and sometime rely on multiple incomes. They are loyal repeat customers with well-established credit records with us.

CONCERNS ON PROPOSED AFFORDABILITY ASSESSMENT GUIDELINES

THE GUIDELINES CREATE AN UNFAIR AND INADEQUATE ASSESSMENT

44. It is uncontroversial that low income earners and the informally employed (and remunerated) do not have access to sophisticated record keeping systems; especially where they are paid in cash or in goods. The guidelines discriminate against such consumers that will not be able to provide bank statements, pay slips or even written confirmation of the income earned, their expenses or of other sources of income.
45. As a credit provider, reasonably and as a matter of law, we are compelled to rely on the honesty and integrity of such consumer during the affordability assessment to provide us with answers that the NCA requires to be given "fully and truthfully".
46. In the absence of indications that would reasonably indicate to the contrary of the truthfulness or reliability of the information, we are bound to accept the veracity of the information provided by the consumer; also, lest not to discriminate against such applicant for credit.
47. In terms of the NCA, a credit provider must use fair and objective measures to assess and determine whether a potential consumer can afford to enter into the loan agreement. The NCA recognises that credit providers may need to create and apply different assessment models and procedures to different types of consumers.
48. The manner in which the new proposed guidelines prescribe the way in which discretionary income must be determined, will not result in a fair and objective test for all consumers, and particularly for low income customers, and/or people with informal employment.

INFORMAL SOURCES OF INCOME ARE IGNORED

49. Section 78 allows for income from any source to be considered in assessing a customer's affordability. In contrast to this, the proposed guidelines would force a credit provider to only consider income that can be validated by means of payslips, banks statements or other credible confirmation.
50. In the HomeChoice middle income mass target market, a large proportion of customers have informal income either as their main source of income or to supplement their salary. Common sources of informal income include rentals from letting available space in houses or backyards, providing services to the community where they live, informal trading or even domestic workers and gardeners. This informal income is usually received in cash, and it is therefore impossible to validate these amounts.
51. It is an economic and social reality that many people earn an informal income and/or supplement their wages. The requirement that only "validated" income can be used in an affordability assessment gives rise to an unfair assessment in cases where the customers can actually afford the repayment of credit as a result of their informal income sources.
52. The expense table would prevent low income consumers buying products from HomeChoice or from accessing any credit anywhere in the market, in practical terms. This inequality is further illustrated by the proposed table of minimum living expense norms ("Table 1").
53. Despite the proposed guidelines allowing for the possibility of a customer having expenses below the minimums set out in the table, a credit provider may only consider such a customer's real expenses if they are able to obtain "credible written evidence" of the expenses. In practice it is impossible to obtain credible written evidence of food, transportation and in many cases, accommodation expenses, as these expenses are paid for in cash. It is also not possible to determine whether a prospective customer is fully disclosing their expenses.
54. The lack of empirical foundation or realism for this arbitrary and discriminatory approach is illustrated once again, when the items that the credit provider are required to consider on the "Necessary Expenses" is below the arbitrary norm – these include "lease agreements, home loan statements, unencumbered deeds of title, personal credit records, vehicle leases or finance agreements". Such items do not exist in respect of low income consumers or within the market sector under discussion. The use of the expression that "credible written evidence" be obtained is meaningless where no such written material exists.
55. It is contrary to the purposes, spirit and objects of the NCA to escalate an affordability assessment to the level of a sophisticated forensic analysis or audit to confirm that the consumer provides answers (including on the "financial means, prospects and obligations" under section 78(3)), fully and truthfully to the credit provider.
56. Obviously if there are indications that reasonably indicate to the contrary of the truthfulness or reliability of the information, we will seek verification or reject the application by a dishonest or unreliable applicant.
57. The majority of our customers live in households with multiple members, and these expenses are shared in a variety of ways. This is particularly evident in the HomeChoice market where well over 80% of customers are women. The sharing of expenses means that the actual expenses are impossible to verify. The customer's actual expenses are therefore not able to be used in an affordability assessment when they do fall below the minimums prescribed in Table 1. The guidelines are unrealistic, discriminatory and effectively also arbitrary in tenor.
58. The affordability guidelines are therefore likely to prohibit all customers with low formal incomes from buying products (including from HomeChoice) on credit, even when they can afford them.
59. We submit that this will further entrench the disadvantages that our customers face in getting equitable access to credit.

CREDIT BUREAU DATA DOES NOT ALWAYS REFLECT A CUSTOMER'S TRUE EXPENSES

60. There are a significant proportion of HomeChoice customers who have debt obligations listed in their name on the credit bureaux, whereas in reality another household member is responsible for paying this debt. In our investigations into customers who would fail the proposed affordability rules, it is common to find that a husband, mother or other family member pays some bureau commitments listed under the customer's bureau record.
61. As stated above, credit bureau records are secondary information, notoriously unreliable and dependant on what is voluntarily filed by credit providers and others. There is no duty to file consumer credit information to credit bureaux save for section 69(2) and the report on settlement under section 71A, if enacted.

