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Feedback to CP91 – Review of the Code of Conduct for Business Lending to Small and Medium Enterprises



Introduction

In 2009, the Central Bank of Ireland (Central Bank) introduced the [Code of Conduct for Business Lending to Small and Medium Enterprises](#) (SME Code) to support business lending to small and medium-sized enterprises. A limited review was conducted in 2011, which focused on the 'Financial Difficulties' provisions. Following this review, the revised SME Code came into effect from 1 January 2012. Since the revised SME Code came into effect, a number of areas have been identified in the SME lending sector that impact on the interaction between lenders and SMEs when providing business credit. These include better communication from lenders regarding timelines, clarity from the start about the credit application process, more transparency around how ability to repay is determined, reliance on personal guarantees, insufficient information on declined applications and the need for SMEs to be more aware of their right to appeal.

As part of the Central Bank's Strategic Plan 2013-2015, a review of the SME Code was proposed, with a view to enhancing our consumer protection framework. A public [Consultation Paper on the Review of the Code of Conduct for Business Lending to Small and Medium Enterprises \(CP91\)](#) was published on 11 January 2015 and closed for submissions on 13 April 2015. CP91 included a set of draft regulations and questions relating to the draft regulations, including questions relating to scope and the introduction of a concept of 'not co-operating'.

The draft regulations published with CP91 sought to enhance protections in a number of areas by including requirements on lenders to:

- provide information on the application process and associated timelines;
- assess affordability and suitability;
- provide reasons in writing for declining credit that are specific to the application (or part thereof) that was declined;
- provide increased information to borrowers about their policies for dealing with financial difficulties, including the implications for borrowers of not co-operating;
- provide detailed information to borrowers in financial difficulties about an offer of an alternative arrangement;
- expand the appeals provisions to include decisions on declining or withdrawing credit and special terms or conditions imposed by a lender on the granting of credit or on an alternative arrangement offered; and

- provide information to the borrower about Government supports, the lender's appeals process, the role of the Credit Review Office (where relevant), the complaints process and the Financial Services Ombudsman (FSO).

Eleven submissions were received from stakeholders, representing a mix of industry stakeholders, SME stakeholders, Government departments and statutory bodies. The Central Bank would like to thank all those who made a submission to the consultation process. The revised SME Regulations also reflect:

- the results of a themed review carried out by the Central Bank of bank practices on certain provisions of the current SME Code;
- issues that have been brought to our attention by stakeholders;
- provisions of the Consumer Protection Code 2012 that apply to personal consumers but are also relevant for lending to SMEs;
- the recommendations of the Oireachtas Joint Committee on Jobs, Enterprise and Innovation: Report on Access to Finance for Small and Medium Enterprises; and
- issues highlighted in other reports and surveys relating to the SME market, such as the *Red C Credit Demand Survey* carried out on behalf of the Department of Finance, the *ISME Bank Watch Survey* and the *InterTradeIreland Report on Access to Finance for Growth for SMEs on the Island of Ireland*.

Having concluded the review, the Central Bank has now published the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Lending to Small and Medium Enterprises) Regulations 2015 (the SME Regulations). The SME Regulations will come into effect from 1 July 2016 for all regulated entities except credit unions. For credit unions the SME Regulations will take effect on 1 January 2017. The SME Regulations must be complied with by all regulated entities involved in lending to SMEs. The six- and twelve-month lead-in periods before the SME Regulations come into effect are to recognise that compliance with the regulations will require regulated entities to put in place policies, systems and procedures, and implement staff training.

Please note that this document is for information purposes only. It does not amend or alter the SME Regulations and does not form part of the SME Regulations. This document does not constitute legal advice and should not be used as a substitute for such advice. It is the responsibility of all regulated entities to ensure their compliance with the SME Regulations.

Nothing in this document should be taken to imply any assurance that the Central Bank will defer the use of its enforcement powers where a suspected breach of the SME Regulations comes to its attention.

In consideration of the submissions following CP91, this document sets out the Central Bank's position on the following key issues:

1. Size of enterprise within scope of the SME Regulations
2. Inclusion of credit unions in scope of the SME Regulations
3. Inclusion of business credit cards in scope of the SME Regulations
4. Enforcement of agreements/rights and obligations of regulated entities
5. Expertise for business lending/reviews
6. Advertising and warning statements
7. Provision of information requirements
8. Applications for credit
9. Refusing or withdrawing credit
10. Security and guarantor protections
11. Borrowers that are 'not co-operating'
12. Independent reviews
13. Appeals

11. Size of enterprise within scope of the SME Regulations

11.1. Proposals outlined in CP91

The requirements of the existing SME Code, with the exception of a very limited number of provisions, apply for the benefit of all SMEs¹. Certain provisions apply only for the benefit of ‘smaller enterprises’². These include provisions relating to advertising, unsolicited credit, notification for guarantors, and the provision of a cost comparison when consolidating credit facilities. These provisions were transferred from the Consumer Protection Code into the SME Code as part of the review of the SME Code in 2011. The definition of ‘smaller enterprises’ in the SME Code derives from the definition of consumer in the Consumer Protection Code 2012, i.e., an SME that comes within the definition of ‘smaller enterprise’ under the SME Code also comes within the definition of ‘consumer’ under the Consumer Protection Code.

CP91 sought views on the merits of applying the ‘Smaller Enterprises’ provisions from the SME Code for the benefit of all SMEs in the draft regulations. We expressed the view that there was merit in applying the ‘Smaller Enterprises’ provisions to all SMEs as they appear to be equally relevant, regardless of the size of the SME. It was proposed that the entire regulations would apply for the benefit of all SME borrowers. The draft regulations defined a borrower as “a micro, small or medium-sized enterprise in the State that is availing or proposing to avail of credit”³.

¹ The SME Code defines ‘SMEs’ as ‘small and medium enterprises’ and ‘SMEs’ are as defined in European Commission recommendation 2003/361/EC which categorises SMEs as “enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million and shall include ‘smaller enterprises’

² The SME Code defines ‘Smaller Enterprises’ as the following sub-category of small and medium enterprises:
a natural or legal person or group of natural or legal persons, but not an incorporated body with an annual turnover in excess of €3 million in the previous financial year, acting within their business, trade or profession (for the avoidance of doubt a group of persons includes partnerships and other unincorporated bodies such as clubs, charities and trusts, not consisting entirely of bodies corporate) or incorporated bodies having an annual turnover of €3 million or less in the previous financial year (provided that such body shall not be a member of a group of companies having a combined turnover greater than the said €3 million).

