FMA
FINANCIAL MARKETS AUTHORITY
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Financial advice given for the purpose of complying with lender responsibilities

This information sheet explains the circumstances that may exclude a lender from some Financial Markets Conduct Act 2013 (FMC Act) obligations related to financial advice. The exclusion applies only in relation to consumer credit contracts and certain credit-related insurance contracts.

About the financial advice regime under the FMC Act

Anyone giving financial advice to retail clients must operate under a Financial Advice Provider licence granted by the Financial Markets Authority. They must also comply with the Code of Professional Conduct for Financial Advice Services and various duties in the FMC Act. Read more about the regime here.

A person gives financial advice when they make a recommendation or give an opinion about acquiring or disposing of a financial advice product (including a consumer credit contract). Regulated financial advice can only be given to retail clients by a person who is authorised to do so under a market services licence.

About the exclusion

The FMC Act has a limited exclusion in relation to lenders under consumer credit contracts and certain credit-related insurance contracts[1] as follows:

1. Financial advice is not regulated financial advice if—
    a. the advice is given—
        i. by a lender to a borrower; and
        ii. in relation to a consumer credit contract or relevant insurance contract (the agreement); and

[1] The exclusion applies to "relevant insurance contracts" as defined in section 9B of the Credit Contracts and Consumer Finance Act 2003 (CCCF Act). Relevant insurance contracts are credit-related insurance contracts entered into, or to be entered into, by a borrower if

- the borrower has also entered into, or is seeking to enter into, a credit agreement with the lender; and
- the insurance is arranged by the lender.

The circumstances in which insurance is "arranged" by the lender are set out in section 9B of the CCCF Act. "Credit-related insurance" is defined in section 5 of the CCCF Act. Further information is available on the Commerce Commission's website: https://comcom.govt.nz/business/your-responsibilities-if-you-provide-credit/when-consumer-credit-law-applies-to-your-business and https://comcom.govt.nz/__data/assets/pdf_file/0026/93941/Credit-related-insurance,-extended-warranties-and-repayment-waivers-Fact-sheet-July-2018.pdf

      iii. either—

         A. in order to comply with the lender's lender responsibilities; or

         B. as a reasonably incidental consequence of complying with the lender's lender responsibilities; and

   b. the lender has taken reasonable steps to ensure that the borrower understands that the advice is not regulated financial advice and the implications of that.

2. A lender is taken to have complied with subclause (1)(b) if the lender gives the borrower a statement in the prescribed manner. [2]

Regulation 229L of the FMC Regulations sets out the form of prescribed statement and explains the manner in which it must be given.

The purpose of this exclusion is to give comfort to lenders that they can do what they need to in order to comply with their responsible lending obligations[3], recognising that consumer lending is already specifically regulated under the CCCF Act. However, it's important to understand the limits of the exclusion.

The exclusion will only apply in circumstances where the lender responsibilities require lenders to give a recommendation or opinion in relation to a consumer credit contract or relevant insurance contract; or where providing that opinion or recommendation is a natural consequence of compliance.

> ***Example***
> *Bob visits Northwest Finance to apply for a $5,000 loan, which he would like to repay at $100 per week. A Northwest representative, Jane, reviews Bob's application and asks Bob various questions. Jane is not satisfied Bob could repay at $100 per week without substantial hardship. Jane suggests to Bob that he obtains a $4,000 loan instead because that would reduce his repayments to $80 per week.*
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> *Jane's suggestion could fall within the definition of "regulated financial advice" under the FMC Act (as amended). However, the suggestion was made only because the lender responsibilities meant Northwest could not provide Bob with his chosen loan (as the loan repayments would have resulted in substantial hardship for Bob). The limited exclusion for advice to comply with lender responsibilities would apply as Jane's suggestion was a reasonably incidental consequence of complying with the lender responsibilities.*

The exclusion does not mean that all financial advice related to consumer credit contracts and relevant insurance contracts is excluded from the new financial advice regime. Where a person is giving financial advice for a reason other than in order to comply with lender responsibilities, or the financial advice is not a reasonably incidental consequence of complying with the lender responsibilities, they will need to comply

[2] See clause 10 of Schedule 5 of the FMC Act.
[3] As set out in section 9C(3)(a) to (e) and 9C(5) of the CCCF Act. Further information is available on the Commerce Commission's website: https://comcom.govt.nz/business/your-responsibilities-if-you-provide-credit/the-lender-responsibility-principles

with the requirements relating to giving regulated financial advice to retail clients. This includes requirements around licensing (i.e., holding or operating under a financial advice provider licence if regulated financial advice is given).

> ***Example***
> *After agreeing to provide Bob with a $4,000 loan, Jane recommends that Bob obtain Northwest's consumer credit insurance so that he is covered if his ability to repay is affected by sickness, unemployment or another similar event. The limited exclusions for advice to comply with lender responsibilities would not apply in this instance as Jane's suggestion was not made in order to comply with the lender responsibilities or as a reasonably incidental consequence of complying with the lender responsibilities.*
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> *In this example the lender responsibilities do not require Jane to recommend that Bob also obtains consumer credit insurance, as recommending Bob obtains this is not reasonably incidental to the lender responsibilities relating to the loan application. Jane needs to comply with the lender responsibilities relating to consumer credit contracts and relevant insurance contracts, and requirements relating to financial advice for the insurance would also need to be complied with in this case.*

Giving financial advice about a relevant insurance contract is most likely to fall under the exclusion where the lender is making enquiries to assess the suitability of the insurance product in order to be satisfied that it is likely to meet the borrower's requirements and objectives, and provides advice to the borrower as a result of those enquiries. It is fairly unlikely that financial advice on a relevant insurance contract will be necessary to comply with the general lender responsibility to exercise the care, diligence, and skill of a responsible lender (or reasonably incidental to that compliance). The costs and exclusions associated with some of these insurance products may mean it is unlikely that they would improve the borrower's situation overall.

> ***Example***
> *Bob ticks a box on Northwest Finance's loan application form saying he wants to take out consumer credit insurance. Jane, a Northwest representative, reviews Bob's application and asks Bob various questions. She is not satisfied the insurance would meet Bob's requirements and objectives. Bob already has life insurance and income protection insurance that covers him for sickness, injury and death. Jane recommends that Bob doesn't take out the insurance. This financial advice falls within the exclusion because it is given by Jane to comply with the lender responsibilities (to be satisfied that the insurance would meet the borrower's requirements and objectives).*