62. To force the use of an unnecessary expense in respect of an agreement to "verify" the consumer answers through a report from a credit bureau is not required, and undermines the requirements of section 81(1) that require responses that are made fully and truthfully; it imposes an undue burden on conclusion of the agreement with no concomitant benefit added, save an unnecessary cost.
63. Again, absent indications that would reasonably indicate to the contrary of the truthfulness or reliability of the information, we are bound to accept the veracity of the information provided by the consumer, lest not to discriminate against such applicant for credit.

TELEPHONIC ORIGATION, CREDIT SALES THROUGH THE INTERNET AND OTHER DIRECT MARKETING CHANNELS HAVE NOT BEEN CONSIDERED IN THE PROPOSALS.

64. The Internet and mobile phone channels are showing the fastest growth in retail sales and credit granting internationally, and in HomeChoice is also the sales channel that has grown the fastest.
65. The overwhelming majority of our transactions are concluded through Internet or telephone-based channels. Expecting a customer transacting by phone to submit paper proof of income or expenses undermines the convenience and potential of these business channels. We submit that paperwork requirements create an excessive barrier given the small value of the credit we provide. Further, and more concerning, this will stifle the growth of this fast-growing retail sector.
66. In any event, several provisions of the NCA allow for conclusion of credit agreements between parties that are not in each other's presence, or for example originated (concluded) on the telephone. The 2006 NCA Regulation 28(1)(c) allows for "... purposes of electronic or telephone originated pre-agreement statements and quotation for small agreements, the electromagnetic recording and transcribing of documents will be sufficient, provided that the consumer is supplied with copies of the documents within a reasonable time."
67. To place more onerous requirements on the consumer where the agreement is between parties not in each other's presence, amounts to discrimination. Also regulations 30(3), 31(4) read with 28(1)(c) similarly so provide for "remote" conclusion where the parties are not in each other's immediate presence.
68. We believe it is important to encourage shopping via these channels in our market as many South African women in the mass market work long hours, rely on costly commuter transport and are unable to easily reach formal retail outlets.
69. The requirement for customers to submit documentation through these channels is not feasible or practical, and the proposals will therefore restrict sales through these important growth areas.

CONCLUSION

70. We invite you to respond to and engage with us in discussion of these very fundamental and critical flaws that exist in the proposed Draft National Credit Amendment Bill [B47-2013], as well as in respect of the pending proposed Affordability Assessment Guidelines.
71. Should you require any further clarification or input, please do not hesitate to contact Mr Michael Roux at mrroux@homechoice.co.za.

Kind regards

MICHAEL ROUX

**GROUP RISK DIRECTOR
HOMECHOICE**

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HomeChoice

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14 June 2013

Attention: Mr L Mashapa

Dear Mr Mashapa,

Response to the Affordability Assessment Guidelines proposed by the NCR

Introduction

The NCR requested comments on the NCR affordability assessment guidelines to be issued under the National Credit Act 34 of 2005 ("NCA"), to be submitted by 14 June 2013.

We support the intent of the regulator in attempting to combat over-indebtedness and reckless lending, and welcome the NCR's intent to consult extensively with industry stakeholders.

About HomeChoice

Business:

- Retailer of homeware products, mainly bedding, but also kitchen appliances, luggage and electronic items
- Home shopping through internet, mobi (mobile) sites and catalogue
- Employs over 1,000 people
- Revenue (2012) R1.4bn, credit sales 93%
- Small unsecured credit agreements provide customers in entry level market sector with access to credit

Customers:

- Customer base of 500,000+
- Black aspirant middle class
- 84% of customers are women
- Average income: R7000 pm (personal, not household income)
- Average purchase: R1500, ranging from R299 to R5000
- Purchase structure: cash, 6 and 16 month instalment terms
- Bulk of customers are repeat customers
- Less than 50% of new customer applications are accepted for credit due to risk and affordability rules.

VARIOUS CONCERNS WITH THE DRAFT AFFORDABILITY GUIDELINES

A INAPPROPRIATE APPLICATION OF A SINGLE SET OF GUIDELINES:

The proposal provides for one set of guidelines across a wide variety of credit agreements, from large secured loans to small and short term credit products. The guidelines fail to distinguish between types of credit agreements or these categories.

Our business offers short term unsecured credit as an adjunct to the sale of relatively small homeware purchases. This is vastly different from a bank offering vehicle finance or home loans with large amounts over a long term horizon.

The application of a single set of guidelines to all types of credit is onerous for small credit agreements, and will negatively impact the customer's retail experience and ability to participate in the credit industry.

- Consider the example of an average customer, earning R7 000 per month, being asked to complete an extensive probe into her financial status in order to allow her to buy a duvet and curtain set on credit, that will cost her less than R120 per month (1.7% of her monthly income).