³The SME Regulations define a “micro, small and medium-sized enterprise” as an enterprise which employs fewer than 250 persons and which has an annual turnover not exceeding €50 million and an annual balance sheet total not exceeding €43 million. The SME Regulations define a ‘micro and small enterprise’ as an enterprise which employs fewer than 50 persons and which has an annual turnover and annual balance sheet total which does not exceed €10 million and a ‘medium-sized enterprise’ as a micro, small and medium-sized enterprise that is not a micro and small enterprise.

11.2. Submissions

We received a diversity of views from various stakeholders on the merits of applying the ‘Smaller Enterprises’ provisions to all SMEs. Industry stakeholders that responded to CP91 did not agree that the ‘Smaller Enterprises’ provisions from the current SME Code should be extended to all SMEs. A number of reasons for this were cited in their submissions, including that protections should be proportionate to the size of the loan and that larger SMEs are a highly sophisticated cohort and financially astute and therefore there is no merit in extending the protections granted to ‘smaller enterprises’ to them. One Government department expressed concern about the ‘one size fits all’ approach and stated that larger SMEs may not need the same level of protections as proposed. Another Government department took a different view and agreed that there was merit in extending the ‘Smaller Enterprises’ provisions to all SMEs. One lender considered that the three SME categories, micro, small and medium, have very different characteristics and suggested that the regulations should apply to micro enterprises only. It stated that this approach would ensure that the majority of businesses would still be covered under the regulations, but that businesses of a certain size and scale would be exempted from scope.

SME stakeholders supported the application of the ‘Smaller Enterprises’ provisions to all SMEs.

11.3. Response

Based on the majority of feedback received from our consultation question on extending the ‘Smaller Enterprises’ provisions to all SMEs, we are applying these provisions to micro and small enterprises. Having considered the submissions received, we are adjusting the scope of the SME Regulations such that:

- The full protection of the SME Regulations will apply in their entirety for the benefit of micro and small enterprises (i.e., Part 2 of the SME Regulations which includes the new reforms and protections);
- the existing, high-level SME Code protections (as they appear in the SME Regulations) will continue to apply for the benefit of medium-sized enterprises (i.e., the protections set out in Part 3 of the SME Regulations); and

- the ‘Smaller Enterprises’ provisions of the existing SME Code, as they appear in the SME Regulations will apply for the benefit of micro and small enterprises;

Although we did not ask a direct question in CP91 about the size of enterprises which should fall within the scope of the SME Regulations, we have considered submissions relating to the sophistication of larger SMEs and the ‘one size fits all’ approach and in particular, whether the enhanced protections proposed in CP91 ought to be extended to larger SMEs.

Figures produced by the Central Statistics Office in its 2011 report on Business in Ireland concluded that 90.8% of active enterprises in the State were micro (less than 10 employees), 7.7% were small (10 – 49 employees), 1.3% were medium (50 – 249 employees) and 0.2% were large (250 employees or more). The data suggests that, by limiting the scope of the SME Regulations, such that they only cover business lending to micro enterprises and small enterprises, approximately 98% of enterprises will be covered.

We believe that medium-sized enterprises should continue to benefit from the existing (less prescriptive as to detail) protections of the SME Code, as they appear in the SME Regulations.

2. Inclusion of credit unions in scope of the SME Regulations

2.1. Proposals outlined in CP91

Credit unions are exempt from the scope of the existing SME Code. In CP91, we expressed the view that SME borrowers should have the same protections available regardless of the type of lender from which they obtain their credit facilities. In this regard, we proposed that credit unions that provide credit to SMEs would be included in the scope of the SME Regulations.

In CP91, we asked if SMEs should be afforded the same level of protections when dealing with credit unions as they would if dealing with other lenders.

2.2. Submissions

We received a variety of responses, with some stakeholders agreeing and others disagreeing with the proposal to include credit unions within scope of the SME Regulations. Credit union

stakeholders, one Government department and one statutory body suggested that credit unions should be excluded from the scope of the SME Regulations. SME stakeholders, some industry stakeholders and one Government department supported their inclusion in scope.

Credit union stakeholders expressed the view that applying the SME Regulations to credit unions would have a disproportionate impact on the credit union sector. These stakeholders stated that the draft regulations were designed around the capacities of large institutions such as banks. As such, the proposed regulations were disproportionate to the volume of SME lending by credit unions and would place credit unions at a competitive disadvantage. These stakeholders stated that the proposed regulations may have unintended consequences for the consumer, and in particular where the consumer is a self-employed person seeking low amount loans. They also stated that, owing to the volume of SME lending by credit unions, the average loan amount of such lending and the community based and member focused position of credit unions, the overall risk to the consumer is low.

One credit union stakeholder suggested that some of the proposed regulations failed to take account of existing legislation for credit unions. The concerns, as raised, can be summarised as follows:

- Credit unions are required to have a Credit Officer and a Credit Control Officer, both with separate and distinct responsibilities. Legislative provision requires the establishment of a Credit Committee and a Credit Control Committee and sets out the responsibility of the committees. Credit unions do not have the same level of staffing resources as banks.
- Prudential limitations under the Section 35 Regulatory Requirements⁴, introduced for credit unions in October 2013, limit the volume of lending over five years. Where alternative arrangements give rise to rescheduled loans, credit unions are obliged to adhere to provisioning requirements.
- Credit unions are already subject to an internal appeal mechanism set up under Section 37 of the Credit Union Act 1997 which requires a credit union to make provisions for an appellate body.

⁴ [http://www.centralbank.ie/regulation/industry-sectors/credit-unions/Documents/Section%2035%20Regulatory%20Requirements%20for%20Credit%20Unions%20\(October%202013\).pdf](http://www.centralbank.ie/regulation/industry-sectors/credit-unions/Documents/Section%2035%20Regulatory%20Requirements%20for%20Credit%20Unions%20(October%202013).pdf)

- There is no legislative or regulatory requirement for credit unions to have a risk or audit committee, and many credit unions do not have such committees in place. Clarity on the proposals in CP91 needs to be provided to explain what is meant by a ‘lender’s management body’.
- The ‘Financial Difficulties’ section is too excessive for credit unions and does not take account of the nature, size and complexity of the business model.
- The regulations will require regulatory compliance where the credit union sector was not party to the less onerous SME codes.

This stakeholder suggested three methods for overcoming the suggested disproportionality of the draft regulations on credit unions. It was argued that one of the following approaches should be adopted:

- (i) there needs to be a separate set of sector specific consumer standards for credit unions;
- (ii) the applicability of the provisions of the regulations needs to be tailored for the credit union sector; or
- (iii) there should be a reduction in the overall reforms and protections available to consumers.

SME stakeholders and other industry stakeholders stated that the SME Regulations should apply to credit unions. They suggested that credit unions are playing an increasing role in the provision of business finance, and should be subject to the same regulations as other lenders. They also expressed the view that SMEs should enjoy the same level of protections, irrespective of whom the finance was obtained from.

