

**MicroFinance Transparency**  
**Truth-in-Lending Legislation Summary: South Africa**

**Scope of Legislation**

The National Credit Act of 2005<sup>1</sup> (the “Act”) was enacted in South Africa for the purpose of promoting a fair and non-discriminatory marketplace for access to consumer credit, and to establish a framework for the general regulation of consumer credit in that country.

The Act applies to every credit agreement between a credit provider and a consumer dealing at arm’s length, subject to certain exceptions listed in the Act and, where relevant, described below. A credit agreement is defined as (i) a credit facility (i.e., an agreement for the supply of goods or services with deferred payment or periodic billing, or for the payment of amounts to the consumer with deferred repayment or periodic partial billing, and providing for charges or fees payable in respect of any amount deferred or billed periodically), (ii) a credit transaction (including several specific examples listed in the Act, but generally defined as any agreement under which payment of an amount owed by one person to another is deferred and any charge, fee or interest is payable to the credit provider in respect of such agreement or the deferred amount), (iii) a credit guarantee (i.e., an agreement under which a person undertakes or promises to satisfy upon demand any obligation of another consumer under a credit facility or credit transaction), or (iv) any combination of the foregoing.

A consumer is generally defined as the party to whom or at whose direction money is advanced or credit granted under a credit agreement. Similarly, a credit provider is generally defined as the party who advances money or credit to another under a credit agreement.

For purposes of determining the applicability of various provisions of the Act, credit agreements are divided in different categories: (i) small agreements, i.e., pawn transactions, credit facilities for a credit limit falling below the lower of two thresholds established by the member of the South African Cabinet who is responsible for consumer credit matters (the “Minister”), and any other credit transaction or guarantee where the principal amount of the debt falls below such threshold, excluding mortgage agreements; (ii) intermediate agreements, i.e., credit facilities for a credit limit falling above the lower of the two abovementioned thresholds, and any other credit transaction or credit guarantee where the principal amount of the debt falls between such thresholds, excluding pawn transactions and mortgage agreements; and (iii) large agreements, i.e., mortgage agreements and any other credit transaction where the principal amount of the debt falls at or above the higher of the two abovementioned thresholds, excluding pawn transactions.

The Act does not apply to any (i) large agreement where the consumer is a “juristic person” (i.e., a partnership, association or other body of persons, corporate or unincorporated, or a trust under certain

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<sup>1</sup> Act No. 34 of 2005, assented to by the President on 10 March 2006.

circumstances), or (ii) credit agreement where the consumer is a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, is equal to or greater than a threshold amount determined by the Minister, of not more than 1,000,000 South African rands.

The Act established both the National Credit Regulator (“NCR”), an independent government body with enforcement, supervisory and regulatory powers over consumer credit, and the National Consumer Tribunal (the “Tribunal”), a separate government body with powers to adjudicate applications that may be made to it pursuant to the Act and allegations of prohibited conduct under the Act, as well as powers to impose remedies provided for in the Act and to review certain decisions of the NCR.

A person must register with the NCR as a credit provider if that person, alone or with an associated person, is the credit provider under at least 100 credit agreements, or if the total principal amount of the debt owed to that person under all outstanding credit agreements exceeds a threshold determined by the Minister, of not less than 500,000 South African rands. If a person required to be registered as a credit provider is not registered, such person must not offer, make available or extend credit, or enter into any credit agreement, and any such credit agreement entered into by such person will be unlawful and void. A credit provider must post a certificate of its registration (or a duplicate) in any premises at or from which it conducts its registered activities, and reflect its registered status and registration number on all its credit agreements and consumer communications.

Registration is not required if the credit provider operates only within one province in South Africa and is registered as a credit provider under the applicable provincial legislation, and only if the Minister has declared that such registration requirements are comparable to or exceed those of the Act. The Act also requires the registration of persons acting as credit bureau or as debt counsellors.

### **Borrowers Protected**

The Act protects consumers of credit (broadly defined as the parties to whom or at whose direction money is advanced or credit granted under a credit agreement). However, as mentioned above, there are exceptions to the applicability of the Act, including, notably and in particular, for large agreements entered into by consumers that constitute juristic persons and, for credit agreements entered into by consumers that constitute juristic persons whose assets or turnover exceed a certain threshold.