The NCA provides for numerous distinctions between small, intermediate and large agreements. The pre-agreement requirements for small loans differ significantly from that applicable to intermediate and large agreements with regard to *inter alia*, the extent of pre-agreement disclosure, processes and the content of the agreement. This distinction ensures that low value credit agreements are processed at a relatively low cost and therefore become accessible to the low income population (specifically in the market sector we serve).

We suggest that a similar distinction between categories of credit agreements be followed in respect of affordability guidelines. Hence the guidelines applicable to small agreements or short term agreements clearly must be less onerous and costly to follow and apply.

B: GUIDELINES APPLY AN UNTESTED METHODOLOGY

The guidelines apply an **untested methodology** that is likely to reduce access to credit rather than the intended reduction in affordability abuse.

The set of rules applies a hypothetical standard to affordability calculations, without any empirical evidence that they would succeed in achieving the aim of reducing unaffordable lending.

International experience shows that scorecard techniques are effective in predicting the likelihood that a customer will be unable to afford the credit, and allow for a clear measurement of their effectiveness.

We use scorecards as a key measure of credit acceptance. Our data shows that scorecards effectively have kept the likelihood of a customer being unable to afford credit at a very low level (under 1% of existing customer orders eventuate in debt review processes). In addition, we continually track the effectiveness of our scorecards and update them when necessary.

The impact of using an affordability process that does not effectively differentiate between high and low risk customers is that customers who fail an arbitrary and inappropriate affordability process will contain a high proportion of customers who actually can repay their credit commitments. This leads to a situation where customers who should be allowed to access credit are disallowed.

If the guidelines do reduce access to credit for the creditworthy, consumers will be forced to obtain credit from unscrupulous and unregulated providers. It is therefore imperative to be sure that the guidelines do not restrict credit unnecessarily for those who can afford it.

C: GUIDELINES ARE APPLIED AT AN INDIVIDUAL LEVEL

The guidelines are **applied at an individual level**, while customers' **lives and financial arrangements operate at a household level**.

This is contrary to the National Credit Act, which in 78 (3) (b) makes it clear that a customer must be assessed in the context of their household income and expenditure.

The guidelines assume that a norm, such as the value of expense items, apply to all members of a household equally, whereas female customers, when they are part of a household structure, are usually responsible for a disproportionate portion of the debt commitments.

D: HOME SHOPPING MODELS OF RETAIL SALES ARE IGNORED AND HINDERED

The home shopping model of retail sales, a growing proportion of international and local markets, is ignored and hindered by the proposed guidelines.

Internationally, internet and home shopping are growing significantly. In South Africa online retail sales are growing at 40% per year. In our own business, over 300,000 customers purchase goods from our company annually over remote channels, such as the internet, voice telephony and mobile phone platforms.

Regulations and guidelines for the credit market need to take these methods of customer interaction into account, and avoid creating barriers to this form of commerce. In particular, any requirement that a customer sends paperwork to a remote credit provider curtails the ability of the customer to transact in an online environment.

In the guidelines, there is a requirement for proof where discretionary income is outside a norm for a person with their income. In an online shopping environment, such proof is impossible to obtain.

Guidelines that reduce its potential for growth will hinder the development of the South African economy and again will not have reasonable results or provide fair results as it stultifies the purposes of the NCA and will result in the *ultra vires* exercise of powers under the NCA.

E: THE OUTCOME OF THE GUIDELINES MAY DISCRIMINATE AGAINST BLACK WOMEN

Household structures are more complex and extensive in the historically disadvantaged community, and there is a large network of interdependencies and financial transfers.

- Consider a woman who is informally employed with no employment record or proof of income. She will be prohibited from entering the market if a complex and costly structure of affordability assessments, including proof of income, is required. This would in turn amount to an assessment that is not a fair and objective assessment. The consumer would be deprived from entering the credit market and suffer discrimination.

The guidelines are written assuming that the only legitimate candidates for credit are the formally employed. This is not the South African reality.

Because the guidelines focus on an individual, women in those communities will be discriminated against in the provision of credit, being unable to prove their discretionary income.

International legislators have recognised that the variety of different types and size of credit agreements require different types of affordability assessment. For example, the UK Office of Fair Trading, in its "Irresponsible lending – guidelines for creditors", provides:

*4.11 The OFT accepts that it would be disproportionate to require creditors to consider **all** of these factors in **all** cases. The creditor should take a view on what is appropriate in any particular circumstances dependent on, for example, the type and amount of the credit being sought and the potential risks to the borrower*

*4.12 Creditors may employ the use of a variety of types and sources of information to assess affordability which **might**, depending on the circumstances, include some or all of the following examples (this is a non-exhaustive list):*

- *Record of previous dealings with the borrower*
- *Evidence of income*
- *Evidence of expenditure*
- *A credit score*
- *A credit report from a credit reference agency*

- *Information obtained from the borrower, whether on an application form or separately'*

Paragraph 4.12 is not a checklist of sources of information that we consider creditors must use – but a list of examples of the types and sources of information that might be appropriate. In our view, creditors may apply their own discretion (acting reasonably) in deciding the types and sources of information they employ to assess affordability. (OFT emphasis throughout)

SPECIFIC ISSUES IN THE NCA DRAFT GUIDELINES:

F: NORMS OF DISCRETIONARY INCOME BASED ON INCOME LEVEL (GUIDELINE 2.1):

Norms of discretionary income cannot be based on gross income.