2.3. Response

We continue to hold the view that SME borrowers should benefit from the protections of the SME Regulations regardless of the type of regulated entity they are borrowing from. We have considered all concerns raised by stakeholders and, in particular, we have made specific amendments to ensure consistency between existing credit union legislation and the SME Regulations. In this regard, we have amended the standard information for borrowers, appeals mechanisms and complaints provisions.

With regard to concerns raised on the disproportionate nature of the SME Regulations in the context of credit unions, clarification on specific regulations may assuage these concerns. In relation to on-site business lending expertise, we proposed in CP91 that in each office of a lender engaging in lending activities, the lender would be required to have at least one person with the responsibility for the provision of credit to borrowers and for borrowers either in arrears or financial difficulties. We have now amended this regulation to ensure regulated entities have clear points of contact for any enquiries on matters relating to the SME Regulations.

Further, while regulated entities must adhere to policies and procedures with the core objective of assisting the borrower, the SME Regulations do not compel a regulated entity to offer an alternative arrangement. The SME Regulations set out requirements to ensure that there is a framework in place to assist SME borrowers in financial difficulties.

In respect of appeals, CP91 proposed that lenders would have to establish and implement an internal appeals procedure which would facilitate appeals where the lender has refused a credit application. Given that credit union borrowers have a right to appeal a decision to refuse credit to the board of directors of the credit union, we have now inserted regulation 24(3), which provides an exemption where this right of appeal exists under the Credit Union Act 1997. This exemption applies for credit unions, where a borrower's right to appeal a declined credit application can be referred to the credit union's appellate body, i.e., the board of directors.

We have also amended the requirement for the analysis of the complaints register to be reported to a risk or audit committee. Regulations 25(9)(a) and 25(9)(b) now provide for the analysis of complaints to be reported to the risk committee or audit committee (or, in the case of credit unions, risk management officer) and management body. The risk management officer is defined as the person appointed by a credit union under Section 76C of the Credit Union Act 1997.

We have amended the proposals in CP91 under 'Standard information for borrowers in financial difficulties' requiring regulated entities to have a dedicated webpage on their website for borrowers in or concerned about going into financial difficulties. The regulations now include an exemption from this regulation where a regulated entity does not have a website. This is to acknowledge that smaller credit unions may not have a website.

Given that lending by credit unions is not within the scope of the existing SME Code and that credit unions may therefore require additional time to implement systems, procedures and staff training to comply with the regulations, we are allowing credit unions additional time for implementation of the SME Regulations. The SME Regulation will apply to credit unions from 1 January 2017.

3. Inclusion of business credit cards in scope of the SME Regulations

3.1. Proposals outlined in CP91

In the SME Code, business credit cards were included within scope, but only in respect of the ‘Smaller Enterprises’ provisions. This is because these provisions originated from the Consumer Protection Code 2006, which applied to credit cards.

In CP91, we sought views from stakeholders on whether business credit cards should be included within scope. We outlined our understanding that business credit cards are not traditionally used as a source of credit for SMEs but are generally used as a payment mechanism, and the outstanding balance is cleared in full each month by a direct debit from the cardholder’s current account. We also noted that it seemed likely that circumstances could arise where the SME would not have sufficient funds available in its current account to pay the credit card in full each month.

3.2. Submissions

The majority of submissions received did not agree that business credit cards should be included in scope of the regulations. Industry stakeholders, some SME stakeholders and one Government department all believed that business credit cards should continue to be excluded. Three submissions were received stating business credit cards should be within scope of the regulations.

Stakeholders that were not in favour of including business credit cards in scope confirmed our understanding that business credit cards are generally used as a payment mechanism rather than a form of credit, and are typically paid in full each month. Views expressed in the submissions arguing for the inclusion of business credit cards pointed out that business credit cards have been used as a source of credit in other jurisdictions and there is the possibility that this practice may spread to Ireland. One SME stakeholder expressed the view that SMEs that need credit can sometimes use

credit cards in exceptional circumstances. This can lead to financial difficulties as credit cards are an extremely high-interest form of borrowing.

3.3. Response

We note the feedback from stakeholders that business credit cards are used as a payment mechanism in practice and are set up such that they are paid off in full each month.

Notwithstanding this, there remains the scope for credit cards to result in financial difficulty for an SME where the balance on the account cannot be cleared. For this reason, business credit cards are not included within scope of the SME Regulations, save for Part 1 and regulations 7, 11(4) and 17 to 23.

By taking this approach, the protections for arrears and financial difficulties will apply in the event that the borrower goes into arrears or financial difficulties. Regulations derived from the ‘Smaller Enterprises’ provisions of the existing SME Code will also apply for business credit cards in order to maintain any existing protections from the SME Code, namely regulations 7 and 11(4). In line with our approach to apply the ‘Smaller Enterprises’ provisions for the benefit of micro enterprises and small enterprises, these regulations will apply to micro and small enterprises only.

4. Enforcement of agreements/rights and obligations of regulated entities

4.1. Proposals outlined in CP91

The existing SME Code includes the following statement in the preamble:

Nothing in this Code prohibits a regulated entity from acting with all necessary speed:

- a) where in the circumstances of the case it is necessary to initiate a liquidation, receivership, examinership or similar insolvency event or where another regulated entity or other third parties initiate such actions;*
- b) where it is necessary in order for a regulated entity to protect its legitimate commercial interests; or*
- c) where there is reasonable evidence of fraud, terrorist connections, money laundering and/or misrepresentation,*

and the provisions of this Code are without prejudice to a regulated entity's regulatory and/or legal obligations and legal rights to enforce any agreement including any security taken in connection with any agreement.

In addition, provision 15 of the SME Code also states:

Nothing in this Code prohibits a regulated entity from acting with all necessary speed to withdraw credit where there is a reasonable suspicion of fraud, money laundering, terrorist connections and/or misrepresentation.

The paragraphs set out above were not included in the draft regulations published with CP91 as we considered that there was nothing in the proposed regulations which would have prevented a lender from:

- acting with all necessary speed if any of the events outlined in the statement were to occur;
- complying with its regulatory/legal obligations; or
- relying on its legal rights to enforce any agreement.

4.2. Submissions

We received a number of submissions on this issue from both industry stakeholders and a Government department. Industry stakeholders raised particular concerns that:

- Not including the clause could inadvertently override a lender's contractual rights and abilities to act with due haste to protect their interests;
- The proposed removal of the 'legitimate rights saver' in page 4 of the current SME Code, allowing a regulated entity "to act with all necessary speed", would mean that a bank would be seriously restrained from exercising its security relative to other business creditors, some of which may not be regulated lenders subject to these rules (e.g., trade creditors); and
- Not including this clause would affect lenders' risk appetites, leading to an increase in loan declines, higher interest for borrowers and higher funding costs for lenders in Ireland. This would occur as there would be a perceived dilution of a lender's contractual rights in regard to security held.

