

Effective from 1 December 2021

Advertising and Fees



This covers new rules around what lenders are allowed to say in advertisements and new rules around fees.

These changes come into effect on 1 December 2021.

Advertising

As a responsible lender—something we hope lenders already are, or are going to become—lenders must act with care, diligence and skill, including when advertising their loans.

This is set out in the responsible lending principles in section 9C of the Credit Contracts and Consumer Finance Act 2003—(CCCF Act).

Lenders also have a duty to help borrowers reach informed decisions about whether to take out the loan, including by making sure that their advertising material is not likely to be misleading, deceptive or confusing.

Just like any other businesses, lenders must also comply with the Fair Trading Act 1986.

That is, lenders must ensure that any advertising isn't misleading or deceptive, and lenders must take care not to make unsubstantiated representations—that is, claims which have no reasonable basis in fact.

The obligation under the responsible lending principles that advertising of loans not be confusing goes a step further than the Fair Trading Act, which prohibits misleading and deceptive representations.

From 1 December 2021 lenders must also comply with new “Advertising Standards”.

These are set out in the Credit Contracts and Consumer Finance Amendment Regulations 2020.

We are calling them “new”, but in many ways the regulations just outline what we already consider to be good practice under the current law.

Lenders must comply with these standards as part of meeting their obligations to act as a responsible lender.

These standards are in place to help the lender to assist the borrower to reach an informed decision about whether or not to take out a loan.

The standards set out certain things that lenders must do when advertising, and certain things that they must not do.

It would be a good idea for lenders to read the standards for themselves, they include things like:

- If an advertisement for a loan states a payment amount, it must also state the total payments that will be payable (if they can be worked out), or the annual interest rates that would apply under the loan;
- If the advertisement includes an interest rate, it must state the annual interest (or range of rates), whether fees also apply (stating any mandatory credit fees), whether the annual interest rate is fixed for the term or part of the term, or not fixed at all;
- If lenders advertise a loan as “interest free”, the advertisement must clearly include the details of any mandatory credit fees.

These must be stated in plain language in a clear, concise and intelligible manner.

Regulations also prohibit certain advertising practices.

Lenders mustn't advertise that lenders won't inquire into, or take account of, the borrowers' circumstances.

For instance, lenders cannot say things like:

- 'No credit checks';
- 'Guaranteed acceptance';
- 'Bankrupt, OK';
- 'Bad credit history, OK'.

If lenders mention the speed of approval in their advertisements (e.g. approval in 60 minutes), lenders must also contain a prominent statement that this is subject to responsible lending inquiries and checks.

We recommend that you:

- Make sure lenders understand what is meant by "advertising"—the changes introduce a new definition which is fairly broad. It covers any communication by or for the lender that is distributed to a person that is reasonably likely to induce them to inquire/apply for a loan—that would include, for example, statements on a lender's website and email communications with borrowers.
- Make sure that lenders develop policies and processes to ensure their adverts meet the advertising standards.

Finally, we'd like to remind lenders about the new due diligence obligations, include ensuring that there are sufficient checks and processes in place to ensure that the advertising standards are complied with.

For further guidance about advertising see Chapter 3 of the Responsible Lending Code.

Remember that the Code is not the law itself, but it can provide additional guidance and evidence of compliance with the Code can be treated as evidence of compliance with the lender responsibility principles.

Lenders who breach the responsible lending obligations (including breaches of the "Advertising Standards") can be ordered to pay penalties of up to \$600,000 for companies and \$200,000 for individuals, plus statutory damages equal to the costs of borrowing.

Fees

Lenders must ensure that fees in the loan contracts are not unreasonable.

Under section 41 of the CCCF Act—a loan contract cannot provide for a credit fee or default fee that is unreasonable.

Lenders must not profit from fees. A fee will be unreasonable if it exceeds the costs that are closely connected to the activity for which it is charged.

If lenders want to get into the details of the CCCF Act fees provisions then they should look at:

- The Sportzone/MTF decisions;
- The Commission's Fees Guidelines—which are available on our website.

Just a note here to say that the Commission is looking to issue revised fees guidelines later this year.

From 1 December 2021 lenders must keep records about how they have calculated each credit and default fee.

As well as keeping records at the time the fee is set, lenders must review their fees regularly to make sure that they are still reasonable, and keep records of that review.

These records must actually demonstrate that each fee was not unreasonable at the time it was set or reviewed.

This comes under a new part of the law, section 41A. It's quite technical.

We expect that lenders' records would include any costs identified as being closely related to the activities giving rise to the fee, and explain their connection to the fee.

Lenders should:

- identify the recoverable portion of any closely related costs and set out how that proportion has been calculated;
- provide the basis for determining the amount of the closely related costs, including information that the lender has used to make any forward-looking estimates;
- document the anticipated number of transactions over which the costs are expected to be incurred, and which has been used as a basis for fee calculations;
- set out the assumptions on which the fee calculations are based and provide the basis for those assumptions;
- for default fees, identify and quantify any assessment of loss that could be incurred by the lender on default as a

result of the acts or omissions of the borrower that the lender wishes to recover through the fee.

Fees need to be reviewed where lenders become aware (or ought to be aware) of a change that is likely to affect the reasonableness of the fee.

For instance, there's been a change in a lender's business costs.

Lenders must reduce the fee if, as a result of the review, the fee is likely to be unreasonable.

Both the Commerce Commission and disputes resolution schemes can require lenders to provide copies of their fee setting records.

Lenders must make the records available when they receive these types of requests, and will have 20 working days to provide records to the requester.

If the request is made by the Commission, the Commission may agree to a longer period.

Lenders must keep records for at least seven years—that starts from the date when the fee was set or reviewed.

Lenders can be ordered to pay penalties of up to \$600,000

for companies, or \$200,000 for individuals, if they're found to have breached their obligations to keep adequate records, including if those records do not demonstrate whether or not the credit or default fee is unreasonable.

Links to existing and relevant resources:

[MBIE Responsible Lending Code \(Revised February 2021\)](#)

[Commerce Commission Consumer Credit Fees Guidelines – June 2017](#)

These are the relevant sections of the Act:

Advertising

Sections 9C(2)(a)(i) & 9C(3)(b) CCCF Act.

Regulations 4AAAQ to 4AAB Credit Contracts and Consumer Finance Regulations 2004.

Part 1 - Fair Trading Act 1986.

Fees

Section 41A CCCF Act.

(All section and regulation references are as at 1 December 2021).

ACTION

Lenders should build the new advertising requirements, and the fee records and review requirements into their compliance processes.

IMPACT

Due diligence obligations mean that directors and senior managers will need to have taken reasonable steps to ensure that the lender has systems and processes in place to ensure that it is not charging unreasonable fees, and that its advertising is compliant.

This material provides guidance only. It is not intended to be definitive and should not be used in place of legal advice. You are responsible for staying up to date with legislative changes.

You can subscribe for information updates at www.comcom.govt.nz/subscribe

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