The Act provides a list of consumer rights in respect of credit, including rights (i) to apply for credit with a credit provider, as a result of which a credit provider may only refuse to extend credit on reasonable commercial grounds and consistent with its customary risk management and underwriting practices, (ii) of protection against unfair discrimination by a credit provider in a variety of situations, including when assessing the ability of the consumer to meet the obligations of a proposed credit agreement, deciding whether to refuse an application for credit, determining any aspect of the cost of a credit agreement or any of its terms and conditions, assessing or requiring compliance with the agreement and exercising any of the credit provider’s rights under the credit agreement, (iii) to be informed of the dominant reasons for having an application for credit or request for credit limit increase refused, including by having access to the contact information of any credit bureau which provided a report in respect of the consumer, (iv) to receive any document required under the Act in an official language of South Africa that the consumer reads or understands (to the extent reasonable and practical), in the prescribed form in accordance with the Act and in plain language, free of any charge or fee.

The Act contains a list of unlawful provisions that may not be included in a credit agreement, including any provision (i) the purpose or effect of which is to defeat the purposes of the Act, deceive the consumer or subject the consumer to fraudulent conduct, (ii) purporting to waive or deprive the consumer of any right set out in the Act or override any provision of the Act, (iii) requiring the entry into any supplementary agreement containing provisions that would be unlawful under the Act, (iv) expressing an acknowledgment of the consumer that, before the agreement was made, no representations or warranties were made by the credit provider or a person acting on its behalf in connection with the agreement or that the consumer has received goods, services or a document which in fact has or have not been received, (v) forfeiting any money to the credit provider if the consumer exercises his or her right of rescission (described below) or if the consumer fails to comply with any provision of the credit agreement prior to receiving any goods or services, (vi) appointing the credit provider as an agent of the consumer other than in accordance with the Act, (vii) authorizing any person acting for the credit provider to enter any premises for the purpose of taking possession of goods to which the credit agreement relates, (viii) granting a power of attorney to the credit provider, (ix) expressing an undertaking by the consumer to sign in advance any documentation relating to enforcement of the agreement, (x) consenting to a pre-determined amount of costs relating to enforcement of the agreement or limiting the credit provider's liability for an enforcement action, and (xi) expressing an agreement by the consumer to deposit any identity document, or credit or debit card, automatic teller machine access card or similar card or document, or to provide any identification code or number for accessing an account, to the credit provider or any person at its direction.

### **Disclosure**

Certain information regarding credit agreements must be disclosed by credit providers to consumers at specified times.

#### **Pre-Agreement Disclosure**

A credit provider may not enter into a credit agreement unless a pre-agreement statement and quotation has been provided to consumers. In the case of small agreements, such statement and quotation must be in the form prescribed by the Minister. For intermediate or large agreements, such statement must be either in the prescribed form or in another form that complies with all requirements prescribed by such form for that category or type of credit agreement, and the quotation must be in the prescribed form, setting out the interest rate, other credit costs and the total cost of the proposed credit agreement. The credit provider is bound by the terms of the quotation to enter into the contemplated credit agreement at or below the interest rate or credit cost quoted, except that intermediate or large credit agreements may be entered into at a higher rate or cost, by a margin no greater than the difference between the respective prevailing bank rates on the quotation date and the date the credit agreement is made.

#### **Agreement Disclosure**

The credit provider must deliver to the customer, without charge, a copy of the credit agreement, in paper form or in a printable electronic form. The credit agreement must be in the form prescribed by the Minister, except that intermediate or large agreements may be in a form determined by the credit provider that complies with all the prescribed requirements for the category or type of credit agreement.

#### **Periodic Disclosure**

A credit provider must deliver periodic statements of account to the consumer, which must be in the prescribed form, except that for intermediate or large credit agreements, the form may be determined

by the credit provider, as long as it complies with the prescribed requirements for the category or type of credit agreement. The statements must be delivered every two months for instalment agreements, leases or secured loans, every six months for mortgage agreements, or every month for any other credit agreement. The parties may agree to reduce the frequency of such statements (other than those relating to mortgage agreements), up to a minimum of one statement for every three months.

In addition, the credit provider must deliver without charge, at the request of the consumer, a statement containing all or any of the following information: the current balance of the consumer's account, any amounts credited or debited during a period specified in the request, any amounts overdue and when each such amount became due, and any amount then currently payable and the date it became due. The consumer may also request, without charge, a statement of the amount required to settle a credit agreement as of a date specified in the request.

#### Marketing and Advertising

The Act contains certain restrictions on marketing practices by credit providers, including prohibitions on making offers to enter into a credit agreement, or to increase the credit limit thereunder, or to amend a credit agreement, on a basis that it will automatically come into effect unless the consumer declines the offer. A credit provider must also comply with certain restrictions on entering into a credit agreement in the private dwelling or place of employment of a consumer.