The variety of household structures causes substantial variation in the amount of discretionary income available. Consider the following examples:

- A married woman who is the sole income earner of the household will have far lower discretionary income than a woman with the same income whose partner or adult children are employed.
- A young adult living with her income-earning parents will have far more disposable income than the same-income young adult living on her own or as the sole earner of the household.

The idea of a norm for discretionary income, based on an individual's gross income, assumes that each individual in the household has the same set of expenses. It is our experience that in a household, a single family member will pay the rent, or the running expenses of a vehicle, medical aid and many other costs.

For example, it is perfectly reasonable for a customer to actually not have any rental obligation, as it may be paid by someone else in the household, as bartering or exchange of services are an African reality, freeing up discretionary income.

The concept of a norm of discretionary income related to personal gross income is severely flawed. Instead, we are compelled to rely on a customer's assessment of their own ability and affordability criteria as part of our affordability assessment.

Our reliance on this is bolstered by the long history we have with our customers, showing consistent repayment performance and the ability to repay the credit extended.

G: PROVING DISCRETIONARY INCOME OUTSIDE THE NORMS (GUIDELINE 2.1):

Many customers have multiple sources of income, and some of them are impossible to prove. How, for example, is one meant to prove the income for any of the following?

- A hairdresser receives a proportion of her income in cash tips.
- A woman receives a contribution for living expenses from an employed adult living in her household.
- A woman works as a housekeeper for a number of different people on different days of the week.
- A family has an informal baking business, while being employed in the day.
- A woman receives rent from a lodger in her house.

A similar problem occurs for expenses. Many women control the household credit, while not always being the main breadwinner.

H: MAKING USE OF "ALL INCOME AND EXPENSES" (GUIDELINE 2.2)

Making use of "all income and expenses" should not require a list of income and expense items (Guideline 2.2).

Customers are very bad at estimating expenditure items, especially when they are irregular in incident or amount. The result obtained from such a list is misleading and unreliable as to true affordability and credit risk assessment.

The method proposed by the guidelines is inflexible, and does not adequately take into account the different ways that customers earn income, nor the different ways they incur expenditure, nor the different business models of credit providers in interacting with customers. In particular, in our direct business model where the customer buys goods on credit from the comfort of their homes, the method proposed is inflexible.

The administrative burden is substantial and negatively impacts the customer experience. This burden is disproportionate when the credit being applied for is small relative to income.

I: LEAVING A MARGIN OF 25% (GUIDELINE 2.3)

The draft guidelines provide that the credit provider should leave a margin of at least 25% of discretionary income for adverse changes in the economy or customers' circumstances (Guideline 2.3).

The margin that is required should differ based on the product structure and term, as well as on the nature and consistency of the customer's income. A single threshold is inappropriate.

For example:

- A credit provider considering an application for a variable interest product should consider the impact of a rise in interest rates and the impact on a customer's affordability.
- A credit provider considering an application for a long term product should consider the impact of inflationary pressures on a customer's discretionary income.
- At the other extreme, a one month loan product such as a "pay-day loan" only needs to be repaid that month, and should not require any monthly affordability buffer.

In our experience, customers who do end up going through a debt review process do so as a result of a significant event that affects their financial wellbeing. Typically the customer or one of their household members has suffered from death, sickness or unemployment, and this has a catastrophic impact on the household finances. *A 25% discretionary buffer does not create a safety net for these types of events.*

The discretionary buffer chosen is arbitrary, and is not appropriate for different customer circumstances or credit agreements.

SUMMARY

While we support and welcome the intent of the regulator in reducing abuse of affordability in the market, we believe that the draft guidelines are inadequate as they:

1. Apply a single process to a wide variety of different types of credit;
2. Apply a process to individuals without adequately considering the varied household circumstances of customers;
3. Are untested in their impact and effectiveness;
4. Ignore the growing internet and home shopping environment;
5. Lead to reduced access to credit for black women in particular;
6. Do not reflect international best practice.

We would welcome further consultation regarding the guidelines, and are happy to engage with the NCR in finding solutions to the problems they are attempting to resolve.

Kind Regards

Mike Roux
Group Risk Director

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HomeChoice

with us you can

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The DTI

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Attention: Mr Klaas Mokaba

28 June 2013

Dear Sir

HOMECHOICE GROUP LIMITED: SUBMISSIONS ON THE DRAFT NATIONAL CREDIT ACT AMENDMENT BILL AND DRAFT NATIONAL CREDIT ACT POLICY REVIEW FRAMEWORK:

PART I: INTRODUCTION

The draft National Credit Act Amendment Bill, 2013 was published for public comment on 29 May 2013, relating to National Credit Act 34 of 2005 ("NCA"), in Government Gazette 29 May 2013, GN 36504 and 36505.

