

Change in threshold for registration as a credit provider

Corporate/Commercial Bulletin

On 11 May 2016, the Minister of Trade and Industry (Minister) published a notice (GN 513) in the Government Gazette amending the threshold for determining whether a person (including a juristic person) is required to register as a credit provider in terms of Chapter 3 of the National Credit Act 34 of 2005 (NCA).

Previously the NCA had a threshold of R500 000 in respect of the total principal debt owed to a credit provider under all outstanding credit agreements. Subject to meeting certain other conditions, if this threshold was not met then the credit provider was not required to register. However in terms of GN 513, the Minister has amended this threshold to nil (R0.00), thereby effectively nullifying this criterion.

The NCA places onerous obligations on persons who are categorised as credit providers under the NCA. Clients should be very careful in this regard as a failure to register as a credit provider will lead to dire consequences. The amendment to the threshold for registration as a credit provider may have implications for those persons who were not previously classified as credit providers prior to such amendment.

In determining whether a person is required to register as a credit provider under the NCA, one has to consider three (now two steps):-

1. Firstly section 4 of the NCA applies to a *credit agreement* (as defined) between parties dealing at *arm's length* and made within or having an effect in the *Republic of South Africa*.
2. Secondly, the agreement must be a credit agreement as envisaged in section 8 of the NCA. Section 8 outlines certain defined categories of credit agreements. However, in circumstances where the agreement in question does not form part of these defined categories, it will nevertheless constitute a credit agreement if it (i) causes a payment obligation to be *deferred*, and (ii) renders a *charge, fee or interest* payable to the credit provider in respect of the amount so deferred. The National Credit Regulator (Regulator) adopts a formalistic approach to the interpretation of this provision, namely that *any* level of charge, fee or interest will render the transaction to be at arm's length. Accordingly, the NCA will be applicable even if nominal interest is charged.
3. In the past where sections 4 and 8 of the NCA applied, the credit provider was required to register as such under the NCA if the total principal debt owed to that credit provider under all outstanding credit agreements exceeded the threshold determined by the Minister. This was previously R500 000, however in terms of GN 513, the Minister has amended this threshold to nil (R0.00).

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The implication of this amended threshold is that all credit providers will now have to register under the NCA irrespective of the amount owed to them under the credit agreement(s). Registration as a credit provider is an onerous process and a fee will be payable to the National Credit Regulator (NCR) for all applications for registrations and renewals as credit providers.

Failure to pay such fee within 15 days from the due date results in the imposition of a penalty by the Regulator. In addition to the penalty imposed by the Regulator, failure to register as a credit provider results in the credit agreement(s) being deemed unlawful and void from the date that the agreement was concluded.

Further, failure to register as a credit provider will limit the option of legal recourse in the event that a credit receiver fails to repay under the credit agreement, as a credit provider will be unable to claim restitution (return to the status quo) under an unlawful agreement. The credit receiver will also have the right to claim unjustified enrichment from the credit provider, who will consequently be required to refund the credit receiver, plus interest.

Clients are advised to revisit their existing loan agreements or similar agreements to ascertain whether such agreements constitute credit agreements under the NCA.