A person who is required to be registered as a credit provider may only advertise the availability of credit or of goods or services to be purchased on credit, if such person is registered in accordance with the Act. An advertisement on the availability of credit must contain any statement required by regulation, must not be misleading, fraudulent or deceptive or contain any statement prohibited by regulation, and must state the interest rate and other credit costs offered by the credit provider, in the prescribed manner and form.

#### Pricing

The Act contains a list of all payments that may be required under a credit agreement, with certain limitations on each of them, as described below, and prohibits credit providers from requiring that any other payment be made by the consumer. None of the restrictions below, however, apply in respect of credit agreements where the consumer is a juristic person.

The principal amount of the debt to be repaid under a credit agreement may include the cost of any extended warranty, delivery, installation or initial fueling charges, connection fees, taxes, license or registration fees, or premiums of any credit insurance payable in respect of the credit agreement (as more fully described below), in each case to the extent applicable in connection with the provision of any goods that are the subject of the credit agreement, provided that the consumer authorizes the credit provider to act as his or her agent in arranging for such additional services and that the consumer is not charged in excess of the amount payable by the credit provider for such service, or its fair market value, if delivered directly by the credit provider.

The credit agreement may provide for payment of interest on the principal amount of the debt. The interest rate must be expressed in percentage terms as an annual rate calculated in the prescribed manner, and may be fixed or variable, provided that, in the latter case, the variation is fixed by relationship to a reference rate stipulated in the agreement and which must be the same as that used by the credit provider in respect of any similar credit agreements then being issued by it. The Minister may make regulations prescribing the manner in which interest is to be calculated and disclosed and, after

consulting with the NCR, may prescribe a method for calculating a maximum rate of interest, and the maximum amount of any other fees charged in connection with a credit agreement. Such regulations must establish different maximums for credit agreements within each subsector of the consumer credit market and may prescribe a method for allocating service fees between the provision of credit and the provision of related financial services.

In addition to principal and interest, a credit agreement may require payment, in each case subject to a maximum prescribed amount determined by the Minister, of (i) an initiation fee, which may only be applied if the application results in the establishment of a credit agreement, (ii) a service fee, payable monthly, annually or, in the case of a credit facility, on a per transaction basis or a combination of periodic and transaction basis, (iii) default administration charges, which may only be imposed if the consumer has defaulted on a payment obligation under the credit agreement, and (iv) collection costs incurred in respect of enforcement of a consumer's monetary obligations under the credit agreement.

The credit provider may require the consumer to maintain insurance during the term of the agreement, solely in the following categories: (i) credit life insurance not exceeding the consumer's total outstanding obligations to the credit provider under the agreement, (ii) insurance covering the immovable property subject to a mortgage agreement, not exceeding the full asset value of such property, and (iii) insurance covering damage or loss of any property (other than immovable property subject to a mortgage), not exceeding the total of the consumer's outstanding obligations to the credit provider under the credit agreement. A credit provider may not offer or demand insurance that is unreasonable or at an unreasonable cost to the consumer. A credit provider may also offer optional insurance in relation to the obligations of the consumer under the credit agreement or relating to the possession, use or ownership of goods and services supplied under the credit agreement. Payment of the premiums must be on a monthly basis, except that large agreements may provide for annual payments instead (subject in the latter case to a refund of the unused portion of the final year's premium, in case of settlement of the credit agreement). In any case, the credit provider must not add any surcharge and may only charge the actual cost of insurance incurred by it, and must disclose such costs to the consumer, explain the terms and conditions of the policies and provide copies of them to the consumer. The credit provider must be a loss payee under such insurance policies only up to the credit agreement's settlement value, and any remaining proceeds must be paid to the consumer.

A consumer has the right and must be informed of the consumer's option to waive the insurance policies offered by the credit provider and select policies of the consumer's own choice, so long as the consumer gives written directions to the credit provider permitting the credit provider to pay any premiums to the insurer and bill the consumer for such premiums, and a valid direction to the insurer naming the credit provider as a loss payee under the insurance policy up to the settlement value of the credit agreement and requiring the insurer to settle the consumer's obligation under the credit agreement as a first charge against the proceeds of the policy.