4.3. Response

While the Central Bank maintains its position that there is nothing in the SME Regulations which would restrict regulated entities from acting with all necessary speed in particular circumstances or from complying with their regulatory or legal obligations or exercising legal rights to enforce any agreement, we accept that in the absence of some clarification, there may be uncertainty for regulated entities.

As with other provisions of the existing SME Code, the wording has been reviewed to take account of the transition of the SME Code to Regulations and a revised version now appears in the SME Regulations. We have included a recast version of the clause regarding a regulated entity's legal and contractual rights, for the avoidance of doubt. This will add clarity to the regulations, in that the provision will provide that:

the provisions of these Regulations are without prejudice to a regulated entity's -

- a) legal and regulatory obligations, and*
- b) legal rights to enforce any agreement including, but not limited to, any security taken in connection with a credit facility agreement.*

The re-drafted clause, while not undermining any of the protections set out by the SME Regulations, will clarify that regulated entities can rely on their legal rights, including their rights to enforce an agreement and any related security, where necessary. This also ensures, for example, that nothing in the SME Regulations prevents a regulated entity from acting with all necessary speed where in the circumstances of the case it is necessary to initiate liquidation, receivership, examinership or a similar action or where another regulated entity or other third parties initiates such actions. Similarly, nothing will prevent a regulated entity from acting with all necessary speed where there is reasonable evidence of fraud, money laundering, terrorist connections and/or misrepresentation.

5. Expertise for business lending/reviews

5.1. Proposals outlined in CP91

The existing SME Code provides that a regulated entity must offer its customers an option of an annual review meeting, to include all credit facilities and security. We proposed a number of new

requirements in CP91 to address stakeholder feedback that there was a lack of knowledge and expertise among lending staff, particularly in relation to the assessment of financial information and business plans.

CP91 proposed the expansion of the existing requirement to offer SME borrowers an option of an annual review meeting by providing that lenders must offer borrowers an option of an annual review meeting, to include a review of credit facility agreements and any security and alternative arrangements. We also proposed that, where a borrower requests a review, the lender would have regard to the borrower's specific circumstances, advise the borrower of any information the lender requires, complete the review in a reasonable timeframe, inform the borrower of what the timeframe for completion is, and complete the review within the timeframe notified.

CP91 added new requirements for lenders to appoint at least one individual in the office of a lender which is concerned with lending activity with responsibility for the provision of credit to borrowers, borrowers in arrears, and borrowers in financial difficulties. Furthermore, lenders would have to provide appropriate training for staff concerned with lending activity. These provisions were included to ensure lenders had knowledgeable and trained business lending staff able to provide information on the provision of credit, arrears, financial difficulties and conduct on-going reviews.

5.2. Submissions

In respect of providing training to staff, one SME stakeholder stated that there should be updated refresher training courses for staff every twelve months. Industry stakeholders stated that the requirement to appoint individuals in each branch with expertise in business lending to be potentially very onerous. The stated that a person should only be required to act as a contact point for the unit/area. Furthermore, the requirement should take account of online service fulfilment and new business models to reflect customer needs.

Industry stakeholders did not object to the enhanced protections in CP91 in respect of annual reviews. However, amendments were sought which emphasised that there would be no requirement to inform the borrower of the results of a review if the results do not necessitate a change to the credit facility/arrangement or no new actions are required by either party.

5.3. Response

On review of our proposals, it was considered that the meaning of a 'credit review' may not be clear. For instance, there could be confusion between the review carried out as part of the annual meeting and the review that could otherwise be requested by a borrower. We have therefore clearly set out the meaning of 'credit review', i.e., a review of credit facility agreements between a regulated entity and a borrower, security held in respect of such credit facility agreements and alternative arrangements. We have also restructured the wording of the requirements around annual meetings and credit reviews to make it clear that these requirements relate to the same type of review.

In respect of annual meetings and reviews, we made a number of changes in response to the submissions. We have inserted a requirement that regulated entities must inform a borrower of the outcome of any credit review initiated by the regulated entity, except where there has been no engagement with the borrower, the results will not lead to a change to the credit facility agreements and no actions are required by either party. This exemption is intended to cover situations where a regulated entity initiates and carries out a credit review as part of its own internal procedures and where the results of the review will not lead to any change to the credit facility agreements, etc.

The annual meeting requirement can be met through a meeting conducted over telephone, video-conferencing or other means of electronic communication. The changes made take into consideration feedback that the requirement, as originally drafted, would impinge upon evolving business models. The Central Bank is cognisant of evolving business models and the fact that regulated entities continue to develop their business models, in particular through online delivery. Regulated entities and borrowers may prefer to conduct meetings over the phone, through video-conferencing or through similar means of communication.

The requirement for business expertise has been amended to address concerns expressed in response to CP91 that there should not be a requirement to appoint one individual to be responsible for credit, arrears and financial difficulties in each office concerned with lending activity. We have re-drafted the regulation so that there are clear points of contact required for any enquiries relating to the provision of credit or any other matters arising under the regulations relating to lending to micro enterprises and small enterprises. The training requirement now provides that the regulated entity must provide appropriate training on an on-going basis to staff concerned with regulated activities.

In addition, the SME Regulations require that training includes training with respect to the different sectors to which it lends.

6. Advertising and warning statements

6.1. Proposals outlined in CP91

In CP91 we proposed a number of warning statements to be included in advertisements. One such warning statement proposed was to require a lender, in an advertisement for variable rate credit, to ensure that the advertisement contained the following warning statement, **'Warning: The cost of your monthly repayments may increase'**.

6.2. Submissions

One credit union stakeholder commented, in relation to the warning statement proposed for variable rate credit, that the warning would be untrue for a credit union that is offering SME loans at the maximum 12.68% APR. Another industry stakeholder commented that the requirement should be amended as monthly repayments may not always increase for variable rate credit and repayments may not always be monthly.

6.3. Response

In response to feedback that repayments may not always be monthly, we have amended the wording of the warning statement for variable-rate credit by removing the word 'monthly'. The warning statement states that 'The cost of your repayments may increase'. We consider that this puts borrowers on notice of the general nature of variable interest rates, i.e., that the cost of credit may increase over the term of the loan.