The submissions below are our response to the

- Draft National Credit Act Policy Review Framework ("Framework") and
- Draft National Credit Amendment Bill ("Bill").

HOMECHOICE BACKGROUND

1. The HomeChoice Group is a leading credit-based direct marketing retailer selling homeware merchandise and financial services to the expanding urban middle-income mass market in southern Africa. The business evolved from mail order into a multi-channel direct marketer, since it was established in Cape Town in 1985, trading under the HomeChoice brand, with a customer base of more than half a million consumers.
2. HomeChoice (Pty) Ltd ("HomeChoice") is a credit provider specialising in small unsecured credit agreements. HomeChoice, with its associated credit provider FinChoice (Pty) Ltd, provides retail credit products including loans.
3. Our transacting is not face-to-face; it is based on direct marketing. Credit marketing and transacting include direct mail through a catalogue, electronic

channels such as the Internet, mobile phone and electronic mail and telemarketing through inbound and outbound call centres.

4. Consumers are often located in rural or other areas where they have limited access to credit providers or shops. Household necessities and similar goods are part of the product range accessed by consumers through the credit products so provided.
5. HomeChoice services a sector of the market in dire need of access to credit to purchase goods and services, obtain education and improve living standards.

The Business:

- Retailer of homeware products, mainly bedding, but also kitchen appliances, luggage and electronic items
- Home shopping through internet, mobile sites and catalogue
- Employs over 1,000 people
- Revenue (2012) R1.4bn, credit sales 93%

Customer Profile:

- Customer base of 500,000+
- Black aspirant middle class
- 84% of customers are women
- Large repeat customer base
- Average income: R7000pm (personal, not household income)
- Average purchase: R1500, ranging from R299 to R5000
- Purchase structure: cash, 6 and 16 month instalment terms
- Bulk of customers are repeat customers
- Less than 50% of new customer applications are accepted for credit due to risk and affordability rules.

6. The provision of credit and loans serve to alleviate socio-economic distress during periods of financial hardship in areas and under circumstances where the consumer otherwise would have had no access to credit (see paragraph 1.3.2 of the Framework).
7. HomeChoice's proven credit risk policy results in high rejections rates of applications, but gives rise to affordable credit, a stable customer base and responsible lending.

PART II COMMENTS ON NCR'S AFFORDABILITY ASSESSMENT GUIDELINES

8. We submit that the National Credit Regulator's ("NCR") request for comments on the Proposed Affordability Assessment Guidelines ("NCR Guidelines") is indicative of the NCR's proposed policy.
9. The NCR Guidelines are relevant to Amendment Bill and Framework. We enclose the NCR's request for comments on the Guidelines of 17 May 2013 with our submissions to the NCR (as annexures "A" and "B" hereto). We incorporate the submissions to the NCR, herein.
10. Our submissions of the NCR Guidelines illustrate the problems that will follow should the NCR proceed with the Draft Guidelines as currently formulated. The principal shortcomings of the NCR Affordability Assessment Guidelines relate to the use of generalised and unproven risk assessment criteria and a guideline over a wide and varying range of credit agreement types and categories.
11. One set of policy guidelines in respect of all credit transactions is inadequate and inappropriate (discussed in annexure "B" hereto), given the distinction drawn between the different categories of credit agreements in the NCA.

PART III GENERAL SUBMISSIONS ON PROPOSED AMENDMENTS**• SMALL CREDIT AGREEMENTS**

12. The NCA distinguishes between large, intermediate and small credit agreements. In respect of small agreements a further subcategory of short term loans has been created under the 2006 Regulations. For Small Credit Agreements the NCA provides for *simple pre-agreement procedures and less prescribed content* (see section 92(1) on small agreements and section 92(2) on intermediate or large agreements and on form section 93 read with regulations 30 and 31 of the 2006 regulations).
13. The NCA's distinguishing approach to small credit agreements contributed to a more affordable and accessible credit market for the consumer at the low cost market sector (small credit agreements).

- **ASSESSMENT MODELS**

14. The credit provider may determine the evaluative mechanisms or models and procedures to be used for credit scoring and affordability assessment. The NCA determines that a "*credit provider may determine for itself evaluative mechanisms or models and procedures to be used in meeting its assessment obligations*" (section 82(1)).
15. This approach is also recognised in section 61(5) providing that the "*credit provider may determine for itself any scoring or other evaluative mechanism or model to be used in managing, underwriting and pricing credit risk ...*".
16. We submit that a less onerous approach to conclusion of small agreements allows for more affordable credit provision and more accessible credit applications. The ability of the credit provider to determine its own assessment procedures and use its own proven credit risk management criteria allows for a more sustainable market and promotes responsible lending.
17. With regard to the foregoing, the intended amendments to the NCA will allow the NCR
 - to determine and apply a single set of guidelines to all categories of credit transactions (as the proposed Guidelines indicate) which will be inappropriate for the reasons discussed our submission (annexure "B") on the Guidelines;
 - to determine guidelines without consultation of the industry;
 - to undermine and destroy the independence of the credit provider to determine the evaluative mechanisms or models and procedures to be used for credit scoring and affordability assessment.