A consumer may settle the credit agreement at any time, with or without advance notice to the credit provider, by paying all the unpaid balance of principal amount of the debt and all unpaid interest charges and other fees and charges payable up to the settlement date. An early termination charge may only be required in the case of a large agreement, and it must be of no more than a prescribed charge in case of an agreement with a fixed interest rate, or, in case of a variable interest rate, of no more than the interest payable for a period of three months less the notice period of settlement, if any, given by the consumer.

Consumers may also prepay any amount used to a credit provider under a credit agreement at any time, without any penalty.

### **Remedies and Enforcement**

The Act gives consumers a right to rescind a credit agreement within five business days after the date it was signed by the consumer, by delivering notice and returning any money or goods, and paying in full for any services received. In such case, the credit provider must refund any money the consumer has paid under the agreement, but may require payment for the reasonable cost of having goods returned and a reasonable rent for the use of those goods, unless they are in their original packaging and it is apparent they have remained unused.

A consumer may also dispute all or part of any particular credit or debit entered under a credit agreement, by delivering a written notice to the credit provider. The credit provider may not begin enforcement (i) until it has provided notice explaining the entry in reasonable detail or confirming that the statement was in error and setting out the revised entry, or (ii) if the matter is under an alternative dispute resolution procedure or pending before the Tribunal. If the attempt to resolve the disputed entry is not successful, the consumer may apply to the Tribunal for an order to correct the statement.

The NCR has enforcement powers under the Act, and is responsible for maintaining and supervising the registration of credit providers. The NCR may issue compliance notices to credit providers who fail to comply with a provision of the Act or engage in any activity inconsistent with the Act.<sup>2</sup> Failure to comply with a compliance notice may be referred to the Tribunal, or to the South African National Prosecuting Authority, if such failure constitutes an offense in terms of the Act (e.g., a failure to comply with an order of the Tribunal). The NCR also has the power to cancel the registration of a credit provider if it repeatedly contravenes the Act.<sup>3</sup> Any person may submit a complaint to the NCR concerning an alleged contravention of the Act. As an alternative, the matter may be referred to a consumer court or an alternative dispute resolution agent for conciliation, mediation or arbitration, if the credit provider is not a financial institution.<sup>4</sup>

The Tribunal has the power to impose administrative fines up to the greater of 10% of the respondent's annual turnover during the preceding financial year or 1,000,000 South African rand. Offenses (e.g., a failure to comply with an order of the Tribunal) may only be prosecuted by the South African National Prosecuting Authority before a Magistrate's Court, and are subject to fines or to imprisonment of up to 10 years for certain offenses.

A person suffering loss or damage as a result of a conduct prohibited under the Act may bring a civil action for recovery of losses. If a credit agreement is declared void, the credit provider must refund to the consumer any money paid under the agreement, with interest at the rate set out in the agreement,

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<sup>2</sup> Before issuing any such notice to a regulated financial institution, the NCR must consult the regulatory authority that issued a license to that regulated financial institution.

<sup>3</sup> If the credit provider is a regulated financial institution, the NCR may refer the matter to the regulatory authority that licensed that institution with a request for review of the license, or request the Tribunal to cancel the registration, at the request or with the consent of the regulatory authority that licensed the regulated financial institution.

<sup>4</sup> If the credit provider is a financial institution, the matter may be referred to an "ombud" or "statutory ombud," as defined in the Financial Services Ombud Schemes Act of 2004 (Act No. 37 of 2004), who has jurisdiction in terms of that act to deal with a complaint against that financial institution.

for the period from the date on which the consumer paid any money until the date the money is refunded to the consumer. All the rights of the credit provider will be cancelled or, if cancelling them would unjustly enrich the consumer, forfeited to the State.

In addition, the Act contains provisions intended to protect consumers against (i) over-indebtedness (in which case the consumer may seek advice from a debt counsellor and file with a court for a re-arrangement of its indebtedness), and (ii) reckless granting of credit by credit providers (in which case force and effect of the credit agreement may be suspended). A credit provider must not enter into a credit agreement unless it appropriately assesses, prior to entering into such agreement, the consumer's ability to understand the risks and costs involved in the proposed credit agreement, to pay the consumer's debt as it comes due, and to successfully achieve any proposed commercial purpose related with the extension of credit.

Every person has a right under the Act to be advised by a credit provider in advance of any adverse information in respect of that person being reported to a credit bureau, and to receive a copy of such information. A person may inspect a credit bureau once within any period of twelve months or if so ordered by a court or the Tribunal, and may challenge the accuracy of any information concerning him or her, with a right of compensation from any person who reported incorrect information.

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