We note the point made by one credit union stakeholder as regards variable interest rate credit that is advertised at the maximum interest rate permitted by credit unions under separate statutory requirements. We do not believe that the existence of a statutory limit (which, like any statutory provision, could change in law in the future) changes the fact that, as a matter of contract, the regulated entity may raise the interest rate during the term of the agreement. In such

circumstances, it is appropriate to give this warning statement, even where the rate advertised is the maximum permitted by law at the time the loan is granted.

A number of regulations require warning statements to be provided to borrowers and, where relevant, guarantors. Warning statements are included in the advertising requirements and the pre-contract information for borrowers; warnings must also be provided in guarantee documentation and to guarantors in advance of providing a guarantee for credit facility agreements. In CP91, we had not included any requirements about how these warning statements should be presented. Provision 3.9 of the Consumer Protection Code 2012 requires regulated entities to ensure that all warning statements required by that code are prominent, i.e., they must be in a box, in bold type and of a font size that is at least equal to the predominant font size used throughout the document or advertisement. We have inserted a similar requirement into the SME Regulations.

7. Provision of information requirements

7.1. Proposals outlined in CP91

The existing SME Code provided high level requirements, including that information provided by regulated entities to the borrower is clear and comprehensible, outlines the terms, conditions, fees and charges for a credit facility, explains to borrowers how interest is calculated, and that they must provide notification of interest rate changes.

In CP91, we sought to enhance the existing provisions of the SME Code in this area. These proposals included new requirements under the heading 'Pre-Contract Information' which outlined the information a lender must provide to a borrower where a borrower engages with a lender prior to submitting an application for credit. We also proposed that specified information would have to be provided to a borrower in good time before the borrower would be bound by a credit facility agreement. This included information on fees and charges, an explanation of terms of material importance in a credit facility, the terms and conditions of the credit facility, a warning statement regarding missing payments due under a credit facility agreement, information about any security sought and the borrower's right of withdrawal.

We also expanded post-sale information requirements by adding provisions to improve transparency. This included a post-sale information requirement for a lender to provide a borrower with a worked calculation of an early redemption charge, before applying a full or partial early repayment to a credit facility.

7.2. Submissions

We received a number of submissions to CP91 reflecting concerns about the increased burden placed on lenders from provision of information requirements.

An industry stakeholder commented, in relation to the requirement to provide specified information to borrowers that engage with a lender prior to submitting an application for credit, that, in practice, SMEs can seek support prior to making a formal application, and therefore this regulation should not require the information to be specific to the individual customer, but rather be more general guidance on successful applications for credit. It said that specific information for each customer would slow down access to credit.

The same industry stakeholder commented that the new requirement under 'Pre-Contract Information' to provide the borrower with the order in which payments will be allocated to different outstanding balances charged at different interest rates was onerous on lenders given this information may not be known at the time of issue of the letter of offer. One SME stakeholder said that the pre-contract information requirements may appear off-putting to businesses seeking to access credit.

We also received feedback from a lender that the new information requirements could impinge on the availability of time-critical, short-term, working capital requests. Industry stakeholders commented that the proposals could operate to restrict access to credit where requests for credit are time critical and indicated that the regulations should not prevent a lender from issuing funds in this scenario.

An industry stakeholder stated that, where an SME customer wishes to redeem a facility which has a market-related rate, the rate is in constant movement and therefore it would not be possible to provide an accurate worked calculation of the early redemption charge to the customer before the early repayment.

7.3. Response

In response to the comments from the industry stakeholder about the information to be provided to a borrower who engages with its lender prior to making an application for credit, we have amended this requirement in the regulations. Under the SME Regulations, regulated entities are simply required to provide the information specified in Regulation 14 (1), i.e., the information a regulated entity must publish on its website, and otherwise make available to borrowers in any office of the regulated entity dealing with SME lending, and provide guidance to the borrower which may assist the borrower in making a successful credit application.

In recognition of the concerns expressed that new pre-contract information requirements could slow up or add disproportionate cost to the lending process, we re-examined each requirement under pre-contract information. We removed the requirement that regulated entities must provide an explanation of the terms of material importance in the credit facility agreement. However, we believe that the other pre-contractual information is necessary in order to allow the borrower to make an informed decision on the credit facility agreement concerned. The objectives of the existing SME Code are:

- to facilitate access to credit for sustainable and productive business propositions,
- to promote fairness and transparency in the treatment of SMEs by regulated entities, and
- to ensure that when dealing with financial difficulties cases, the aim of a regulated entity will be to assist borrowers to meet their obligations, or otherwise deal with the situation in an orderly and appropriate manner.

The objectives of the SME Regulations, while not set out in the text of the Regulations, are the same as those stated in the existing SME Code. We believe that the new information requirements reflect the objectives of the SME Regulations, in particular by promoting fairness and transparency in the treatment of SMEs by regulated entities.

We have removed the pre-contract information requirement for lenders to provide borrowers with the order in which payments are allocated to different accounts on the basis that regulated entities may not be in a position to provide this information in good time before the borrower is bound by the credit facility agreement.

In response to concerns that the regulations could impinge on time-critical working capital requests, we have included an exception in the regulations for pre-contract information, where specified conditions are met. The SME Regulations should not prevent a borrower from accessing credit when emergency funding is necessary. In this regard, where a borrower, who is an existing customer of the regulated entity, indicates that additional credit will be required within three working days, the regulated entity may issue the additional credit to the borrower without providing the pre-contract information. However, where this provision is being relied upon, the regulated entity must comply with pre-contract information requirements within three working days of the credit being advanced.

We have also amended the requirement for a regulated entity to provide a worked calculation of an early redemption charge so that only an estimation of the early redemption charge must be provided by the regulated entity (and only on request from the borrower). Regulated entities are still required to provide this estimation before applying the full or partial payment to the account.

8. Applications for credit

8.1. Proposals outlined in CP91

The SME Code contains high-level protections for SME borrowers when applying for credit or declining credit applications. When assessing a credit application, regulated entities are required to consider each application on its merits, inform borrowers of how long the process is considered likely to take, maintain records of all applications and have appropriate procedures in place to assess loan applications.

During engagement with various stakeholders prior to the publication of CP91, some of the key issues raised included a lack of communication, insufficient clarity and a lack of transparency by lenders when assessing credit applications. Stakeholders advised that better communication was required from lenders regarding their application process. They wanted clarity from the start of the application process about what information was required in order to avoid issuing further requests for information. They also indicated that more transparency was needed regarding how 'ability to repay' is determined. The Oireachtas Joint Committee on Jobs, Enterprise and Innovation's 'Report on Access to Finance for Small and Medium Enterprises' recommended that loan applications should

be dealt with by banks within a specific timeframe and a response should be provided within two weeks.