PART IV PROPOSED AMENDMENTS OF SECTIONS 48, 49 AND 57

- **AMENDMENT TO SECTION 48**

18. After promulgation of the National Credit Act (NCA), industry codes of conduct were drawn up by the industry and approved by the National Credit Regulator (NCR). We emphasise

- These codes contained practical procedures and practices that enabled the effective functioning of the credit industry, including the administration of debt review applications; and
- The proposed amendment to section 48 changes the process for creating codes of conduct, by allowing the NCR to issue codes without following any consultative process or inviting comment from the industry.

19. The proposed amendment therefore makes it possible for the Regulator to impose conditions for registration without considering

- (i) whether implementing such codes is practically achievable;
- (ii) the impact on industry; or
- (iii) whether such implementation achieves the objectives of the NCA; and
- (iv) whether a fair and objective assessment would be attainable.

20. Under the NCA currently a "*guideline published by the National Credit Regulator is not binding on a credit provider ...*" (see section 82(3)).

21. The NCA is also clear that the test of an evaluative system is not whether it conforms to a set of NCR guidelines, but whether the credit provider's evaluation results in a fair and objective assessment (see section 82(4)). Should the credit provider repeatedly fail to meet its obligations under section 81 or customarily use evaluative mechanisms, models or procedures that "*do not result in a fair and objective assessment, the Tribunal, on application by the National Credit Regulator, may require that credit provider to-*

- (a) *apply any guidelines published by the National Credit Regulator in terms of subsection (2) (b); or*
- (b) *apply any alternative guidelines consistent with prevailing industry practice, as determined by the Tribunal.*"

22. As set out above, the NCA already provides a process under which the credit provider's assessment mechanisms may be challenged under section 82(4).

23. The NCR can simply apply this process and the amendment is clearly not required.

24. Under the amendment, what is intended is that the NCR is empowered without due process to determine policies, impose same and cancel, suspend or refuse registrations.
25. After the amendment a credit provider's non-adherence to a guideline may result through the proposed powers of the NCR,
 - in summary cancellation of the registration of the credit provider;
 - upon a single breach of the guideline;
 - with no hearing or trial; and
 - without considering that a significant value of transactions, validly concluded (even worth billions) will be rendered unenforceable by the deregistered credit provider – clearly a result the drafters of the proposed amendment also did not consider; and
26. Such exercise by the NCR of the proposed powers will be unconstitutional as it will be *inter alia*
 - procedurally unfair,
 - amount to an arbitrary deprivation of property, and
 - a denial of the right to a fair public hearing before a court or another independent and impartial tribunal or forum.
27. Furthermore, the NCA regulates a wide variety of credit agreements; it is inevitable that any single set of guidelines would be inappropriate for some credit providers or customers.
28. Additionally, it is an untenable approach, in law and logic, to empower the Regulator to require conformity to a set (or sets) of guidelines, which may not have considered the particular characteristics of the consumer or credit provider, to be a condition of registration as a credit provider.
 - A credit provider who has a set of evaluative mechanisms which give rise to a fair and objective assessment of the credit applicant's affordability should be permitted to register as a credit provider, even if the evaluative mechanism does not conform to the guidelines under appropriate conditions.
 - The imposition of unilaterally determined "affordability assessment and standards for industry code guidelines" as envisaged in the Amendment Bill will negatively impact upon the purposes of the NCA.

29. It is accordingly submitted that any affordability assessment standard or other guideline issued by the NCR must be read with and subject to the provisions of section 82(1), (2) and (4).
30. As the Act currently stands it is clear that it is intended that any guideline published by the NCR "is not binding on a credit provider".
31. The foregoing submissions must be kept in mind with reference to the intended amendment of section 48 of the NCA and be seen against the following aspects:
 - The proposed amendment of section 48(1)(b) makes registration subject to the compliance by a particular prospective credit provider "with the affordability assessment and standards for industry codes guidelines issued by the National Credit Regulator".
 - This amendment contradicts section 82(3) in terms whereof a guideline published by the National Credit Regulator is not binding on a credit provide;
 - The amendment, without qualification, will fall foul of the purposes of the Act and create an irreconcilable conflict in the NCA in section 82(1), (2), (3) and (4).
 - Whilst the NCA seeks to provide domestic remedies to control and regulate the credit industry including the registration of credit providers, the proposed amended paragraph 48(1)(b) will disallow or exclude the due process provided for in terms of section 82(4), read with (3) as the Act currently provides.
 - The NCA may be challenged on Constitutional grounds as set out above;
 - The lack of due and fair procedure is against the purposes and spirit of the NCA.
 - The issue of compliance notices in terms of section 55, read with section 56 would in the ordinary course precede any cancellation of registration under section 57.
 - Such due process is in effect revoked through and contradicted by the amendment.
32. The Tribunal may consider and determine

- on application by the NCR under section 82(4) whether evaluative mechanisms, models or procedures used by a credit provider "result in a fair and objective assessment" or not; and
- require that the credit provider in question
 - (a) comply with the guidelines published by the NCR, or
 - (b) that any alternative guidelines consistent with prevailing industry practice, as determined by the Tribunal, be applied.