In addition, *Red C Credit Demand Surveys*, covering the periods October 2013 – March 2014 and April – September 2014 indicated that there was a lack of knowledge among SMEs about Government support options.

In CP91 we sought to address these issues in relation to applications for credit. We proposed that lenders would be required to publish specified information on their website or otherwise make the information available to borrowers in any office of the lender dealing with SME lending. We proposed that the specified information would include the timelines which apply to the assessment of an application for credit as set out in the lender's policies and procedures, a comprehensive list of the information that may be required from a borrower in support of an application for credit and a description of the lender's policies on security.

We proposed requirements for a lender to gather and record sufficient information from the borrower to assess whether that credit is suitable to that borrower. We proposed that the level of information gathered should be appropriate to the nature and complexity of the credit facility agreement being sought by the borrower, and at a minimum, this would have to be to a level that would allow the lender to assess the borrower's likely ability to repay the debt over the duration of the agreement. We also proposed that the lender could only offer a credit facility agreement to a borrower where it has satisfied itself on reasonable grounds that the credit is appropriate to the borrower. Further, prior to advancing additional credit to a borrower, we proposed that a lender would be required to gather and record information and carry out a further affordability assessment.

8.2. Submissions

One statutory body stated in its response to CP91 that there should be a requirement for lenders to provide, in writing, an acknowledgment of each credit application received and that where further information is required by the lender, it should be required to write to the borrower setting out the information required and clear timelines for its submission and outline the consequences of non-receipt of this information.

One Government department stated that the key element is that timelines are explicit and that any delays the lender may have in processing a loan application must be communicated to the SME. An industry stakeholder stated that the proposed regulations did not make sufficient allowance for online SME credit applications and did not contain guidance as to how compliance with the various elements of the proposed regulations can be achieved in the online environment. It was also stated that the comprehensive list of information required for an application to be provided by lenders needed to be determined on a case-by-case basis, with reference to the borrower's characteristics. A credit union stakeholder considered that the requirement is excessive taking into consideration the volume of lending undertaken by credit unions, and the small value of some credit union loans. This credit union stakeholder also expressed the view that the level of detail displayed could be off-putting for a potential borrower, especially loans sought by small traders seeking small value loans.

8.3. Response

In response to stakeholder feedback, we have inserted a requirement that a regulated entity must acknowledge receipt of an application for credit, in a durable medium, within 5 working days of receipt of the application.

We have amended the wording of the requirement to publish 'a comprehensive list of the information that may be required from a borrower in support of a borrower's application for credit' by removing the word 'comprehensive'. This is to address industry comments that each credit application should be taken on a case by case basis, with reference to the borrower's characteristics. It is accepted that, in certain circumstances, regulated entities may require very specific information from a particular SME borrower which may not be required, or indeed relevant, in the vast majority of credit applications. Given that this information is to be published on the regulated entity's website, and otherwise made available to borrowers in any office of the regulated entity dealing with lending, we agree that it may not be feasible for regulated entities to publish a *comprehensive* list of the information that may be required.

On further review of our proposals around suitability and affordability, we concluded that the requirements proposed in CP91 were not clear enough. It was clear that there was a requirement to gather and record information to allow the regulated entity to assess the suitability of credit and

that this included a requirement that the level of information would be appropriate to the nature and complexity of the credit facility agreement being sought and, at a minimum, this had to be to a level which would allow the regulated entity to assess the borrowers likely ability to repay. However, it was not entirely clear that the information requirements were to cover both suitability and affordability. This was further confused by the use of the term ‘appropriate’ in the requirement that the regulated entity could offer a credit facility agreement to a borrower only where it has satisfied itself on reasonable grounds that the credit is appropriate to the borrower. We have clarified that the requirements relate to both suitability and affordability. Further, prior to advancing additional credit to a borrower, a regulated entity is required to gather and record sufficient information and to satisfy itself that the credit is suitable to the borrower and of the borrower’s likely ability to repay.

We have also clarified that, where an SME comes within the definition of a ‘consumer’ for the purposes of the Consumer Protection Code 2012, the suitability requirements of the SME Regulations do not apply. This is because these borrowers will be protected under the suitability requirements of the Consumer Protection Code 2012.

9. Refusing or withdrawing credit

9.1. Proposals outlined in CP91

The existing SME Code has a number of provisions relating to declines including a requirement that regulated entities must explain clearly to the borrower the reasons why the credit application was declined, make each decision to withdraw or amend credit facilities on its merits, notify the borrower of a withdrawal or amendment and advise the borrower of the reasons.

A themed review carried out by the Central Bank in 2014, showed that, in the case of credit application declines, lenders typically used standard letters that provided limited information on the reason for declining the application and, where it was presented to the Central Bank that more detailed information was provided verbally, SME lenders often did not have a record of these discussions.

During engagement with various stakeholders prior to the publication of CP91, stakeholders indicated that there was insufficient clarity on the reasons for the refusal of credit facilities.

The Oireachtas Joint Committee on Jobs, Enterprise and Innovation’s ‘Report on Access to Finance for Small and Medium Enterprises’ also recommended that it should be mandatory for banks to provide detailed written explanations as to why a particular application for credit has been turned down.

CP91 proposed strengthening the protections for borrowers where their application for credit is declined by requiring lenders to provide the borrower with specified information, including an explanation of the reasons why the application for credit was refused that are specific to the borrower’s application. Further, the lender would have to provide this information in a durable medium. It was proposed lenders would also have to provide borrowers with information about the lender’s internal appeals procedure and how to appeal, information about the Credit Review Office, Government support schemes available from or through the lender and information about the borrower’s right to make a complaint.

9.2. Submissions

One Government department agreed with the proposed approach for refused credit applications stating that as well as providing clarity and transparency on the decisions reached, the regulations could also encourage a learning effect for SMEs, which could inform any subsequent applications for credit. However, caution was advised; the regulations should not affect the speed of credit approval and the associated cost of credit.

One industry stakeholder expressed concerns that the customisation of decline responses on a case by case basis would be impractical, cause significant technology issues and would serve only to extend the timeframe in which banks can respond to customers. A Government department also highlighted the importance of online models, stating that the accessibility and use of online credit applications is to be encouraged and the requirement for more detailed decline information should not hinder the developments of online credit applications. A statutory body expressed the view that lenders should be obligated to set out all of the reasons for decline in a response letter. This decline

letter should outline why the credit was declined and where appropriate, what it might do to improve the chances of obtaining approval for future applications.

9.3. Response

The Central Bank recognises that regulated entities adopt standardised procedures and communication with customers and that regulated entities will have standardised criteria and grounds for decision making. The SME Regulations do not preclude refusal letters citing these standardised reasons, provided they are clear, comprehensible, identify why the application was refused, are specific to the borrower's application and compliant with the requirements set out in Regulation 16, 'refusing or withdrawing credit'.