This process that is currently available is adequate fair and inherently sound in law.

33. In short, it is not for the NCR, but for the Tribunal to make such determinations as to whether or not any evaluative mechanism, model or procedure does not result in a fair and objective assessment.

AMENDMENT OF SECTION 49

34. The effect of this proposed amendment is to empower the Regulator to impose new registration conditions at any time, if the Regulator deems it necessary for the proper attainment of the objects of this Act.
35. Again it seems that these "new" conditions can be imposed without following any consultative process with the credit provider(s) in question.
36. This could potentially have a severe impact on a credit provider's business operations without affording the credit provider the opportunity to object to imposed conditions or discuss alternatives that could have the same intended effect that the Regulator had in mind but that would allow the credit provider to continue with its business operations.
37. The same considerations discussed in response to the proposed amendment of section 48 apply, as set out above.
38. In short, the above proposed amendments will not pass any Constitutional muster.

AMENDMENT TO SECTION 57

39. The effect of this proposed amendment is to empower the Regulator (and not the Tribunal) to deregister a credit provider summarily.
40. Again the due process of section 82(4) is effectively rendered redundant through the unconstitutional usurping of powers by the NCR in terms of the amendment.
41. In terms of the proposed amendments the Regulator will be entitled to deregister a credit provider after a single contravention. The word "repeatedly" is being deleted. Repeat transgressions also are a requirement of section 82(4).
42. This position is at odds with the intent of the NCA that the NCR should attempt to correct any systematic contraventions, whether by the issuing of compliance notices (section 55) or through the rulings of the Tribunal (section 82).

GENERAL SUBMISSIONS ON AMENDMENTS OF SECTIONS 48, 49 AND 57

43. The amendment will concentrate inordinate power in the NCR and undermine the powers of the Tribunal. These powers may have large ramifications for business. It is submitted that deregistration or cancellation should not be allowed without a warning being issued or an opportunity to rectify any alleged contravention of the Act.
44. The proposed amendment would make the Regulator both the prosecutor and the judge of a deregistration process. This is not an acceptable application of administrative power and contrary to section 34 of the Constitution.
45. The amendment to section 57 (see item 7 of the Amendment Bill), provides in respect of the cancellation of registrations that it may be cancelled by the National Credit Regulator, but no longer by the Tribunal on request by the National Credit Regulator.
46. The whole of Item 7 amending the provisions of section 57(1), (2), (3), (5) and (7) are aimed at allowing the National Credit Regulator to supersede and usurp the functions of the Tribunal.
47. This will effectively allow for the National Credit Regulator to bypass the Tribunal or any due process, prior to the unilateral cancellation of registration. This may

have a significant result of the credit provider so effectively terminated without a fair public hearing.

ADMINISTRATIVE ACTION: LACK OF A FAIR PROCESS

48. The above intended amendments are at variance with the requirements of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and more significantly clearly at variance with the provisions of the Constitution in respect of access to courts (that determines that "everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum" section 34 of the Constitution).
49. Deregistration or refusal to register clearly is administrative action which materially and adversely affects the rights or legitimate expectations of the credit provide or prospective credit provider.
50. Under the law and PAJA, where the NCR acts as an administrator, its actions must be procedurally fair.
51. The NCR cannot act arbitrarily and terminate the registration of a credit provider without fair or due process.
52. The NCR cannot be seen unilaterally review its own decisions (such as cancellation or suspension of the registration of a credit provider) without a due process.
53. There are no due recourse measures provided for under the Amendment Bill, such as that which is currently provided for (before amendment) through the referral of the issues to the Tribunal, resulting in a hearing and a process wherein the disputes or potential disputes may be determined.
54. In law and under PAJA, the credit provider would be entitled to, also before any decision is taken,
 - (i) adequate notice of the nature and purpose of the proposed administrative action;
 - (ii) a reasonable opportunity to make representations;
 - (iii) a clear statement of the proposed administrative action;
 - (iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5

(see section 3(2)(b), PAJA).

55. *The NCR ought not* assume or usurp the functions of the Tribunal or be able to, without recourse, cancel registrations or *even issue "an order" such as provided for in the amended section 57(7)*; wherein it is envisaged that a registration of a credit provider would be cancelled, without more, as of the date on which the National Credit Regulator issues an order.
56. The intended amendment also contradicts the purposes and spirit of the NCA by allowing 'an order' to be issued by the NCR without recognition of the lawful redress and due process that avails a credit provider. The Amendment Bill does not refer to or allow for the application of PAJA, as the decision to cancel the registration would be final in effect and form.
57. It is in consequence respectfully submitted that the amendment of the provisions would be capable of a successful challenge on a constitutional basis.