The Central Bank believes that the standards set out in the SME Regulations are required in order to protect the best interests of SME borrowers. These standards are therefore as relevant to the provision of credit online as through any other channel, and the SME Regulations do not distinguish or place more onerous obligations on regulated entities when providing services online as opposed to through other channels. Nevertheless, in recognition of the extent to which industry has highlighted the move to online delivery as a key feature for the years ahead, within 12 months of the Regulations coming into effect, the Central Bank will carry out a review of how Regulation 16(1) is being complied with in the case of online applications for credit, with a view to confirming that it is fit for purpose, including whether any aspect of it is acting as an obstacle to the introduction of enhancements for SMEs.

10. Security and guarantor protections

10.1. Proposals outlined in CP91

The existing SME Code has protections with regard to security and guarantees. Having due regard to the nature, liquidity and value of collateral, and the value of the credit being offered, a regulated entity must not impose unreasonable collateral requirements. In addition, the SME Code provides that a regulated entity must not impose unreasonable personal guarantee requirements on borrowers. Where collateral or a personal guarantee is sought, regulated entities are required to

explain clearly the possible implications for the guarantor of giving such collateral or personal guarantee. Regulated entities must also, at the request of a borrower, promptly return any security held by it when all facilities for which the security pledged has been repaid.

We received feedback from SME stakeholders that there was an over-reliance on personal guarantees. We attempted to significantly enhance protections for borrowers and guarantors in CP91 with a number of new requirements. We proposed enhancing existing protections by providing the borrower and the guarantor with a clear explanation on the reasons why security or guarantee is required. We also proposed that when security requested exceeded the value of the credit sought, the lender would be required to notify the borrower and, where applicable, the guarantor of that fact and provide a detailed explanation of the reasons why that level of security or guarantee is considered reasonable and proportionate.

CP91 also proposed that lenders would be required to promptly return any security held by the lender to the borrower upon repayment of all credit for which the security is pledged.

We proposed that guarantee documentation would have to carry specified warning statements which included warnings that guarantors would have to repay the debt amount, any interest and all associated charges if the borrower does not and recommending that the guarantor should get independent legal advice. Under the CP91 proposals, guarantors would also be warned that they may be at risk of losing their home if the borrower does not keep up repayments on the credit facility agreement.

10.2. Submissions

An industry stakeholder expressed the view that the proposed SME Regulations must not restrict lenders' ability to act to protect or realise their security by placing overly restrictive and lengthy processes on them that are not applied to other creditors. The industry stakeholder also submitted that nothing in the proposed regulations should impact on the ability of each lender to set its own lending criteria, risk appetite and terms around provision of security/guarantees. SME stakeholders emphasised the need for further guarantor protections.

An industry stakeholder disagreed with the proposal that, where a lender seeks security or a guarantee which exceeds the value of the credit sought, it must notify the borrower and, where applicable, the guarantor of that fact and provide a detailed explanation of the reasons why that level of security or guarantee is considered reasonable and proportionate to support the application for credit. It was argued that this serves only to dictate lending criteria. Each bank will have its own lending criteria, risk appetite and terms around the provision of security/guarantees and prescribing this within the regulations is not in the interests of prudential and sustainable lending. It was suggested that where the borrower has indicated its intention to seek credit again, the security did not need to be realised so as to avoid additional costs associated with release and re-registration of the security.

In relation to guarantor protections, an industry stakeholder commented that it is standard market practice for guarantors to provide “all sums” guarantees to lenders, whereby the guarantee is designed to cover not only the present credit facility agreement but also future agreements entered into between the lender and the borrower. The same industry stakeholder stated that lenders already put protections in place so that the guarantor and borrower are clearly advised as to the meaning and effect of “all sums” guarantees and that they are cost effective and efficient forms of security in terms of administration for SME customers.

One SME stakeholder suggested that guarantors should be informed if the loan they have guaranteed goes into arrears and they should be notified of any changes or progression of the process. The stakeholder argued that in the instance of a borrower not co-operating, the guarantor must be notified and kept informed of the status of the claim. The stakeholder stated that guarantors should also be advised if an independent review is being conducted and should receive a copy of the review. A statutory body expressed the view that the area of personal guarantees needs to be addressed in the Code.

10.3. Response

We have removed the requirement to provide an explanation of the reasons why security exceeds the value of credit sought. While we do not agree that this requirement would dictate lending criteria or impinge on a regulated entity’s lending criteria, risk appetite and terms around the

provision of security/guarantees, we accept that in many cases, the value of a guarantee or collateral will exceed the value of the credit sought, as the level of security will often depend on what security the borrower has available. Further, given that we have retained requirements for security to be reasonable and proportionate and for regulated entities to provide borrowers and, where applicable, guarantors, with a clear explanation of why the security or guarantee is required, we believe that the protections set out in the SME Regulations are sufficient to protect borrowers and guarantors.

We have added a requirement to the SME Regulations that a regulated entity must write to the borrower and advise it of its right to return of security, when the credit for which the security was pledged has been repaid. This new approach addresses industry concerns and maintains the intent of the original provision pertaining to prompt return of the security to borrowers. The new regulation fosters transparency and choice for an SME whether to leave the security with the regulated entity or to seek the return of security.

We have given due consideration to feedback received on the enhancement of guarantor protections and it is apparent that guarantors need to be made aware of the implications of providing a guarantee. With regard to all-sums guarantees, we are now including a warning statement which means that regulated entities will be required to provide a guarantor with a warning that they are not only guaranteeing the credit in relation to a particular transaction, but also any other credit that may in the future be provided by the regulated entity to that same borrower, for as long as the guarantee remains in place.

We have retained the warning statements proposed in CP91, though they have been slightly amended, in particular to take account of the fact that the wording should be consistent with a one-off guarantee and an all-sums guarantee. The warning statement which warns guarantors that they may be at risk of losing their home, if the borrower does not keep up repayments, now also refers to personal assets and we have clarified that this warning statement is only relevant in the case of personal guarantees.

In terms of keeping guarantors informed, we have included a number of additional requirements in the regulations, namely:

- within ten days of the borrower first entering financial difficulties, a regulated entity will have to inform any guarantor, in a durable medium, of the status of the borrower’s account;
- prior to classifying a borrower as not co-operating, a regulated entity must contact the guarantor advising that the borrower will be classified as not co-operating if it does not perform specific actions;
- where a borrower is classified as not co-operating, the guarantor must also be notified;
- regulated entities must inform a guarantor where it requires an independent review of the borrower’s business;
- where a guarantee is held and any credit facility agreement to which it relates has been repaid, the regulated entity must inform the guarantor that the guarantee is extinguished or, in the case of an all sums guarantee, that the guarantee remains in place; and
- where security on a credit facility has been realised, a regulated entity must inform the guarantor of specified information.

We believe that the protections for guarantors have been significantly improved following our consultation. In this regard, guarantors will now have to be kept informed at crucial points during the relationship between the regulated entity and the borrower. These provisions aim to address significant stakeholder concerns raised around protections for guarantors.

11. Borrowers that are ‘not co-operating’

11.1. Proposals outlined in CP91

In CP91 we considered whether there would be merit in having a concept of ‘not co-operating’ in the proposed new SME Regulations. We asked stakeholders if they agreed that the introduction a concept of ‘not co-operating’ was useful in the SME context.

11.2. Submissions

There was a broad range of support for a concept of ‘not co-operating’ with a mixture of industry and SME stakeholders agreeing with its introduction. Only two stakeholders disagreed with the proposals.

While generally supporting the concept of not co-operating, a number of the submissions we received expressed reservations and suggestions. One SME stakeholder stated that the concept should be clearly defined and that an appeals process should be put in place which would allow borrowers to challenge being designated as not co-operating.

One Government department expressed concerns that the concept of not co-operating may be an ineffective measure when applied to SMEs. It stated that SMEs often operate in a different environment from consumers and the application to the SME sector of a broad consumer protection measure, such as this, may therefore not be appropriate to businesses. It stated that the broader credit relationship an SME borrower would have with a financial institution means that non co-operation would become transparent sooner. It questioned how the regulation could differentiate in a partnership, where one partner co-operates and the other does not.

One statutory body proposed that a definition for not co-operating should include a situation where an SME wilfully fails to make a full and honest disclosure of information to the lender that would have a significant impact on the business, provides information in relation to the business that they know to be false, inaccurate or misleading or fails to provide information sought by the lender within an appropriate timeframe. It suggested that a three-month period should have elapsed during which the SME has failed to meet its loan and other repayments in full, or has failed to operate its overdraft within the agreed terms, or has failed to comply with any alternative arrangement entered into, or has not made contact with, or responded to, any communications from the lender.

11.3. Response

In response to the feedback received in CP91, we will retain the concept of ‘not co-operating’. This regulation is without prejudice to the legal rights of a regulated entity to enforce any agreement. We did not amend the definition of not co-operating since we believe that, in the context of the SME

Regulations, the CP91 definition is wide enough to encapsulate the circumstances in which a regulated entity might classify a borrower as not co-operating. Regulated entities are required to outline the implications to the borrower, when they have been deemed to be not co-operating. This may include, but is not limited to, the refusal to offer an alternative arrangement, institution of legal proceedings or enforcement of security. We have amended the requirements around appeals to require that an appeal can be made by a borrower that has been classified as not co-operating.

In response to feedback seeking clarification on the application of the concept of not co-operating to partnerships, where one or more partners is not co-operating, it is a matter for regulated entities to determine whether the actions of the partners constitute non co-operation, as defined, by that partnership in the context of the terms and conditions of the credit facility agreement in question. We do not believe it is practical or appropriate for the Central Bank to seek to prescribe further detail in this respect since the matter will be integral to the nature of the action or inaction in question, the terms and conditions of the credit facility agreement and whether the regulated entity wishes to classify the borrower as not co-operating.

12. Independent reviews

12.1. Proposals outlined in CP91

The existing SME Code did not have any measures in place for instances where a lender requires an independent review by a third party of the borrower's business. We proposed new measures in CP91 to increase transparency where an independent review is requested by a borrower.

These measures included that the lender would be required to explain to the borrower the reasons for the review, what will be covered by the review, the name of the person carrying out the review and any costs to be borne by the borrower.

12.2. Submissions

In the submissions received, one SME stakeholder commented that the guarantor should also receive a copy of the report following an independent review. Another SME stakeholder stated that the costs of an independent review should be proportionate to the size of the business and the

complexity of the case. They noted instances where expensive large consulting firms were being used for these purposes, when better value might be achieved by the banks having a broader panel of small firm consultancies.

12.3. Response

In response to the submissions received from SME stakeholders, we added a new requirement to ensure that where a borrower bears any cost of the independent review, the cost of the review must be proportionate to the amount of credit provided under a credit facility agreement and the size and complexity of the borrower's business.

We have also included a requirement that, where there is a guarantee in place, the guarantor is informed that the regulated entity requires an independent review of the borrower's business. In addition, the borrower must be provided with a copy of any report provided to the regulated entity following the review.

13. Appeals

13.1. Proposals outlined in CP91

Appeals in the existing SME Code are limited to a requirement on regulated entities to have a written procedure for the proper handling of appeals where a regulated entity makes a decision on an alternative arrangement. The existing provisions require regulated entities to adjudicate on appeals and provide a written response to the borrower on the appeal within 15 days. Regulated entities must also advise borrowers of their right to refer a matter to the Credit Review Office.

We carried out a themed review in 2014 and found that some regulated entities were applying their internal appeals mechanism to all credit applications, withdrawals or alternative repayment arrangements, going beyond the minimum requirements of the SME Code. These good practices included having a dedicated appeals unit, with dedicated, experienced appeals panel members, oversight by a Steering Committee and the use of management information to provide feedback and to improve the process.

Drawing on this, CP91 sought to expand the appeals provisions by including additional grounds on which an internal appeal can be made. These include decisions by a lender to refuse credit, withdraw or reduce credit and the terms and conditions imposed by a lender when granting credit and alternative arrangements. It was also proposed that lenders would have a dedicated appeals panel to conduct internal appeals.

13.2. Submissions

An industry stakeholder raised concerns that the appeals process could lead to borrowers being able to challenge a lender's standard terms and conditions. This industry stakeholder stated that the standard terms and conditions which make up part of every lending agreement and apply to all SME customers are integral to the product offering and form a key part of the lending process. This stakeholder also stated that SME customers are entitled to appeal bespoke terms and condition which are particular to them but, in the interest of fairness to all SME customers, and being mindful of prudential lending standards, standard terms and conditions should not be subject to appeal as might be implied by the proposed regulations.

One SME stakeholder felt that an appeals process should be put in place for borrowers that have been classified as not co-operating.

13.3. Response

In response to stakeholder concerns about borrowers appealing standard terms and conditions, we have amended the wording of this regulation to apply the right of appeal only to 'a special term or condition'. It is not intended that standard terms and conditions would be appealable, rather it is only terms and conditions that are applied in addition to standard terms and conditions that will be appealable.

Addressing SME stakeholder feedback, we have added a regulation which enables a right of appeal for borrowers when they have been classified as not co-operating.

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