PART V

INSERTION OF SECTION 92A OF ACT 34 OF 2005

58. The requirement of this proposed clause is that the spouse of a consumer married in community of property should either sign or write to the credit provider giving consent for the other spouse to enter into the credit agreement.
59. We strongly believe adherence to this clause will be impractical for consumers and credit providers alike and in the result will disempower individuals and restrict their access to credit (especially female consumers) and may cause considerable consumer dissatisfaction.
60. Furthermore, the clause unduly burdens the pre-agreement procedure and restricts modern channels of communication:
- The growth in applications through use of the internet, mobile and other online channels, and voice recorded calls is substantial and will continue to grow at faster rates than face-to-face transactions (such as store or branch based interactions).

- It appears that this reality has not been taken into account when the proposed amendment was introduced to the Bill.
61. The consumers using these channels are provided with access to credit as the consumers can
- transact at their own convenience (whether it is in the taxi or train, at home or at work); and
 - without additional incurring travel costs and expenses;
 - obtain immediate access to credit; and
 - at such times, the spouse may not be present.
62. The proposed amendment will make it very difficult for the consumer to use these channels. The consumer will not be able to submit the actual written consent of the other spouse to the credit provider, especially when the consumer is transacting remotely. By way of example,
- HomeChoice is a home shopping retailer, with a substantial proportion of its sales on credit terms.
 - The average instalment is R150 per month.
 - A woman wishing to buy a bedding set on credit, with a very low instalment, would now be required to obtain the consent of her spouse in writing, then find a fax provider or send it by post, before being able to conclude the transaction.
 - The requirement that *written consent must be received by the credit provider prior to transacting will practically deny access to credit.*
 - The fact that the requirement will not be cost effective (such as through the internet and other online and voice channel shopping).
63. On another practical level, in many cases, consumers married in community of property are living apart from their spouses, often in different parts of the country. Examples are consumers who are formally or informally separated but not divorced or living apart through employment necessity (e.g. migrant workers).
64. In all these cases the proposed insertion would make it practically impossible for the consumer to make even small purchases on credit. The reality of the South African economy and socio-economic conditions must be taken into account and less onerous requirements on the consumers must be considered.
65. We submit that a more acceptable alternative to the draft clause 92A could require that credit providers must expressly confirm with the consumer that

he/she has obtained the written consent of the spouse to enter into such a credit agreement. It should not be a requirement that the credit provider itself obtain the physical written proof (especially for Small Credit Agreements as defined in the NCA).

66. We furthermore submit that the legislation specifically allow voice recorded consent and electromagnetically recorded consent (e.g. a tick box on a web site) as an acceptable form of obtaining consent. In the modern age of internet and telephonic transactions, the requirement for paper-based written consent forms needs to be reviewed.
67. The NCA expressly provides for telephonic and electronic origination and conclusion of agreements through these channels.
68. The new amendment may create desperation or a situation where more hardship is created by the inherently discriminatory, if not archaic, requirement imposed on the consumer.

PART VI

CONCLUSION AND SUMMARY

69. The amendments will undermine essential tenets of the NCA and the Constitution by granting powers to the NCR that is apparently in conflict with the law and the administrative law principles stated above.
 - Current provision of the NCA such as sections 55 and 56 (compliance notices), section 57 (on cancellation of registration) and section 82(4) (on the Tribunal's determination of assessment models) are adequate measures that ought to be applied, not amended.
 - With regard to conclusion of electronic or telephonically originated agreements, the amendment of section 92A is inadequate and will cause unnecessary uncertainty. A more acceptable alternative would be to require the consumer to expressly confirm to the credit provider on entering into the agreement that the consumer has the written consent of the spouse. At the least, such a less onerous requirement ought to apply to the category of Small Credit Agreements; this would accord with the less administratively intense approach of the NCA towards Small Credit Agreements.

70. We look forward to your responses to our above submissions and invite you to engage with us in further consultation and discuss the matters raised hereinabove.

We thank you for the opportunity to comment on the draft Bill.

Should you require any further clarification or input, please do not hesitate to contact Mr Michael Roux at mroux@homechoice.co.za.

Kind regards



Michael Roux

Group Risk Director

ANNEXURES TO SUBMISSIONS**IN RESPECT OF THE**

- **DRAFT NATIONAL CREDIT ACT POLICY REVIEW FRAMEWORK, 2013 AND**
 - **DRAFT NATIONAL CREDIT AMENDMENT BILL**

ON BEHALF OF HOMECHOICE GROUP AND HOMECHOICE (PTY) LTD

NCR REQUEST FOR COMMENTS ON NCR'S AFFORDABILITY ASSESSMENT GUIDELINES DATED 17 MAY 2013	A
HOMECHOICE (PTY) LTD RESPONSE TO AFFORDABILITY ASSESSMENT GUIDELINES AS PROPOSED BY THE NCR	B